



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 83 OF 2016

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

AND

PATRICK KANGETHE NJUGUNA..... 1ST RESPONDENT

EDWARD NJUGUNA KANGETHE.....2ND RESPONDENT

GEORGE JAMES KANGETHE.....3RD RESPONDENT

NGURU AUCTIONEERS.....4TH RESPONDENT

LEAKEY AUCTIONEERS.....5TH RESPONDENT

JOSERICK MERCHANTS AUCTIONEERS.....6TH RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya

at Mombasa (Otieno, J.) dated 26th July,2016

in

H.C Misc. Applic. No. 59 of 2008)

JUDGMENT OF THE COURT

1. The 1st 2nd and 3rd respondents (*the Kang'ethes*), were Plaintiffs in Mombasa High Court Civil Cases Nos. 50 and 54 of 2016; where they sought declaratory as well as injunctive orders against the appellant and the rest of the respondents in respect of land described as LR 209/136/44, Dagoretti/Riruta/2289 and LR 209/2489/31 (*the suit land*). Contemporaneously with the Plaint in HCCC 50 of 2016, they also filed a motion on notice dated 27th May, 2016 seeking temporary injunctive relief on the following terms:

a.spent.

b. spent.

c.spent.

d. *That pending the hearing and determination of this suit, a temporary injunction do issue to restrain the 2nd and 3rd defendants from placing advertisements in any of the local dailies over the sale by public auction or otherwise of properties LR No. 209/136/44 and title No. Dagoretti/ Riruta/ 2289 and from offering them for sale or selling them by public auction or otherwise.*

e. That pending the hearing and determination of this suit, the 1st defendant be restrained by an injunction from taking any further steps in the exercise of its statutory power of sale over properties LR No. 209/136/44 and title No. Dagoretti/ Riruta/ 2289.

f. Costs of this application be provided for.

2. A similar application, dated 31st May, 2016 was made in HCCC No. 54 of 2016 too, save that the land in question in that file was LR 209/2489/31. Both suits and their respective applications were opposed and in light of the common issues arising in both matters, the two cases were consolidated.

3. At the outset, the applications were certified urgent and interim injunctions issued, which were to subsist for 14 days; within which time, it was anticipated the applications would be heard. The relevance of these interim orders to this appeal shall become apparent shortly.

4. Through two charge agreements, both dated 18th August, 2010, the Kang'ethes had charged the suit land to the appellant, a banking institution. Thereafter, they defaulted in servicing the charge facility, prompting the appellant to exercise its statutory right of sale of the suit land. The intended sale by public auction was being executed by the other respondents, who are licensed auctioneers. On their part, the Kang'ethes felt that the appellant's right to statutory sale was being unlawfully exercised. To begin with, the suit land was said to carry a market value of Kshs.400,000,000 while the sum demanded by the appellant stood at Kshs.397,002,243.38 However, the Kang'ethes contended that the demanded sum was inflated, as what was truly owing was a paltry Kshs.198,501,121.60/-. Not only that, the purported sale was said to be premature, as the appellant had failed to issue the requisite statutory notices prior to commencing the sale process. For these reasons, the Kang'ethes sought the grant of the interlocutory orders earlier mentioned.

5. In opposing the applications, the appellant filed two replying affidavits, both sworn by its credit officer, one Ann Olago in which she raised an objection regarding the court's lack of jurisdiction. To this end, it was contended that the High Court lacked jurisdiction to entertain the matter by virtue of **Article 162 (2) (b)** as read with **Article 162 (3)** of the Constitution, **section 150** of the **Land Act No. 6 of 2012**, **Section 13 (2)** of the **Environment and Land Court Act, 2011 (ELC Act)** and **Section 2** of the **Statute Law Miscellaneous Amendment Act No. 25 of 2015**. Instead, that jurisdiction over the matter lay with the Environment and Land Court (ELC).

6. It was also contended that the applications were unmerited and an abuse of the court process, as the statutory notices complained of had been duly issued. In addition, that notwithstanding the Kang'ethes' default in repayment, the appellant had even varied the initial terms of the charge by enlarging the term of the loan from 122 months to 216 months while readjusting the monthly repayment rate down to Kshs.2,525,961.46. Despite all this, the default persisted, causing the appellant to believe that the Kang'ethes were simply buying time with no intention of ever settling the debt, which prompted the issuance of statutory demand notices and commencement of the sale process.

