



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, GATEMBU & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 109 of 2017

BETWEEN

ETRADE LIMITED.....APPELLANT

AND

THRIFT ESTATES LIMITED.....1st RESPONDENT

DAKAGI HOLDINGS LIMITED.....2nd RESPONDENT

EQUATORIAL COMMERCIAL

BANK LIMITED (now SPIRE BANK.....3rd RESPONDENT

(Appeal from the Ruling of the High court of Kenya at Nairobi

(Lady Justice Farah S.S.M. Amin) dated 21st December 2016,

in

H.C.C.S No. 576 of 2014)

AND

CIVIL APPEAL NO. 156 OF 2015

BETWEEN

EQUATORIAL COMMERCIAL BANK LIMITED.....APPELLANT

AND

THRIFT ESTATES LIMITED.....1st RESPONDENT

DAKAGI HOLDINGS LIMITED.....2nd RESPONDENT

ETRADE LIMITED.....3rd RESPONDENT

JUDGMENT OF THE COURT

1. Two separate rulings were delivered by the High Court in relation to **Land Reference No. 14902/70 (IR. 89871)** the suit property in this matter. The first ruling was delivered on 30th April 2015. The second ruling was delivered on 21st December 2016. Subsequent to the

rulings, two separate appeals and a cross-appeal were filed against each ruling. The appeals are **Nairobi Civil Appeal No. 156 of 2015** impugning the ruling dated 30th April 2015 and **Nairobi Civil Appeal No. 109 of 2017** impugning the ruling dated 21st December 2016. The two appeals and cross-appeal were heard back to back. This judgment is a determination of the two appeals and the cross-appeal.

BACKGROUND FACTS

2. By an agreement dated 5th September 2011 the 1st respondent, **Thrift Estates Limited**, borrowed a sum of Ksh. 30,000,000/= from the 3rd respondent Bank, **Equatorial Commercial Bank Limited** now **Spire Bank**. In consideration thereof, a charge was executed over **LR No. 14902/70 (IR. 89871)** which property was registered in the name of the 2nd respondent, **Dakagi Holdings Limited**. The 2nd respondent was guarantor to the monies lent to the 1st respondent.

3. The 1st respondent defaulted in repaying the loan and the 2nd respondent defaulted in honouring the guarantee. Upon such default, the 3rd respondent Bank advertised for sale by public auction the suit property in the Daily Nation Newspaper dated 4th September 2013.

4. Subsequent to the advertisement, the parties engaged in out of court negotiations and a consent order was recorded dated 9th October 2014 in **H.C.C.C. No. 403 of 2013**. Pursuant to the consent, the 1st respondent was to deposit with the 3rd respondent Bank several title deeds in respect of **Land Reference Nos. KAJIADO/KAPUTEI NORTH 68164, 68165, 68166, 68167, 68168, 68169, 68170 and 68171**. It was further agreed that the 1st respondent would cause the proceeds of sale from the foregoing properties to be paid or deposited with the 3rd respondent towards liquidation of the outstanding loan. The aforementioned properties were in the names of **Mr. Daniel Kamita Gichuhi** and **Mrs. Josephine Kabura Gichuhi**.

5. The 1st and 2nd respondents contend that while they were in the process of selling the KAJIADO properties referred to above, the 3rd respondent advertised the suit property for sale by public auction in the Daily Nation Newspaper dated 24th November 2014.

6. Apprehensive that the property would be sold, the 1st and 2nd respondents filed suit at the High Court seeking injunctive orders to prevent sale of the suit property.

7. In a ruling dated 30th April 2015, the learned judge expressed herself thus:

“... I find that the balance of convenience is best served by the asset being preserved pending resolution of the issues...”

This is the first ruling the subject of the instant appeal.

8. Upon the injunctive and preservation order being made and in line of the consent of the parties recorded in court, the 1st and 2nd respondents allege that pursuant to the consent, they found a financial who was willing to take over their financial liability to the 3rd respondent Bank; that despite bringing this to the attention of the 3rd respondent Bank, the Bank through **Garam Investment (Auctioneers)** proceeded to advertise for sale the suit property LR No. 14902/70 (IR. 89871) in the Daily Nation Newspaper dated 26th November 2014. The public auction was held on 9th December 2014 and the suit property was sold **to Etrade Company Limited**, the appellant in this matter. The appellant purchased the suit property for the sum of Ksh. 42,750,000/=. A memorandum of sale was executed.

9. Subsequent to the sale by public auction, the 1st and 2nd respondents filed suit against the 3rd respondent Bank seeking orders to prevent the transfer of the suit property to the appellant. In a ruling dated 21st December 2016, the learned judge issued an injunctive order restraining the 3rd respondent or its agents from disposing or selling by public auction the suit property or in any way transferring, alienating or dealing with the suit property. This is the second ruling the subject of this appeal.

10. Aggrieved by the interlocutory injunctive orders granted by the court on 30th April 2015 and 21st December 2016, two appeals were filed. The compressed and amalgamated grounds of appeal are:

(i) The judge erred in failing to find the dispute between the parties was res judicata under the provisions of Section 7 of the Civil Procedure Act in view of the consent recorded by the parties in Nairobi High Court Commercial Case No. 403 of 2013.

(ii) The judge failed to appreciate the consent recorded in court is binding on the parties and no party is challenging the consent.

(iii) The judge erred in dealing with extraneous matters.

(iv) The judge erred in failing to apply the provisions of Section 99 (3) and (4) of the Land Act and erred in issuing injunctive orders after sale by public auction.

(v) The judge erred in failing to appreciate the distinct nature of the parties and their interest in the suit property.

(vi) The judge erred in the application of the principles of injunction.

11. At the hearing of this appeal, learned counsel **Mr. Njuguna C.M.** appeared for the appellants while learned counsel **Mr. Samuel Kairu**

appeared for the 1st and 2nd respondents. Learned counsel **Mr. Micheal Maramba** appeared for the 3rd respondent. All parties filed written submissions.

APPELLANT'S SUBMISSIONS

12. Both the appellant and the 3rd injunctive orders issued by respondent contend they are aggrieved by the the learned judge on 21st December 2016 restraining the 3rd respondent Bank from transferring or alienating or dealing with the suit property. The appellant, **Etrade Limited**, contend it is an innocent purchaser for value of the suit property in a public auction. As an innocent purchaser, the judge erred and failed to appreciate the effect of **Section 99 (3) and (4)** of the **Land Act**; the judge erred in issuing injunctive orders after sale by public auction. It was submitted that **Section 99** of the **Land Act** protects an innocent purchaser for value at a public auction.

13. Verbatim, **Section 99 of the Land Act** provides:

“99. (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.” (Emphasis supplied)

14. The appellant submitted that it purchased the suit property from the 3rd respondent Bank which is chargee to the suit property; that **Section 99 (3)** of the Land Act protects the appellant from any impropriety or irregularity that may attach to the sale by public auction. It was submitted that there is no fraud, misrepresentation or any dishonest conduct on the part of the 3rd respondent to which the appellant had actual or constructive knowledge.

15. The appellant averred that the 1st and 2nd respondents equity of redemption to redeem the suit property lapsed at the fall of the hammer and as such, the 1st and 2nd respondents have not right in or over the suit property; that if at all the 1st and 2nd respondents suffered any loss, damage or prejudice, their remedy lies in an action for damages as provided in **Section 99 (4)** of the Land Act.

In support of its submission, counsel cited the case of **Bomet Beer Distributors Limited & another -v- Kenya Commercial Bank Limited & 4 others [2005] eKLR**. The appellant submitted that in the absence of fraud, the title of the transferee acquired after the chargee exercises the statutory power of sale is indefeasible. It was submitted that the 1st and 2nd respondents neither pleaded nor alleged any fraud on the part of the appellant.

16. It was further urged that the 1st and 2nd respondents have no case or claim against the appellant who is an innocent purchaser for value of the suit property; that the learned judge erred in failing to appreciate the principles for grant of an injunction; that pursuant to **Section 99 (3)** and **(4)** of the Land Act, the balance of convenience tilts in favour the appellant as an innocent purchaser for value. It was further urged there is no evidence on record to prove fraud or collusion between the appellant and the 3rd respondent.

17. Of relevance, it was urged the appellant paid the entire purchase price of Ksh. 42,750,000/= to the 3rd respondent; the appellant is out of pocket and the suit property has not been transferred to it due to the injunction granted by the learned judge. Counsel submitted that presently there is no consideration given for the sum of Ksh. 42,750,000/= which was paid as purchase price for the suit property.

3rd RESPONDENT'S SUBMISSION

18. The 3rd respondent Bank made submissions in support of the appeal and its cross-appeal against the ruling dated 21st December 2016. It

was submitted that the 1st respondent borrowed the sum of Ksh. 30,000,000/= from the Bank and defaulted in repayment; the parties reached an amicable settlement and recorded a consent in court on 9th October 2014; pursuant to the terms of the consent, the 1st and 2nd respondents were to pay all outstanding sums and in default the suit property was to be sold pursuant to the statutory notices dated 26th March 2014 and 1st July 2014; that the 1st and 2nd respondents defaulted in complying with the terms of the consent order and the Bank advertised the suit property for sale.

19. It was submitted that pursuant to the consent order, the principle of *res judicata* applies. In support, the cases of **Pop-In (Kenya) Limited & 3 others -v- Habib Bank A.G. Zurick C.A. No. 80 of 1988** was cited.

20. On the cross-appeal, it was submitted that the learned judge framed up her own issues for determination which issues were neither pleaded nor canvassed by the parties. The issues erroneously framed by the court for determination were: the correct interest rate applicable to the loan; the validity of the notice of sale and therefore the validity of the consent order; whether the public auction was lawful and if the same could pass a good title to the purchaser and whether there was a sale at undervalue. Counsel submitted that these issues raised by the court were not pleaded by any party; parties are bound by their pleadings and the learned judge erred in raising issues not pleaded by either party.

21. The 3rd respondent conceded a public auction was held on 9th December 2014 and the appellant purchased the suit property; that by the time the learned judge issued the injunctive orders on 21st December 2016, (one and half years later) the suit property had been sold. The respondent averred **Section 99 (2)** of the Land Act protects the appellant as purchaser of the suit property in a public auction. Counsel submitted that if the 1st and 2nd respondents are aggrieved, their remedy lies in damages as provided in **Section 99 (4)** of the Land Act.

1st and 2nd RESPONDENTS SUBMISSION

22. The 1st and 2nd respondents oppose the two appeals and cross-appeal in this matter. Upon rehashing background facts, the respondents submitted that indeed a consent was recorded in court on 9th October 2014 and title deeds to several properties in KAJIADO were deposited with the 3rd respondent Bank. However, it is alleged that the 3rd respondent refused to release the title documents to the properties thereby jeopardizing and obstructing sale of the properties; that refusal to release the titles to the KAJIADO properties raise a presumption of fraud and dishonesty on the part of the 3rd respondent Bank; that the Bank illegally and in breach of the consent order sold the suit property.

23. It was submitted that the judge did not err in restraining the 3rd respondent from transferring the suit property to the appellant because the validity and compliance with the consent order is contested. It is contended that the 3rd respondent Bank in selling the suit property by public auction was attempting to take advantage of the 1st and 2nd respondents; that since compliance with the consent order is in contention, the judge correctly issued injunctive orders restraining any dealing, transfer or alienation of the suit property.

24. On the issue of *res judicata*, it was submitted the same does not apply in the instant matter; that in any event, the parties in **Civil Suit No. 403 of 2013** and **Civil Suit No. 156 of 2014** are different.

25. On applicability of **Section 99 (3)** of the Land Act, it was submitted that whereas allegations of fraud were not specifically pleaded, this does not defeat the position taken by the judge that indeed there was collusion or a sense of dishonest conduct on the part of the Bank and the appellant.

26. The respondents concluded their submission stating the judge did not err in applying the principles in **Giella -v- Cassman Brown & Company Ltd (1973) EA 358**. For injunction to issue, the applicant must show a *prima facie* case with a probability of success and that he stands to suffer irreparable damage. In the instant appeal, counsel submitted that the 1st and 2nd respondents had established a *prima facie* case with probability of success; they had also proved they stand to suffer irreparable loss and damages would not be an adequate remedy as land being the substratum of the instant appeal will be alienated.

ANALYSIS and DETERMINATION

27. The two appeals and cross-appeal before this Court arise from two rulings before the High Court. Being interlocutory appeals, the main suit between the parties is pending for trial. We bear the foregoing in mind and shall confine ourselves only to the facts and applicable law relevant to determination of this interlocutory appeal.

28. The central issue in the appeals and cross-appeal is whether learned judge erred in granting injunctive orders restraining the 3rd respondent Bank from transferring, dealing or alienating the suit property. More specifically, whether the court erred in restraining the 3rd respondent Bank from transferring the suit property to the appellant who purchased the same in a public auction held on 9th December 2014.

29. It is not in dispute that the 1st and 2nd respondents borrowed the sum of Ksh. 30,000,000/= from the 3rd respondent. It is also not in dispute that the 1st and 2nd respondents defaulted in repaying the loan amount and interest thereon. It is not in dispute that the 1st and 2nd respondents offered the suit property as security for the monies advanced.

30. In **Bii -v- Kenya Commercial Bank Ltd [2001] KLR 458**, Ringera, J. correctly stated:

“Once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages.”

31. In the instant matter, the 1st and 2nd respondents charged the suit property in favour of the 3rd respondent as security for the borrowed sum. Despite several attempts to sell the same, the property was eventually sold by public auction to the appellant for the sum of Ksh. 42,750,000/=. The appellant has paid the purchase price in full and which sum is presently held in a joint account of the parties. The public auction was held on 9th December 2014 and the injunctive orders made by the learned judge were issued on 21st December 2016 which is one and a half years after the sale by public auction.

