REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 104 OF 2014

KARIGE KIHORO.....RESPONDENT

-VERSUS-

EQUITY BANK LIMITED.....1ST RESPONDENT

WAGLY AUCTIONEERS.....2ND RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated **11th December, 2016** and amended on or about **28th December, 2006** the respondent instituted a suit in the lower court to wit, Nyeri CMC's Civil Case No. 889 of 2006 seeking judgment againt the appellants for:-

a) An injunction to restrain the defendants (now appellants) from selling his land (Aguthi/Gatitu 1915) pending the hearing and determination of the case.

b) Exemplary and general damages for damage to his reputation and name.

c) Cost of the suit with interest thereon at court rates.

d) Any other or better relief that the court may deem fit to grant.

2. Upon hearing the case presented before him by the parties, the trial magistrate (hereinafter TM) entered judgment in favour of the plaintiff (now respondent) in the following terms:-

"....**plaintiff it is admitted paid the money, including the overpayment. He is entitled to the refund of overpaid sum. He was obliged to. If he was over anxious and overpaid, he gets his refund. He gets his interest from the date it became an overpayment, 16/12/08 at court rates as prayed in his prayer (d) in the amended plaint.**

Plaint gets cost of this suit and interest...."

3. Being dissatisfied with the decision of the (TM), the appellant filed this appeal challenging the judgment of the lower court on seven (7) grounds which can be summarised as follows:-

1. That the learned TM erred in law and fact by finding that the plaintiff had proved his case on a balance of probabilities when there was no such proof.
2. That the learned TM erred in law and fact by declaring the deposit or credit balance held by the 1st appellant in the account of Hanna Wau Ngunya (principal debtor) be released to the plaintiff/respondent with interest when the respondent had no recognised mandate by the account holder to operate the said account.
3. That the learned TM erred by ordering that the overpaid money be refunded to the respondent with interest when the respondent had no such claim in his plaint.
4. That the learned TM erred by making an order for release to the respondent of the deposit or credit balance held in a 3rd party account without the authority or participation of the account holder.
5. That the learned TM failed to recognise the relationship that existed between the respondent and the 1st appellant.
6. That the learned TM erred by awarding costs of the suit and interest thereof to the respondent.
7. That the learned TM failed to consider the appellants' submissions.

4. For the foregoing reasons, the appellant prays that the appeal be allowed, the judgment of the lower court be quashed and set aside and the appellants be awarded costs of the appeal.

5. This being a first appeal, this court is under an obligation to evaluate afresh the evidence on record in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

6. The case presented before the TM and that led to the impugned decision was that sometime in 2002, the respondent offered his property (Aguthi/Gatitu/1915) to guarantee a loan facility advanced to Hanna Wau Ngunya (Hereinafter referred to as the principal debtor) by the 1st appellant.

7. The principal debtor defaulted in her obligations to the 1st appellant. Consequently, sometime in 2006, the 1st appellant intimated its intention to sell by public auction the security offered by the respondent. In this regard, the 1st appellant put up two advertisements, on 27th November, 2006 and 11th December, 2006 (the respondent produced the adverts as Pexbt 1A and B). According to the adverts, the respondent's property was to be sold on 14th December, 2006.

8. The respondent contended that the adverts for sale of his property were made without serving him with the requisite statutory notices.

9. Pursuant to a notice issued by the respondent to the appellants to produce certain documents, the appellants produced a bundle of documents that showed that some documents were posted to the respondent's address on 28th July, 2005. Contenting that it is impossible to know what was posted to him, the respondent submitted that the appellants' ought to have made a certificate of service (The appellants had copies of certificate of registration of the documents allegedly sent to the respondent). As the respondent insisted on production of the original certificates of registration, the appellants promised to supply the original later on. Notice to produce was produced as Pexbt 2.

10. The respondent contended that the notices were sent to the principal debtor and not to himself.

11. Concerning an affidavit of service showing that the notification of sale was served on a member of the respondent's family, a Mr. Wahome, the respondent stated that the said wahome is not a member of his family and challenged the appellants to produce the said Wahome.

12. Referring to the statement of Account provided by the appellants, the respondent explained that as at 16th March, 2010 he had overpaid the loan by Kshs. 32,635.00/=. The respondent contended that he is entitled to the overpaid amount with interest at court rates or at the rate the bank charges its customers.

13. The respondent took issue with the description of his land in the notification and advertisement for sale. In this regard he explained that whereas his land is not developed, the appellants had described the property as developed with a single storey residential house. He contended that the appellants were

selling what was not offered. Referring to paragraphs 8 and 9 of his further amended plaint, the respondent urged the court to allow the case as pleaded. The respondent produced a valuation in respect of his property as Pexbt 3.

14. Upon being cross examined by Counsel for the appellants, the respondent admitted having guaranteed the principal debtor and that he signed a charge for that reason. He admitted that he gave his address for purposes of service as P.O Box 1334, Nyeri. He explained that he changed his postal address in 2004,but admitted that he did not inform the 1st appellant about his change of address. He also admitted that the principal debtor defaulted in her obligation to the 1st appellant and that he had an obligation to pay the loan if the principal debtor failed to pay, otherwise the security he offered would be sold.

15. The respondent states that when he knew that the principal debtor was not repaying the loan, he tried to contact her in vain. He then went to the bank and got information concerning the outstanding amount. He paid Kshs. 75,000/= leaving a balance of about Kshs.63,000/= outstanding.

16. He admitted that as at 22nd December, 2006 the debt was still outstanding. He went to the bank and it was agreed the auction of his property would not proceed.

17. He produced a statutory notice of sale addressed to the address he had provided for that purpose that is P.O Box 1334 Nyeri but explained that at the time the notice was sent to that address he had ceased using it.

18. The respondent contended that by advertising his property, the bank put his name to disrepute.

18. D.W.1, Francis Gakuo Macharia, a credit manager with the 1st appellant, Nyeri branch, explained that the respondent had offered his property to secure a loan of Kshs. 300,000/= advanced to the principal debtor. The property was charged in 2002 to secure the loan facility advanced to the principal debtor. The loan, which was to be repaid within a period of one year was not repaid as agreed. The 1st appellant wrote a demand letter to the principal debtor and the respondent (the guarantor). A statutory notice was isued on 21st July, 2006 to the respondent. D.W.1 produced the charge executed between the principal debtor and the respondent as Dexbt 1 and the statutory notice posted to the respondent as Dexbt 2.

19. D.W.1 told the Court that the statutory notice was sent through registered post to the address provided by the respondent. He produced a certificate of postage, as Dexbt 3A and a copy of the statutory notice sent to the principal debtor as Dexbt 3B.

20. D.W.1 explained that the respondent wrote to the 1st appellant acknowledging the debt, paid some money and requested the bank to cancel the auction slated for 14th December, 2006. He stated that the 1st appellant accepted the request by the appellant and for that reason the property was not sold. He produced the request by the respondent as Dexbt4.

21. D.W.1 explained that on 14th August, 2006 the 1st appellant had written a demand letter to the respondent, copied to the principal debtor. He produced the letter as Dexbt 5. He explained that because the demand was not complied with, the 1st respondent instructed the 2nd appellant to sell the security by public auction. Before the intended sale, the 1st appellant got the property valued by Landmark Realton Ltd. He produced the Valuation report as Debt 8.

22. Concerning the disparities in description of the property between the Valuation report and the adverts, he stated the 1st appellant had not given such instructions and opined that the disparities could have been as a result of misreporting.

23. D.W.1 further informed the court that the 2nd respondent issued a notification of sale to the respondent and the principal debtor. He produced a copy of the notice as Dexbt 6 and the certificate of postage in respect thereof as Dexbt 10.

24. D.W.1 admitted that as at 16th December, 2008 the principal debtor's account showed a credit

balance of Kshs.32,635/= but stated that the 1st appellant cannot release that money to the respondent because according to the law governing the relationship between the bank and the principal debtor (who is the owner of the account in question) only the principal debtor can get the money from the account.

25. With regard to the allegation that the 1st respondent defamed the respondent, he stated that the 1st appellant did not go out to ruin the respondent and that the 1st appellant was unaware of the respondent's aspiration to be a member of parliament.

26. D.W.1 further stated that through the advert, the 1st appellant did not portray that respondent as a non debt payer. He pointed out that the respondent was described as a guarantor, which description was correct.

27. Upon being cross examined by the respondent, D.W.1 maintained that statutory notices were served on the respondent through registered post. With regard to the contention by respondent that he did not receive the notices, he contended that the respondent must have received the notices because they were not returned unserved.

28. Concerning the plaintiff's contention that he should have been served personally, D.W.1 contended that there is no need for personal service on statutory notices.

27. The foregoing was the evidence presented before the trial court and which formed the basis of the impugned decision.

28. The appeal was disposed of by way of written submissions.

Appellant's submissions:-

29. On behalf of the appellants, it is submitted that the TM erred by finding in favour of the respondent. In this regard it is pointed out that as at the time the suit was heard and determined the threat of sale had abated.

30. Explaining that the respondent's obligation to the 1st appellant was not limited to payment of the principal debt but extended to payment of incidental costs like valuation fees, auctioner's charges and legal charges, the appellants contend that by issuing an injunction against them the trial court deprived the 1st appellant of its security.

31. Pointing out that the 1st appellant was not found to have been in breach of the terms of the contract executed between it and the respondent, the appellants contend that it was wrong to restrain the appellants from realising the security.

32. The TM is said to have failed to appreciate the appellants' evidence to the effect that the respondent was served with statutory notices by registered post. This is said to have been so despite the court having admitted the evidence of service.

33. Terming the service effected on the respondent proper, the appellants explain that they used the address given by the respondent and point out that the respondent had not communicated to the 1st appellant any change of the address.

34. Explaining that the mail posted to the respondent was not returned, the appellants submit that a certificate of postage, in the circumstances, is sufficient proof that the mail was received at the post office and consequently received by the addressee.

35. The appellants maintain that there is evidence that the respondent was served with statutory notices and that the 1st appellant's statutory right to sell the charged property had crystallised and became exercisable.

36. Referring to the respondent's letter dated 8th December, 2006 and the evidence of service of statutory notices, the appellants urge the court to find that the respondent was served with the requisite statutory notices, acknowledged his legal obligations and undertook to meet them by February, 2007. The respondent's obligations to the 1st appellant is said to have been the principal debt and incidental charges incurred by the bank.

37. Concerning the order for release of Kshs.32,635/= being overpayment made by the respondent, it is submitted that the TM erred in making that order because whilst the claim is in the nature of special damage, it was not pleaded, particularised and strictly proved as by law required. The TM is faulted for having given that award under the generalised prayer, any other relief that the court may deem fit to grant.

38. It is explained that the money was held in an account of a third party, the principal debtor; whose relationship with the 1st appellant is that of a bank and its customer. That being the case, it is submitted that the 1st respondent holds the credit balance in that account on behalf of the account holder and that 1st appellant cannot touch the money without the consent of the account-holder. It is further submitted that to access that money, the respondent requires the permission of the account-holder or a garnishee order.

39. Pointing out that the account holder was not a party to the suit, the appellant have submitted that if the respondent wanted to access the credit balance in the principal debtor's account, he should have enjoined her in the suit or brought interpleader proceedings.

40. Explaining that there are other outstanding charges owed to the 1st appellant, the appellants explain that neither the principal-debtor nor the respondent has paid those charges to warrant release of the security to the respondent.

41. With regard to the order for costs, it is submitted that the respondent did not proof his case against the appellants to warrant the order for costs and interest. It is also contended that the respondent did not issue the appellants with any notice before lodging the suit. Arguing that the suit was meant to burden the appellants with unnecessary costs, the appellants explain that if the respondent had notified them before bringing the suit, they would have mitigated and pre- empted the costs.

42. The TM is also said to have failed to consider the submissions tendered by the appellants.

Respondent's submissions:-

43. In his submission, the respondent begins by admitting that he guaranteed the principal-debtor herein but contends that the appellants did not strictly proof that he was served with statutory notice before the threatened sale. Explaining that he did not receive the statutory notice allegedly sent to him, the respondent submitted that the certificate of postage relied on by the appellants to prove service is not the same as registered post. The respondent points out that no evidence was called from the post office in Nyeri to show that he received the statutory notices.

44. The respondent referred to the case of **Trust Bank Limited v. Kiran Ramji Kotedia, Nairobi Civil Appeal No. 61 of 2000** where the court was of the view that personal service is the best mode of service. The respondent contends that the appellants ought to have personally served him or tendered evidence to show that he received the statutory notices.

45. On the propriety of the injunction issued against the appellants, the respondent submits that the issuance of the injunction was proper.

46. Wondering why the 1st appellant is still holding on the security yet he has even overpaid the debt, the respondent submits that the injunction issued by the lower court should be sustained until the security is released to him.

47. Concerning the 1st appellant's contention that it still has an interest on the suit property on account of unpaid charges and fees incidental to the loan, the respondent blames the appellant for incurring those charges and submits that they should not form the basis of holding the security.

48. With regard to the order for refund of the overpaid amount, the respondent submits that the trial court was justified in issuing that order.

49. Maintaining that the appellants have not made up a case for being granted the orders sought, the respondent urges the court to order the 1st appellant to release the money deposited in court being his costs and refund, interest and accrued interest since the money was deposited. The respondent also urges the court to compel the 1st appellant to release the security held by the appellants and to award him the costs of the appeal.

Analysis and determination

50. From the memorandum of appeal filed in this appeal and the submissions by the advocates for the respective parties, the issues for determination are:-

a) Whether the respondent was served with statutory notices?

b) If the answer to (1) above is in the affirmative,whether the mode of service was proper?

c) Whether the respondent proved his case against the respondents?

d) Whether the trial court was justified in ordering the 1st appellant to release the overpaid sum to the respondent?

e) Whether the appellants have made up a case for been granted the orders sought?

f) What order(s) should the court make?

Whether the respondent was served with statutory notices?

51. Whereas the respondent maintains that he was not served with statutory notices, the evidence on record, and in particular, Dexbt 2 and Dexbt 3 show that the statutory notices were posted to the address provided by the respondent for that purpose. Although the respondent claims that he had ceased using that address, he admitted that he had not notified the 1st appellant about his change of address. The appellants' testimony was to the effect that the documents posted to the respondent were not returned unserved. Under **Section 153** of the Registered Land Act (Cap 300) (repealed) Laws of Kenya, **a notice under that Act shall be deemed to have been served on or given to any person** -

(*a*) if served on him personally;

(*b*) if left for him at his last known place of residence or business in Kenya;

(*c*) **if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;**

(*d*) if served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorized to accept such service;

(*e*) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land.

52. In the circumstances of this case, there is evidence that statutory notices were sent to the respondent using his last known postal address.

53. Although there is evidence of postage of a registered mail addressed to the respondent, based on the observation of the Court of Appeal in the case of **Trust Bank Limited v. Kiran Ramji Kotedia** (s*upra)* that:-

"...Instead of sending the notice by registered post, the appellant chose to send it 'under certificate of posting'. Mr. Sarvia for the appellant, eloquently told us that the appellant chose to modify the method of service provided in paragraph (d) of section 102(2) because the provisions set out in paragraphs a to d cannot be treated as being exhaustive....we think the answer to mr sarvia's question lies in the fact that where personal service, which is always treated by the courts as the best mode of service, is effected there would be ready and available evidence to prove such service. The person effecting service would be able to make a return of service showing the manner in which service was effected and whether the person served signed or refused to sign for the service and so on and so forth. ...The appellant having chosen to change the procedure of service allowed under section 102(2) (d) of the Act, the burden clearly shifted to him to show that the respondent actually received the notice. If the notice had been sent by registered post, all the appellant would be obliged to show was that the notice was infact sent by registered post and that the same was not returned to it through the post. We do not know the implication of sending the notice under certificate of posting and whether that is the same thing as sending it by registered post."

the respondent contends that a certificate of postage is not the same as registered post and that the appellant ought to have personally served him.

54. I have read and considered the argument advanced by the respondent concerning service of statutory notice and the authorities cited in support of the argument. My view of that argument is that the court of appeal did not express any preference of one mode of service over another. All the court did was to emphasize that if service is effected through registered post there must be evidence of registration and postage and that the posted mail was not returned unserved.

55. The above holding is in tandem with the provisions of **section 153** of the Registered Land Act (repealed)(Cap 300 Laws of Kenya) which similarly does not prefer any mode of service over the other.

56. As pointed out in this case, the appellants' led evidence to the effect that the respondent was served through registered post to his last known postal address to wit, P.O Box 1334, Nyeri. The evidence produced in support of that assertion are certificates of posting a registered postal article. Although the court of appeal raised doubts whether a certificate of postage is the same thing with a registered post, from the description of the certificate, I entertain no doubt that the document referred to as a certicate of postage is the document issued by the postal corporation of Kenya to confirm receipt and postage of a registered mail. This being a matter of public notoriety the court is, under **Section 59** of Evidence Act (cap 80) Laws of Kenya allowed to take judicial notice of such matters.

57. The notices herein having been sent to the respondent's last known postal address, the respondent is by law, deemed to have been served with the notices.

58. In the case of **Trust Bank Limited** *(supra)*, the court made it clear that no return of service is required to prove service if the service was effected through registered post.

59. From the above analysis of the law and the evidence adduced in this case, I find and hold that, in the circumstances of this case, the respondent was served with statutory notices as by law required. No return of service was required to prove service as contended. The certificates of postage, which clearly show that they are in respect of registered postal article, in my view sufficed to prove service on the respondent.

60. The 1st appellant categorically stated that the notices were not returned to it. The notices themselves indicate that they were served by registered post.

Did the Respondent prove his case against the respondents?

61. With regard to this question, it is noteworthy that the respondent has admitted that he owed the 1st appellant the obligation to repay the loan advanced to the principal debtor. The respondent also admitted that if the principal debtor failed in her obligations to the 1st appellant he would be called upon to repay the loan. The evidence on record shows that the principal debtors failed in her obligations to the 1st appellant. Consequently the respondent was called upon to fulfil his obligation to the 1st appellant failing which the security he had provided would be sold to realise the debt. Although the respondent contended that he was not served with the requisite statutory notices, as pointed out above, there is evidence that the respondent was served by registered mail.

62. As pointed out hereinabove, the method used to effect service on the respondent was sanctioned by law hence proper.

63. On whether the respondent proved his case against the appellants, it is noteworthy that the case was premised on the allegations that the appellants had failed to issue the respondent with statutory notices and/or proper statutory notices. Having found that the respondent was served with the requisite statutory notices and that the mode of service was proper, I return a negative verdict to this question.

Was the order for refund justified

64. With regard to this question, the trial court was informed that it was not possible for the 1st appellant to refund the overpaid money because it was held in the account of a third party. D.W.1 informed the court that the appellant could not deal with that money without the authority of the account-holder, the principal debtor.

65. Whereas it is not indispute that the credit balance in the principal-debtor's account was paid by the respondent, the plea of the respondent for refund of that amount raises a serious issue of law to wit, whether a bank can access money held in a customer's account without the authority of the customer or a court order authorising it to do so?

66. In my view, the 1st respondent could not do what it was being asked to do without breaching its legal obligations to the account-holder. If the respondent wanted to access the money, he should have moved the court for such an order. Since there was no order authorising the 1st respondent to access moneys held in a third party's account, I find and hold that the order for refund was, in the circumstances of this case, untenable.

67. With regard to the order for costs and interest, having determined that the respondent did not prove his caseagainst the appellants, I find and hold that the order for cost was improper.

68. As for what orders this court should make, whereas its true that the 1st appellant is entitled to hold the security given by the respondent until all the obligations secured by the security are met, there being no evidence that the 1st appellant notified the respondent of those oblgations and the respondent failed to meet them, in the special circumstances of this case, I find and hold that the 1st appellant is not justified in continuing to hold the security.

69. The upshot of the foregoing is that the appeal has merit and is allowed in terms of prayers (a) and (b).

70. As the respondent has demonstrated that the 1st appellant is not justified in continuing to hold the security he provided, I order that parties bear their own costs of the appeal and the suit filed in the lower court.

Orders accordingly.

Dated, signed and delivered at Nyeri this 18th day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kihara for the appellant/1st & 2nd defendants

Kihige Kihara – respondent/plaintiff

court assistant - Lydia