



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL NO. 1 OF 2014

HOUSING FINANCE COMPANY OF KENYA LIMITED.....APPELLANT

-VERSUS-

JOHN MWASHIGADI MWAKISHA RESPONDENT

JUDGEMENT

1. This Appeal emanates from an interlocutory ruling of the subordinate court (Hon. Gandani, SPM) delivered on 22nd July 2014 in Mombasa CMCC No. 34 of 2014. By that ruling the learned Magistrate granted an injunction to restrain the Appellant from selling by public auction the Plaintiff's property known as subdivision number 2874 Section VI Mainland North pending hearing and determination of the suit.
2. The appeal is premised on the following grounds:
 - i. The learned magistrate erred in law and fact in finding that the Statutory Notice dated 19th September 2013 was invalid.
 - ii. The learned magistrate erred in law and fact in finding that the Statutory Notice dated 19th September 2013 was ambiguous and prejudicial to the Respondent.
 - iii. The learned magistrate erred in law and fact by finding that the statutory notice dated 19th September 2013 did not inform the Respondent the consequences of failure to comply with the said notice.
 - iv. The learned magistrate erred in law by formulating and determining on issues which had not been raised by any of the parties in their respective pleadings.
 - v. The learned magistrate erred in law and fact in granting an injunction pending hearing and determination of the suit solely on the basis of a defective statutory notice.
 - vi. The learned magistrate erred in law and fact by conclusively determining the propriety of the statutory notice at an interlocutory stage.
 - vii. The learned magistrate erred in law and fact in granting at the interlocutory stage an injunction which was at variance with the prayers in the main suit.
 - viii. The learned magistrate failed to consider the evidence in its totality hence reaching a wrong conclusion of both facts and law.
3. The parties agreed that the appeal be disposed of by way of written submissions. The Appellant filed its submissions on 28th October 2015 while the Respondent filed on 8th December 2015.

The Appellant's Submissions

4. The Appellant submitted that this court, being an appellate court, can entertain a point of jurisdiction raised for the first time on appeal even where such question had not been raised in the trial court.

5. The Appellant submitted that under section 2 of the Registration of Titles Act Cap. 281 (now repealed), the subordinate court had no jurisdiction to determine any dispute concerning that land since the said section defines “court” to mean the High Court. The Appellant relied on the cases of **JOEL NDIRANGU NJARAMBA -VS- JAMES MWANGI KAMARU [2014] eKLR** and **KIBWANA ALI KARISA & ANOTHER -VS- SAID HAMISI MOHAMED & 3 OTHERS [2015] eKLR** to support that submission.
6. The Appellant submitted that one of the grounds relied upon by the learned magistrate to invalidate the Statutory Notice was that the same included two figures which were confusing to the Respondent. According to the Appellant, the learned magistrate erred by relying on such ground since the same was not raised in the Respondent's pleadings but was only raised by the Respondent's advocates during submissions. That therefore the learned magistrate had no basis to rely on evidence from the bar.
7. The Appellant submitted that the issue of defective three month statutory notice popped up for the first time through the submissions by the Respondent's advocate. That in fact, there were no submissions whatsoever of the non-service of the forty-day notice to sell or the forty-five- day redemption notice which had consumed five paragraphs of the Respondent's very brief Supporting Affidavit.
8. According to the Appellant, even if the learned magistrate was right to address the issue of the three month statutory notice and proceeded to find, as she did, that the same was invalid, the injunction would only last until the Appellant issued a fresh statutory notice that was compliant with the law. The Appellant relied on the case of **NATIONAL BANK OF KENYA LIMITED - VS- SHIMMERS PLAZA LIMITED [2009] eKLR**.
9. The Appellant submitted that the error by the magistrate is further compounded by looking at the prayers in the Plaint. That the Respondent sought an order to restrain the Appellant from disposing or selling the suit property “in the absence of a valid redemption notices having been served upon the plaintiff”. That the Respondent had himself acknowledged that his only problem was the service of valid redemption notices. That once those notices were served, the Respondent did not wish to further restrain the Appellant from exercising its statutory right of sale. That the learned magistrate ought to have taken cue from the prayer in the Plaint and directed the Appellant to serve a valid statutory notice or notices. The Appellant abandoned grounds 6 & 8 of the appeal.

The Respondent's Submissions

10. The Respondent submitted that the granting of injunction was the learned magistrate's discretion which this court being an appellate court should be reluctant to interfere with unless the court is satisfied that the discretion was not exercised judicially. The Respondent relied on the cases of **UNITED INSURANCE CO. LTD -VS- EAST AFRICA UNDERWRITERS KENYA LTD [1985] EA 898** and **MBOGO -VS- SHAH [1968] EA 93**.
11. On jurisdiction, the Respondent submitted that the same was raised for the first time in the written submissions but was not set out in the Memorandum of Appeal. That secondly, in the Appellant's statement of defence, the Appellant had pleaded that the jurisdiction of the court is not contested, an indication that it had clearly admitted the court's jurisdiction. The Respondent submitted that the dispute in the lower court was purely a commercial dispute that does not fall within the ambit of Article 162 (2) (b) of the Constitution of Kenya, 2010.
12. According to the Respondent, the learned magistrate rightly found that the statutory notice was invalid as did not inform the Respondent of the consequences of failure to comply with the notice. That section 90 (2) (d) requires that statutory notice shall adequately inform the recipient of the consequence that if the default is not rectified within the specified time, the Chargee will proceed to exercise any of the remedies referred to in the Act.
13. The Respondent submitted that the learned magistrate having found that the Statutory Notice did not comply with section 90 of the Land Act exercised her discretion properly by granting an injunction to restrain the intended sale of the Plaintiff's property pending the hearing of the suit.

Determination:

14. I have considered the submissions rendered and I have framed two issues arising for my

determination;

- i. Whether the appellant is entitled to raise the issue of jurisdiction at this stage and if yes, whether the subordinate court had jurisdiction to hear the matter.
- ii. Whether the trial magistrate erred in granting the orders of injunction as issued.

15. On the first issue, the Appellant submitted that it was right to raise the issue of jurisdiction even if it was not contained in their memorandum of appeal. He has cited several decisions in support of this inter alia; **Joseph Karioba Gicheru Vs Michael Gachoki Gicheru (2013)eKLR**. In this case, the Court of appeal held that the issue of jurisdiction could be dealt with although it was not raised in the memorandum of appeal. Further in the Karobia case, the determination was on a final appeal. The matter before me is an appeal on an interlocutory application.

16. The Respondent has contested the submission by the Appellant that the trial Court (Magistrate) lacked jurisdiction to entertain this matter. They have not objected to the issue of jurisdiction being raised yet it was not contained in the memo of appeal. In submitting that the Court has jurisdiction, they have relied on Article 162 (2) of the Constitution and the statement of defence filed where the defendant pleaded not contesting the jurisdiction of the Magistrate's Court.

17. Did the trial magistrate's Court have jurisdiction to entertain the matter before it? The Appellant made reference to section 2 of the Registration of Titles Act (repealed) which defined Court to mean High Court and the Land Registration Act and Land Act which makes references to the Environment and Land Court to hear all disputes concerning land.

18. The issue in dispute concern exercise of statutory power of sale by the Appellant. The Respondent has submitted that this is a commercial dispute and does not relate to the environment, use and occupation of and title to land. I must admit that the boundary of what constitutes use, occupation and title to land and commercial transactions is very thin. In my view the dispute as regards to charges and mortgages where title to land is used as security fall under the commercial transactions and therefore not disputes exclusive for determination by the Environment and Land Court.

19. In many decisions of the High Court and Court of Appeal, it has been held that once land is charged, it becomes a commercial commodity for sale. Although the Registration of Titles Act (repealed) clearly ousted the jurisdiction of the magistrate's Court Act, this suit was filed after the said Act was repealed. The applicable law in my view is the Land Act, the Land Registration Act, the Magistrate's Act and the Environment and Land Act and the Practice Directions of the Chief Justice.

20. Under Rule 7 of the Practice Directions, the Chief Justice directed that, "**Magistrate's Courts shall continue to hear and determine all cases relating to the environment and use and occupation and title to land (whether pending or new) in which the Courts have the requisite pecuniary jurisdiction**". This direction was given pronouncement in the **Petition No 72 of 2013, Edward M. Gatura & Another vs The Attorney General & 2 Others** where Lenaola J found that the Environment and Land Court does not have exclusive jurisdiction to hear and determine disputes concerning land and the environment especially that this Court is clothed with appellate jurisdiction.

21. The present appellant did not state that the trial magistrate lacked pecuniary jurisdiction. He only relied on the provisions as regards definition of a Court in Registration of Titles Act and the creation of Environment and Land Court to hear all matters relating to land exclusively. Having found otherwise, I find the trial magistrate's Court has jurisdiction to entertain the matter.

22. The second issue is whether the order of temporary injunction issued to be sustained pending hearing and determination of suit was proper. The Respondent cited the decision of **Kasango J. in HCC 31 of 2013, Fredrick A. Makumbi vs KCB** where the Court said thus ;

"... The purpose of giving that notice is to enable him to rectify the default. In this case if the pertinent law could not require the plaintiff to pay the whole outstanding amount but ought to have calculated the amount that make up the default and demand payment of

that amount”.

The Respondent submits that learned magistrate was right in issuing the orders having found the statutory notice issued was invalid for not complying with section 90 of the Land Act.

23. The Appellant on his part submitted that the notice was valid but even where the Court found the statutory notice issued is invalid, the order of injunction given should only last until the Appellant issued a statutory notice that was compliant with the law. In support of this, he cited the case of **National Bank of Kenya vs Shimmers Plaza Ltd (2009) eKLR**. He also submits that the Respondent in the prayers in the plaint prayed for the restraining order **“in the absence of a valid redemption notices having been served”**. That the trial magistrate ought to have been guided by this prayer.

24. I have weighed the options put forth by both parties. In the plaint filed in the Court below at paragraph 9 – the Respondent pleaded that **“... the securities cannot be realised without service upon the mortgagor or chargor of at least 3 months notice of intention to sell as provided for under sections 90 and 96 of the Land Act followed by a further notice of at least 40 days as provided in section 96 (2)”**. In paragraph 11, the Respondent's claim is for declaration that the intended sale is unlawful and on injunction restraining the defendant from selling the suit property in the absence of a valid pre – sale notice(s).

25. The dispute clearly relates to validity of the statutory notice served upon the Respondent. In case of an injunction was issued to last until a proper and legal notice was issued to the chargor. The similar decision was reached in the **NBK Ltd case supra**. Consequently the order of the trial magistrate ought to have been issued for a limited period until a valid notice in compliance with the law was served and not to last until determination of the suit.

26. In conclusion, I find merit in the appeal. I do hereby vary the orders of the trial magistrate and substitute it with the following order ;

That an injunction be and is hereby issued restraining the defendant by itself, agents, or otherwise howsoever from selling and or disposing by public auction or otherwise property known as subdivision 2874 Section VI MN and all improvements thereon subject to valid statutory notice in compliance with section 90 and 96 of the Land Act is served upon the plaintiff.

27. I make an order that each party meets their costs of this appeal. The Subordinate Court file be returned to the lower Court civil registry for parties to deal with that suit as appropriate.

Judgement dated and delivered in Mombasa this 13th day of April 2016

A. OMOLLO

JUDGE