32. The appellant and 3rd respondent submitted that the judge erred in issuing the injunction despite the provisions of **Section 99 (3) and (4)** of the Land Act. Of pivotal relevance to this appeal is **Section 99 (4)** of the Act. At the risk of repetition, the Section provides that:

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

33. In **Bomet Beer Distributors Limited & another -v- Kenya Commercial Bank Limited & 4 others** [2005] eKLR it was correctly stated the chargor’s equity of redemption expires at the fall of the hammer. Kimaru, J. expressed himself thus:

“In the present case, the chargee in exercise of its powers of sale under a charge sold the suit properties in a public auction.

The plaintiffs are now complaining that the said sale was irregularly conducted. They are seeking injunctive orders of this court to restrain the said property from being transferred to the transferee who purchased the said properties in a public auction. The principles for the grant of interlocutory injunction are now well established. In the landmark case of Giella – versus- Cassman Brown [1973] EA 358 it was held that an injunction would be granted where an applicant establishes a prima facie case. The applicant is further required to establish that he would suffer irreparable loss which may not be compensated by an award of damages. If the court fails to decide the case on the two principles stated above, then it would decide whether or not to grant the injunction based on a balance of convenience.

In the present application, the plaintiffs have not established a prima facie case. The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they were entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5th defendant who purchased the property in the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction. In the premises therefore and for the reasons stated, the application for injunction must fail. It lacks merit. It is hereby dismissed with costs to the defendants.”

34. In **Kitur & Anor -vs- Standard Chartered Bank & Anor (No. 2)** [2002]1 KLR 640 at page 645; it was held that:

“The law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneer, shall be compensated by an award of damages. (See Section 77(3) of the registered land Act and Section 26(1) of the Auctioneers Act.”

35. In **Joyce Wairimu Karanja v James Mburu Ngure & 3 others** [2018] eKLR, the High Court correctly stated:

“33. In my view, there is little reason to belabour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under section 99 of the Land Act. Thirdly, a mortgagor’s equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders.”

36. Justice J.B. Havelock had this to say about **Section 99** and the position of a purchaser in **Simon Njoroge Mburu -v- Consolidated Bank of Kenya Ltd** [2014] eKLR:

“That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Plaintiff’s remedy lies in this case. In this regard, the Plaintiff would do well to note the powers of the Court in respect of remedies and reliefs set out in under section 104 of the Land Act, 2012....

What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages...”

37. On our part, we are persuaded by the merits of the decision in **Bomet Beer Distributors Limited & another -v- Kenya Commercial Bank Limited & 4 others** (supra)[2005] which is in tandem with the appellant’s claim in this matter. Taking into account the provisions of **Section 99 (4)** of the Act, and considering the judge issued injunctive orders one and a half years after sale by public auction, we find the

judge erred in law in failing to give effect and apply **Section 99 (3) and (4)** of the

Land Act to the dispute in this matter. We are satisfied that any grievance the 1st and 2nd respondents have against the 3rd respondent Bank can adequately be compensated by way of damages as stipulated in **Section 99 (4)** of the Land Act.

38. In similar vein, this Court had this to say in **Nancy Kahoya Amadiva -v- Expert Credit Limited & another [2015] eKLR:**

“The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser” In **Captain Patrick Kanyagia and Another - v- Damaris Wangeci and others**, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in **David Katana Ngomba - v- Shafi Grewal Kaka [2014] eKLR**. In **Priscilla Krobought Grant - v- Kenya Commercial Finance company Ltd and others** Civil Appeal No.227 of 1995 (unreported), this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2nd respondent had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2nd respondent before the trial court, the 2nd respondent’s action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security.”

39. Guided and persuaded by the merits and good law in the above cited judicial decision, we see no reason to depart from them. This being an interlocutory appeal, we decline to consider and determine the other grounds raised in the appeal as the same will be canvassed before the trial court.

40. The upshot is that the two appeals and cross appeal have merit. Our final order is **Nairobi Civil Appeal No. 156 of 2015** and **Nairobi Civil Appeal No. 109 of 2017** and the cross-appeal therein be and are hereby allowed. We set aside in entirety the ruling by the High Court dated 30th April 2015 and the ruling dated 21st December 2016. For avoidance of doubt, the injunction issued by the High Court on 21st December 2016 be and is hereby set aside.

41. The 1st and 2nd respondents shall bear the costs in this appeal and cross-appeal and costs before the High Court.

Dated and delivered at Nairobi this 5th day of July, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR