



Sagwe & another v Waithira & another (Suing as the Administrators of the Estate of Kenneth Ng'ang'a - Deceased) (Environment and Land Appeal 3 of 2022) [2024] KEELC 3475 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 3 OF 2022
LC KOMINGOI, J
APRIL 25, 2024**

BETWEEN

HARON ONDICHO SAGWE 1ST APPELLANT

VERONICA NYAMOITA MAKORI 2ND APPELLANT

AND

LUCY NANCY WAITHIRA 1ST RESPONDENT

MARY NYAMBURA MBATIA 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF KENNETH
NG'ANG'A - DECEASE**

(Being an Appeal from the Judgement of Hon. Mrs. Gicheha, Chief Magistrate in CMC ELC Case No. 83 of 2018 at Kajiado delivered on 27th October 2022)

JUDGMENT

1. On the 27th October 2022, Honourable L. L. Gicheha CM granted the orders;
 - “1. The Defendant is ordered to grant vacant possession within 21 days of this order failure of which eviction orders to issue.
 2. Costs to the Plaintiff.”
2. The Appellants aggrieved by the said judgement moved this court through a Memorandum of Appeal dated 3rd November 2022. The grounds are;
 1. The learned Magistrate erred in fact and in law in holding that the Appellants’ defence in the matter was not merited.



2. The learned Magistrate erred in law and in fact in failing to consider the defence of lack of spousal consent for a charge and notification of sale.
 3. The learned Magistrate erred in law and in fact by making conclusions without listening to the parties' evidence.
 4. The learned Magistrate erred in law and in fact in denying the Appellants their Constitutional right to a hearing.
 5. The learned Magistrate erred in law and in fact in failing to abide by the well known principles enunciated in the [Land Act](#) and [Land Registration Act](#).
 6. The learned Magistrate erred in law and in fact in failing to find that the Respondents would be entitled to an order of specific performance.
 7. The learned Magistrate erred in law and in fact in making a finding in favour of the Respondents, who had no locus standi in the matter.
 8. The learned Magistrate reached an absurd conclusion in seeming to find that the Respondent, a defaulter, had a better entitlement to the suit property than the Appellants.
 9. The learned Magistrate erred in law and in fact in failing to appreciate that the Appellants have tried every means possible to resolve the dispute with the Respondent who has flatly refused, objected to and obstructed every such move.
 10. The learned Magistrate erred in law and in fact in ruling that the interests of the respondents override the right to access to justice as provided for in [the Constitution](#) of Kenya.
 11. The learned Magistrate erred in law and in fact in failing to appreciate the principles of evictions and timelines given in law.
 12. The learned Magistrate erred in law and in fact in mixing up the issue of access to land, quiet enjoyment of land and issue of right to specific performance.
 13. The learned Magistrate erred in law and in fact in failing to have regard for the Appellant's exhibits.
 14. The findings of the Magistrate were not supported by the evidence on record.
 15. The trial Magistrate erred and misdirected himself (sic) in relying solely on the submissions of the Respondent and failing to consider at all the Appellants' submissions.
 16. The learned Magistrate reached erroneous findings and conclusions both on fact and law.
3. The Appeal was canvassed by way of written submissions.

The Appellants' Submissions.

4. Counsel submitted on only one ground of Appeal: that the Magistrate erred in fact and in law in holding that the appellants Defence in the matter was not merited.
5. Counsel further submitted that the trial magistrate was in violation of Section 6 of the [Civil Procedure Act](#) in determining the suit while a similar suit between the second Appellant; Veronica Nyamoita Makori & 2 others vs Kenya Commercial Bank Ltd in High Court Civil Case No. 168 of 2016 (Nairobi) was pending.



6. Further, the purported sale was unprocedural contrary to Section 90 of the *Land Act* because the Appellants were not served with notice. Adding that the suit property was matrimonial property as per Section 6 and Section 2 of the *Matrimonial Property Act* as such consent from the wife should have been acquired before charging the property as established under Section 79(3) and Section 28(a) of the *Land Act* and held in *Mugo Muriu Investments Ltd vs EWB & 2 others* (2017) eKLR.
7. As such, the Appeal should be allowed and the suit be referred to a different Magistrate for determination.

The Respondents' Submissions.

8. Counsel for the Respondent highlighted on the following issues for determination:
9. On whether the registration of the deceased as the registered proprietor of LR No. Kajiado/Kaputiei-North/5215 was regular and procedural, counsel submitted that the 2nd Appellant having defaulted in repaying the loan facility taken against the suit property, its sale through a public auction was advertised on the Daily Newspaper on 1st February 2016. The late Kenneth Ng'ang'a then attended a public auction at Popman House Nairobi on 3rd March 2016 and being the highest bidder he was issued a Memorandum of sale and a transfer by chargee on dated 3rd March 2016. He was also granted consent by the Land Control Board dated 12th April 2016. The land was registered in his favour and title issued to him on 27th April 2016. Therefore, the procedure was regular as per Rule 21 of the *Auctioneers Act* and Section 90(3) of the *Land Act*. The purchasers also had immunity vide Section 99 of the *Land Act* as held in *Joyce Wairimu Karanja vs James Mburu Ngure & 3 others* [2018] and the buyer at the time of the auction had no duty to inquire into the rights of the charge Bank to sell as held in *Captain Kanyagia & another v Damaris Wangechi & 2 others* [1995] eKLR. The Appellants only remedy was in damages.
10. Counsel added that the Respondents proved their case on the stipulated threshold but the Appellants closed their case without prosecuting it despite being given several opportunities to be heard. Therefore, the pleadings were mere statements of facts with no probative value since they had not been subjected to the required test of cross examination was held by Makau J. in *North End Trading Company Limited (carrying on the Business under the registered name of Kenya Refuse Handlers Limited) vs City Council of Nairobi* [2019] eKLR. The trial court was therefore right in allowing the Respondents' claim.
11. Counsel went on to submit that the Appellant did not prove that the suit property was matrimonial property which he did not give consent to have it charged. Additionally, the Respondents were not party the alleged pending suit at the High Court and were unaware of its existence. The Appellants neither attached it among their pleadings nor file for stay of proceedings at the lower court pending its determination.
12. Court was thus urged to dismiss the Appeal and uphold the lower court's judgement with costs to the Defendants.

