



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. A. NO. 13 OF 2015

(FORMERLY HCCA NO. 10 OF 2012)

LAWRENCE MUGAMBI RUTERE APPELLANT

VERSUS

NELLY WACHIRA RESPONDENT

J U D G E M E N T

1. This Appeal arises from the decree of the learned Chief Magistrate Hon. Margaret Wachira in Embu CMCC NO. 256 of 2010 where the parties were Nelly Wachira (as Plaintiff) and Nancy Mumbi Muriithi (as Defendant). The Appellant in this case, Lawrence Mugambi Rutere, was an interested party in that suit.

2. The brief facts of the aforesaid suit are that the Plaintiff therein had sometime in 2009 given a loan of Kshs.200,000.00 to the Defendant who then pledged various chattels to her as security for repayment of the loan. Among the 'things' which Defendant deposited with the Plaintiff was the title deed for Title No. MBETI/GACHOKA/2651.

3. It would appear that before she could repay the Plaintiff the said loan, the Defendant somehow sold the said property to the interested party in consequence of which the Plaintiff filed Embu CMCC NO. 256 of 2010 claiming the following reliefs:-

a. That a prohibitory order be registered against Title No. MBETI/GACHOKA/2651 pending the hearing and determination of the suit or further orders of the court.

b. The Defendant be ordered to pay the Plaintiff the outstanding loan balance.

c. Costs of the suit.

d. Any other relief the court may deem fit to grant.

4. It is also evident from the record that when the interested party sought to transfer the said property, he was unable to do so due to a prohibitory order which had already been registered against the title. He, therefore, opted to file Embu CMCC NO. 258 of 2010 against the same Defendant. The parties in that suit were Lawrence Mugambi Rutere as Plaintiff and Nelly Wachira as Defendant.

5. It is further evident from the record of appeal that Lawrence Mugambi Rutere had sought the following reliefs against the Defendant for alleged breach of contract:-

a. A declaration that Title No. MBETI/GACHOKA/2651 was properly bought and the original title deed be dispensed with.

b. In the alternative the purchase price paid be refunded with interest.

c. Costs of the suit.

6. During the pendency of Embu CMCC NO. 256 of 2010, the Plaintiff was amended on 1st July 2010 to include the following reliefs:

a. A declaration that the Plaintiff is entitled to dispose the chattels instrument pledged including Title No. MBETI/GACHOKA/2651 being the property held in lien for the debt due.

b. An order for realization by way of sale the property held as security being Title No. MBETI/GACHOKA/2651 by the process of court and for the Executive Officer to be compelled to implement and or execute the relevant transfer instruments, documentation, and or necessary papers to give effect to this order.

c. Costs of the suit.

7. It is also evident from the record that Embu CMCC NO. 258 of 2010 was heard and concluded on 9 December 2010 whereby Lawrence Mugambi Rutere, the Appellant herein, obtained a decree in his favour as prayed in the suit.

8. The suit in Embu CMCC NO. 256 of 2010, however, was heard on 27 October 2011 with full participation of the interested party, who is the Appellant herein. The Appellant testified in the said suit and produced not only documentary evidence of his dealings with the Defendant but also the decree he obtained against her in Embu CMCC NO. 258 of 2010.

9. By a judgement dated 16th January 2012 the learned Chief Magistrate Hon. Margaret Wachira entered judgment for the Respondent, Nelly Wachira as prayed in her amended Plaintiff.

10. The interested party in that suit, Lawrence Mugambi Rutere, was aggrieved by the said judgment since it allowed the Plaintiff, who is the Respondent in this appeal, to dispose of the said property (Mbeti/Gachoka/2651) as a 'Chattel' for recovery of the loan due to her from Nancy Mumbi Muriithi.

11. The Appellant raised five grounds of appeal against the decree of 16 January 2012, namely;

a. The trial court erred in law and fact in failing to conclude that the Respondent lacked locus standi to institute the suit against the Defendant.

b. The trial court erred in law and fact in failing to dismiss the suit on the basis that Kash Kilo Ltd and not the Respondent was the lawfully mandated party who could file suit.

c. The trial court erred in law and fact in ordering that the respondent was entitled to dispose of the suit property since the property was not charged, secured, or registered as a chattel or security under the Chattels Transfer Act, the Registered Land Act or any other laws of Kenya.

d. The trial court erred in law and fact in failing to hold that the Appellant had a prior right and registrable interest to the suit property by virtue of the judgment in Embu CMCC NO. 258 of 2010

e. The trial court erred in entering judgement and making an order which violated and prejudiced the Appellant's entitlement to the suit property pursuant to the decree in Embu CMCC NO. 256 of 2010.

12. The Appellant therefore sought for the appeal to be allowed, the judgment and decree dated 16 January 2012 and all consequential orders to be set aside, and an order dismissing Embu CMCC NO. 256 with costs to the Appellant.

13. The parties herein agreed to dispose of the appeal through written submissions. The Appellant filed his submissions on 27 October 2016 whereas the Respondent filed hers on 14 November 2016. When the appeal was mentioned before me on 14 March 2017, the parties requested for a judgment date in consequence of which the court fixed the matter for judgement on 11 May 2017.

14. In opposition to the instant appeal, the Respondent filed a Notice of Preliminary Objection on 12 March 2012. The Preliminary Objection related to the competency of the appeal and the capacity of the interested party to file the appeal when the Defendant against whom the decree was issued had not appealed against it.

15. The Respondent reiterated the issue of lack of capacity on the part of the Appellant to amount the instant appeal in her written submissions as the first point of opposition. She relied on the case of **Kiserian Isinya Pipeline Road Residents Association (KIPRRA) & Others vs Jamii Bora Charitable Trust & Anor. NBI Civil Appeal No. 307 of 2006** for the proposition that an interested party is not a proper party who can mount an appeal against decisions involving the substantive parties.

18. The Respondent also submitted that there was a conspiracy between the Appellant and the Defendant in Embu CMCC NO. 256 of 2010 to defeat course of justice by making up a sale, arranging for the filing of Embu CMCC 258 of 2010 and fast tracking it with a view to defeating the Respondent's claim in Embu CMCC NO. 256 of 2010.

17. The Respondent also submitted that there was no privity of contract between the Respondent and the Appellant who were Plaintiff and interested party respectively in Embu CMCC NO. 256 of 2010. The real dispute in that case for breach of contract was between the Plaintiff and the Defendant the latter had not appealed the judgment to date.

18. In view of the Respondent's submissions on the competency of the appeal by the Appellant who was an interested party in the subordinate court, it is necessary to consider the competency thereof before dealing with any of the grounds of appeal.

19. The Respondent contends that the Appellant was merely a spectator in the proceedings in the Magistrate's court. It was submitted that the Appellant was not a "party" in Embu CMCC NO. 256 of 2010 hence lacked capacity to mount the instant appeal. The Respondent relied upon the case **of Kiserian Isinya Pipeline Road Residents Association (KIPRRA) & 6 others vs Jamii Bora Charitable Trust & Another** (supra) for the submission that the Appellant was not a party hence without capacity to file an appeal.

20. In that case, some of the organizations which had joined the proceedings before the National Environment Tribunal had filed an appeal against the decision of the Tribunal in allowing a certain contested development of 2500 low cost housing units to go ahead. The High Court held that those intervenors or interested parties had no capacity to file the appeal since they were not proper parties to the main case but had been allowed to be joined and to be heard in the proceedings by the Tribunal for the purpose of assisting the Tribunal to arrive at a just resolution of the environmental matters before it. It was further held that such status did not give them *locus standi* to file an appeal and that if they were aggrieved their remedy lay in filing fresh proceedings before the High Court for whatever relief they deemed fit.

21. So, can the same reasoning apply to the current Appellant who was an interested party in Embu CMCC No.256 of 2010? It cannot be said that he was joined as an interested party merely for the purpose of assisting the court to arrive at a just resolution of the case. He was not merely a public spirited litigator who wanted to ensure that the law was applied justly and fairly. He was a party who had an identifiable proprietary interest in Title No. MBETI/GACHOKA/2651 as a purchaser for value. He was allowed to

testify in that suit and to produce documentary evidence of his interest in the said property. He also produced the decree he had obtained in his favour in Embu CMCC NO. 258 of 2010 in respect of the said property. His legal and proprietary rights stood to be affected by the outcome of CMCC NO. 256 of 2010. He was not merely a nominal party but had a real interest in the case.

22. In my opinion, therefore, the cited case of KIPRRA is clearly distinguishable from the present case both in terms of facts and the rationale. It cannot be legitimately argued, as was stated in the KIPRRA case, that the Appellant's remedy lay in filing a fresh suit in the High court or other superior court when he already had a decree in his favour in Embu CMCC NO. 258 of 2010. This court is, therefore, not persuaded that the Appellant has no capacity to mount the instant appeal.

23. According to Black's Law Dictionary, 9th Edition by Garner B. A.(Editor), an interested party is defined as a "party who has a recognizable stake (and therefore standing) in a matter". It is my opinion, therefore, that if a party has a legal standing in a matter, then it is possible for such party to be aggrieved by a decree or order made in such proceedings.

24. The same dictionary defines an "aggrieved party" as follows;

A party entitled to a remedy, especially a party whose personal, pecuniary, or property rights have been adversely affected by another Person's actions or by a court's decree or judgment".

25. There is nothing contained in Section 65 of the Civil Procedure Act (Cap.21) which deals with appeals from the subordinate courts or Order 42 of the Civil Procedure Rules which deals with appeals generally which excludes an interested party from the purview of aggrieved parties. It is therefore my view, and I so hold, that if the Appellant was aggrieved by the decree in Embu CMCC NO. 256 of 2010, he was entitled to prefer an appeal as opposed to filing fresh and separate proceedings in the superior court.

26. I shall now consider the 5 grounds of appeal in the order in which they were enumerated in the Memorandum of Appeal in so far as they touch on the Appellant.

27. Although it was submitted by the Appellant that the Respondent had no *locus standi* to institute Embu CMCC NO. 256 of 2010 in her own name because the money was allegedly lent out by a limited liability company, this ground is not supported by the evidence on record. The documentary evidence on record indicates that the lender was an entity known as Kash Kilo Enterprises and not Kash Kilo Limited. The court therefore finds no merit in the first and second grounds of appeal and the same are hereby dismissed.

28. The third ground of appeal faults inclusion of Tile No. MBETI/GACHOKA/2651 amongst the chattels to be disposed of by the Respondents under the Chattels Transfer Instrument for the purpose of recovering the loan of Kshs.200,000/= which had been given to the Defendant in the subordinate court. The Appellant's counsel further submitted that the Chattels Transfer Instrument having not been stamped and registered, was not valid or enforceable.

29. A chattel under Section 2 of the Chattels Transfer Act is defined as follows;

"Chattel means any movable property that can be completely transferred by delivery, and includes machinery, stock and the natural increase of stock as hereinafter mentioned, crops and wool, but does not include

a. Title deeds, choses in action or negotiable instruments...

30. It is evident from the above definition that a chattel does not include land or a title deed for such land. A pledge of such land or title deed for repayment of a debt does not constitute a chattels mortgage. Any dealings with an interest in land which was registered under the repealed Registered Land Act (Cap.300)

which was in force in 2009 could only be effective if undertaken in accordance with the provisions of that Act. It is common ground that no legal charge was ever registered over Title No. MBETI/GACHOKA/2651 to secure repayment of any loan. No consent for registration of a charge was ever sought or obtained from the Land Control Board.

31. In those circumstances, the learned trial Magistrate clearly erred in granting judgment to the Respondent allowing her to sneak in Title No. MBETI/GACHOKA/2651 among the pledged chattels to be sold for the recovery of her loan. That was not permissible under both the Chattels Transfer Act and the Registered Land Act (now repealed).

32. In my opinion, the only way in which the Respondent could be allowed to dispose of the suit property was through the normal process of execution under Order 22 of the Civil Procedure Rules. The Respondent was not at liberty to short-circuit the process and ring fence the property against which she wished to enforce payment of her civil debt. This ground of appeal, therefore, succeeds and the court shall make an order excluding this property from the decree.

33. The fourth ground of appeal faults the trial magistrate for failing to uphold the Appellant's rights and interest obtained in a decree prior to the conclusion of Embu CMCC NO. 256 of 2010. The fifth ground is similar in that it faults the trial court for making an order which was prejudicial to the Appellant who had a lawful decree in Embu CMCC NO. 258 of 2010.

34. In view of the court's holding on ground 3 of appeal, it is not necessary to make a separate finding on the issue of priority of the prior decree in favour of the Appellant in Embu CMCC NO. 258 of 2010 suffice it to reiterate that the trial magistrate erred in including the suit property amongst the pledged "Chattels" to be disposed of by the Respondent to enable her recover her money.

35. I have considered the Respondent's submission that the Appellant herein may have colluded with the Defendant in Embu CMCC No. 258 of 2010 to fast track the hearing of that suit in order to defeat the cause of justice in Embu CMCC NO. 256 of 2010. The trial court also faulted the Appellant for prosecuting his suit expeditiously and obtaining a decree. There is no evidence on record, however, to suggest the existence of such conspiracy. According to the record, the Appellant's suit was concluded with incredible speed, but that of itself, is not necessarily evidence of impropriety. I am of the view that the court should encourage parties to prosecute their cases expeditiously.

36. The court is aware that the Defendant in Embu CMCC NO. 256 of 2010 has not appealed the decree against her. The Appellant herein has asked this court to allow this appeal, set aside the judgment and decree of the magistrate's court and substitute it with an order dismissing the Respondent's suit with costs.

37. I do not think that would be the proper thing to do in the circumstances of this case. The Appellant is not aggrieved by the entire decree but by the component of the decree which includes Title No. MBETI/GACHOKA/2651 as part of the pledged chattels to be sold by the Respondent. In that event, the court shall only vary the decree in Embu CMCC NO. 256 of 2010 to exclude Title NO. MBETI/GACHOKA/2651 from the chattels to be sold. That is the order which commends itself to the court.

38. The upshot of the foregoing is that the Appellant's appeal succeeds only to the extent that the decree shall be varied to exclude the suit property from the decree. The Appellant shall also have the costs of the appeal before this court.

39. It is so adjudged.

Dated, signed and delivered in open court at Embu this **11th** day of **May** 2017 in the presence of Mr. P. N. Mugo holding brief for Mr. Eddie Njiru for the Appellant and Ms Migwi holding brief for Ms Muthoni for the Respondent.

Y.M. ANGIMA

ELC JUDGE