



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPEAL NO. 273 OF 2009

BETWEEN

WINFRED WAMBUI KINGORI.....APPELLANT

AND

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

JOHN IRUNGU WACHIRA.....2ND RESPONDENT

DAVID SWAO.....3RD RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Kimaru, J.) dated 1st July, 2009

in

H.C.C.C. No. 605 of 2003

JUDGMENT OF THE COURT

This is an appeal from an interlocutory application made in **H.C.C.C. No. 605 of 2003** filed at the High Court at Nairobi by **Winfred Wambui Kingori (the appellant)**. In the original suit the appellant named as defendants the 1st respondent, **Paramount Universal Bank Limited**, the 2nd respondent **George Irungu Wachira**, the 3rd respondent **David Swao** and there were also other defendants who are not party to this appeal being the Commissioner of Lands and the Attorney General.

The 2nd and 3rd respondents came into the suit later when the plaint was amended.

The 1st respondent delivered a defence denying the claim.

The relationship between the appellant and the 1st respondent was that of banker and customer. The appellant maintained an account with the 1st respondent and it was alleged in the amended plaint that she was in the business of trading of imported second hand clothes at Gikomba market in Nairobi. The appellant applied for a loan from the 1st respondent for Kshs.6,500,000 to enable her import used clothes for her business. She also applied for an overdraft facility from the the 1st respondent which was granted. She offered as security for the loans some parcels of land namely Title Number L.R. No. 14600, L.R. No. 13824, Nairobi/Block/82/3887 and a log book for a motor vehicle registration mark KAK 047R.

It is a disputed fact whether those lands were charged as security for the loans and because the suit at the High Court has not been heard or determined we will leave that issue to the trial court for determination. It is however admitted in the amended plaint that there was a first legal charge for Kshs.3,000,000 created over L.R. No. 14600 as a continuing security for a loan, a further legal charge for Kshs.4,500,000 over L.R. No. 14600 in favour of the 1st respondent as further security for the loans; a first legal charge for Kshs.3,000,000 over the property known as L.R. No. 13824 in favour of the 1st respondent as further security for the facilities offered, and a deposit of the appellant's original title Nairobi/Block 82/3887 as supplemental security for the facilities and also the appellant's personal guarantee for the said loans.

It was stated in the amended plaint that the 1st respondent mismanaged the loan facilities and it was therefore prayed that the 1st respondent be restrained from selling or otherwise disposing the appellant's lands LR. No. 14600 and 13824; that the properties be discharged; injunction

issued to restrain the respondents from dealing with the said lands; accounts be given on the proceeds of motor vehicle registration number KAK 047R; that accounts be given on an account at the 1st respondent's Westlands branch; that a declaration issue on the issue of purchase of second hand clothes; that an injunction be issued against the respondents and the respondents be ordered to pay compensation for fair market value of L.R. No. 13824 amongst other orders sought in the amended plaint.

The appellant presented an Amended Chamber Summons with leave of the trial court which summons is the subject of this appeal. It was prayed in the main that the 1st respondent be restrained by way of injunction from selling, transferring and/or in any other manner dealing with the parcels of land known as L.R. No.13824(IR 64445), and L.R. No. 14600 (IR 71664) both situate in Nairobi; that temporary injunction be granted to restrain the 2nd and 3rd respondents from selling, transferring, charging or in any other manner alienating the parcel of land known as L.R. No. 13824 pending hearing of the suit and that costs be given to the appellant.

In grounds in support of the application and in a supporting affidavit of the appellant it was prayed that the 1st respondent had issued a notification of sale over the appellant's properties L.R. No. 13824 and IR No. 71664; that the 1st respondent sought to enforce what the appellant called an illegal charge over L.R. No. 14600 for the repayment for a sum of money; that the appellant had discovered that the 1st respondent had charged her properties without her knowledge for the repayment of loans; that the appellant had never been a party to a further charge over the property No. IR 71664 and the charge over L.R. No. 13824; that the 1st respondent had repossessed the appellant's motor vehicle KAK 047R which had not been given as a security for any loan; that a statutory notice required in law had not been given and that the 1st respondent had unlawfully transferred L.R. No. 13824 to the 2nd and 3rd respondents while the suit was pending.

In the further supporting affidavit the appellant deposed at the following paragraphs:

“3. I instructed Mr. Nyachoti that the 1st defendant was threatening to sell L.R. No. 13824 and L.R. No. 14600. 1st defendant had only served me with a notification of sale from Westminster Merchants.

4. I gave Mr. Nyachoti all the documents that I had exchanged with the 1st defendant.

5. Technically I did not know that the 1st defendant is under statutory duty to serve me with a statutory notice before taking steps to sell the property. I was advised by Mr. Oriaro who is now handling the matter on my behalf. He had perused the pleadings and realized that the issue of statutory notice had not been raised by myself. Consequently, it was conveniently avoided by the 1st defendant I explained to him that I did not know about the statutory notice because I had not seen any.

6. To the best of my knowledge the 1st defendant did not serve me with any statutory notice. I have now amended my plaint to raise the issue of statutory notice in paragraph 22B. I demand to see the original certificate of posting if any statutory notice was ever served.”

Kimaru, J. heard the application and delivered a ruling on 1st July, 2009 where the learned judge found no merit in the application and dismissed it. The appellant was dissatisfied with the said ruling and filed this appeal predicated on the Memorandum of Appeal drawn by the appellant's advocates, **Oriaro and Company Advocates** where 12 grounds of appeal are raised. The judge is faulted for what the appellant says is making a final finding of fact on the issue of service of statutory notice in the matter; the learned judge is faulted for finding that misdescription of the name of the addressee in the statutory notice did not invalidate the notice; the learned judge is faulted for misdirecting himself on the effect of **section 69B** of the **Transfer of Property Act** because fraud had been alleged; that the judge erred in law by failing to consider the effect of pleadings and the provisions of the then **Order VI rule 6 and 9** of the **Civil Procedure Rules**; that the judge erred in relying on affidavit evidence; that the judge erred in misinterpreting **section 97 (1)** of the **Evidence Act**; that the judge fell into error on the issue of accounts between a borrower and a bank; that there was a failure of right to fair hearing; that the judge erred in not finding that the 2nd and 3rd respondents acquired L.R. No. 13824 irregularly; that the judge should have found that the 1st respondent could not sell the charged property to its agents or nominees; and that the judge erred in failing to find that the appellant had established a *prima facie* case. We are therefore asked to allow the appeal and to set aside the orders made by the judge.

When the appeal came up for hearing before us, **Miss Makobu** for the appellant abandoned grounds of appeal relating to properties that had already been sold. On the issue of service of statutory notice it was Miss Makobu's submission that statutory notice had not been served as required by **section 69A (1)** of the **Indian Transfer of Property Act** which required a service of 3 months notice before statutory power of sale could be exercised. Counsel pointed to the notice at page 248 of the record where notice of seven days was given. On grounds 3-6 of the Memorandum of Appeal, counsel submitted that the appellant was not aware that she was signing charge documents to secure the loans. According to counsel, the appellant had a good relationship with the 1st respondent and she was not aware that she was charging her properties. In further submissions Miss Makobu submitted that the effect of **section 69(4)** of the **Indian Transfer of Property Act** where the advocate must explain the effect of the section to a chargor had not been satisfied.

Mr. P. Ogunde for the 1st appellant submitted that the learned judge at the High Court had exercised discretionary powers and we should not interfere with his discretion unless we find that the same had not been properly exercised. Counsel pointed to us a statutory notice at page 410 of the record where the firm of **Njoroge Regeru and Company Advocates** served a 3 months statutory notice on the appellant. According to counsel, the only issue was misspelling of a name where the appellant was referred to as “Wilfred” instead of “Winfred”. The learned judge had found that the appellant had been properly served and did receive the notice and the learned judge found that the appellant had not contested that service of notice. In final submissions Mr. Ogunde pointed out that the appellant had enjoyed injunction orders from the year 2003 to 2009 and should not continue benefitting from such orders.

Miss Wangari Kamau for the 2nd and 3rd respondents referred to written submissions that had been filed on behalf of those respondents as well as list of authorities which counsel fully relied on. Counsel submitted that the relevant property had been transferred in May 2005 and that the 2nd and 3rd respondents were innocent purchasers of property without notice.

We have considered the record of appeal and the submissions made. As already stated the suit at the High Court has not been heard and we

should not comment on issues that may impact on the trial court.

The 1st respondent stated in the application before the judge that it had served a statutory notice upon the appellant and that in response thereto the appellant had written to the 1st respondent requesting certain indulgence to settle the loans. The learned judge considered the issue of typographical mistake in that the statutory notice was addressed to a Wilfred instead of Winfred, the name of the appellant. The learned judge considered that the notice was sent to the appellant's postal address, that the appellant had received it and had acted on it. Upon consideration we are of the same view. 3 months statutory notice as required in law was duly served on the appellant who received the same and acted on it by responding and making certain requests for consideration to repay the loans as per the appellant's request. Those requests were considered, granted but not met. We are satisfied that the appellant was duly served with statutory notice, did not pay the loans as required and her property was sold in consequence of failure to pay.

On the issue of **section 69B** and **section 52** of the **Indian Transfer of Property Act** we have perused the charge documents and note that an advocate had certified that he explained the effect of the loan documents to the appellant who executed the same after understanding the effect of charging her properties to secure a loan.

Having made those findings we do not consider this appeal to have any merit. It is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 11th day of October, 2019.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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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