Analysis and Determination

13. I have considered the appeal, record of appeal, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the Appeal is merited and should be allowed.
 - ii. Whether the Appellant's are entitled to the orders sought.



- iii. Who should bear costs of the Appeal?
- 14. The suit before the High Court Commercial Division No. 168 of 2016 Veronica Nyamoita Makori Vs. Kenya Commercial Bank is about the legality of the sale.
- 15. It is not in dispute that the sale was concluded and a title issued in the name of Kenneth Ng'ang'a (deceased).
- 16. As to whether the sale was unprocedural is a matter to be decided by the High Court. In any case, the 2nd Appellant can be compensated by an award of costs.
- 17. The claim that the suit property is matrimonial property is neither here nor there as the Appellants despite being given several opportunities in the lower court failed to attend court to demonstrate so.
- 18. The 1st Appellant signed an affidavit of consent of spouse and he cannot run away from it.
- 19. In the case of Co-operative Bank of Kenya Limited Vs. Patrick Kangethe Njuguna & 5 Others (2017)eKLR the court stated;

“ 36. By definition, a charge is an interest on land securing the payment of money or money's worth on the fulfilment of any condition (See Section 2 of the *Land Act*). As such it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are Limited to the realization of the security so advanced. (See Section 80 of the *Land Act*).

The creation of that relationship therefore, has nothing to do with the use of the land. Indeed that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advance to the chargor.”

- 20. In a nutshell the suit in the High Court could not stop the lower court from proceeding with the suit before it, to conclusion.
- 21. I agree with the Respondents' submissions that the Appellants claim of irregularity on the basis that the suit property was matrimonial property and that he did not consent to the charge faulty does not hold water. He was given an opportunity to demonstrate so but he did not. I find that the learned trial magistrate cannot be faulted for arriving at the said decision.
- 22. I also agree with the Respondents' submission that as a bonafide purchaser there was no duty on the part of the deceased as the purchaser, at the time of the auction, properly advertised to inquire into rights of the chargee bank to sell. I rely on the case of Captain Kinyagia & Another Vs. Damaris Wangechi & 2 Others (1995) eKLR.
- 23. The only remedy available to the Appellants is to sue the bank for damages, if there was any irregularity as regards the sale. This will be determined in the pending suit being HCC No. 168 of 2016;

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- 24. I find that the sale was concluded at the fall of the hammer and the Appellants are just buying time. The Court of Appeal in the case of Sema Health Products Limited Vs. Housing Finance Corporation & another (Civil Appeal (Application) (2024) KECA 245 (KLR) stated thus;

“ 22. Even if the applicant's intended appeal were to succeed, the law is clear that a mortgagor's equity of redemption is extinguished at the fall of the hammer,



and the only remedy lies in an action for damages. See Section 99(4) of the *Land Act*, 2012. The 1st respondent has averred that it is a reputable commercial lender, which the applicant has not disputed. It would be in a position to compensate the applicant if its appeal is successful.”

25. Similarly in *Cieni Plains Company Limited & 2 Others Vs. Ecobank Kenya Limited* (2017) eKLR the court held;

“68. I must point out that there is now a clear paradigm when it comes to purchasers of charged property. The statute affords them protection. Section 99 of the *Land Act* shields the purchaser almost absolutely save where he has participated in fraud. Instead, the purchaser is not to be robbed of any acquisition simply because the sale was irregular or improper or out of dishonest conduct.....Indeed, Section 99 proceeds to state that the party prejudiced by the sale is to be compensated through damages.”

26. Again in *Kamulu Academy Limited & another v British American Insurance (K)Limited & 2 others* [2018] eKLR it was held;

“29. Section 99 of the *Land Act* provides:-

- (1) This section applies to—
 - (a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
 - (b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
- (2) A person to whom this section applies—
 - (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
 - (b) Is not obliged to see to the application of the purchase price;
 - (c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way,



unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”
30. The above section protects the purchaser. The Equity of redemption is extinguished at the fall of the hammer. The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not.”

27. It is my view that the Respondents ought to be left to enjoy the fruits of their judgement.

28. The upshot of the matter is that I find no merit in this appeal and the same is dismissed. Each party do bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:

Mr. Karisa Iha for the Appellants.

Ms. Kiema for the Respondents.

Court Assistant – Mutisya.

