IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), MAKHANDIA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 110 OF 2018

(CONSOLIDATED WITH CIVIL APPEAL NO. 111 OF 2018)

BETWEEN

HOUSING FINANCE CO. OF KENYA LTD.....1ST APPELLANT

JAMES K. KAGETE.....2ND APPELLANT

SAVINGS & LOAN KENYA LTD.....3RD APPELLANT

AND

SAMUEL KITI LEWA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Mombasa (Mwangi, J.) dated 28th July 2017

in

HCCC No. 357of 2007)

****

JUDGMENT OF THE COURT

This judgment determines two consolidated appeals, namely ***Civil Appeal No. 110 of 2018*** and ***Civil Appeal No. 111 of 2018***. Due to the fact that the two appeals arise from the same judgment, the same transaction, involve the same parties and raise the same or closely related issues, we directed at the hearing, and with the consent of the parties, that the same be consolidated pursuant to ***rule 103*** of the ***Court of Appeal Rules***, with File No 110 of 2018 as the running file.

In the first appeal ***Housing Finance Company of Kenya Ltd. (HFCK)*** is the 1st appellant whilst ***James K. Kagete (Kagete)*** is the 2nd appellant. ***Samuel Kiti Lewa (Lewa)*** is the sole respondent in that appeal. In the second appeal, ***Savings & Loan Kenya Ltd (Savings & Loan)*** is the sole appellant whilst Lewa is the 1st respondent, HFCK the 2nd respondent and Kagete the 3rd respondent. For convenience, in this judgment HFCK is the 1st appellant, Kagete the 2nd appellant and Savings & Loan the 3rd appellant, whilst Lewa is the respondent.

The background to the appeal is as follows. On or about 11th June 1998, Lewa, then the registered proprietor of the property known as ***L.R. Subdivision No. 9763 (Original Number 9677/85) of Section I Mainland North (the suit property)*** charged it in favour of HFCK to secure a mortgage of ***Kshs 1,515, 940*** repayable in a period of 15 years. In a re-amended plaint which he filed in the High Court at Mombasa on 19th August 2010, Lewa pleaded that while he was up to date with the mortgage repayment and without serving upon him a statutory notice as then required by the ***Transfer of Property Act***, HFCK sold and transferred the suit property to Kagete who subsequently charged it to a third party, Savings & Loan.

Lewa further averred that the charge documents in favour of HFC were null avoid and the funds secured thereby were not recoverable. He also pleaded that the sale and transfer of the suit property to Kagete was fraudulent, null and void. The particulars of fraud that he pleaded were that HFCK sold the suit property without first serving upon him a statutory notice; that HFCK sold the suit property at Kshs 1, 700,000.00 which was way below the market value; that the suit property was subsequently charged in favour of Savings & Loan; and that

HFCK failed to notify him that it had sold the suit property.

Accordingly, he prayed for declarations that the charge in favour of HFCK was null and void and the moneys advanced under it were irrecoverable; that the sale and transfer of the suit property to Kagete was null and void; that the charge of the suit property in favour of Savings & Loan was null and void; and a permanent injunction to restrain HFCK and Kagete from dispossessing or evicting him from the suit property or otherwise interfering with his enjoyment or quiet possession. He also prayed for general damages for breach of contract, or in the alternative compensation for the full market value of the suit property.

By their joint Further Further Amended Defence and Counterclaim dated 18th October 2010, HFCK and Kagete denied Lewa's averments and all the particulars of fraud. They averred that the charge was valid and that HFCK validly and lawfully exercised its power of sale after Lewa failed to service his loan. In the counter-claim, the two prayed for an order of eviction of Lewa from the suit property and costs of the suit.

Although Lewa had made specific averments against Savings & Loan, including allegations of fraud and prayed for nullification of the charge in its favour, Savings & Loan was never made a party to the suit or otherwise notified or served with the plaint and the suit therefore proceeded to hearing and determination without its participation. ***Ibrahim J.*** (as he then was) and ***Kasango J***. partly heard the suit before **Mwangi, J**. concluded the hearing and wrote the judgment. Lewa testified on his own behalf and called as a witness, ***Mr. Paul Wambua (PW2)***, a value who testified that the market value of the suit property at the time it was sold was Kshs 2 million. On their part, HFCK and Kagete called as witnesses Kagete; HFCK's Assistant Manager, Legal Services, ***Ms. June Njoroge (DW2***); and ***Ms. Sally Mahihu (DW3)***, the advocate who prepared and registered the charge between HFCK and Lewa.

At the conclusion of the hearing, the learned judge framed some 12 issues for determination, in respect of which she found that Lewa was the registered proprietor of the suit property, which he charged to HFCK to secure a mortgage of Kshs. 1,515,940 payable, together with interest, at a rate of Kshs 34,479 per month for a period of 15 years. The learned judge further found that Lewa partly repaid the loan and had an outstanding balance of ***Kshs 1,400,000.00*** when he left his employment. On the validity of the charge she held that it was duly executed, was not null and void as claimed by Lewa, and that it was binding on him. As regards service of the statutory notice upon Lewa prior to the sale of the suit property, the learned judge found that it was indeed served, but the same was defective for failure to ***"explicitly state that the consequences that would befall the plaintiff in default of payment of arrears would be the sale of his property."*** The learned judge found the omission to be a violation of ***section 69(1)*** of the ***Indian Transfer of Property Act*** (repealed), which rendered the notice null and void. Lastly, the learned judge found that Lewa had failed to prove that the sale of the suit property to Kagete was fraudulent.

Ultimately the learned judge declared the sale and transfer of the suit property to Kagete as well as the charge of the suit property by the latter to Savings & Loan null and void for failure of the statutory notice to expressly inform Lewa that the suit property would be sold after expiry of three months. Regarding Lewa's claim for damages, the learned judge held that because he was still in occupation of the suit property, he had not suffered any loss capable of compensation. On HFCK's and Kagete's counterclaim, the learned judge dismissed the same with costs, but directed Lewa, whom she found to be still indebted to HFCK, to make the payments, failing which HFCK was at liberty to issue a proper statutory notice.

HFCK and Kagete were aggrieved by the judgment and decree of the High Court and preferred Civil Appeal No 110 of 2018 faulting the learned judge for basing her decision on unpleaded issues and in respect of which no evidence was led by the parties; for holding that the statutory notice was defective, null and void; for nullifying the sale of the suit property even after finding that the charge was valid and that Lewa had failed to prove the fraud that he had pleaded; and by ignoring binding precedent on the application of section 69(1) of the Indian Transfer of Property Act.

On its part, Savings & Loan filed Civil Appeal No 111 of 2018 impugning the judgment primarily on the ground that the learned judge nullified its charge over the suit property without affording it an opportunity to be heard, even though its interest in the suit property was known to Lewa and the court, and in the absence of any fraud proved against it.

On behalf of HFCK and Kagete, ***Mr. Kong'ere***, learned counsel, submitted that Lewa's case as pleaded was that HFCK sold the suit property without first serving upon him a statutory notice. That, it was further submitted, was also one of the issues that the learned judge framed for determination and found, contrary to Lewa's pleadings, that HFCK had indeed served upon him a statutory notice prior to the sale. Counsel argued that the validity of the notice was never an issue and neither party addressed the matter. In his view, the learned judge fell into error by basing her decision on validity of the notice when the issue the parties had submitted to her for determination was whether HFCK had served a notice upon Lewa.

These two appellants relied on the judgment of this Court in ***Global Vehicles Kenya Ltd v. Lenana Road Motors [2015] eKLR*** and submitted that parties are bound by their pleadings and that the court is not allowed to delve into issues, which are not raised by pleadings. They added that had the issue of validity of the notice been raised, they could have easily demonstrated that the notice was valid, an opportunity which they were denied.

On the second ground of appeal, counsel submitted that even if the learned judge was entitled to base her decision on the validity of the statutory notice, which he disputed, she erred by finding that the statutory notice was invalid because it did not expressly state that the suit property would be sold after expiry of a period of three months. In counsel's view, the notice sufficiently informed Lewa that unless he settled his indebtedness, HFCK would sell the suit property after the expiry of the notice because the notice expressly stated that upon expiry of the three months, HFCK would exercise its statutory rights under section 69 of the Transfer of Property Act.

Counsel further submitted that the trial court misapprehended the judgment of this Court in ***Trust Bank Ltd v. Eros Chemists Ltd & Another [2000] eKLR***, which emphasised the importance of giving notice for the prescribed period rather than the importance of specifying the consequence of failure to comply with the notice. He added that HFCK's notice substantially complied with the law because it identified the specific provisions of the Transfer of Property Act, which HFCK would invoke in the event of Lewa's failure to comply with the notice, and that those provisions entitled it to sell the suit property. It was also contended that having signed a certificate confirming that the

consequence of section 69(1) of the Transfer of Property Act had been explained to him, Lewa could not turn round and claim that he was not informed of the consequence of failure to settle his indebtedness within the period of three months set out in the notice.

On the third and fourth grounds of appeal, counsel faulted the learned judge for nullifying the sale of the suit property to Kagete even after finding that there was no fraud in the sale. He cited ***Joseph N. K. Arap Ng'ok v. Moijo ole Keiwua & 4 Others [1997] eKLR***, in support of the proposition that Kagete's title to the suit property could not be impeached in the absence of evidence of fraud on his part, as well as ***Nancy Kahoya Amadiva v. Expert Credit Ltd & Another [2015] eKLR*** for the view that the remedy of a mortgagor who has been prejudiced by a defective auction lies in damages.

For the all the above reasons, learned counsel urged us to allow the appeal, set aside the judgment of the High Court and substitute therefor an order dismissing Lewa's plaint and allowing the counter-claim by HFCK and Kagete with costs.

Next we heard ***Mr. Odour***, learned counsel for Savings & Loan who faulted the learned judge for condemning his client without an opportunity to be heard. He submitted that at the material time Kagete had charged the suit property in favour of Savings & Loan to secure moneys advanced to him and that the learned judge could not nullify the charge without affording Savings & Loan, an opportunity to be heard. Counsel further contended that the approach taken by the learned judge amounted to a violation of ***Article 47*** of the ***Constitution*** and the rules of natural justice. He relied on the judgment of this Court in ***JMK v. MWM & Another [2015] eKLR*** to underline the importance of observing the rules of natural justice. Otherwise counsel adopted in full the submissions by counsel for HFCK and Kagete and urged us to allow the appeal with costs.

Mr. Mokaya, learned counsel for Mr. Lewa opposed the appeal contending that the learned judge did not determine any unpleaded issues. He submitted that the issue decided by the trial court on the validity of the notice flowed from the pleadings and all the evidence presented in court. Although there was no cross-appeal against the finding by the learned judge that HFCK had served Lewa with a statutory notice, learned counsel nevertheless submitted that from the evidence no statutory notice was served upon Lewa.

On the validity of the statutory notice, counsel took a rather perplexing and confusing position, contending on the one hand that the learned judge was entitled to make that finding, and on the other that no statutory notice was served on Lewa because the suit property was sold to Kagete secretly and by private treaty. That of course begs the question, which notice did the court find invalid for failure to specify the consequences of default, if none at all was served?

Regarding nullification of the sale in the absence of a finding of fraud, counsel maintained that the nullification was proper and justified because no statutory notice was served on Lewa as mandatorily required by the law. Lastly regarding the right of Savings & Loan to be heard, counsel submitted that the appeal arose from an ordinary commercial transaction and did not raise any constitutional issue. He accordingly urged us to dismiss the appeal with costs.

We have carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal, the submission by the respective parties and the authorities they cited. We have also carefully re-evaluated and weighed the evidence on record as we are duty bound to do in a first appeal before coming to our own conclusion, given allowance for the fact that we do not have advantage that the trial judge had of hearing and seeing the witnesses as they testified. (See ***Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123).***

Although HFCK and Kagete have raised a number of grounds of appeal, whether the learned judge erred by determining matters that were neither pleaded nor addressed by the parties and whether the judgment is vitiated by failure to hear a party directly affected by the case are threshold issues that we must determine first. We will only venture to consider the other grounds of appeal if the answer to these two issues is in the negative.

The pleadings on record show beyond doubt that the ground upon which Lewa challenged the sale and transfer of the suit property to Kagete by HFCK was that the latter did not serve on him the statutory notice required by section 69(1) of the Transfer of Property Act. In the pertinent paragraph of the re-amended plaint, Lewa pleaded as follows:

> ***"10. The plaintiff further states that no statutory notice or otherwise was ever served upon him as required under the provisions of the Transfer of Property Act prior to the transfer of the property and he does not understand under what circumstances the transfer to the 2nd defendant (Kagete) was effected."***

As regards the alleged fraud, he pleaded four particulars, the relevant one being:

"(a) Transferring the property without first issuing the plaintiff with the mandatory statutory notice as provided under the Indian Transfer of Property Act."

HFCK and Kagete responded to that issue in paragraphs 7 and 10 of their further further amended defence and counterclaim and it became one of the 12 issues that the trial judge specifically framed for determination. That issue, framed as issue No. 8 read as follows:

(viii) Was the plaintiff served with a statutory (notice) prior to the transfer of the suit property by the 1st defendant to the 2nd defendant?"

The other relevant issue framed by the learned judge was whether the sale and transfer of the suit property to Kagete was fraudulent.

Upon hearing evidence, the learned judge resolved the issue in favour of HFCK after finding that it had indeed served the notice upon Lewa.

Thereafter, the court went ahead, without invitation and held that the notice that HFCK served upon Lewa was deficient, null and void. It is the contention of HFCK and Kagete that the learned judge erred by making that an issue and determining it because the question of validity of the notice was neither pleaded nor addressed by the parties, Lewa's complaint being only that he had not been served with a notice prior to the sale. They contend that had the learned judge raised the issue and asked them to address it, they would easily have shown that the notice was indeed valid.

At the hearing of this appeal, we requested Lewa's counsel to point to us where the issue of validity of the notice was raised in the pleadings or addressed in the parties' written submissions before the trial court. He readily conceded that the issue before the trial court was whether HFCK had served a statutory notice upon Lewa and not whether it had served a notice, which was invalid. However, notwithstanding the finding by the learned judge that HFCK had served Lewa with a statutory notice, counsel urged us to uphold the judgment on the basis that indeed no statutory notice was served on Lewa.

We cannot accede to that request simply because Lewa did not file a notice of cross-appeal, as required by ***rule 93*** of the ***Court of Appeal Rules*** to challenge the finding by the learned judge that HFCK had served Lewa with the statutory notice. It is such a notice of cross-appeal which would grant us the jurisdiction to delve into the question. In ***Margaret Njeri Mbiyu v. David Njunu Mbiyu Koinange & 13 Others, CA No. 47 of 2016***, this Court emphasized the importance of the notice of cross-appeal as follows:

> ***"Rule 93(1) of the Rules of this Court obliged any respondent who wished to challenge any aspect of the findings of the learned judge to file and serve a notice of cross-appeal. The purpose of such notice is to give the other parties due notice and an opportunity to prepare to answer the issue or issues raised in the cross-appeal. A respondent who has indicated that he is happy with the judgment cannot, out of the blue, start attacking aspects of it without any notice."***

We respectfully agree. In the circumstances, we do not have any basis for questioning the finding by the learned judge that HFCK served Lewa with a statutory notice before the sale of the suit property.

We agree that the question whether HFCK served upon Lewa a statutory notice was distinct and different from the question addressed by the learned judge, namely whether the notice that the she found to have been served upon Lewa, was valid. To legitimately address that question required amendment of the pleadings to make validity of the statutory notice, which the learned judge found to have been served, an issue. In the alternative, the learned judge should have drawn the parties' attention to the issue and afforded them a fair opportunity to address her on the same. Having answered the question that the parties had submitted to the court, the learned judge could not on her own motion raise and determine the question of the validity of the notice that she found was served without affording the parties an opportunity to address her on the issue. Lewa's complaint was consistently that he was not served with a statutory notice. It was not that he had been served with a notice that was invalid. That is what HFCK set out to respond to and to show that it had indeed served Lewa with a notice. For the hearing to be described as fair, the court was obliged to notify the parties that the issue had metamorphosed from one of service of notice, to of validity of the notice that it found to have been served.

A statutory notice may be invalid for a myriad of reasons such as failure to specify the notice period, lack of service, lack of signature, failure to contain a date, the name of the debtor, among other things. Without a particular pleading showing the ground on which the validity of the notice is impeached, how can a party be expected to respond to bare allegations that the notice is invalid or defective? That is why in ***Mohamed Fugicha v. Methodist Church in Kenya, CA No. 22 of 2015*** this Court stated:

> ***"We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer."***

Where a plaintiff alleges that a statutory notice is defective, the defendant is entitled to expect to be notified through pleadings what the alleged defect is. That was never the case here; the learned judge distilled, addressed and determined the issue on her own without the benefit of hearing the parties.

We are therefore satisfied that in the circumstances of this appeal, the learned judge erred by determining a different issue from that which the parties asked the court to determine. Decisions abound from the superior courts in this jurisdiction that parties are bound by their pleadings and that it is not open to the court to decide an issue that does not arise from the pleadings, unless the parties have addressed an unpleaded issue and left it to the court to decide. Thus for example, in ***IEBC & Another v. Stephen Mutinda Mule & 3 Others [2014] eKLR,*** this Court quoted with approval the following words of the Supreme Court of Malawi in ***Malawi Railway Corporation v. Nyasulu [1998] MWSC 3:***

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by the pleadings."***

(See also ***Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139, Odd Jobs v. Mubia [1970] EA 476*** and ***Kenya Ports Authority v. Kuston (Kenya) Ltd (2009) 2 EA 212).***

The second threshold issue is whether Savings & Loan was denied the right to be heard on a matter in which it was directly interested. Once again, Lewa specifically challenged in his plaint the validity of the charge over the suit property by Savings & Loan. He claimed the charge was fraudulent and prayed for its nullification. Lewa did not make Savings & Loan a party to the suit nor did he serve the plaint upon it. At

the hearing, we were informed by counsel for Savings & Loan that it learnt of the suit only after the judgment of the High Court declaring its charge over the suit property null and void.

The importance of upholding the rules of natural justice, particularly the right of every person to be heard before an adverse decision is made against him cannot be gainsaid. It is one of the fundamental tenets of a justice system. In ***Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun'gu & Others [1997] 1 KLR (E&L),*** this

Court stated thus:

> ***"An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision****…"*

(See also ***Onyango Oloo v. Attorney General [1986-1989] EA 456).***

We have said enough to show that this appeal must be allowed because the learned judge determined issues that were neither pleaded nor addressed by the parties and also delivered a judgment that divested a party of its property rights without an opportunity to be heard. We allow the appeal, set aside the judgment dated 28th July 2017 and substitute therefor an order dismissing Lewa's suit and allowing HFCK and Kagete's counterclaim with costs. HFCK and Kagete will have the costs of this appeal. It is so ordered.

Dated and delivered at Mombasa this 26th day of September, 2019

W. OUKO, P.

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is

a true copy of original.

DEPUTY REGISTRAR