Wamidha v Co-operative Bank of Kenya Limited & 4 others (Civil Appeal 307 of 2016) [2022] KECA 596 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 596 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 307 OF 2016

HM OKWENGU, F SICHALE & S OLE KANTAI, JJA

APRIL 28, 2022

BETWEEN

PELESIA ATIENO WAMIDHA .... APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED .... 1ST RESPONDENT

HERITAGE BUSINESS SOLUTION LIMITED .... 2ND RESPONDENT

ANNE MUENI NDEMWA .... 3RD RESPONDENT

CONSOLIDATED BANK OF KENYA LIMITED .... 4TH RESPONDENT

REGISTRAR OF TITLES (DISTRICT LAND REGISTRY) MOMBASA .... 5TH RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nairobi (Ochieng, J.) dated 14th July 2015) in (HCCC No. 429 of 2002)

JUDGMENT

1 Pelesia Atieno Wamidha (the appellant herein), has filed this appeal against the judgment of Ochieng J. dated 14th July 2015.

2. The appeal arises from a suit that was filed by the appellant at the Milimani Commercial Law Courts sometimes in the year 2002. The appellant via a further amended plaint dated **19**th May 2014, sought *inter alia* a declaration that the purported transfer of L.R No. 6676/Section 1/ Mainland North-Mombasa to the 2nd appellant was null and void.

3. The 1st respondent had also filed a counter claim as against the appellant for the sum of Kshs 2,783,112.80.00 together with interest thereon at court rates from **6**th October 2010, until payment in full.

4. The matter was heard by Ochieng, J who in a judgment delivered on 14th July 2015, *inter alia* dismissed the appellant's claim and the 1st respondent's counter claim.

5. The aforesaid judgment aggrieved the appellant and provoked the instant appeal vide a Notice of Appeal dated 23rd July 2015 and a Memorandum of Appeal dated 23rd December 2016, setting out the following grounds of appeal:

    1. The Learned Judge erred in finding that the 1st defendant/respondent did not advance to the borrower more than the maximum aggregate principal sum of Kshs 500,000/- stated in the charge which was contrary to the evidence on record.

    2. The Learned Judge erred in finding that the 1st defendant/respondent served a statutory notice upon the appellant contrary to the evidence on record.

    3. The Learned Judge erred in finding that the 1st defendant/respondent served a valid notification of sale and conducted sale of property in accordance with the Auctioneers Act.

    4. The Learned Judge erred in not giving weight to the credible evidence on record of the plaintiff/applicant that she was not served with a statutory notice as required by law.

    5. The Learned Judge erred in failing to consider the evidence given for both sides in the dispute evenly, fairly and equitably."

6. The brief facts in this appeal are that sometimes in the month of May 1996, in consideration of an overdraft facility not exceeding Kshs 500,000/= by the 1st respondent to Richard B.O Abiero t/a Hoducts Enterprises (hereinafter the borrower), the appellant executed a legal charge over her property, L.R No 6676/Section 1/Mainland North- Mombasa(hereinafter the suit property.)

7. The borrower subsequently defaulted in repaying the monies owed to the 1st respondent prompting the 1st respondent to invoke its statutory power of sale, whereupon the appellant instituted suit in a bid to salvage the suit property. During the pendency of the suit, the appellant and the 1st respondent entered into a consent on 21st May 2002, where it was agreed that the 1st respondent in exercise of its statutory power of sale would issue a fresh notice of sale in compliance with the provisions of the law. On 29th August 2007, the 1st respondent served a statutory notice upon the appellant and proceeded to undertake the sale by way of public auction to the 2nd respondent who subsequently transferred the same to the 3rd respondent who in turn charged the same to the 4th respondent. On 14th July 2015, Ochieng, J. dismissed the appellant's claim thus provoking the instant appeal.

8. When the appeal came up before us for hearing on 30th November 2021, learned Counsel, Mr. Oteyo appeared for the appellant whereas learned Counsel, Mr. Manda appeared for the 1st respondent and learned Counsel, Mr. Ombwayo appeared for the 4th respondent. There was no appearance for the 2nd, 3rd and 5th respondents. Mr. Oteyo and Mr. Manda sought to rely on their written submissions whereas Mr. Ombwayo intimated to Court that they would rely on their written submissions filed at the High Court.

9. It was submitted for the appellant that in consideration of the 1st respondent according an overdraft facility of up to a limit of Kshs 500,000.00 to Richard B.O Abiero, trading as Hoducts Enterprises, the appellant executed a legal charge over the suit property for Kshs 500,000.00; that it was evident in

the legal charge that the maximum principal sum secured was Kshs 500,000.00; that further DW1 had admitted that there was an extra facility of Kshs 65,000.00 advanced to the principal debtor without the consent and the knowledge of the appellant and that as such, the 1st respondent had unilaterally varied the terms of the guarantee contained in the charge by granting a further facility of Kshs 65,000.00 and thus, the appellant was discharged from the guarantee contained in the legal charge over the suit property.

10. With regard to grounds 2 and 3 of appeal, it was submitted that vide a consent order dated 21st May 2002, the 1st respondent was required to serve a valid statutory notice on the appellant in compliance with the relevant provisions of the law. The appellant stated in her testimony that she was neither served with the requisite statutory notice nor notification of sale prior to sale of the suit property. It was thus submitted that failure by the 1st respondent to serve a statutory notice and a valid notification of sale upon the appellant in accordance with Rules 15 (b) and (c) of the *Auctioneers Rules* under the Auctioneers Act was not only in breach of the law but also in disobedience of the consent order of the 21st May 2002, that required them to comply with all laws related to statutory power of sale.

11. As regards grounds 4 and 5 of appeal, it was reiterated that the Judge failed to appreciate the effect of the consent order, the unilateral alteration of the charge terms by the 1st respondent and as such arrived at a wrong finding.

    Consequently, we were urged to allow the appeal.

12. On the other hand, it was submitted for the 1st respondent that the charge executed by the appellant was security for an overdraft facility not exceeding Kshs 500,000.00; that the borrower's account had a debit balance of Kshs 145,957/25 as at 20th June 1996 and that upon release of the money on 21st June 1996, the borrower's account remained with a credit balance of Kshs 354,042/75 which was below the limit of Ksh 500,000.00. It was thus submitted that the trial judge did not err in finding that the 1st respondent advanced to the borrower an amount well within the maximum aggregate principal sum of Kshs 500,000/.

13. With regard to grounds 2,3,4 & 5 of appeal, it was submitted that although the appellant denied ever receiving any notices through her postal address of P.O Box 90182 Mombasa, she admitted that it was her postal address which she had given to the 1st respondent. It was further submitted that the appellant did not adduce any evidence to show that the borrower was not served and neither did she call the borrower as a witness to support her contention that she was not properly served

14. It was further submitted that the appellant had close to 10 years from 1999 to 2008 (when the suit property was sold) to redeem the same; that by her own admission, she was aware of the arrears, and that she was also aware that there were no orders to stay any proposed auction and that the 1st respondent had every right to pursue recovery under the law, but instead made promises to repay which she never fulfilled and later blamed the 1st respondent for allegedly varying the terms of the charge.

15. Based on the foregoing, it was submitted that the trial court exercised its discretion prudently and did not err in finding that the 1st respondent served a valid statutory notice and notification of sale and conducted the sale of the suit property in accordance with the Auctioneers Act.

16. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by rule 29 of the *Court of Appeal Rules*, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123.

17. With regard to the first issue, it was submitted that in consideration of the 1st respondent according an overdraft facility of up to a limit of Kshs 500,000.00 to the borrower, the appellant executed a legal charge over the suit property for the said amount, that the maximum principal sum secured under the charge was Kshs 500,000.00 and that on admission by DW1, an extra facility of Kshs 65,000.00 was offered to the principal debtor without the knowledge and/or consent of the appellant. It was thus contended that the 1st respondent unilaterally varied the terms of the guarantee hence, discharging the appellant from the guarantee contained in the legal charge.

18. For a start, we note that the legal charge dated 4th June 1996 was not annexed to the Record of Appeal for the benefit of this Court's perusal. Be that as it may, and contrary to the appellant's contention that DW1 admitted that the borrower was offered an extra facility of Kshs 65,000.00 without her knowledge and or consent, DW1 John Martin Chege in cross examination stated:

> "the maximum principal amount loaned as per the document is Kshs 500,000/-. This amount was disbursed to the principal debtors...."

The witness further stated:

> "the bank guaranteed no further facility. There was a letter of offergranting the facility an overdraft being a temporary accommodation.
>
> There was no entry in the bank statement for the extra facility of Kshs 65,000/-

In re-examination he stated:

> "it is correct that the Kshs 65,000/- was not disbursed. An overdraft is when a customer is allowed to withdrawal (sic) his account up to a certain limit. In the case, the withdrawing of the account was already there. We allowed the limit to be extended and the money was taken..."

19. From the foregoing and contrary to the appellant's contention, there is nowhere in DW1's statement that he admitted that the borrower was offered an extra facility of Kshs 65,000.00

20. The learned judge while addressing this issue stated as follows in his judgment;

> "On its part, the Co-operative Bank has demonstrated that as at 20th June 1996, the current account of Hoducts Enterprises had a debit balance of Kshs 145,951/=. In other words, the account was overdrawn to that magnitude.
>
> On 21st June 1996, the bank credited the current account with Kshs 500,000/-, resulting in an overall credit of Kshs 333,942/=. At no time did the bank give to the customer an overdraft whose limit exceeded Kshs 500,000/-. The plaintiff submitted that on 4th January 1997, the sum of Kshs 65,000/- was debited to the account of Hoducts Enterprises pursuant to the further overdraft facility which the bank gave to the customer. A perusal of the statement of account shows that on 4th January 1997, the account balance was Kshs 1,480. 55 DR. the account was overdrawn.
>
> So, when the customer wrote a cheque No. 00915976, for Kshs 65,000/-, he did not have sufficient funds in his account from which the bank could make payment. However, the bank honoured the cheque resulting in an overdraft of Kshs 66,450.55/=. Obviously, that overdraft did not exceed Kshs 500,000/=. Therefore, the plaintiff has failed to prove that

Co-Cooperative Bank did allow Hoducts Enterprises to have an overdraft exceeding Ksh 500,000/=."

Again the learned judge at page 23 of his judgment stated as follows:

> "in this case, there is no evidence at all that Co-operative Bank did at any time seek to impose upon the guarantor, the liability in respect to the overdraft facility of Kshs 65,000/-=. It does appear that the bank made every effort to keep several accounts so that the principal liability of the plaintiff never exceeded the sum of Kshs 500,000/=. Therefore, I find that the charge instrument which was executed by the plaintiff was not discharged as asserted by the plaintiff."

21. Unlike the trial judge, we did not have the benefit of perusing the statement of account as it was once again not part of the record. In our view, nobody could have said it better than the trial judge who had the opportunity of seeing the witnesses testify. Consequently, nothing turns on this ground of appeal and the same fails.

22. With regard to grounds 2 and 3 of appeal, it was submitted that failure by the 1st respondent to serve a statutory notice and a valid notification of sale upon the appellant in accordance with Rules 15 (b) & (c) of the Auctioneers Rules under the Auctioneers Act was not only in breach of the law but also in disobedience of the consent order dated 21st May 2002, that required the 1st respondent to comply with all laws related to statutory power of sale.

23. It is indeed not in dispute that on 21st May 2002, the appellant and the 1st respondent consented to an order in which the 1st respondent was to issue a fresh statutory notice and comply with all the provisions of law with regard to exercise of power of sale without prejudice to the appellant.

24. Subsequently, on 3rd and 29th August 2005, the 1st respondent issued fresh statutory notices to the appellant using her postal address namely; P.O Box 90182 Mombasa which the appellant denied having ever received. The appellant further denied having ever received notification of sale. In cross examination by the advocate for the 1st respondent, the appellant admitted that this was the address that she had given to the 1st respondent.

25. The learned judge while addressing this issue at page 13 of his Judgment stated as follows;

> "the plaintiff confirmed that that used to be her postal address. She also confirmed that that was the address which she had given to the bank. According to the plaintiff when she testified on 20th May 2014, she changed her address in the year 2009. Her new postal address was P.O Box 83011 Mombasa. However, the plaintiff confirmed to the court that she did not notify the Co-operative Bank about her change of address. Notwithstanding the change of her address, the plaintiff said that in the year 2012, she still used P.O BOX 90182 Mombasa. She used it when she instructed Value Consult to carry out a valuation of the suit property.
>
> In the result, I find that whether or not the plaintiff changed her postal address in the year 2009, she also continued using the address given to the bank. As she did not notify Co-operative bank of the change of her address, I find that the bank could not have been expected to send the statutory notice to any other address apart from P.O BOX 90182 Mombasa.
>
> By sending the statutory notice to the plaintiff's last known address, the Co-operative Bank discharged its obligation, which was to give notice to the chargee that the chargor would exercise its statutory power of sale if the chargee did not pay the debt within 3 months of

service of the notice. It is sufficient that the chargor sends the notice to the chargee's last known address."

Again at page 24 of the judgment the Learned Judge stated as follows;

> "On 29th August 2007 the C0-operative Bank sent a statutory notice to the plaintiff. That notice was at page 142 of the bank's bundle of documents.
>
> The notice dated 29th August 2007 was compliant with the law because it specified that the 3 months' period would run from the date of service of the notice.
>
> In her submissions, the plaintiff raised issue about the notification of sale which was issued by the auctioneer. However, in the pleadings the plaintiff had not raised any issues concerning the notification of sale. It cannot therefore have become an issue in contention when it was raised in the final submissions."

26. From the circumstances of this case we are unable to agree with the contention by the appellant that the 1st respondent failed to serve a statutory notice. The appellant indeed admitted in cross examination by the advocate for the 1st respondent that she had changed her postal address and that she did not inform the 1st respondent of the same. How then did she expect the 1st respondent to effect service upon her when she changed her postal address and did not notify the 1st respondent of the same?

27. Regarding the issue of the notification of sale and as was rightly held by the trial court, the same was not one of the issues raised by the appellant in the further amended plaint dated 19th May 2014. Consequently, nothing turns on these grounds of appeal and the same must as well fail.

28. Finally regarding grounds 4 and 5 of appeal which were basically a reiteration of the other grounds of appeal, namely; effect of the consent order and the alleged unilateral alteration of the charge terms by the 1st respondent, the same are without merit and must as well fail. In any event it has not been demonstrated that the learned judge arrived at a wrong finding thereof.

29. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed with costs to the respondents who took part in this appeal, namely the 1st and the 4th respondents.

30. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

HANNAH OKWENGU

....

JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR