



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPEAL NO. 15 OF 2015**

**BETWEEN**

**JOSEPH M. MBUVA .....APPELLANT**

**AND**

**PIONEER BUILDING SOCIETY LIMITED**

**(IN RECEIVERSHIP).....1<sup>ST</sup>RESPONDENT**

**PETER KARANJA NGURE .....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Gitumbi, J.) dated 17<sup>th</sup> May 2013***

**in**

***H.C.C.C. No. 259 of 2004)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant sought to impugn the sale of land L.R 2787/50/XII “*the suit premises*” to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent on the ground that the transaction was fraudulent, null and void. By a plaint dated 18<sup>th</sup> March, 2004 and filed in the High Court at Nairobi on even date, the appellant sought against the respondents jointly and severally, a permanent injunction restraining them from in any way whatsoever interfering with the suit premises, an order of revocation of the illegal transfer of the suit premises to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent, a declaration that the appellant was the legitimate purchaser of the suit premises and costs of the suit.

According to the appellant, he purchased the suit premises from one, **Leonard Muriungi M’Ambutu**, “*the vendor*” the then registered proprietor of the suit premises, subsequently executed a transfer to him dated 20<sup>th</sup> July 1989, at a consideration of Kshs.300,000/-. However, the transfer could not be registered as the suit premises were at the time charged by the vendor to the 1<sup>st</sup>respondent, then under receivership. According to the appellant, the vendor was expected to use part of the purchase price aforesaid to pay off the outstanding amount on the charge. It appear however, that the vendor did not act

as agreed and fearing that he may well lose his investment, the appellant opted to engage the 1<sup>st</sup> respondent directly. Before the 1<sup>st</sup> respondent, the appellant enhanced the purchase price to Kshs.450,000/- against the 1<sup>st</sup> respondent's offer of Kshs.650,000/-. In the meantime and acting on the representation of the vendor, the appellant took possession of the suit premises.

Having hit a stalemate on the purchase price, the 1<sup>st</sup> respondent on 13<sup>th</sup> December, 2002 in the exercise of its statutory power of sale instructed **Messrs Libco Merchants** to sell the suit premises by way of public auction. On the day scheduled for the auction, the appellant rushed to the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi and filed **Civil Suit Number 2678 of 2003** against the 1<sup>st</sup> respondent challenging the intended auction. Contemporaneous with the filing of the suit, the appellant took out an application for an injunction to stop the intended auction. He was successful albeit briefly for the *ex parte* orders of injunction he obtained on 20<sup>th</sup> March, 2003 were soon thereafter on 3<sup>rd</sup> April, 2003 discharged following the failure by the appellant to prosecute the application *inter partes*. Buoyed by this success, the 1<sup>st</sup> respondent soon thereafter followed up with the application to strike out the suit on account of the appellant being a stranger to the charge. The application was successfully prosecuted and the suit was duly struck out.

As there was now no order restraining the 1<sup>st</sup> respondent from in any way dealing with the suit premises, it once again instructed Libco Merchants to re-advertise the suit premises for sale. On 28<sup>th</sup> April, 2003 the re-advertisement appeared in the East African Standard Newspaper and the public auction was scheduled for 9<sup>th</sup> May, 2003. Come this date, the 2<sup>nd</sup> respondent was declared the highest bidder at Kshs.617,000/-. One of the terms of the sale was that the 2<sup>nd</sup> respondent should pay 25% of the auction price at the fall of the hammer. The 2<sup>nd</sup> respondent duly complied with this requirement and paid the sum of Kshs.300,000/- by way of a banker's cheque. Soon thereafter it paid directly to the 1<sup>st</sup> respondent the balance of the purchase price by instalments of Kshs.150,000/- on 4<sup>th</sup> June, 2003 and Kshs.167,000/- on 30<sup>th</sup> July, 2003. What followed thereafter was the execution of a transfer in favour of the 2<sup>nd</sup> respondent that was registered against the title to the suit premises. As of now, the 2<sup>nd</sup> respondent is the registered proprietor of the suit premises.

All these developments were allegedly unknown to the appellant who continued in occupation of the suit premises and even made improvement to the six rooms which he had rented out. He was therefore surprised when sometimes in January, 2005 the 2<sup>nd</sup> respondent stormed the suit premises and demanded that the tenants therein either pay the monthly rent to him or be evicted. It is then that the appellant visited the lands office and upon conducting an official search, discovered that the suit premises had been sold in a public auction and transferred to the 2<sup>nd</sup> respondent. Alarmed at the turn of events, the appellant filed the suit that has culminated in this appeal.

In a nutshell, the appellant pleaded that the sale and transfer of the suit premises to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was fraudulent on account of:-

- (i) Being sold through private treaty instead of a public auction;
- (ii) The 2<sup>nd</sup> respondent buying the suit premises whilst aware of the appellant's interest therein;
- (iii) Selling the suit premises at a gross under value;
- (iv) The 1<sup>st</sup> respondent breaching the chargee's duty of care;
- (v) The 1<sup>st</sup> respondent selling the suit premises to the 2<sup>nd</sup> respondent yet on the other hand assuring the appellant that it had taken care of his interests; and,
- (vi) Transferring the suit premises yet there was a court order in force barring such move.

By way of defence, the respondents averred that they were not parties to the sale agreement between the appellant and the vendor and that the vendor having charged the suit premises to the 1<sup>st</sup> respondent, lost capacity to enter into any agreement for the disposal of the same. In the premises, any agreement and transfer if at all in favour of the appellant, was null and void. They went on to aver that there was no agreement to sell the suit premises through private treaty. Indeed the suit premises were sold in a public auction and the 2<sup>nd</sup> respondent was the highest bidder. That the 2<sup>nd</sup> respondent was a bona fide purchaser for value without notice of the appellant's interest. That the 1<sup>st</sup> respondent did not breach any duty of care as chargorand in any event the duty of care was owed to the chargee and not the appellant, nor did it give any assurances to the appellant that it would protect his interest as no such interest had arisen in favour of the appellant. Concluding this aspect of the matter, the respondents averred that at the time of the transfer of the suit premises to the 2<sup>nd</sup> respondent, there was no court order prohibiting the transaction. With regard to the previous suit between the parties the respondents contended that the said suit had made the current suit *res judicata*, and if the appellant had any remedy, it lay in damages against the vendor.

The suit was first heard by **Sitati, J.** who took the evidence of the appellant on 27<sup>th</sup> October 2009, that of the respondents' first witness and partially the evidence of the respondents' second witness on 23<sup>rd</sup> June, 2010. Sitati, J. was thereafter transferred to the High Court in Kisii and it was not until 20<sup>th</sup> February 2013 that **Gitumbi, J.** took over the case and heard the remaining witnesses for the respondents, crafted and delivered the judgment.

In dismissing the appellant's suit, the learned judge held that it was not disputed that the vendor charged the suit premises to the 1<sup>st</sup> respondent, that he subsequently defaulted in the repayment of the loan forcing the 1<sup>st</sup> respondent to exercise its statutory power of sale. Accordingly, the claim by the appellant that the 1<sup>st</sup> respondent was guilty of fraud because it did not sell the suit premises by public auction or private treaty were baseless. That it was also common ground that the suit premises were going to be sold to the appellant by the 1<sup>st</sup> respondent at a consideration of Kshs.650,000/- but the appellant was unable to raise the amount but instead offered Kshs.450,000/- which was rejected by the respondent paving way for sale by public auction to the 2<sup>nd</sup> respondent. In the circumstances there was no fraud. The learned judge further held that the appellant not being the chargee, could not claim that the suit premises were not sold at the market value or that the 1<sup>st</sup> respondent breached chargor's duty of care. Further there was no proof that the public auction conducted on 9<sup>th</sup> May, 2003 was carried out in contravention of a court order. The judge therefore on the whole found that the respondents were not guilty of any fraud as alleged by the appellant. Flowing from that conclusion the judge upheld the certificate of title issued to the 2<sup>nd</sup> respondent and dismissed the suit with costs to the respondents.

Aggrieved by that decision, the appellant filed this appeal on two grounds; that the judge erred in failing to uphold the appellant's submissions and evidence that the purported auction of the suit premises to the 2<sup>nd</sup> respondent was fraudulent and unsustainable and secondly in failing to uphold the appellant's right to the suit premises having purchased the same for good consideration that the 1<sup>st</sup> respondent duly acknowledged.

When the appeal came up for directions before the Deputy Registrar of this Court, parties agreed to canvass it by way of written submissions. Consequently, respective parties filed and exchanged their written submissions and list of authorities that we have carefully read and considered. Essentially the parties reiterated their positions set out in their respective pleadings and the submissions before the trial court. Similarly the authorities cited were the very ones that were cited before the trial court. There is therefore no need to rehash those submissions and the authorities here.

This is a first appeal and pursuant to the provisions of **Rule 29(1)** of this Courts rules, our primary duty in considering this appeal is to re-appraise and re-evaluate the evidence tendered before the trial court afresh so as to reach our own independent conclusions but in doing so we must hasten to give allowance to the fact that we did not have the advantage enjoyed by the trial court in observing the demeanour of the witnesses. See also **Selle & Anor v Associated Motor Boat Co. Ltd & others [1968] EA 123.**

As we see it, the broad issue for determination in this appeal is not how the 2<sup>nd</sup> respondent came by the suit premises. Rather it is whether the appellant had an interest in the suit premises that was recognizable and enforceable in law either against the respondents or any other person or party.

The appellant's alleged entitlement to the suit premises is anchored on three pillars; purchase of the same from the vendor and or the 1<sup>st</sup> respondent and *Lis Pendens*.

With regard to the first pillar, the appellant testified that by an agreement dated 20<sup>th</sup> May, 1989, he agreed to buy the suit premises from the vendor, at a consideration of Kshs.300,000/- and paid him in full. Thereafter the vendor executed a transfer in his favour. However the vendor failed to discharge his liability to the 1<sup>st</sup> respondent to whom the suit premises had been charged as a result of which it intimated its desire to exercise its statutory power of sale. It was then that the appellant contacted the 1<sup>st</sup> respondent and expressed his interest in the suit premises.

Given the foregoing, can it really be said that the appellant had acquired an interest in suit premises capable of legal enforcement? We think not. First and foremost the suit premises were at the time charged by the vendor to the 1<sup>st</sup> respondent, and a legal charge registered against the title. The title was therefore encumbered and the vendor could not deal with suit premises unless he first discharged the title. In practical and legal terms the suit premises belonged to the 1<sup>st</sup> respondent pending the discharge of charge. All the documents of title in respect of the suit premises were in the possession of the 1<sup>st</sup> respondent. The vendor therefore had no capacity to enter into any agreement regarding the disposal of the suit premises without the involvement of the 1<sup>st</sup> respondent. It is evident that the 1<sup>st</sup> respondent did not grant the vendor authority to enter into an agreement for the sale of the suit premises nor was part of the alleged purchase price ever remitted to the 1<sup>st</sup> respondent. It is trite that one cannot give what he does not have. The vendor did not have any valid title which he could pass to the appellant. We think that the appellant was aware of this fact as in his own testimony he alluded to the fact that part of the purchase price was to go towards the discharge of charge in favour of the 1<sup>st</sup> respondent. It is also interesting to note that despite what went on between the vendor and the appellant, the appellant did not deem it necessary to make him a party to the suit or even call him as a witness. What inference should be drawn for such herculean omission when he was so central in the transaction? The inference can only be adverse. The best the appellant can do now is to pursue the vendor for the sum of Kshs.300,000/- he paid him and not the respondents and or a claim for the suit premises.

How about the appellant's alleged purchase of the suit premises from the 1<sup>st</sup> respondent? According to the appellant's testimony, when he realized that he could not get title to the suit premises from the vendor after paying him the full purchase price because the suit premises had been charged to the 1<sup>st</sup> respondent, he approached the 1<sup>st</sup> respondent and expressed interest to purchase suit premises directly from it. He offered Kshs.450,000/- as the purchase price, but the 1<sup>st</sup> respondent asked for Kshs.650,000/-. Around March, 2004, the suit premises were advertised for sale by public auction by the 1<sup>st</sup> respondent. Alarmed by the turn of events the appellant on 19<sup>th</sup> March, 2004 rushed to court and obtained an injunction stopping the intended auction. He was therefore surprised that sometimes in January 2005, the 2<sup>nd</sup> respondent came to the suit premises claiming that the suit premises belonged to him. On checking with the Lands Office, he realized that the suit premises had been transferred and registered in the name of the 2<sup>nd</sup> respondent on 21<sup>st</sup> March, 2003 by way of an auction for a consideration of Kshs.617,000/-. According to the appellant, this is the auction that had been stopped and that he was not aware of any other auction. This is all the evidence that the appellant relies on to show that he had purchased the suit premises from the 1<sup>st</sup> respondent and or that the 1<sup>st</sup> respondent was aware of his interest in the suit premises.

First and foremost there is no evidence that the 1<sup>st</sup> respondent agreed to sell the suit premises to the appellant. What the evidence suggests is that the appellant offered to buy the suit premises from the 1<sup>st</sup> respondent for Kshs.450,000/-. That offer was rejected when the 1<sup>st</sup> respondent counter offered

Kshs.650,000/-. It appears that there was no agreement and no further progress was made by either party to the transaction. There is no evidence that any sale agreement was executed between the 1<sup>st</sup> respondent and the appellant. There is no credible evidence that pursuant to any agreement whether verbal or written the appellant paid to the 1<sup>st</sup> respondent any consideration whether in full or in part. Indeed in his own testimony he concedes to that fact. He testified thus:-

**“...I now see exhibit 3 - letter dated 15/4/2003. (Advocate reads it). Yes, my offer for Kshs.450,000/- was not accepted.**

**I have not paid any money to the official receiver. I have not entered into a sale agreement with Pioneer Society ....”**

With this emphatic admission, how can the appellant claim to have purchased the suit premises from the 1<sup>st</sup> respondent?

On *lispendens*, we reiterate what was stated in **Bellamy v Sabirie (1857) 1 De G & J 556** which we quoted with approval the case of **Bruce Joseph Bockle v Coquero Ltd, Mld C.A. No. 41 of 2013:-**

**“...It is a doctrine common to the courts both of law and equity, and rests, as I apprehend upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendentelite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant’s alienating before the judgment or decree and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding ....”**

And **Mulla** and **Gour** in their treatises on the Indian Transfer of Property Act explains the doctrine as follows:-

**“... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendent lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit”.**

See also **Mawjiv US International University & Anor[1976 - 80] 1 KLR 229**. In essence the doctrine bars dealing with landed property under litigation to the detriment of the parties to pending litigation. A transfer if undertaken in those circumstances will amount to nothing. As stated in **Mawji (supra):-**

**“.....only a foolhardy purchaser, or a fraudulent purchaser, would purchase a property which is actually the subject matter of litigation..... It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party .... The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party ....”**

In the trial court the appellant claimed that the 1<sup>st</sup> respondent lost the capacity to sell and transfer the suit premises to the 2<sup>nd</sup> respondent or any other party by public auction or even private treaty because when he filed CMCC No. 2678 of 2003 against the 1<sup>st</sup> respondent, he obtained an injunction restraining it from alienating the suit premises. That at the time of the transfer of the suit premises to the 2<sup>nd</sup> respondent, that order was still in force and accordingly on the doctrine of *lispendens* the transfer was a nullity.

The respondents on the other hand are of the view that the doctrine was inapplicable in the circumstances of this case as there was no order in place restraining them from transacting the suit premises at the time they were auctioned.

From the record, it is indeed clear that the appellant did obtain *ex-parte*, an order of injunction restraining the 1<sup>st</sup> respondent from alienating the suit premises on 20<sup>th</sup> March, 2003. It is also on record that the said orders were discharged on 3<sup>rd</sup> April, 2003 when the appellant failed to appear in court and prosecute the application *inter partes*. Further it is on record that the 1<sup>st</sup> respondent subsequently filed and successfully prosecuted an application to strike out CMCC No. 2678 of 2003. From the date when the application was dismissed onwards, there was no other order barring the 1<sup>st</sup> respondent from alienating the suit premises. It was on this basis that the 1<sup>st</sup> respondent re-advertised the suit premises for sale by public auction. The auction eventually took place and the 2<sup>nd</sup> respondent was declared the highest bidder and following the payment of the full purchase price, the suit premises were transferred and registered in the name of the 2<sup>nd</sup> respondent. Although the appellant asserted that there was no auction on 9<sup>th</sup> May, 2003 he did not support this assertion at all with credible evidence. What is not in doubt is that indeed there was such auction. A copy of the re-advertisement by Libco Merchants was supported by newspaper evidence as well as payments of the purchase price.

Given the foregoing circumstances, the doctrine of *lis pendens* was unavailable to the appellant. This appeal must in the circumstances collapse. It is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of November, 2016.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W.OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**