



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. NAI 335 OF 2018

BETWEEN

HARISHCHANDRA BHOVANBHAI JOBANPUTRA.....1ST APPLICANT

BHAVNA HARISHCHANDRA JOBANPUTRA.....2ND APPLICANT

AND

PARAMOUNT UNIVERSAL BANK LIMITED.....1ST RESPONDENT

SHREE KRISHNA HARDWARE & PAINTS LIMITED...2ND RESPONDENT

SURESH GHEDIA.....3RD RESPONDENT

RAJESH GHEDIA.....4TH RESPONDENT

(Being an application for interlocutory injunction in an intended appeal from the Ruling of the

High Court of Kenya at Nairobi (Olga Sewe, J.) delivered on 28th September, 2018

in

H.C.C.C. No. 828 of 2010)

RULING OF THE COURT

When this appeal came up for hearing on 7th March, 2019 **Mr. A.O. Wandago**, learned counsel for the appellants, informed us that the property subject of the suit before the High Court (**L.R. No. 209/4300/77**) had been sold by public auction on 22nd February, 2019 by the 1st respondent, Paramount Universal Bank Limited. The original registered owners of the said property are the applicants, **Harishchandra Bhovanbhai Jobanputra (deceased) - and his widow, Bhavna Harishchandra Jobanputra.**

A brief rendition of the facts of the case will assist in answering the question we will soon pose which we have identified as central for determination of the main issue in this ruling.

The applicants filed suit at the High Court of Kenya at Nairobi being HCCC No. 828 of 2010. The plaint is dated 2nd December, 2010. They named as defendants **Paramount Universal Bank Limited (the 1st respondent), Shree Krishna Hardware & Paints Limited (the 2nd respondent), Suresh Ghedia (the 3rd respondent) and Rajesh Ghedia (the 4th respondent).** It was stated in the plaint that the 3rd and 4th respondents as directors of the 2nd respondent had requested the applicants to guarantee a loan offered by the 1st respondent to the 2nd respondent and that the applicants had offered their property L.R. No. 209/4300/77 as security for the loan. It was further stated that without the applicants' knowledge the 1st respondent in collusion with the 3rd and 4th

respondents had granted a further loan to the 2nd respondent with the said property being security for the loan and that there was fraud by the respondents in that action. Various declarations were sought - that the subsequent credit facilities granted to the 2nd respondent by the 1st respondent were null and void; that the applicant be discharged on personal guarantees given to the 1st respondent; a permanent injunction be granted restraining the 1st respondent from enforcing the said guarantees; that the charge over the said property be discharged and damages be granted to the applicants for fraudulent misrepresentation. That suit has not been heard or determined so caution dictates that we tread carefully so as not to embarrass the High Court when it is called upon to determine the issues after a hearing takes place. Various applications followed – some are in our record while others can be gleaned from the rulings or affidavits which we have perused.

The applicants filed an application for injunction (this is not in our record but is referred to in the ruling of Kariuki, J. delivered on 15th July, 2016) and Njagi, J. gave orders of injunction in favour of the applicants against the 1st respondent restraining the sale of the subject property pending hearing and determination of the suit.

The 1st respondent filed a motion to discharge those orders of injunction. In a considered ruling delivered on 21st November, 2014, Gikonyo, J. refused to discharge the injunction, holding that issues of fraud had been alleged in the plaint and needed to be determined. He held:

“... there may be need to sustain the injunction but it will not be without conditions. Accordingly, I sustain the injunction on these conditions: 1) that the parties will file all the necessary documents, witness statements and issues within 30 days; 2) the plaintiff will then apply and set down the suit for hearing within 15 days after the first 30 days for compliance in (i) above. If the plaintiffs will default on any of these conditions, the injunction will stand discharged without the necessity to apply on that behalf. It is so ordered.”

In the application before Kariuki, J. the applicants prayed amongst other things that injunction orders be granted restraining the 1st respondent from selling or dealing with the applicants' said property for various reasons given in the application. The Judge reviewed the matter and found that the 1st respondent had not complied with various provisions of the Land Act and the Auctioneers Act. The Judge held that the 1st respondent was required to issue a proper notice to the applicants in accordance with the Land Act and, after doing so, give proper instructions to an auctioneer who must comply with provisions of the Auctioneers Act and was then at liberty to sell the applicants' said property by public auction. The Judge further ordered that, before sale, the 1st respondent carry out a valuation of the applicants' said property to ascertain the value, considerable time having elapsed from the last valuation.

There was then the application before Olga Sewe, J. ruling which was signed on 17th August, 2018 (delivered on 28th September, 2018), the subject of this appeal. It was prayed in the main that certain officers of the 1st respondent be cited for contempt of court and be detained in prison for a term not exceeding six months; that the 1st respondent be ordered through mandatory injunction to issue to the applicants copies of bank statements of the applicants and 2nd respondent's account with the 1st respondent and that an injunction be issued to restrain the 1st respondent from selling the applicants' said property. The Judge reviewed the whole matter including the applications which had been filed in the suit and, agreeing with the ruling of Kariuki, J. which we have visited in this ruling, Olga Sewe, J. held:

“... I would dismiss with costs the 2nd plaintiff's application dated 26th May, 2017 and order that, upon a fresh valuation being undertaken, granted the period that has elapsed since the last valuation; and upon a fresh redemption notice being served by the Auctioneer in compliance with Rule 15(c) of the Auctioneers Rules, the 1st Defendant be at liberty to advertise and sell the suit property in exercise of its statutory power of sale.”

Those are the orders that provoked the motion before us stated to be brought under various provisions of law including **rule 5 (2) (b)** of the rules of this Court. It is prayed in the main that we issue injunctions restraining sale or dealing with the applicants' said property pending the hearing and determination of the suit which is pending before the High Court. The grounds in support of the Motion and the affidavit of the 2nd respondent need not be repeated here as we have given a detailed summary of the facts of the case. Sticking out, however, is the deposition by the 2nd applicant Bhavna

Harischandra Jobanputra, widow of the 1st applicant, that the loan they guaranteed was **Kshs.4,400,000/=** but had since ballooned to the massive sum of **Kshs.31,000,000/=** by the time of the Motion which is dated 14th November, 2018.

Mr. Wandago, learned counsel for the applicant, in submissions before us when the Motion came up for hearing thought that there was an arguable appeal. According to him Olga Sewe, J. had erred in law in not making a determination on the effect of **section 44** of the **Banking Act**. Further, that the further charge registered against the applicants property was illegal as it was unknown to them, and, finally, that the 2nd applicant is a widow, a housewife, with no ability to get another house if the suit property is sold.

Mr. Paul Ogunde, counsel for the respondents, did not agree. He submitted that the equity of redemption had been extinguished when the property was sold on 22nd February, 2019 and the purchaser of the same became an affected party who should be heard in the High Court. Counsel referred to the various rulings in the suit at the High Court and submitted that there was no arguable appeal, and, in addition, that the subject property had been offered as a security for a loan and could be sold if the loan was not serviced. For all that counsel asked us to disallow the application.

In a brief rejoinder Mr. Wandago submitted that Gikonyo, J, had blamed both sides on delay in prosecution of the suit and that because of the allegation of fraud in procuring the loan there was an arguable appeal.

We come to the important question which will determine this application when is the equity of redemption extinguished? We ask this because both sides agree that the property subject of the suit was sold on 22nd February, 2019 and title thereof transferred to the successful bidder at the auction who is not a party before us. A visit back to the motion before us shows that the applicant prays for an order of injunction to restrain the respondents from interfering with the legal or actual possession of the subject property pending the full hearing of the suit at the High Court.

This Court in the case of **MBUTHIA v JIMBA CREDIT FINANCE CORPORATION AND ANOTHER [1986-1989] 1 EA 340** considered the scope of the equity of redemption and held that the same is lost or extinguished at the fall of the hammer at a sale by public auction or when a binding contract of sale has been entered into. Apaloo, JA, in that case, quoting the author **Fisher and Lightwood** in “**Law of Mortgage**”:

“A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagees exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the person interested according to priorities.”

The same holding was reached by this Court in the later case of **PATRICK KENYAGIA & ANOTHER v DAMARIS WANGECHI & 2 OTHERS [1995] eKLR.**

Section 89 of the **Land Act (2012)** which came into force after those decisions provides that the equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Also relevant to the said provision is the Land Registration Act, 2012.

This Court has – post The Constitution of Kenya, 2010 – had occasion to pronounce on the said equity of redemption. In the case of **SAVINGS AND LOAN KENYA LIMITED v MAYFAIR HOLDINGS LIMITED [2012] eKLR** we found that a chargers right of redemption over a charged property is extinguished when the property is sold by the chargee in exercise of its statutory power of sale. We observed:

“This position is further reflected in common law and the doctrines of equity which are applicable in this case by virtue of section 163 of the RLA. In Mbuthia v Jimba Credit Finance Corporation & Another Civil Appeal No. 111 of 1986 the Court of Appeal held that by virtue of the security being registered under the RLA the equity of redemption was lost at the fall of the hammer at auction sale. This is because at the fall of the hammer the highest bidder is declared the purchaser and a binding contract of sale is concluded.”

The answer, then, to the question we posed is that the applicant is not entitled to the orders sought, the property having been sold to a 3rd party at the auction that took place earlier this year. The application has no merit and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28th day of June, 2019.

P.N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR