



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OKWENGU, MUSINGA & SICHALE, J.J.A.]

CIVIL APPEAL NO. 32 OF 2019

BETWEEN

EDWARD NYINGI MUKUNDI.....APPELLANT

AND

TERRY WANJIRU KARIUKI1ST RESPONDENT

EQUITY BANK LIMITED2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nzioka,J.) dated 20th November, 2018 **IN HCCC NO. 343 OF 2009**)

JUDGMENT OF THE COURT

The appellant, **Edward Nyingi Mukundi (Edward)**, filed the appeal herein against the judgment of **Nzioka, J.** delivered on **20th November, 2018**.

A brief background to this appeal is that **Terry Wanjiru Kariuki, (Terry)** (the 1st respondent herein and the then plaintiff), filed a suit at the High Court of Kenya at Nairobi against **Equity Bank Ltd (the Bank)**, (the then 1st defendant and the 2nd respondent herein), and **Edward Nyingi Mukundi, (Edward)** (the then 2nd defendant and the appellant herein), seeking the following orders against the appellant and the Bank:

“

i. An urgent temporary injunction do issue restraining the 1st and 2nd defendants, their agents, servants, employees and whosoever from interfering in any manner with the plaintiff's possession and from forcefully evicting the plaintiff on the site of the suit premises known as Title No. Nairobi Block 91/213 pending the hearing and determination of this suit.

ii. General damages and aggravated damages.

iii. An order do issue by this Honourable Court registering a caveat against Title No. Nairobi/Block 91/213 pending the hearing and determination of this suit.

iv. An order do issue hereby cancelling the sale and transfer dated 1st September, 2008 of the property known as Nairobi/Block 91/213 by the 1st defendant (Equity Bank Limited) to the 2nd defendant (Edward Nyingi Mukundi).

v. Special damages of Kshs 7,749,773.00

vi. Interest

vii. Costs of this suit”.

In the plaint dated 18th May, 2009, Terry alleged that on or about 25th January, 2002, she borrowed a loan of Kshs 6,000,000.00 from the Bank, which was secured by registration of a charge on property known as No. Nairobi/Block 91/213 ,(the suit property). It was further contended that on or about 14th April, 2008, Terry, with the consent of the Bank, entered into a sale agreement with Edward for sale of the charged property for a sum of Kshs 30,000,000.00 which sale agreement was duly executed by Terry and Edward. On diverse dates in May, 2008, the Bank wrote to Terry purporting that the loan amount was Kshs 22,000,000.00, which amount Terry strongly denied and disputed. Terry instructed the firm of Kamuruci & Associates Auditors to audit the various loan accounts she had with the Bank and the audit revealed that the Bank had overcharged Terry with written off interest and non -existent loans which amounted to a total of Kshs 7,749,773.00. On or about 10th September, 2008, Edward and the Bank in breach of the aforesaid sale agreement of 14th April, 2008 fraudulently, illegally and unlawfully caused the transfer of the suit property to Edward purportedly in exercise of the Bank’s statutory power of sale. Terry contended that the Bank as a chargee did not act in good faith and did not have regard to her interests as a chargor, but instead colluded with Edward to defraud her. It was Terry’s further claim that she did not benefit from interest on the 5,000,000.00 which was to be paid as deposit to earn an interest of 18% p.a; that she was entitled to general damages since she had other potential purchasers who were willing to purchase the suit property at Kshs 50,000,000.00; that conditions precedent before a financial institution exercises its statutory right of sale were not adhered to, hence the purported sale of the suit property to Edward by the Bank was null and void *ab initio*. Terry therefore prayed for cancellation of the sale and transfer of the charged property to Edward.

In a defence dated 20th June, 2012, the Bank denied the allegation of breach of the sale agreement dated 14th April, 2008, and/or fraudulently, illegally and unlawfully causing the transfer of the suit property to Edward. The Bank contended that it had exercised its statutory power of sale through sale by private treaty and not by public auction, thus denying all the particulars of breach of contract, misrepresentation, collusion, fraud, unlawful and illegal actions set out in the plaint. The Bank asked that Terry’s suit be dismissed.

In his defence, Edward argued that the suit property was sold to him by Terry with the express consent of the Bank by private treaty and not at a public auction; that thereafter, Terry gave vacant possession of the suit property to him and thus, the subject agreement was fully performed and completed by all the parties. Edward further averred that the transfer of the suit property was lawful and proper; that although Terry duly executed the transfer of lease dated 25th June, 2008, the transfer form by the Chargee dated 1st September, 2008 was lawfully used with the express and or implied consent and knowledge of all the parties and hence the transfer was valid, proper and neither was there any fraud or illegality in the transaction.

The dispute between the parties was heard by Nzioka, J., who in a judgment dated 20th November, 2018 held that:

“In my considered opinion, it will serve the interest of justice, if the current status quo is maintained save for the 1st defendant to withdraw the transfer documents signed and the same be replaced with the document that was signed by the plaintiff and the 2nd defendant. That the 1st defendant, who in my considered opinion [was] mainly responsible for the prevailing circumstances herein, together with the 2nd defendant should “bite the bullet” and compensate the plaintiff for any loss suffered. This includes the delay in payment of the balance of the purchase price within the agreed time of 90 days and the subsequent loss that may have been suffered as a result of the illegal transfer of her property to the 2nd defendant. The parties may consider calculating the appreciation value of the property less the development thereof, and compensate the plaintiff accordingly since all through the 2nd defendant was on the property. A valuation of the property as of the date of this judgment will be guideful and the court will be willing to supervise the subsequent amicable settlement of the matter. This is informed by the fact that, if the plaintiff were to repay the loan with interest and redeem the physical possession on the same, she cannot levy claims on the development thereon.

In conclusion, I find and make the following orders:

a. Prayers (a) and (c) of the plaint are spent;

b. Prayer (b) of the plaint is not allowed;

c. Prayer (d) of the plaint is not allowed in so far as the cancellation of the sale is concerned and the plaintiff is at liberty to treat the agreement of sale as repudiated and /or rescinded and refund the deposit and all other sums she has benefited from with interest at court rates from the date of payment to the date of full refund, or conclude the sale agreement by lodging and registering the *transfer form she signed in favour of the 2nd defendant. However, prayer (d) is allowed in so far as transfer dated 1st December, 2008 over (sic) the suit property is concerned. The 1st defendant is at liberty to pursue recovery of the arrears if any procedurally and lawfully.*

d. Prayer (e) and (f) of the plaint are not allowed. No interest is payable in view of the fact that no damages have been awarded;

e. In view of the surrounding circumstances of this case, and in particular the findings that, the plaintiff still has liability to repay *the loan in arrears in favour of the 1st defendant and that the defendants*

caused the illegal transfer and the 2nd defendant did not pay the balance of the purchase price in time, I find that each party has a portion of blame to bear and I order that each party meets its own costs”

The appellant was aggrieved by the findings of the learned judge and in a Memorandum of appeal dated **29th January, 2019**, listed five (5) grounds of appeal faulting the learned judge: for failing to appreciate the nature and weight of the appellant’s evidence thus arriving at an erroneous decision of cancelling the transfer of the suit property merely on technicality for want of form; for erroneously making conflicting orders by correctly finding that there was a valid sale agreement for the suit property and performance by the appellant but erroneously proceeding to hold that **Terry** was still at liberty to treat the sale agreement as repudiated and /or rescinded and demand a refund of the deposit and all sums paid with interest at court rates; for failing to consider the binding nature of the sale agreement entered into by the parties and making orders whose implication would be to rewrite the contract for the parties contrary to the law and, for making inconsistent and contradictory decisions incapable of execution thus leaving the dispute unresolved. The appellant urged the court to allow the appeal, set aside the High Court judgment dated **22nd November, 2018** together with all the consequential orders and decrees with costs to the appellant.

On **26th March, 2019**, **Terry** filed a Supplementary Record of Appeal and a Cross-Appeal. In the Notice of Cross-Appeal, **Terry** challenged the decision of the learned judge, contending that the trial court having ordered the cancellation of the transfer of the suit property by **the Bank** to the appellant, the learned judge should have ordered title to the suit property to revert to **Terry** and not to **the Bank**; for failing to find that the mandatory statutory notice had not been served on her and, for failing to assess the quantum of damages payable to her by **the Bank** or the appellant or by both of them, jointly and severally, upon finding that **Terry** suffered loss and deserved compensation as a result of the delay in payment of the balance of the purchase price and for the illegal transfer of the suit property to the appellant by **the Bank**; for failing to make a finding that **Terry** was entitled to damages for the loss of use of the suit property from **10th September, 2008** to date, as a result of the unlawful and illegal transfer thereof by **the Bank** to the appellant, who is in possession thereof to date; for failing to make a finding that the participation of the appellant in the execution of the transfer dated **1st September, 2008** with **the Bank** purportedly in exercise of the chargee’s statutory power of sale expressly and or impliedly cancelled, rescinded, repudiated and or abandoned the agreement for sale dated **14th April, 2008** between the appellant and **Terry**. In the Cross-Appeal therefore, **Terry** sought to have the appellant’s appeal and the **Bank’s** cross-appeal dismissed; that her cross appeal be allowed and an order issued reversing the registration of the suit property (Nairobi Block 91/213) to the name of **Terry Wanjiru Kariuki**.

The appeal came up before us for plenary hearing on **22nd January, 2020**.

Dr. Amollo, learned counsel leading **Mr. John Kinyori** and **Mr. Paul Mungla** for the appellant highlighted the appellant’s written submissions dated **29th April, 2019** and a list of authorities dated **4th September, 2019**. He posited that **Terry** borrowed 6 million in 2002 from **the Bank** and by **21st November, 2007**, she owed **the Bank** Kshs 25.9 million; that a notification of sale was issued and a demand made but **Terry** requested to have the property sold by private treaty; that the highest offer came from the appellant for 30 million; that on **14th January 2008**, a sale agreement was signed; that **Terry** asked for the loan to be re-adjusted; that **the Bank** agreed to have the loan owing reduced to 22 million; that by **10th September, 2008**, all the money had been paid from the sale and the debt of Kshs 22 million had been fully repaid ; that **Terry** received the balance of Kshs 6.7 million which she said she had used for school fees; that possession of the suit property changed hands; that **Terry** signed the transfer form (RL -2) to effect the transfer but that she now says that the sale must be cancelled because **the Bank** used form RL4 (transfer by a chargee in the exercise of its statutory power of sale) instead of form RL2; that form RL2 is the transfer document she voluntarily signed pursuant to an agreement before her advocate and finally, that the court found the agreement was valid but proceeded to nullify the transfer on the basis that a wrong form for the transfer was used.

In support of the appeal, **Mr. Mungla** associated himself with **Dr. Amollo’s** submissions. He was of the

Dated and Delivered at Nairobi this 8th Day of May, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR