REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CIVIL APPEAL NO. E218 OF 2024

JONES MOKAYA……APPELLANT

-VERSUS-

NATIONAL BANK OF KENYA LTD.....1ST RESPONDENT

SHENYA SERVICES AUCTIONEERS……2ND RESPONDENT

(Being an appeal against the judgment delivered on 25th November 2024 by Hon. P. K. Mutai (PM) at Kisii in MCCC No. 229 of 2022)

JUDGMENT

1. Vide plaint dated 8/4/2022, the respondent filed the suit before the lower court seeking a permanent injunction restraining the respondents from dealing in anu way with land parcel Kitutu/Bogetaorio/1287, a declaration that the respondents attempt to exercise statutory power of sale over Kitutu/Bogetaorio/1287 was illegal, null and void, an order compelling the 1st respondent to discharge the charge and return the original title deed for land parcel Kitutu/Bogetaorio/1287 to the appellant, and damages and costs of the suit.

2. The suit was brought on grounds that on 12/8/1994, the appellant guaranteed Nyamira Wholesalers Limited for a bank loan of Kshs. 270,000/= from the 1st respondent using his parcel of land number Central Kitutu/Bogetaorio/1287 (herein Kitutu/1287) as collateral. That the said Nyamira Wholesalers Limited defaulted causing the 1st respondent to file a suit against the appellant and obtained favourable judgment and decree against him.

3. That on that basis, the 1st respondent took out a notice to show cause as against the appellant. That upon the appellant's arrest, the appellant offered land parcel L.R No. Kisii Municipality/Block III/342 (herein Kisii/342) to be attached in exchange of Kitutu/1287 as it was more valuable. That the 1st respondent agreed, visited the land and obtained prohibitory orders against the appellant and the same was registered on 4/11/1997. That the 1st respondent issued a notice of sale on Kisii/342 by public auction and the appellant's advocate requested for discharge of the initial security Kitutu/1287 but the 1st

respondent failed to comply and instead issued the appellant with a notification of sale for the said land. That the 2nd respondent served the appellant with a notice of sale for Kitutu/1287 for Kshs. 3,235,463.65/= allegedly owed to the 1st respondent causing him to file the suit before the lower court.

4. The respondents entered appearance and filed a statement of defense dated 12/10/2022 denying any offer to replace Kitutu/1287 with Kisii/342 as an alternative security. That the 1st respondent issued the 90 days statutory as required and the same was delivered by way of registered post.

5. The matter proceeded for hearing and both parties called their witnesses. Vide judgment delivered on 25/11/2024, the trial court found that there was no evidence to support that the two parcels were swapped and the charge could not have been amended orally thus that part of the claim failed. The trial court however found that the 1st respondent did not

properly serve the statutory notice as the evidence presented was not sufficient. The trial court thus found that the appellant's case was partly successful and ordered each party to bear its own costs.

6. The appellant was dissatisfied with that judgment and filed the memorandum of appeal dated 19/12/2024.

The Appeal

7. The appellant filed the appeal based on three grounds being that the trial court erred in failing to find that the 1st respondent was estopped by conduct and waiver from exercising its statutory power of sale, the trial court erred in failing to hold that the intended exercise of statutory power of sale could not arise due to the illegalities and irregularities, and that the trial court erred in holding that the security was not replaced against the weight of evidence on record.

8. The appeal proceeded by way of submissions.

Analysis and Determination

9. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in **Peters – vs- Sunday Post Limited [1958] EA 424**.

10. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR** where the court held that: -

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of***

Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

Whether the trial court erred in failing to hold that the 1st respondent was estopped by conduct and waiver from exercising its statutory power of sale

11. I do note that the above issue was not an issue for determination before the lower court and cannot be brought now for determination. Though the appellant introduced the same in his submissions before the lower court, it is trite that parties are bound by their own pleadings. The issue of estoppel was never pleaded or testified on and was also never determined upon. As such, this ground is found to lack basis and the same cannot be heard and determined.

Whether the trial court erred in failing to hold that the intended exercise of statutory power of sale could not arise due to the illegalities and irregularities

12. Though the appellant raised this issue, I do note that the trial court indeed found the intended sale to be irregular on the basis of non-service. It is lost as to why the appellant framed this ground. The same is baseless and cannot issue.

Whether the trial court erred in holding that the security was not replaced against the weight of evidence on record.

13. The trial court found that the only document produced was a copy of the register for land parcel Kisii/342 which indicated a prohibition was entered in Kisii Civil Suit Number 268 of 1997 but there was nothing to show the parties in that suit. The court further found that the charge could not have been amended orally more so as there was an alleged agreement on discharge thus there was no sufficient evidence to demonstrate that the security was replaced.

14. I have considered the court record. The appellant's case was that upon the 1st respondent filing case number Kisii No. 1077 of 1996, the appellant was arrested on the basis of a

notice to show cause why he should not be committed to civil jail. That to secure his release, he offered parcel number Kisii/342 to replace Kitutu/1287 as the previous parcel was located in town and was more valuable. That the 1st respondent agreed and registered a prohibition as against parcel Kisii/342 after visiting and verifying the same.

15. The appellant produced a copy of the land registry record's for parcel Kisii/342. Entry 5 entered on 4/11/1997 indicated that a prohibitory order was issued in CMCC No. E1077 of 1996 restraining the appellant from transferring or charging the parcel till the matter was settled in court. I do note that the 1st respondent had indeed filed that case against the appellant to exercise its statutory power of sale as against Kisii/342 as evidence by the notice issued in that case to proclaim that parcel against the accrued debt of Kshs. 372,422.95/= inclusive of interest.

16. Further, entry 6 entered on 10/11/1977 indicated that a prohibitory order was issued by the high court in Kisii Civil Suit No. 268 of 1997 in favor of the 1st respondent herein for the sum of Kshs. 2,944,404.55/=.

17. Going by the above, I do find that the trial court erred in finding that there was no sufficient proof to support the allegation that there was an agreement on mode of settlement of the outstanding debt. Though the 1st respondent feigned no knowledge of parcel Kisii/342, there was evidence to show that the 1st respondent had indeed dealt with that land and registered prohibitory orders in its favor. Both prohibitory orders were in favor of the respondent and it was clear that the land was registered in the appellant's name. The notice to sale was in regard to parcel Kisii/342. Going by that, I am convinced that the 1st respondent indeed took active steps to exercise its power of sale as against parcel number Kisii/342 in place of the initially charged property.

18. I do note that during the hearing, the appellant testified that Kisii/347 was indeed sold by the 1st respondent. Though the 1st respondent had a chance to cross-examine the appellant on that allegation, there was no such effort and that testimony remained uncontested. In any case, the 1st respondent did issue the notice of sale for parcel Kisii/342 notifying of a sale to be conducted on 12/11/1997 by public auction.

19. I do note that the transaction took place years ago and it is possible that the appellant was not in custody of all the transactional documents and records. However, the above evidence shows a probability that it was more likely that upon the 1st respondent moving the court to exercise its statutory power of sale, the appellant successfully offered parcel Kisii/347 to be sold in exchange of the initial parcel Kitutu/1287 and the 1st respondent thereafter took active

steps to exercise its statutory power of sale as against the offered property, Kisii/347 but failed to discharge the initial property Kitutu/1287.

20. Noting that the 1st respondent bore a greater risk in the transaction, it ought to have reduced the new terms altering the charge into writing more so considering that it was and has always been a reputable banking institution with the necessary legal expertise. Lack of such agreement in writing cannot solely be blamed on the appellant. In the same breath, the 1st respondent cannot be seen to execute against both parcels.

21. I do note that the standard of proof in the suit was a balance of probability and not beyond reasonable doubt. All that the appellant needed to do was show that on a scale of probabilities, his version was more likely to have occurred. The Court of Appeal in **Mumbi M'Nabea v David**

M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say: -

> ***"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not."***

22. In any case, the judgment forming the basis for such execution was in relation to Kisii/342 and not Kitutu/1287 against which the 1st respondent issued notices against. Though the 1st respondent disputed that it agreed to the swap the two parcels, no explanation was offered as to how prohibitions were registered in its favor against Kisii/342, and why it issued a notice to sell that parcel. Considering the entire record, the above evidence and the witnesses' testimonies at the lower court, I do find that the claimant's version was more probable to have happened. This ground

therefore succeeds. It then follows that the 1st respondent cannot again purport to exercise its power of sale against Kitutu/1287 and ought to have discharged that property but failed to. That prayer ought to have been allowed.

23. I do also note two other issues that was raised before the trial court, submitted on by both parties, but not addressed in the impugned judgment. Both issues were preliminary in nature and ought to have been determined to pave way for a determination of the issues on merit.

24. The first issue related to the allegation that the 1st respondent was barred from enforcing the judgment of 1997 as the same was statute barred. The appellant's case was that the judgment obtained in Kisii CMCC No. 1077 of 1996 sought to be executed against was statute barred as it had been more than 12 years since the same was delivered. It was not in doubt that the judgment was delivered in 1997.

The 1st respondent purported to exercise its statutory power of sale pursuant to that judgment 24 years after the same was delivered. The 1st respondent did not give any satisfactory reasons to explain why it did not execute the decree within the set time limit of twelve (12) years.

25. Under ***section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya),*** this court is enjoined to facilitate just, expeditious, proportionate and affordable resolution of dispute between parties. Further, this court is enjoined under ***Section 1B*** of the said Act to facilitate the efficient disposal of its business and the efficient use of the available judicial and administrative resources.

26. ***Section 4(4) of the Limitation of Actions Act*** provides as follows: -

> ***"An action may not be brought upon a judgement after the end of twelve years from the date of which judgement was delivered".***

27. It has already been found that the 1st respondent could not exercise its statutory power of sale over Kitutu/1287 and the charge registered against that parcel ought to have been discharged. Even if this court found to the contrary, the 1st respondent would still be on the losing end noting that it sat on its rights for 24 years and suddenly woke from its slumber and issued the statutory notice dated 19/10/2021 when its rights were long barred. For that reason, the attempted exercise of statutory power of sale lacked legal basis and was thus null.

28. I do note that the 1st respondent's witness admitted in his statement that the judgment in Kisii CMCC No. 1077 of 1996 was was statute barred and thus unenforceable. The questions that begs to be answered are these; on what basis does the 1st respondent now seek to exercise its statutory power of sale if it itself admits that the only judgment it holds is statute barred and unenforceable? Even if such execution was to be exercised against Kitutu/1287, wouldn't' the judgment remains to be statute barred? What stopped

the 1st respondent from proceeding with the notified sale by way of public auction on 12/11/1997?

29. Even if the computation of time was to start as of the time the notice to sell was issued, the 1st respondent would still be statute barred noting that the time difference remains to be 24 years before any other action was taken.

30. Justice Otieno J. ***in Chepkwony v Chetambe & another (Civil Suit 15 of 1995) [2022] KEHC 13862 (KLR)*** succinctly observed that: -

> ***"On the prayer to declare the decree stale and incapable of enforcement, I interpret the provisions of Section 4 (4) of the Limitation of Actions Act to say that for a decree to become incapable of enforcement, no steps must have been taken towards its enforcement for a continuous period of twelve (12) years. If, like in all limitations, a step is taken within 12 years, the period of computation terminates and commences afresh. It is the commencement of the process of execution which determines the***

date the computation of time under Section 4(4).”

31. From both angles, the 1st respondent is barred from executing a judgment it has held onto for 24 years from when computation of time began, notably, a judgment that the 1st respondent acknowledges is statue barred and unenforceable.

32. The 2nd preliminary issue was on the amount of money claimed by the respondent. It was not in dispute that the appellant guaranteed a loan of Kshs. 270,000/=. The 1st respondent filed Kisii CMCC No. 1077 of 1996 to recover the loan and accrued interests amounting to Kshs. 372,442.95/=. The appellant averred that parcel Kisii/342 was indeed sold and the same was not uncontested. That aside, numerous years later, the 1st respondent attempted to execute against the appellant for the sum of Kshs. 3,235,463.65/= on the basis of accrued interests.

33. It is now trite that courts of law will not allow a party to benefit from its own slumber. A lender cannot be seen to sit on its rights to execute when such rights cement with the intention to allow interest charged on the loan to blow up to such high scales that would defeat any efforts of the borrower to redeem their property. The 1st respondent ought not to have sat on its right for 24 years and afterwards charge interest for all those years leading the principal amount of Kshs. 270,000/= to triple to almost 12 times more. This would be against public interest and would encourage other lenders to follow suit at the expense of borrowers who have lesser bargaining power in such transactions.

34. More importantly, such trends offend the equitable principle found in the *in duplum* rule. The court in **Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR)** held that: -

""In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced…

The rationale for this rule was elucidated in the latter case of Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation (supra) wherein the court of Appeal held:-"The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

From the foregoing, the Court of Appeal was alive to the fact that the rule was concerned with public interest. In my view, the rule was

introduced in our Laws to tame the appetite of Lenders who had made recovery of interest on advances a cash cow. Simply put, the Legislature was expressing its displeasure with lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers.

It was intended to protect borrowers from exorbitant interest accumulation on loans and limit the amount recoverable by a lender on a defaulted facility to no more than double the principal owing when the loan has become non-performing plus recovery expenses.

In this regard, I hold that being of public interest, the in duplum rule will be applicable for those lending monies as it does to banks

35. Fully associating with that decision, I do find that even if the 1st respondent had an opportunity to exercise its power of sale, the same would be defeated as the sums sought grossly offended the above rule. As such, even if the 1st respondent survived all the preceding issues, it could not be

allowed to execute for colossal amounts of Kshs. 3.235.464.65/= for a loan of Kshs. 270,000/= issued 9/8/1994.

36. In the end, I find that the appeal is partly successful on the basis of the third ground of appeal as well as the preliminary issues raised and discussed above.

37. The upshot is that the appeal is found to be merited and I hereby order as follows: -

1. **The judgment delivered on 25/11/2024 and any resultant decree or order is hereby reviewed and set aside.**
2. **A permanent injunction hereby issues restraining the respondents by themselves, their officers, servants, agents or anyone acting on the respondent's behalf from selling either by way of public auction or private treaty or in any manner interfering with part or whole of parcel of land known as Plot No. Central Kitutu/Bogetaorio/1287.**

3. **The 1st respondent is hereby ordered to discharge the charge and release the original title deed for land parcel No. Central Kitutu/Bogetaorio/1287 to the appellant within 30 days hereof.**
4. **The appellant is awarded costs of the appeal.**

JUDGEMENT DELIVERED virtually, **DATED** and **SIGNED** this **5th** day of **November, 2025.**

In the presence of:

Siele:CA

Bosire for the appellant

N/A for the respondent

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J.K.NG'ARNG'AR

JUDGE