



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 30 OF 2015**

**BETWEEN**

**BENARD KIPTARUS ..... APPELLANT**

**AND**

**NATIONAL BANK OF KENYA LTD .....1<sup>ST</sup> RESPONDENT**

**SPARKLING IDEAS LTD .....2<sup>ND</sup> RESPONDENT**

**B.K. SILA T/A LEGACY**

**AUCTIONEERING SERVICES .....3<sup>RD</sup> RESPONDENT**

**COUNTY LAND REGISTRAR (NANDI).....4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL .....5<sup>TH</sup> RESPONDENT**

**(An Appeal from a Ruling and Order of the High Court of Kenya at Kitale (Obaga, J.) dated 22<sup>nd</sup> July 2014**

**in**

**H.C. ELC. NO. 21 OF 2014)**

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**JUDGMENT OF THE COURT**

1. This in an appeal from an interlocutory ruling of the High Court (Obaga, J.) delivered on 22<sup>nd</sup> July, 2014, in Kitale ELC No. 21 of 2014 in which the learned Judge dismissed the appellant's two applications which had sought orders of injunction and inhibition.
2. In that case, the appellant claims that between December 1993 and January 1994, he executed a guarantee to secure the advance by the 1<sup>st</sup> respondent of Kes. 600,000/= to one Elly Tarus Chumo (the borrower). He, however, denied executing in favour of the 1<sup>st</sup> respondent any charge over the title to his piece of land situate in Nandi and known as **Title No. Nandi/Keben/135** (the suit

- land). He claims he only surrendered to the 1<sup>st</sup> respondent the title deed to that piece of land. He was therefore surprised to learn on or about 16<sup>th</sup> January 2014 that the borrower, in collusion with the 1<sup>st</sup> respondent, fraudulently registered a charge against the title to the suit land and that on 24<sup>th</sup> May 2013, in purported exercise of the power of sale under that charge, the 1<sup>st</sup> respondent had, through the 3<sup>rd</sup> respondent, sold the suit land to the 2<sup>nd</sup> respondent.
3. In the particulars of fraud against the respondents, the appellant claims that having not executed any charge over the suit land in favour of the 1<sup>st</sup> respondent, and having not sought or obtained the requisite Land Control Bond consent to charge the suit land, the charge registered against the title to the suit land was therefore fraudulent hence incapable of being the basis of any sale that would confer a valid title to the 2<sup>nd</sup> respondent.
  4. On those averments the appellant sought declarations nullifying the sale and restoring the suit land to him. He also sought a perpetual injunction to restrain the 2<sup>nd</sup> respondent from disposing of the suit land or interfering with the appellant's quiet possession of it.
  5. Contemporaneous with the filing of the suit, the appellant filed two applications in which he sought similar orders of injunction as those sought in the plaint albeit on a temporary basis as well as an order inhibiting registration by the 4<sup>th</sup> respondent of any dealings against the title to the suit land.
  6. After hearing those applications, as we have stated, Obaga, J. dismissed them thus provoking this appeal premised mainly on the ground that the learned Judge erred in holding that the appellant had not made out a prima facie case and consequently dismissing his said applications.
  7. Arguing the appeal before us, Mr. Marube, learned counsel for the appellant, submitted that in the plaint, the appellant challenged the validity of the charge principally on three grounds: that it was a forgery; that no land control board consent was obtained in respect of it; and that by dint of **Sections 4 and 7** of the Limitation of Actions Act the charge had, prior to the purported sale, long expired. In the circumstances, the 2<sup>nd</sup> respondent could not have acquired a good title on the basis of exercise of the statutory power of sale under that charge. Consequently, counsel concluded, the appellant had made out a prima facie case for grant of the injunction sought. He therefore urged us to allow this appeal with costs.
  8. Opposing the appeal, Mr. Langat, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, submitted that the appellant executed a valid charge a copy of which was exhibited by the replying affidavit filed in Civil Application No. 67 of 2015 before this Court which was withdrawn just before this appeal was argued. Upon default, the 1<sup>st</sup> respondent exercised its power of sale under that charge and auctioned the suit land to the 2<sup>nd</sup> respondent. He concluded that as the suit before the Environment and Land Court (the ELC) is pending for hearing, the 1<sup>st</sup> and 3<sup>rd</sup> respondents will produce other documents to prove the validity of the charge and the regular exercise of the power of sale under it.
  9. Mr. Maberu, learned counsel for the 2<sup>nd</sup> respondent, submitted that when the 2<sup>nd</sup> respondent saw a notice advertising the auction of the suit land in the print media, he subsequently attended the scheduled auction and bought the suit land. He referred us to copies of that advertisement, transfer by chargee and the title deed issued in favour of the 2<sup>nd</sup> respondent consequent upon that transfer, and urged us to find that the 2<sup>nd</sup> respondent was a bona fide purchaser for value without notice and dismiss this appeal with costs.
  10. Mr. Wabwire, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents also urged us to dismiss this appeal as there is nothing irregular that the 4<sup>th</sup> respondent did in registering the charge and the transfer by chargee.

11. We have considered these rival submissions and read the authorities that counsel cited to us. As we pointed out at the beginning of this judgment, this is an appeal from an interlocutory ruling dismissing the appellant's applications for injunction and inhibition. As the suit before the ELC is still pending trial, we are therefore constrained from making any definitive findings that may prejudice its hearing.

12. It is evident from the record that copies of the charge document and/or documentary proof that consent to charge was not obtained were not placed before the Judge who heard the applications. Further, no document was placed before the learned Judge to prove the appellant's claim that the alleged execution of the said charge was a forgery. Instead what the Judge had were copies of the newspaper cutting advertising the suit property for sale, the certificate of sale issued by the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent after the auction and the title deed in the name of the 2<sup>nd</sup> respondent. On the basis of lack of the said documentary evidence, we find that the Judge had no option but to find that the appellant had not made out a prima facie case to warrant the grant of the injunction and or inhibition sought in the two applications. Consequently we find no merit in this appeal and we accordingly hereby dismiss it with costs to the respondents.

**DATED and delivered this 17<sup>th</sup> day of February, 2016.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is the true copy of original.

**DEPUTY REGISTRAR**