IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 39 OF 2015

BETWEEN

GEORGE OWEN NANDY……APPELLANT

AND

RUTH WATIRI KIBE……..RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 6th June, 2014 in E.L.C. C. No. 29 of 2012)

JUDGMENT OF THE COURT

The property at the centre of this legal tussle is a parcel of land measuring approximately 36.9 acres situate at Mambrui, Kilifi County. **George Owen Nandy** "*the appellant*" alleges to have purchased that parcel of land known as **L.R No. Markebuni/Mambrui/40** "*the suit premises"* from Agricultural Finance Corporation "*AFC*" after the latter had advertised it for sale by public auction. AFC is a State Corporation established under the Agricultural Finance Corporation Act with the core function of assisting farmers and other entities engaged in agriculture or agricultural industries by advancing them loans with the aim of fostering agricultural development.

The suit premises having been sold and transferred to the appellant vide a transfer dated 29th January 2010, which showed that the transfer was in consideration of Kshs.1.8 million paid to AFC by the appellant, he was however unable to acquire physical possession of the same since **Ruth Watiri Kibe** "*the respondent*" was in actual possession. Apparently, the respondent had acquired the suit premises way back in 1984 on the strength of a loan advanced to her by AFC in the sum of Kshs.80,000/-. When she fell behind in her repayment of the loan, she requested AFC to allow her to sell a portion of the suit premises to enable her pay the outstanding loan owed to AFC but AFC declined the overture. She was therefore surprised by the appellant's claim that the suit premises had been sold and transferred by AFC to him since she had never been served with any statutory notice by AFC before the purported sale and that she was still *in situ* on the suit premises.

Through a Plaint dated 12th September 2012 the appellant instituted the suit giving rise to this appeal against the respondent praying in the main that she be evicted, permanently restrained from trespassing onto the suit premises and for vacant possession. Upon service of summons on the respondent, she entered appearance through the firm of **Messrs Gekanana & Company Advocates** but failed to a file defence in good time or at all. Pursuant to an application by the appellant, **Meoli, J.** on 28th January, 2013 entered interlocutory judgment in terms:-

> **"Defendant herein having been served and having failed to file defence and on the application by the plaintiff's advocate I enter judgment as prayed."**

The suit was thereafter set down for formal proof on the 13th May 2013. However, on the scheduled day, **Mr. Gicharu**, appeared for the respondent and sought an adjournment stating that he had just been instructed and had noticed that there was no defence filed by the respondent. He sought leave to file the defence out of time. **Angote, J.** acceded to the request and ordered thus:-

> "**In the interest of justice, I will allow Mr. Gicharu to file his documents before this matter can proceed for hearing.**"

The respondent then filed her defence in which she averred that the appellant had never been the registered owner of the suit premises. That if indeed the suit premises were transferred to the appellant, the process was illegal, dubious and contrary to law. The respondent went on to state that she had resided on the suit premises for 29 years and was *in situ*. Finally, she pleaded that she was never served with the statutory notice as required if indeed there was public auction as claimed by the appellant.

At the hearing, the appellant testified through one **Jonah David Mwende,** pursuant to the power of attorney he had donated to him, that the appellant was the owner of the suit premises and produced as exhibit the transfer document. According to the transfer, the appellant purchased the suit premises from AFC after it had placed an advertisement in the newspaper. That the suit premises were sold by AFC by public auction and the appellant put in his bid. It was his evidence that after purchasing the suit premises at an auction, it was transferred to the appellant on 8th February, 2010. The respondent had however refused to vacate the suit premises. Alex Katana Mwageni Pw2 testified to the effect that he was aware that the appellant had purchased the suit premises from AFC. He was also aware that the respondent had borrowed money from AFC and was unable to service the loan and that is why AFC sold the suit premises by way of public auction. According to the witness, the respondent had constructed a permanent house on the suit premises subsequent to the filing of the suit and that although she was informed by the Chief to vacate the suit premises, she had refused to do so and that she was still staying on the suit premises even after it was sold to the appellant.

In response, the respondent testified that she acquired the suit premises in 1984 after being advanced a loan of Kshs.80,000/- by AFC. According to the respondent, the suit premises were registered in her name and when she fell behind in her repayment of the loan, she requested AFC to allow her sell a portion of the suit premises to raise the arrears. AFC declined to receive Kshs.100,000 which she was willing to repay immediately and the request. Later she was informed that the suit premises had been sold. It was further her evidence that she was not served with any statutory notice before the purported sale of the suit premises and that she was still staying on the suit premises. The respondent called two other witnesses, **Francis Kibe Kimani** (Dw2) and **David Kariuki Ogoyo** (Dw3) to testify on her behalf. Their evidence merely confirmed the above narrative. Suffice to add that, Dw3 had proposed to AFC that he was willing to pay off the amount that was due and owing.

By the judgment dated 6th June, 2014, Angote, J. dismissed the appellant's suit holding thus:-

> **"……In the absence of any evidence to show how the suit property passed from the Defendant to the Corporation then to the Plaintiff, and in the absence of a notice to the Defendant as required by law before the suit property was sold to the Plaintiff, I find and hold that the Plaintiff has not proved his case on a balance of probabilities….."**

The appellant now comes before this Court on appeal, impugning the trial court's judgment. In his Memorandum of Appeal, he has proffered 19 grounds. A perusal of those ground, reveals that fourteen of them are challenging the trial court's conduct and behaviour after the entry of the interlocutory judgment. The other five grounds of appeal unrelated to the above are that the Judge erred in imposing his views about the procedure for forced sale of charged property by AFC; that there was evidence of how the appellant came by the suit premises though the Judge held otherwise; that the Judge erred in awarding party and party costs to the respondent; and finally that the Judge erred by entering judgment which

effectively set aside a duly executed, stamped and registered transfer of private property to the appellant despite the respondent having not provided any or any legal basis for the making of such an order. We have carefully read and considered grounds of appeal.

When the appeal came before us for hearing on 27th October, 2015 parties consented to canvass it by way of written submissions. Those submissions were subsequently filed and exchanged. We have carefully read and considered them.

Highlighting the same, **Mr. Kithi**, learned counsel for the appellant, maintained that the court having entered interlocutory judgment on the application of the appellant, it could not subsequently ignore the legal consequences that flow from such entry. That the Judge was in error in allowing evidence from the respondent when there was already an interlocutory judgment. Counsel further submitted that the Judge took a lot of time pointing out failures in the exercise of statutory power of sale which was erroneous since the respondent had admitted that at some point she had transferred the suit premises to AFC. The resulting sale was not therefore in the exercise of statutory power of sale but was a sale by private treaty. It was also submitted that the Judge made findings of fact and law regarding the proprietary rights of a third party, AFC who was not joined in the suit. To counsel the best that the Judge could have done was to direct that third party proceedings be taken out. With regard to party and party costs being awarded to the respondent, counsel submitted that it was irregular since in the interlocutory judgment, costs had already been awarded to the appellant.

Finally, counsel conceded that these issues were never raised in the trial court and were being raised for the first time in this appeal. However, counsel sought refuge in the assertion that since we are a court of justice, we were at liberty to entertain the issues even at this late stage.

In his highlights, **Mr. Gicharu**, learned counsel for the respondent submitted that the appeal was against the judgment and decree of the court and not against the order of Angote, J. made on 13th May, 2013. With regard to the alleged ownership of the suit premises by the appellant, counsel submitted that it was not readily apparent from the record as to how the appellant came to own the same. Counsel posed the question, was the sale claimed by the appellant by way of public auction or by private treaty? Counsel then reverted to the provisions of **Section 33** of the Agricultural Finance Corporation Act that lays down the procedure as to how AFC disposes securities charged to it. To counsel, it was the duty of the appellant to lead evidence to show that he had complied with the aforesaid provisions of the law, but he had completely failed to do so.

As a first appellate court, the mandate of this Court is to exhaustively reappraise and re-evaluate the evidence on record and come to its own independent conclusion. The Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. (See **Ramji Ratna & Company Ltd v. Wood Products (Kenya) Ltd CA. NO. 117 OF 2001**). This Court should also bear in mind that the trial Judge, Angote, J. had the singular advantage of seeing and assessing the demeanor of witnesses as they testified.

It is not in dispute that an interlocutory judgment was entered against the respondent. What is in dispute however is whether that judgment was reviewed and or set aside. We think it is important at this stage to remind ourselves of the effect of a judgment once entered. In **James Karuri Ndegwa & Another v Ndegwa Mbiti & Another [2008] eKLR,** the Court stated as follows**:-**

> **"…..a court order remains a valid court order until and unless it is set aside on appeal and or reviewed. As long as the court order has not been challenged, overturned, set aside and or reviewed, it remains a valid court order which has to be obeyed and or enforced. By whichever means it was obtained, until a competent court is moved to vary or set aside the said order, the same remains in force and binding to all parties**. **"**

Be that as it may, the dictates of justice demand that each case be decided upon its own peculiar circumstances as the law is not cast in stone. It is therefore imperative, in our view, that we interrogate the

circumstances of this case. The appellant was represented by counsel throughout the trial in the High Court. Indeed it was his learned counsel at the time, **Mr. Lughanje** who requested for default judgment to be entered in favour of the appellant upon failure by the respondent to file her defence within the prescribed time. The suit was then set down for formal proof. On the scheduled day, Mr. Lughanje pointed out to court that an interlocutory judgment had already been entered and he was ready to proceed with formal proof. Nevertheless the court after hearing the plea of Mr. Gicharu, granted leave to counsel for the respondent to file her defence before the matter could proceed for hearing, effectively in our view, reviewing and setting aside the order of interlocutory judgment. After the respondent filed the defence, the hearing of the case proceeded and Mr. Lughanje fully participated in prosecuting his client's case by procuring witnesses and cross-examining the respondent's witnesses upto the conclusion of the trial. The appellant never raised the issue of interlocutory judgment being on record throughout the trial. As such it was not an issue that fell for determination by the trial court and that possibly explains why the learned Judge made no reference or mention of it in his judgment.

Can the appellant now raise the issue of the interlocutory judgment at this stage? In general, a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point which has not been the subject of argument and decision of lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See **Nyangau v Nyakwara [1986] KLR 712**). However, the appellant in the present appeal fully acquiesced and submitted to the jurisdiction of the High Court to decide the case on merit. His conduct can only be interpreted to mean that he understood that the interlocutory judgment had been set aside when the High Court allowed the respondent to file her defence out of time.

The respondent in her written submissions stated that the trial court had on its own motion set aside the interlocutory judgment, by implication, by granting the respondent leave to file her defence out of time under **Order 10 rule 11** of the Civil Procedure Rules. As we understand it, this order and rule gives court the power to set aside a default judgment upon terms that are just. The respondent relied on the case of **Patel v E.A Cargo Handling Services Ltd [1974] E.A 75** where it was held that there are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he must do so on such terms as may be just. In our view, the appellant, having lost in the High Court, cannot now turn around and purport to allege that the trial was a nullity in view of the interlocutory judgment already on record. At the very least, it must be taken to mean that the appellant waived any rights that flowed from the interlocutory judgment by participating in the trial. To allow the appellant to now turn around and claim illegality of a trial after its conclusion and judgment despite having all the material facts could set a bad precedent. It would present a situation where a litigant would go through the rigours and motions of a trial which they have reason to believe might be illegal and only raise it on an appeal when they lose. That would result in wastage of valuable judicial time. A situation where parties raise all the issues they have in the trial for deliberation should be encouraged so that matters are dealt with expeditiously, conclusively and not in installments. Further this Court does not have the benefit of the reasoning of the High Court on the issue of the interlocutory judgment. Accordingly, we eschew all the aforementioned grounds of appeal that flow or touch on the entry of the interlocutory judgment.

In any event, from the notice of appeal filed and indeed the intitulement of all the subsequent documents filed, it is clear that the appeal was against the judgment and decree of the court dated 6th June, 2014. If the appellant wanted to question the exercise of discretion of the Judge in allowing the respondent *suo moto* to file the defence out of time despite the interlocutory judgment, he should have filed a notice of appeal in that regard followed by the record of appeal. He cannot therefore legally challenge that order in an appeal against the aforesaid judgment and decree. It is important at this stage to point out that the jurisdiction of this Court emanates from the notice of appeal as per **Rule 75** of the Court of Appeal Rules. Since there was no notice of appeal filed in respect of the Judge's order against the interlocutory judgment, we do not think that we have jurisdiction to entertain those complaints. Further in allowing the respondent to file the defence out of time, the Judge was emphatic that it was in the interest of justice. Strictly speaking therefore, the Judge was exercising discretion unless it is shown that the discretion was exercised capriciously, whimsically or in utter disregard of the law, an appellate court will not interfere with such exercise of discretion. We have not seen anything remotely suggestive of the Judge having abused his discretion.

Did the High Court misapprehend the facts or act on wrong principles of law thus reaching a wrong conclusion?

Let us re-examine the basis upon which the learned trial Judge reached his conclusions in dismissing the appellant's suit. In his judgment the trial Judge delivered himself as follows:-

> "**No evidence was placed before this Court by the Plaintiff that a notice was issued to the Defendant before the alleged sale of the suit property by public auction was undertaken. Indeed, this Court was not even informed of the auctioneer who conducted the auction on behalf of the corporation and on which day.**
>
> **There is no evidence before the court of what amount was owing to the corporation on the date of the alleged auction and whether the alleged purchase price of Kshs.1,800,000/- was ever paid to AFC after the sale of the suit property to the Plaintiff.**
>
> **The only document that the Plaintiff is relying on to claim the suit property is the Transfer document…that document does not indicate that the corporation was transferring the suit property to him as chargee. The plaintiff did not even produce a certificate of postal search to show that he is the registered owner of the suit property.**
>
> **In the absence of any evidence to show how the suit property passed from the Defendant to the Corporation then to the plaintiff, and in the absence of the notice to the Defendant as required by law before the suit property was sold to the Plaintiff, I find and hold that the Plaintiff has not proved his case on a balance of probabilities**."

The trial Judge was alive to the fact that for AFC to pass legal title to the appellant, the procedure provided for under **Section 33** of the AFC Act had to be strictly observed and followed. It appears from the record that the appellant fell foul of the aforementioned provisions of the law which appear to be couched in mandatory terms.

The record is indeed bereft of any evidence that the mandatory procedure was followed. The burden of proof is placed on the party that alleges a particular fact as per **Section 107** of the Evidence Act. The appellant has argued that it was only AFC that could have provided that evidence. If that be the case, why did he not join AFC in the suit? No reason was advanced to explain such wanton omission. As it is discernable from the trial court's judgment, the appellant's case was untenable because of failure by the appellant to prove his case on a balance of probabilities. The only reliable piece of evidence which the appellant tendered in support of his case was the transfer document between himself and AFC; a document which actually elicited more gaps than answers especially as to events and procedure that preceded it. In arriving at the transfer, was the law as prescribed followed or not? Was for instance the Land Control Board consent obtained? Was, there any advertisement as required? During highlighting of the submissions, counsel for the appellant, faced with these pertinent questions submitted that as the suit premises had been reconveyed back to AFC, the sale between AFC and the appellant was a sale by private treaty rather than by public auction. Counsel must have realized that the only way he could salvage an otherwise weak case was to change course mid-stream and now claim sale by private treaty. This is because there was simply no evidence at all to support his case. Of course his submissions in this regard at best must be taken as an afterthought and disregarded. In any event, the pleadings and evidence adduced by the appellant attested to the fact that the suit premises were purchased at a public auction and not through a private treaty. In other words, the pleadings and evidence led by the appellant did not attest to sale by way of private treaty. If anything the appellant was emphatic that he bought the suit premises in a public auction.

The upshot of the above is that this appeal ought to fail. We discern no misdirection on the trial court's part which would warrant our interference with its judgment and decree. Accordingly, we dismiss the appeal with costs to the respondent

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE- MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR