



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 35 OF 2015**

**EDWARD WAWERU WAKABU.....APPELLANT**

**VERSUS**

**KIAMBU UNITY SAVINGS & CREDIT**

**CO-OPERATIVE SOCIETY LIMITED.....1<sup>ST</sup>RESPONDENT**

**SANNEX AUCTIONEERS.....2<sup>ND</sup>RESPONDENT**

**JUDGMENT**

This is an appeal against the judgment of Hon. S. K. Arome R.M. made on 5<sup>th</sup> May, 2015 in Kiambu Chief Magistrate's Court Civil Suit No. 17"A" of 2013 (hereinafter referred to as "the lower court"). The appellant filed a suit in the lower court against the respondents seeking the following reliefs:

*(a) An order restraining both defendants from auctioning, trespassing on, interfering with or dealing howsoever with all that parcel of land known as Kabete/Nyathuna/2006 ("the suit property").*

*(b) An order compelling the 1<sup>st</sup> Defendant to look for their loanee, John Muchiri Kimani and attach his property or properties to recover their loan.*

*(c) Costs*

In his plaint, the appellant averred that on 25<sup>th</sup> May, 2005 he guaranteed one, John Muchiri Kimani (hereinafter referred to as "the debtor") in respect of a loan facility in the sum of Kshs.400,000/= that the debtor obtained from the 1<sup>st</sup>respondent pursuant to which guarantee, he charged the suit property to the 1<sup>st</sup>respondent to secure the debt.

The appellant averred that on 4<sup>th</sup> December, 2012 he learnt that the debtor had defaulted in his loan repayment obligations to the 1<sup>st</sup> respondent and was indebted to the 1<sup>st</sup> respondent to the tune of Kshs.975,000/=. The appellant averred that he learnt of this development when he was served with a notice by the 2<sup>nd</sup>respondent of its intention to sell the suit property on behalf of the 1<sup>st</sup>respondent to recover the said amount. The appellant averred that his attempts to reach the debtor to find out from him why he had defaulted in his loan repayment did not bear fruit. The appellant averred that his request to the 1<sup>st</sup> respondent to be given time to trace the whereabouts of the debtor was not received well. The appellant averred that he should have been given time to bring the debtor before the 1<sup>st</sup> respondent to show cause why he had not paid the debt. The appellant averred that he was staying on the suit property with his family and if the same was sold he was going to be rendered landless.

The appellant averred that the 1<sup>st</sup>respondent failed to co-operate with him to look for the debtor but instead directed its energy towards the sale of the suit property through the 2<sup>nd</sup> respondent. The appellant averred that the 1<sup>st</sup> respondent was under a duty to co-operate with him in the search for the debtor to find out if he was in a position to repay the loan before attempting to sell the suit property to recover the debt.

Together with the plaint, the appellant filed an application for a temporary injunction restraining the respondents from selling the suit property pending the hearing of the suit. The respondents filed a joint statement of defence on 8<sup>th</sup> March, 2013 denying the appellant's claim in its entirety. The respondents averred that the appellant stood as a guarantor for the debtor and charged the suit property to secure the debt with full knowledge of the consequences that would ensue in the event of the debtor's default. The respondents averred that they had served the appellant with all requisite notices provided for in law before putting up the suit property for sale. The respondents contended that the

plaint disclosed no reasonable cause of action against them. The appellant filed a reply to defence on 13<sup>th</sup> March, 2013 in which he joined issue with the respondents in their statement of defence.

On 2<sup>nd</sup> April, 2013, the appellant filed a further affidavit in support of his interlocutory application for injunction. In the affidavit, the appellant changed the nature of his claim against the respondents. The appellant stated that after filing the lower court suit, he had come to learn that the debtor had in fact repaid the loan in full to the 1<sup>st</sup> respondent and that there was no debt outstanding on account of which the suit property could be sold. The appellant stated that after the repayment of the loan, the charge against the suit property was discharged and a discharge of charge registered against the title of the suit property at the land registry. The appellant averred that after the debtor repaid the loan, the 1<sup>st</sup> respondent issued him with a discharge of charge which he registered at the land registry. The appellant averred that he carried out a search on the title of the suit property after the filing of the suit which showed that the title had no encumbrance. The appellant claimed that when he filed the suit, he was of the mistaken belief that the debtor had got a top up loan using the same security.

The respondents filed amended defence and counter-claim dated 28<sup>th</sup> October, 2013 against the appellant upon being served with the appellant's further affidavit. In their counter-claim against the appellant, the respondents averred that the appellant had fraudulently, irregularly and wrongfully caused a discharge of charge to be registered against the title of the suit property in an attempt to deprive the 1<sup>st</sup> respondent of its security for the funds it had advanced to the debtor. In the particulars of fraud pleaded in the counter-claim, the respondents accused the appellant of drawing a false discharge of charge and registering it against the title of the suit property knowing well that the debtor had not repaid the loan. The respondents averred that the purported discharge of charge over the suit property was null and void. The respondents sought judgment against the appellant for:

- (a) A declaration that the discharge of charge on L.R No. Kabete/Nyathuna/2006 registered on 19<sup>th</sup> February, 2009 is fraudulent, null and void.
- (b) A declaration that 1<sup>st</sup> defendant is at liberty to realize its security over the said property in satisfaction of the unpaid arrears of the loan as per the terms of the charge that was registered on 23<sup>rd</sup> March, 2005.
- (c) A permanent injunction restraining the plaintiff from dealing with the said property prior to the repayment of the loan.
- (d) Any other or alternative relief that the court might deem fit.

The appellant filed a reply to defence and defence to counter-claim dated 31<sup>st</sup> October, 2013 in which he denied the respondents' counter-claim in its entirety and termed it a mere allegation without any basis in law. The suit was heard by the lower court for several days. The appellant gave evidence and closed his case without calling a witness. On their part, the respondents called one witness. At the close of evidence, the parties made closing submissions in writing. In a short judgment that was delivered on 5<sup>th</sup> May, 2015, the learned magistrate dismissed the appellant's claim and allowed the respondents' counter-claim with costs. The learned magistrate made a finding that the appellant had failed to prove that the debtor had repaid the loan to the 1<sup>st</sup> respondent and that the 1<sup>st</sup> respondent had discharged the charge over the suit property. The learned magistrate found the evidence that was placed before him in proof of the loan repayment and discharge of charge wanting in several material respects.

The learned magistrate was convinced by the evidence that was adduced by the 1<sup>st</sup> respondent that the debtor was still indebted to it and that it had not discharged the charge. The learned magistrate wondered why the appellant failed to call the debtor as a witness to prove that he had paid the loan. Following his finding that the loan had not been repaid, the learned magistrate concluded that the charge over the suit property could not have been validly discharged.

The appellant has challenged the lower court's decision on several grounds which can be summarized as follows;

- 1) The learned magistrate erred in his finding that the appellant was liable to pay the loan without proof that the discharge of charge over the suit property had been obtained by fraud.
- 2) The learned magistrate erred in restraining the appellant from dealing with the suit property while the loan to the debtor had been repaid and the suit property discharged.
- 3) The decision of the learned magistrate was against the weight of evidence in that the learned magistrate ignored the official search that was produced before him which showed that the title of the suit property had no encumbrance.
- 4) The learned Magistrate erred in authorising the 1<sup>st</sup> respondent to sell the suit property that was no longer charged to it.

I have carefully considered the record of appeal, the judgment of the lower court and the grounds of appeal that have been put forward by the appellant. I have also considered the written submissions on record and the authorities cited in support thereof. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of Verani t/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle v Associated Motor Boat Co. Ltd. [1968] E.A. 123 on the duty of the first appellate court.

In the cases of Peter v Sunday Post Ltd. [1958] E.A. 424 and Makube v Nyamuro [1983] KLR 403, it was held that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence, or were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion.

It is on the foregoing principles that the appeal before me falls for consideration. On the evidence that was before the lower court, I am satisfied that the court was justified in dismissing the appellant's suit. The appellant's claim in his plaint dated 18<sup>th</sup> February, 2013 was that the 1<sup>st</sup> respondent had no right to sell the suit property before looking for the debtor and trying to recover the loan from him in the first instance. The appellant sought injunction to restrain the respondents from selling the suit property on the ground that the 1<sup>st</sup> respondent had failed to pursue the recovery of the debt from the debtor before seeking payment from the appellant. In my view, the appellant's claim against the respondents had no basis in law. A chargee has no obligation to attempt to recover a debt secured by a charge from a principal debtor before demanding payment from a chargor/guarantor. The injunction that was sought by the appellant against the respondents in the lower court had no basis in the circumstances. The same applies to the order that the appellant sought to compel the 1<sup>st</sup> respondent to look for the debtor and demand the payment of the debt from him.

With regard to the respondents' counter-claim, again, I am satisfied that the evidence that was before the lower court supported the learned magistrate's finding that the discharge of charge that was registered against the title of the suit property was null and void. Having found and rightly so that the charge over the suit property was fraudulently discharged, the learned magistrate was entitled to issue an injunction to restrain the appellant from dealing with the suit property which as at that time had no encumbrance, the charge having been fraudulently removed. I am satisfied that the evidence that was adduced before the court was sufficient to warrant a finding that the charge over the suit property was fraudulently discharged. In my view, fraud was proved to the required standard. The statements that the appellant produced before the lower court to prove repayment of the debt were all forgeries and the lower court was right in making that finding. There was no way in which the 1<sup>st</sup> respondent could have discharged the charge over the suit property before the loan was repaid in full. I am in agreement with the appellant that the evidence he placed before the court showed that the suit property had no encumbrance, the charge having been discharged. There was however no evidence that the charge was lawfully discharged.

The appellant had also taken issue with the declaration that was made by the lower court that the 1<sup>st</sup> respondent could proceed to realize its security over the suit property for the recovery of the unpaid loan in accordance with the charge registered on 23<sup>rd</sup> May, 2005. With regard to this ground of appeal, I am in agreement with the appellant that the learned magistrate erred in making that declaration. There was evidence before the lower court showing that the charge in favour of the 1<sup>st</sup> respondent had been discharged. In my view, it was immaterial that the discharge was fraudulent as was rightly found by the court. The bottom line is that there was no longer a charge over the suit property that could entitle the 1<sup>st</sup> respondent to sell the suit property. Having made a declaration that the discharge of charge over the suit property was fraudulent, the court should have proceeded to rectify the register by cancelling the purported discharge of charge and reinstating the charge that was registered on 23<sup>rd</sup> May, 2005 in the register of the suit property. It was after this that a declaration could be made that the 1<sup>st</sup> respondent was at liberty to realise its security over the suit property.

I cannot blame the learned magistrate for this omission. He could not grant the orders that the respondents had not asked for. The 1<sup>st</sup> respondent did not seek the rectification of the register of the suit property and the restoration of its charge that was fraudulently discharged. It is not surprising therefore that those orders were not granted by the learned magistrate. The 1<sup>st</sup> respondent may have to go back to court in a new suit for further reliefs. A declaration that was made to the effect that it could sell the suit property cannot stand due to the foregoing reasons.

The upshot of the foregoing is that the appellant's appeal succeeds in part. I hereby set aside the declaration that was made by Hon. S.K. Arome R.M in the judgment delivered on 5<sup>th</sup> May, 2015 that the 1<sup>st</sup> respondent was at liberty to realise its security over L.R No. Kabete/Nyathuna/2006 in accordance with the terms of the charge registered on 23<sup>rd</sup> May, 2005. The other orders of the court remain undisturbed. Since the appeal has succeeded only in part, each party shall bear its own costs.

**Delivered and Dated at Nairobi this 21<sup>st</sup> day of June 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Present in person for the Appellant

No appearance for the Respondents

Catherine Court Assistant