7. In conclusion, the appellant averred that even upon sale, she still stood to lose money, for the maximum realizable amount upon sale was only Kshs.56,700,000 leaving her with a Kshs.40,551,121.69 deficit. For these reasons, the appellant sought to have the application dismissed to pave way for the statutory sale.

8. Following the parties' respective submissions, the learned trial judge Otieno J., reserved the matter for delivery of ruling on 26th July, 2016. However, prior to the said ruling date, the Kang'ethe's realized that the hitherto subsisting interim orders earlier mentioned had since lapsed, leaving them exposed to the likelihood of a re advertisement and sale of the suit land by the appellant. In a bid to avert such an eventuality, they filed yet another application, dated 21st July, 2016 seeking a temporary injunction restraining the respondents from re advertising the suit land pending the delivery of the ruling on 26th July, 2016. By an order of even date as the application, the Kang'ethes were once again granted an interim injunction pending delivery of the ruling.

9. Come the 26th of July, 2016, the Ruling on the earlier consolidated applications was delivered and the Kang'ethes were deemed to have established a *prima facie* case warranting the issuance of the interlocutory orders prayed for. Dismissing the objection on jurisdiction, the Judge held that the dispute before him was not one of land, but of a commercial nature; whose determination was within his jurisdiction. He thus proceeded to determine the matter and granted the temporary injunction pending determination of suit, albeit on condition that:

i. Within 7 days from today, the plaintiff applicant shall pay to the 1st defendant and into their account the sum of Kshs.10,000,000 towards the reduction of the loan and pay another Kshs.10,000,000 on or before the 15th August 2016.

ii. Within 14 days from today noting that their request was for accommodation upto end of July, the plaintiff shall give to the 1st defendant a clear and unequivocal acceptable proposal to liquidate the entire debt within a period not later than 90 days from today.

In default of compliance with any one of the foregoing conditions, the injunction herein granted shall stand lapsed and the 1st defendant shall be at liberty to realize the security through a one (sic) appointed auctioneer. Not the three different auctioneers.

10. That Ruling provoked this appeal; wherein the appellant impugns the decision on grounds that the learned judge erred by:

i. Acting in violation of Article 50(1) of the Constitution in admitting and entertaining the application for injunction ex parte but granting final orders behind the appellant's back.

ii. Arrogating (himself) jurisdiction which is denied by Articles 162 (2) (b) and 165 (5) of the Constitution, section 150 of the Land Act No. 6 of 2012, section 13 (2) of the Environment and Land Court Act 2011 and section 2 of the Statute Law (Miscellaneous Amendments) Act No. 25 of 2015.

iii. *Disregarding the principle of stare decisis in finding that the appellant had not complied with section 96 (3) (c) and (1) of the Land Act.*

iv. *Granting an injunction on the basis of an unpleaded issue; to wit, the non-compliance with section 96 (3) (c) and (1) and 97 (1) of the Land Act No.6 of 2012.*

v. *Reaching the conclusions he did based on unpleaded issues referred to above.*

vi. *Finding that the 1st, 2nd and 3rd respondents would suffer irreparable loss incapable of monetary compensation.*

vii. *Issuing orders whose effect was to create a contract and impose it on the appellant.*

viii. *Issuing interlocutory orders which effectively determined the main issue in the suit.*

ix. *Issuing orders that were nebulous, unclear, incomplete and incapable of any meaningful compliance.*

11. With the leave of court, parties filed written submissions, with oral highlights at the hearing of the appeal.

12. **Mr. Kongere**, learned Counsel for the appellant, began his submissions by addressing the issue of jurisdiction. The question to be answered, he posited, is which court has the jurisdiction over a dispute concerning a legal charge? He asserted that **Article 162 (2) (b)** of the Constitution requires parliament to establish a court with exclusive jurisdiction over matters of 'environment, use and occupation of and title to land', hence the enactment of the **ELC Act**, whose **Section 13 (d)** also gives the court jurisdiction to hear disputes over instruments granting any enforceable interests in land.

13. Consequently, that a legal charge fits the definition of a dispute within the jurisdiction of the ELC in two ways; Firstly, the creation of a charge constitutes 'use' of the land within the meaning of **Article 162(2) (b)** aforesaid. To him, this also explains why some legal provisions control how proprietors use their land. For example, that under **Section 6 (1)** of the **Land Control Act**, contracts for the sale of land are required to be authorized in order for them to be valid. In equal measure, that **Section 13 (2) (d)** of the **ELC Act** recognizes an unregistered charge as a contract. All these, serve to show that once a charge is prepared and executed by the parties, it is a contract *inter partes* and can be enforced as such. Consequently, that the trial court's holding on jurisdiction in this case was erroneous for contrary to the Judge's finding, a registered charge is not just a commercial contract but an interest in land, capable of transfer under **Section 86** of the **Land Act**. Consequently, that by charging the land, the Kang'ethes were 'using' it, thus bringing this dispute within the meaning of **Article 165 (5)** of the **Constitution** and **Section 13 (2) (d)** of the **ELC Act**. Therefore, that since **Section 97** of the **ELC Act** has provided an avenue to seek redress in such a case, the proper forum would have been the ELC court and not the High Court.

14. Secondly, that a charge is an instrument granting an enforceable interest in land, thus falling within the jurisdiction of the ELC under **Section 13 (2) (d) of the ELC Act**. Furthermore, since that jurisdiction is exclusive under **Section 150** of the **Land Act** and given the limitation put in place by **Article 165 (5)** of the **Constitution**, then the only court with jurisdiction in this matter was the ELC and the High Court was thus barred from entertaining the dispute. Counsel paid homage to the principle that a court should not arrogate itself jurisdiction where it has none.

15. With regard to the contention that the injunction as granted offended the principle of *stare decisis*, counsel submitted that the learned judge misapprehended **Sections 90 (1)& (2), 96 (1) & (3) (c) and 97** of the **Land Act** and case law when he held that the appellant had failed to prove service of the demand notices. According to the appellant, the learned Judge ignored evidence of service placed before him by the appellant, thereby imposing a standard of proof alien to the law of precedent, upon the appellant.

16. Lastly, counsel submitted that the appellant's right to be heard as provided under **Article 50 (1)** of the **Constitution** was infringed; for the application dated 21st July, 2016 was heard and determined *ex parte*. Additionally, that whereas the reason for the application was to simply stop the re advertisement and sale of the suit land, the learned Judge's reason for granting the orders was said to be mitigation of the costs of advertisement. The appellant argues that this was an unpleaded issue and the Judge thus erred by introducing and relying on it.

17. Opposing the appeal, was **Mr. Gikandi**, learned counsel for the Kang'ethes, who submitted that the only issues raised by the plaint were questions of accounting and the legality of the statutory power of sale. Citing the decision in the case of **Mistry Amor Singh v. Serwano Wofunira Kulubya [1963] EA 408**, he contended that neither of these issues relate to the use of land. As such, that had the matter been filed before the ELC, the court would have in fact found the case to be outside its domain, because questions of accounts rendered this a civil matter falling under the High Court's jurisdiction per **Article 162 (2) (a)** of the Constitution.

18. With regard to the allegation that the Judge addressed unpleaded issues, counsel submitted that under **Article 165 (2) (a)** of the Constitution, the High Court is not only vested with unlimited original jurisdiction, but has an accompanying duty to determine issues placed before it. In support of this contention, counsel relied on the authority in **Kisimani Holdings Limited & Another v. Fidelity Bank Limited [2014] eKLR** and **Odd Jobs v. Mubea [1970] EA 476**. In addition, that since the appellant never requested to cross examine the deponent to the Kang'ethes' supporting affidavits, the court was left to assess the matter purely on the basis of the affidavits and the appellant cannot allege that she was never accorded a hearing. Besides, that since injunctive orders are steeped in the exercise of the trial court's discretion, the court is at liberty to impose conditions when granting the same and unless it is shown that the discretion was wrongly exercised, this Court should not interfere with the findings of the trial Judge and should instead dismiss the appeal.

19. Counsel concluded by urging this Court to nonetheless make a determination on the interplay between the exercise of a chargee's statutory right of sale *vis-à-vis* the doctrine of *lis pendens*. In his view, though the **Transfer of property Act (1882)** which recognized the doctrine of *lis pendens* was repealed, the doctrine still subsists under common law. As such, a chargee should not be allowed to dispose a property that is the subject matter of legal proceedings. Consequently, that it stands to reason that institution of legal proceedings challenging

the exercise of the power of statutory sale should be deemed to automatically operate as a stay on the intended sale, pending the determination of suit.

20. There was no representation on the part of the 4th, 5th and 6th respondents.

21. As this is a first appeal, it is this court's duty to analyze and re-assess the evidence on record and reach its own conclusions in the matter. As put more succinctly in **Selle v. Associated Motor Boat Co. [1968] EA 123**:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan. (1955), 22 E. A. C. A. 270).”

22. From the submissions, the issues for determination in this appeal are whether;

a. The trial court had jurisdiction.

b. The statutory notices were issued and the interplay between the Statutory power of sale and the doctrine of lis pendens.

c. The learned trial judge based his decision on un-pleaded issues.

23. Whereas the appellant contends that this was a land matter, whose jurisdiction lay with the ELC, the Kang'ethes have always advanced the view that this was a commercial dispute that could only be determined by the High Court.

24. At the outset, it is without doubt that jurisdiction is everything, without which the court can do nothing else and must down its tools. See **Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1**.

25. The respective jurisdictions of the ELC and the High Court are well spelt out by our **Constitution**. With regard to the ELC, **Article 162(2)& (3)** of the **Constitution** requires *inter alia*, that;

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a) ...

b) The environment and the use and occupation of, and title to, land. Emphasis added.”

And that

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

26. To this end, parliament passed the ELC Act which establishes the ELC Court as well as the Land Act whose **Section 150** stipulates that the ELC

“...shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

27. The jurisdiction of the High Court on the other hand has been broadly set out under **Article 163(3)** which states that the High Court shall among others, have;

a) Unlimited original jurisdiction in criminal and civil matters.

28. Both before this Court and the court below, the appellant has contended that charging the suit land constituted 'use' of land, thus bringing the dispute within **Article 162 (2) (b)** aforesaid. In order to affirm or reject this assertion, it is perhaps pertinent to ascertain the real cause of action herein while also revisiting the definition of land, land use and Charges.

29. To begin with, **Article 260** of the **Constitution**, states that unless the context requires otherwise, 'land' includes-

a) The surface of the earth and the subsurface rock;

b) Any body of water on or under the surface;

c) Marine waters in the territorial sea and exclusive economic zone;

d) *Natural resources completely contained on or under the surface; and*

e) *The air space above the surface.”*

30. **Article 260** aforesaid echoes the traditional definition of land under the common law doctrine known as *Cujus est solum, eius est usque ad coelum et ad inferos* (*cujus doctrine*) which translates to "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell". As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well. The doctrine restricts the definition of land use to necessary and ordinary use and enjoyment of the land and structures upon it (see. **Lord Bernstein of Leigh v. Skyviews and General Limited [1978] QB 479**).

31. Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.

32. As for land use, the **Black's Law Dictionary, 9th Edn**; gives the basic definition of the word 'use' as being:-

‘the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.

33. In addition, the **Constitution** envisions a definitive land regime and under **Article 67**, the National Land Commission is established, whose functions include the formulation of land use policy. Under sub article (2) thereof, the Constitution provides that-

“The functions of the National Land Commission are-

a) ...

b) To recommend a national land policy to the national government.

c) ...

d) To conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.

...

e) To monitor and have oversight responsibilities over land use planning throughout the country policies.”

34. While the National Land Commission is already operational, the land use policy envisioned under (b) above is yet to be passed. The same is still at the drafting stage with the latest draft having been published in 2016; titled '*Land Use Policy*'. While not binding on this Court, the same may provide some insight and guidance as to the proposed definition of 'land use'. According to that draft, 'land use' is defined under part 2.3.1 as:

“..the activities to which land is subjected to and is often determined by; economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practiced on the land. Emphasis added.

35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the *cujus doctrine* nor **Article 260** whether expressly or by implication recognizes charging land as connoting land use.

36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see **Section 2** of the **Land Act**). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see **Section 80** of the **Land Act**). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

37. Further, **Section 2** aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of **Article 162** of the **Constitution** fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.

39. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of **Section 13 (2) (d)** of the **ELC Act**. The said section provides that;

2. In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;...

40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under **Section 2** of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under **Section 13** of the **ELC Act** ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In **Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR**, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under **Article 162** of the **Constitution**, **Section 13** of the **ELC Act** and **Section 150** of the **Land Act**; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under **Article 165(3)** of the **Constitution** provides *inter alia*, that;

1. subject to clause (5), the High Court shall have-

a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant's objection on jurisdiction was rightly dismissed.

43. As stated earlier, the mainstay of the Kang'ethes' application was that the statutory sale was unlawful for having been commenced prior to the issuance of the mandatory 90 day statutory notices as by law required. Consequently, that the instruction of the auctioneers was reckless and unlawful as not only was the rightful procedure ignored, but that the sum claimed was in excess of what was owed. On her part, the appellant countered this by stating that there was evidence that the said notices had duly issued and the judge thus erred in ignoring the same and granting the orders as he did. In resolving this aspect, the judge expressed himself as follows:

“This being an interlocutory determination, which ought not to go into the merits of the suit, I will proceed from the premise that there exist three distinct charges all securing the total indebtedness of the Plaintiff to the defendant. I will equally take into account the fact that the plaintiff do (sic) not dispute the debt. The complaint seems limited to the contestation about the service of the notice and the choice by the 1st defendant to appoint three different auctioneers to sell each of the property (sic) offered as security. At the close of the respective parties' submissions, it remained a contestation whether the notices were indeed issued and served in accordance with the law.”

44. It is however common ground that the suit land was secured through two charges, both dated 18th August, 2010. Both parties annexed the said charges to their respective affidavits. However, with regard to the statutory notices, the appellant's replying affidavits bore several letters produced to support the assertion that the requisite notices were duly given. As stated earlier, the learned trial Judge left the question of whether notices had issued for determination at trial; which left the appellant with the belief that her evidence had been ignored.

45. The law governing the issuance of interlocutory orders is primarily contained in the oft cited case of **Giella v. Cassman Brown [1973] E.A. 358** at p. 360 where it was stated that:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated

by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. Emphasis added.

46. Aside from the issue of accounts, the other bone of contention between the parties was whether the commencement of the sale was couched in procedure to wit; the issuance of 90 day statutory notices. By extension, whether the Kang'ethes had established a *prima facie* case that the procedure was flouted so as to warrant the court's decision halting the sale. The Kang'ethes claimed that no such notices had issued. However, in the replying affidavits filed on her behalf, the appellant annexed two statutory notices dated 3rd December, 2014 purportedly issuing 90 day notices to the Kang'ethes. The said notices stated in part:

“BY REGISTERED POST

Copy by ordinary mail

As you are fully aware and despite referenced notice, the above account is in arrears of Kes. 9,005,322.25 as at 3rd December, 2014 which continues to accrue interest at the bank prevailing base rate (currently 18.5p.a) and late penalties of 6.5% per month and further the total outstanding sum due to the bank as at 3rd December, 2014 is Kes 167,782,005.40 dr ...

TAKE NOTICE that pursuant to the provisions of section 90 of the Land Act 2012, the bank intends to take action and exercise remedies provided in this section after the expiry of THREE (3) MONTHS from the date of service of this notice upon upon yourself if you do not rectify the default by repaying the outstanding sum of Kes. 167,782,005.40 dr which includes the arrears stated above together with the interest thereon...”

The appellant's contention is that the learned trial judge turned a blind eye to this evidence

47. As rightly submitted by the appellant, in considering whether to grant an interlocutory injunction, the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. (*per Lord Denning in Hubbard v. Vosper* [1972] 1 ALL ER, 1023 at Page 1029). That position has been adopted by this Court in **Orion East Africa Ltd v. Ecobank Kenya Ltd & Another** [2015] eKLR. But even while so doing, it is to be remembered that under section 90 aforesaid, the operation of the statutory notice is triggered by service of the same upon the mortgagor.

48. In this case, the appellant also annexed some two certificates of posting to evince its contention that the notices were duly served. A cursory inspection of the said certificates however does not reveal the dates when the posting was done. Therefore, *prima facie* the court cannot rely on the assertion that the notices were dispatched in time as alleged. In the face of the Kang'ethe's denial of service, this becomes an issue for determination at trial. In **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Other** [2003] eKLR, a *prima facie* case was defined as

“a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

49. In this case, the material before court lends credence to the possibility or likelihood that the procedure might have been flouted. This is because, the statutory notice under **Section 90** of the **Land Act** becomes operational upon service of the same upon the mortgagor and as long as doubt on that aspect persists, then the matter calls for interrogation of the evidence and the same can only be done at trial. In the interim, the same attracts the issuance of injunctive orders and the judge cannot be faulted for holding as much.

50. As to whether there is any interplay between statutory power of sale and the doctrine of *lis pendens*; the **Black's Law Dictionary** defines *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending. The Supreme Court of India in the case of **KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others** [2013] INSC 1069 stated that the doctrine is based on the legal maxim '*ut lite pendente nihil innovetur*' (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.

51. Our previous land legislation regime expressly embraced the doctrine under **Section 52** of the repealed (**Indian**) **Transfer of Property Act (ITPA) 1882** by stipulating that:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” Emphasis added.

52. Do courts still recognize the doctrine? The **ITPA** was repealed by the **Land Registration Act (LRA) Number 3 of 2013**; whose **Section 107 (1)** of the **LRA** provides for the saving and transitional provisions of the Act, and provides that:-

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law

applicable to it immediately prior to the commencement of this Act.”

53. Presently, the **LRA** does not prohibit the application of the doctrine of *lis pendens*; nor does any law for that matter. For this reason and in view of **Section 107** aforesaid, this Court has previously held that the doctrine of *lis pendens* is still applicable to this day, albeit under common law (see. **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR**)

54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed **Section 52** of the **ITPA**, an automatic prohibition of dealings or transfers of the property is only during the ‘active prosecution’ of the proceedings. Consequently, while the parties are automatically duty bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin.

55. This conclusion is informed by the fact that *lis pendens* as applied in Kenya is heavily borrowed from the Indian system. However, unlike our system, the Indian one was amended to rid itself of the phrase ‘active prosecution.’ Consequently, in India, *lis pendens* kicks in from the moment proceedings are instituted, all the way through to the appellate stage. This has been the position adopted by the Supreme Court of India (see **Jagan Singh v. Dhanwanti [2012] 2 SCC 628**). Clearly, the plaintiffs under that system enjoy a wide berth in so far as the doctrine is concerned. To ensure that this new found freedom is not abused by unscrupulous plaintiffs-who may file frivolous suits in a bid to frustrate a legitimate owner’s right to deal in his land, several safeguards were put in place; from levies of compensatory costs in frivolous proceedings, to expedited proceedings and compensatory damages against vexatious plaintiffs (see **Vinod Seth v. Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010**). In Kenya, however, no such measures have been legislated regarding *lis pendens*. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in. Consequently, the contention that mere filing of suit operates as an automatic stay of dealings, fails.

56. Lastly, it was alleged by the appellant that the Judge also erred in granting orders based on **Section 96(3) (c)** of the **Land Act** which had not been pleaded. The said section provides as follows with regards to the statutory notice:

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—

(a)

(b).....

(c) a spouse of the chargor who had given the consent;

57. However, looking at the ruling, it is notable that the learned Judge never cited failure by the appellant to serve the Kang’ethes’ spouses as a basis for his orders. Failure to serve the statutory notices is what was said to be the bedrock to the Judge’s orders. Therefore, that ground of appeal too fails. Lastly, was also the contention that the learned judge erred in granting interim orders without according the appellants an opportunity to be heard. Though this ground was never ventilated in greater detail in learned counsel’s submissions, it would appear that the appellant was referencing the orders issued on 21st July, 2016; which were to subsist pending delivery of ruling. Those orders in effect reinstated the temporary injunction that had been extended to the respondent, but which had since lapsed before the applications could be determined. Whether the appellant was heard or not is a matter which ought to have been raised in either, an application to set aside these orders or an appeal against the said orders. The present appeal is only confined to the final orders given in respect of the applications. Consequently, that ground of appeal should also fail. On the whole therefore, the appeal is hereby dismissed with costs.

Dated and delivered at Mombasa this 12th day of October, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR