



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, G.B.M. KARIUKI, OUKO JJ.A)**

**CIVIL APPEAL NO. 1 OF 2006**

**BETWEEN**

**PETER G.N. NG'ANG'A ..... APPELLANT**

**AND**

**DANIEL GICHANGA KARIUKI**

***(T/A WATTS ENTERPRISES (FIRM) .....1<sup>ST</sup> RESPONDENT***

**NATIONAL BANK OF KENYA LTD. .... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... A FRIEND OF COURT**

*(An appeal from the Ruling and Order of the High Court of Kenya at Milimani*

*(Ochieng', J.) dated 25<sup>th</sup> October, 2005*

*in*

***H.C.C.C NO. 40 OF 2003)***

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

**JUDGMENT OF THE COURT**

The appellant, Peter G.N. Ng'ang'a as the registered proprietor of KAJIADO/OLOOLOITIKISHI/KITENGELA/2913 (the suit property) brought an action against the respondents, Daniel Gichanga Kariuki T/A Watts Enterprises and National Bank of Kenya Ltd for a declaration:-

- “a) THAT the Instrument of Charge registered in escrow is null and void and unenforceable against the plaintiff or against his property Kajiado/Ololoitokishi/Kitengela/2913.**
- **THAT the registration without disbursement of loan funds and the exercise of statutory sale in respect of the said property is unconscionable, high-handed, oppressive, illegal and**

**inequitable.**

- **THAT there was no consideration for the 2<sup>nd</sup> defendant's charge on Kajiado/Ololoitokishi/Kitengela/2913 which wholly failed.**
- **THAT consideration for the alleged charge was a past consideration and is not sufficient in law to support the alleged agreement for charge on Kajiado/Ololoitokishi/Kitengela/2913.**
- **THAT in any event unsecured overdraft facilities granted in August 1988 by the 2<sup>nd</sup> defendant to M/S Olympic Fruit Processors Ltd were not secured by the said charge and the course of action therein to recover the principal thereof and interest therein did not arise within 6 years before commencement of process for realization of the said security and is barred by provisions of Limitation of Actions Act.**
- **Further or in the alternative by reason of matters aforesaid the right to recover overdraft facilities has been extinguished by virtue of provisions of Limitation of Actions Act.**
- **THAT waiver of requirement of provisions of section 74 of Registered Lands (sic) as to notice never given was fatal to the statutory power of sale and is unconscionable.**
- **THAT the 2<sup>nd</sup> defendant's charge over Kajiado/Ololoitokishi/Kitengela/2913 is in the circumstances null and void, illegal and unenforceable against Kajiado/Ololoitokishi/Kitengela/2913 by exercise of statutory power of sale under section 74 of Registered Land Act and that the plaintiff's and any other guarantees therein are unenforceable as civil debts.**

**The charge is in any event void for illegality the suit premises being agricultural and no consent to charge the suit premises having been obtained from Kajiado Land Control Board prior to a registration of the charge in favour of the 2<sup>nd</sup> defendant contrary to provisions of section 6 Land Control Act.”**

2With the suit, the appellant filed an application for a temporary order of injunction to restrain the respondents from selling or otherwise disposing of the suit property until the hearing and determination of the suit. The application was prompted by the threat of the respondents to sell the suit property while the appellant believed that the threatened sale was against the law.

On the day the application was filed under certificate of urgency it was placed before Nyamu, J. (as he then was), who apart from only certifying it urgent, did not grant interim orders but instead directed that it be heard *inter partes* by another judge as he was unable to hear it for the reasons he communicated to counsel for the appellant. When the matter came up before Ringera, J. – (as he then was), the suit property was due for sale by public auction the next day, yet counsel representing the respondents asked for time to respond to the application. The learned Judge confronted with the two situations noted:

**“I am therefore in a dilemma. Do I refuse the relief sought by the plaintiff without hearing his application on the basis that he lodged it belatedly and the defendant has not been afforded a fair chance to respond thereto or do I grant it without hearing the defendant who has been served and is present in court but is unable to resist it for the good reason that he has not had adequate notice of the application?”**

Applying the equitable principles of “*delay defeats equity*” and “*equity will not aid the indolent*” the learned Judge resolved the dilemma by noting that the appellant knew of the threatened sale way in advance but decided to move the court at the 11<sup>th</sup> hour and therefore must suffer the consequences. The application for injunction was refused.

Intending to challenge that decision in this Court, the appellant filed a notice of appeal and at the same

time applied to this Court for an injunction pending the hearing and determination of the Civil Appeal No. 55 of 2003. The application was granted effectively stopping the sale or interference of the suit property by the respondents until the determination of the appeal. The appeal was subsequently withdrawn and the interim injunction lapsed.

The appellant returned to the High Court still challenging the decision of Ringera, J. but this time with an application brought in the main suit (HCCC No. 40 of 2003) pursuant to the provisions of **sections 70, 75, 77 and 82** of the former Constitution, **section 3** of the Judicature Act, **section 3** of the Civil Procedure Act,

**Orders XLIV and L** of the Civil Procedure Rules and **Rule 10** of the then Chunga Rules, the main prayers being:

- A permanent injunction to restrain the respondents from disposing of, charging or interfering with the suit property pending the hearing and determination of the application.
- ii. a declaration that the orders given by Ringera, J. on 27<sup>th</sup> January 2003 violated the appellant's rights under,
  - **section 70** of the Constitution - not to be deprived of the protection of the law.
  - **section 77** of the Constitution - to be afforded a fair hearing by an independent and impartial court.
  - **Section 82** of the Constitution - not to be discriminated against. The first prayer for permanent injunction was premised on an order in

HCCC No. 390 of 1999, **National Bank (K) Ltd Vs. Olympic Fruit Processors & 2 Others** in which Ondeyo, J. dismissed the suit brought by the bank for want of prosecution. The appellant contended that following this dismissal, he and the other two respondents in that suit were discharged of any debt, if at all, owed to the bank; that the bank was barred from demanding any payment from them; that the bank ought to surrender the document of title it held as security in respect of the alleged loan.

The constitutional application came before Ochieng', J. who, upon considering it found on the last issue that the mere dismissal of the bank's suit did not determine the question of liability of the appellant and the other parties to the bank since the dismissal was on the basis of the failure of the bank to prosecute its suit; that as a matter of fact the bank's power of sale was not dependant on the dismissed suit but derived from the legal charge; that indeed Ondeyo, J. expressed similar view, that the dismissal did not in any way prejudice the bank's right to exercise its statutory power of sale of the suit property.

Regarding the other grounds relating to the decision of Ringera, J., the learned Judge found that the appellant, having failed to follow through the appeal in this Court challenging the decision of Ringera, J., he could not go back to the High Court for the very relief he had voluntarily let to collapse; that the granting of the application under review would be tantamount to sitting on appeal over the decision of Ringera, J. a judge of coordinate jurisdiction; and that it did not matter that the action was brought as constitutional reference. In any case, the learned Judge concluded, there was no constitutional issue raised in the application; that the application was a back door way of challenging Ringer J's decision in a wrong forum; and that parties were heard by Ringera, J. before he made the decision in question and found that the appellant was not vigilant in his pursuit for justice; hence the sale of the suit property was to be blamed on the appellant. With that the learned Judge dismissed the application provoking this appeal which raises 21 grounds which, before us, were argued together.

The main issue is whether Ochieng' J. erred in failing to find that the refusal by Ringera, J., to grant a temporary order of injunction paving the way to the bank's exercise of its statutory power of sale was in violation of the appellant's fundamental right under the former Constitution, to the secure protection of the law, protection from deprivation of property and protection from discrimination.

The High Court, no doubt, was, by dint of the provisions of **section 84** of the former Constitution clothed with jurisdiction to consider any allegation regarding the contravention of any of the fundamental rights contained in Chapter V of that Constitution. We find, as a five-judge bench of this Court recently found, in **Mumo Matemo Vs. Trusted Society of Human Rights Alliance & 3 others**,

Civil Appeal No. 290 of 2012, on the authority of **Anarita Karimi Njeru Vs. The Republic** [1976-1980] KLR 1272 that it is still a good practice now than ever before, in view of the elaborate bill of rights, that allegations of violation of fundamental rights be pleaded with reasonable precision.

We reiterate what the court said in **Mumo Matemo** (supra):

**“41. We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court.....However, we also note that precision is not conterminous with exactitude.....We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”**

The motion before Ochieng, J. was premised on the grounds that the decision of Ringera, J. rendered on 27<sup>th</sup> January 2003 condemned the appellant without being heard; that after the suit by the bank was dismissed for want of prosecution the bank was estopped from advertising the property for sale or claiming any interest over it.

We have carefully looked at the brief ruling of Ringera, J. and cannot see in which way it could possibly amount to a violation of any fundamental right. The learned Judge was confronted by what he termed “*a difficult matter*”, a “*dilemma*”. The sale of the suit property was slated for 28<sup>th</sup> January 2003. The appellant sought to stop the sale and brought an application under a certificate of urgency for that purpose on 24<sup>th</sup> January 2003 – four days before the “*D*” day. On the same day, the application was filed it was placed before Nyamu, J. who could not hear it having, as a practicing advocate, acted for one of the parties. After certifying the application as urgent, he directed that it be heard *inter partes* on 27<sup>th</sup> January, 2003, a day before the date fixed for sale of the suit property. Ringera, J. was to decide whether to stop the sale without hearing the bank that had not filed a replying affidavit or to let the sale go on. Balancing these interests and applying equitable principles aforesaid, the learned Judge formed the opinion that the appellant had not been vigilant in pursuing his interest, having known all along since 26<sup>th</sup> November 2002 of the impending sale but waited for the 11<sup>th</sup> hour.

This Court (Shah, Owour & Githinji, JJ.A) in Civil Application No. Nai 203 of 2003 gave the appellant a lifeline to challenge the substance of Ringera J’s ruling after it found that the appeal was arguable and that if an injunction was not granted “*the parcel of land in question may be sold by auction thereby rendering the appeal futile.*” With an injunction stopping the bank from selling the property until the appeal challenging the decision of Ringera, J. was heard and determined, the appellant promptly lodged the appeal, No. 55 of 2003.

In a strange twist of events, the appellant withdrew the appeal. He explains this as follows in his affidavit of 27<sup>th</sup> September, 2005 in support of the application the subject of this appeal:

**“13. That unfortunately I withdrew my Civil Appeal No. 55 of 2013 because the notice of appeal was defective due to typographical error on the face of the notice of appeal and a copy of my said appeal is annexed hereto.....”**

It is clear where blame for failure to pursue, through the correct process, the appellant’s right to challenge the decision of Ringera, J. rests. With the withdrawal of the appeal and seeing that he had reached a dead end, the appellant decided to resort to the unusual route of challenging the decision as being a violation of the Constitution. The well-known decision of this Court in **Peter Ng’ang’a Muiruri Vs Credit Bank Limited & 2 Others**, Civil Appeal No. 203 of 2006 provides the right launch pad for our decision.

In that case bearing striking similarity with the present one and the appellant bearing the same name as the appellant in this appeal sued a bank over a mortgage debt. The appellant sought direction from the Chief Justice for the empanelling of a bench of the High Court to hear an application alleging that this Court had, by its ruling violated the appellant's fundamental rights. The Chief Justice not finding any merit on the application dismissed it. That dismissal opened a new form of challenge with the appellant bringing a constitutional application in the High Court for a declaration that the dismissal violated the appellant's fundamental rights and freedoms, as the dismissal denied the appellant access to court and amounted to a denial of a hearing. Nyamu, J. (as he then was) heard the application and expressed the following opinion:

**“When a challenge is directed at a Judge’s order or ruling pursuant to section 84 of the Constitution a Judge of the High Court has jurisdiction by virtue to (sic) section 84**

**(1) and (2) of the Constitution to hear the challenge. The jurisdiction I am now exercising in this matter or any other High Court Judge placed in similar situation does not certainly extend to considering or reviewing the merits of the ruling of another Judge. In my view, where there is a final order or ruling the jurisdiction extends to whether the process, or procedure adopted in obtaining the ruling there were any procedural improprieties which could have led to any violation or contravention of the fundamental rights and freedoms of the applicant..... This is a very rare jurisdiction but it is now being invoked in several cases. The question is therefore no longer whether such a challenge can be entertained but rather to what extent can another court intervene.”**

The learned Judges (Omolo, Bosire & Onyago Otieno, JJ.A) thought the Judge had overstepped the limits of his jurisdiction and went ahead “*to set the law straight*” as follows:-

**“It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity.....**

**Moreover, if Nyamu J.’s views were to be accepted, it will create an absurd situation. Appeals from the High Court lie to this Court. If this Court’s decisions will be subject to a review by the so called “Constitutional Court”, an appeal from that court will lie to this Court for a second time, and if any of the parties feels any of his fundamental rights has been violated by this Court he will have recourse to the**

**“Constitutional Court” whose decision thereon will be appealable to this Court. There will be no end to litigation.”**

We come to the conclusion that Ochieng’ J. was right in holding that he had no jurisdiction to entertain a matter concluded by a court of coordinate jurisdiction irrespective of how the matter was brought.

Accordingly, we find no merit in this appeal. It fails and is dismissed with costs.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May 2015.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

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