



Rupa Kenya Limited & 2 others v Kenya Commercial Bank Limited (Civil Appeal (Application) 330 of 2014) [2023] KECA 1027 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KECA 1027 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 330 OF 2014
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
AUGUST 4, 2023**

BETWEEN

RUPA KENYA LIMITED 1ST APPLICANT

DAVID KARANJA KAMAU 2ND APPLICANT

CYRUS MBUIMWE KAMAU 3RD APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(Being an application for contempt of court and committal to civil jail of the Managing Director, Kenya Commercial Bank Limited for fraudulent and unlawful sale of Title No. Kajiado/Ntashart/258 in H.C.C.C. No. 53 of 2014.)

RULING

1. Before this court is a notice of motion dated May 23, 2018 which is brought by the applicants under the provisions of rule 42 of the [Court of Appeal Rules, 2010](#) and sections 3A & 3B of the [Appellate Jurisdiction Act](#) and section 27(b) of the [Contempt of Court Act](#) No 46 of 2016. The main order sought by the applicants is that this court be pleased to order that the Managing Director of Kenya Commercial Bank Limited be hereby cited for contempt of court and committed to civil jail for a period not exceeding six (6) months or such other sentence as may be found fair and just in the circumstances for the fraudulent unlawful sale of the suit property herein, namely, title No Kajiado/Ntashart/258.
2. The background to the application is that sometime in the year 1990, Rupa Kenya Ltd, the 1st applicant, was offered a loan facility by the respondent which was secured by a charge on the suit property. The suit property was registered in the name of the 2nd applicant, who was a director of the 1st applicant. The 1st applicant did not service the loan as per its agreement with the respondent, as



a result of which the loan went into arrears. As of June 2003, the outstanding loan amount stood at Kshs 3,300,000/=.

3. After making formal demand of payment of the outstanding amount to the 1st applicant and its guarantors for the facility (the 2nd and 3rd applicants), the respondent instituted suit against the applicants, to wit, HCCC No 53 of 2014, for recovery of the outstanding amount. The prayers sought by the respondent in the suit were, *inter alia*: judgment against the 1st applicant for Kshs 3,197,396.96 together with interest thereon at the rate of 23% p.a from September 30, 2003 till payment in full; judgment against the 2nd applicant herein for Kshs 450,000.00 together with interest at the rate of 21% p.a from September 23, 2003; judgment against the 3rd applicant for Kshs 450,000.00 together with interest thereon at the rate of 21% per annum from September 23, 2003 but so that the total amount recoverable herein from the 2nd and 3rd applicants should not exceed the indebtedness of the 1st applicant; costs of the suit and interest.
4. On June 25, 2014 the trial court entered judgment in favour of the respondent as follows: Kshs 2,535,675/= against the 1st applicant; interest on this amount at 14% p.a from the date of judgment till payment in full; Kshs 450,000/= together with interest thereon at 16.5% p.a from September 30, 2003 until payment in full against the 2nd applicant; Kshs 450,000/= together with interest therein at 16.5 % p.a from September 30, 2003 until payment in full against the 3rd applicant but so that the total amount recoverable from the 2nd and 3rd applicants shall not exceed the 1st applicant's indebtedness. The trial court dismissed the counterclaim filed by the applicants with costs.
5. The applicants were dissatisfied with the decision of the trial court and filed an appeal before this court. Their contention as evident from the face of the motion and the affidavit in support sworn by David Karanja Kamau, the 2nd applicant, is that during the pendency of the hearing of their appeal, they learnt through an official search of the suit property that it had been sold by the respondent and already transferred to one Harrison Wambugu Gaita.
6. It is averred that the purported sale and transfer of the suit property to the said third party did not comply with mandatory requirements in law in that under the Land Act, the chargee cannot sell the charged property at less than 75% of its forced sale value and that the respondent has not availed a copy of the valuation report used to assess the forced sale value of the suit property.
7. The applicants further contend that once the respondent opted to recover its loan by way of a suit, which suit was accordingly heard and determined in its favour, its statutory power of sale of the charged property was extinguished, and the respondent was estopped from purporting to exercise a non-existent power of sale; that according to the doctrine of *lis pendens*, where a property is the subject matter of proceedings in court, any dealing there with it is fraud and null and void ab initio; that through its actions, the respondent impedes the cause of justice in that it seeks to put beyond recall the suit property which is the subject matter of this appeal, hence it undermines the authority of this court and the rule of law.
8. The court is urged to find that the respondent has committed grievous and egregious contempt of court, which is punishable, either by way of imprisonment or by way of hefty fine, and that unless the order sought herein is granted, the authority of this court as well as the rule of law will be seriously affected and diminished.
9. The application is opposed by the respondent through a replying affidavit sworn by Tom Ogola, its Litigation Manager. The respondent contends, *inter alia*, that it served the applicants with the 90-day statutory notice of sale of the suit property as required under section 74(1) of the Registered Land Act (now repealed); the service of the foregoing 90-day notice was sufficient as the respondent's right of



sale over the suit property arose before the enactment of the *Land Act*, 2012, consequently, it was not obliged to serve fresh notices; the suit property was sold at its forced sale value of Kes 6,750,000/= duly determined by a registered valuer; the sale was authorised by the trial court following the delivery of its judgment in HCCC No 53 of 2004; in any event, there is a pending suit and a pending application before the Environment and Land Court at Kajiado in ELC Case No 99 of 2018 between the parties herein in respect of the sale of the suit property. The suit and the application raise the same issues that are being raised herein and therefore this court is not in a position to consider the application as the matter is sub judice.

10. The respondent further contends that the exercise of its statutory power of sale over the suit property was not taken away by its filing of suit to recover the amounts due under the facility; and that there was no court order staying the sale of the suit property, and therefore the respondent's exercise of its statutory power of sale could not have amounted to contempt of court.
11. At the hearing of this application, learned counsel Ms Kosgei appeared for the applicants. There was no appearance on behalf of the respondent despite service with the hearing notice. Counsel indicated that she would be relying entirely on her client's written submissions dated May 10, 2022. She however made an oral application for leave to have her clients' supplementary affidavit sworn on May 10, 2022 admitted as part of the record.
12. Turning to the written submissions, it is contended that the respondent sold the suit property based on a non-existent statutory power of sale since it already had a judgment and decree in its favour. It is submitted that pursuant to the provisions of section 5(1) of the *Judicature Act* and section 35 of the *Court of Appeal (Organization and Administration) Act*, 2015, this court has power to punish for willful disobedience of any court judgment or decree as is the case herein. The case of *Freight in Time Limited v Image Apparels Limited* [2015] eKLR is cited in support of the argument that a person who has knowledge of a court order and who willfully does anything to subvert it is liable to be committed for contempt.
13. It is further contended that the respondent, by selling the suit property during the pendency of the appeal, offended the common law principle of *lis pendens* and the decision of this court in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR where the purpose of this principle was addressed in detail is cited in support. According to the applicants, the respondent's failure to bring to this court's attention that it had sold the suit property is a demonstration of the indignity it treats this court with. It is urged that the respondent is clearly in contempt of court and should be punished accordingly.
14. The respondent did not file any written submissions in respect of the application. Its submissions that are on record are in respect of the main appeal.
15. We have carefully perused the record, the submissions by counsel, and considered the applicable law. Before delving into the merits of the application, we deem it necessary to address the oral application made by the applicants' advocate for leave to have the applicants' supplementary affidavit admitted. We decline the application as the applicants ought to have brought themselves within the ambit of rule 29 of the rules of this court for the court's consideration whether to grant or decline such leave.
16. The jurisdiction of this court to punish for violation of court orders cannot be in question. The *Judicature Act*, the *Court of Appeal (Organization and Administration) Act* as well as the *Contempt of Court Act* gives power to the superior courts to punish for contempt any person disobeying their orders. The question we must determine is whether the Managing Director of the respondent is in contempt of court for what the applicants' term as fraudulent unlawful sale of the suit property.



17. It is an indisputable fact that the trial court entered judgment in favour of the respondent against each of the applicants herein. The applicants did not satisfy the judgment and decree of the trial court which required them to make payments to the respondent. Instead, they lodged an appeal before this court. They did not seek stay of execution of the judgment and decree of the trial court, either before the trial court or this court. The respondent, on the strength of the 90-days statutory notice it had previously served upon the applicants, proceeded to exercise its statutory power of sale. As a result, the suit property was sold to a third party. The forced sale value of the suit property as per the valuation report dated November 13, 2014 was Kshs 6,750,000/=. As at the time of the sale of the suit property to the third party, there was no court order made against the respondent restraining the sale or any other form of disposal of the suit property. In other words, the respondent's statutory power of sale had already arisen, and the decree issued in its favour did not stop it from exercising that statutory power of sale.
18. We are not persuaded by the arguments made by the applicants that the filing of suit for recovery of the outstanding loan amount extinguished the respondent's statutory power of sale over the suit property. Filing of a suit cannot extinguish a mortgagee's statutory power of sale. Once a power of sale has accrued, a mortgagee has the right to exercise it. The respondent's statutory power of sale had arisen upon issuance of the 90-days statutory notice. The judgment and decree of the trial court did not restrain the respondent from selling the suit property. The remedy available to the applicants if the respondent's exercise of its statutory power of sale occasioned loss or damages upon them lies in a suit for damages against the respondent.
19. That notwithstanding, there is a suit filed before the Environment and Land Court at Kajiado viz, ELC Case No 99 of 2018, between the parties herein in respect of the sale of the suit property. This suit is pending hearing and determination. The suit could be determined in any of the parties' favour, and until a decision is rendered by that court, the orders sought in this application are, in our respectful view, premature.
20. In the upshot, we are not persuaded that the respondent's exercise of its statutory power of sale constituted willful disobedience of a court order. Accordingly, this application is without merit, and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY AUGUST, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

