



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 143 of 2006

BETWEEN

ELIJAH KIPN'GENO ARAP BII.....APPELLANT

AND

PETER KIPYEGON ROTICH1ST RESPONDENT

KENYA COMMERCIAL BANK2ND RESPONDENT

*(An appeal from the Ruling and Order/Decree of the High Court of Kenya at Nairobi (M.G. Mugo, J.)
dated 13th May 2005*

in

H.C.C.C. No. 1252 of 2003)

JUDGMENT OF THE COURT

1. In the years 1977, 1988 and 1991, *Elijah Kipn'geno Arap Bii* the appellant herein borrowed various sums of monies from the 2nd respondent Bank and charged his parcel of land known as **LR. No. Kericho/Kabianga/1824** and the developments thereon as security. LR No. Kericho/Kabianga/1824 is hereafter referred to as the suit property. The appellant defaulted in repaying the secured monies and interest thereon.
2. On 20th November 2002, the 2nd respondent by public auction sold the suit property to the 1st respondent for the sum of Kshs.1,310,000/= . Consent to transfer and register the suit property in the name of *Peter Kipyegon Rotich* the 1st respondent was obtained from the Kericho Land Control Board and the 1st respondent became and is now the registered proprietor of the suit property.
3. Upon being registered as proprietor of the property, the 1st respondent filed suit against the appellant at the High Court being Civil Suit No. 1252 of 2003 seeking an order for vacant possession of the property and *mesne* profits. The 1st respondent contended in his plaint that the appellant without any colour of right had interfered with his quiet possession and enjoyment of the

suit property and had destroyed a fence and repulsed his workers from tilling the land and harvesting tea which is on the suit property. It is worth noting that the appellant, as at the date of this judgment, is still in possession and occupation of the suit property.

4. Subsequent to the 1st respondent filing his suit at the High Court, the appellant filed a Statement of Defence and Counterclaim averring that he has been and continues to be the owner of the suit property and he has never transferred the same to the 1st respondent; that he does not know how the suit property came to be registered in the 1st respondent's name; that he had not interfered with the 1st respondent's quiet possession of the suit property since the 1st respondent has never had possession of the property; that he could not have destroyed any fence erected by the 1st respondent and he had not violated any right belonging to the 1st respondent in relation to the suit property.
5. By way of counterclaim the appellant joined the 2nd respondent Bank in the suit and averred that on or about October 2003, the 2nd respondent Bank communicated to the appellant that it had sold to the 1st respondent the suit property. In his counterclaim the appellant averred that if any sale took place, then the same was done fraudulently and in breach of the laid down procedures in law.
6. The appellant in his counterclaim itemised the particulars of fraud *to wit* that the 2nd respondent sold the suit property for an inordinately low and fraudulent price of Kshs. 1.34 million whereas its then market value was about Kshs.7 million; that the appellant was not served with the mandatory notification of sale and statutory notice; that the 1st and 2nd respondents fraudulently and deceptively obtained Land Control Board consent for the transfer of the suit property to the 1st respondent; that the 1st and 2nd respondents obtained the said Land Control Board consent from an inappropriate Land Control Board. The appellant's prayer in his counterclaim was for a declaration that the sale by public auction of the suit property by the 2nd respondent to the 1st respondent be declared *void ab initio*.
7. By Chamber Summons application dated 17th March 2004, the 1st respondent filed an application by way of Summary Judgment at the High Court seeking orders for vacant possession of the suit property and mesne profits. In the application, it was averred that the defence and counterclaim filed was scandalous, frivolous and an abuse of the court process and aimed at prejudicing, embarrassing and delaying the trial of the action; it was contended that the appellant's title to the suit property was extinguished at the public auction held on 20th November 2002 and the appellant's remedy, if any, lies in damages against the 2nd respondent Bank; that the 1st respondent was an innocent purchaser for valuable consideration without notice.
8. The appellant filed a replying affidavit to the Chamber Summons stating that the defence and counterclaim filed were neither scandalous nor frivolous and asserting *inter alia* that his remedy is on nullification of the sale by public auction which was done in collusion between the respondents in this matter; that the 1st respondent having colluded with the 2nd respondent is not an innocent purchaser for value; that the suit property was sold for a very inordinately low price and no evidence had been given to support the fact that the entire purchase price was paid; that the letters purported to have sent to the appellant were mailed to a wrong address namely P. O. Box 157 Kericho which does not belong to the appellant. The appellant urged the High Court to allow the suit to proceed to full hearing to enable the parties give evidence in trial.
9. The High Court (M.G. Mugo, J.) upon hearing arguments by counsel in a ruling dated 13th May 2005 struck out the defence and counterclaim and allowed the application by granting vacant possession of the suit property to be given to the 1st respondent but ordered the issue of *mesne* profits to go on trial. The Ruling dated 13th May 2005 is the subject matter of this appeal. The learned judge, in striking out the defence and counterclaim expressed as follows:

“According to Section 77 (2) of the Registered Land Act, a chargee becomes entitled to possession of the charged land and becomes entitled to recover such possession upon a bid being accepted at the auction sale. Under Section 77 (3)...any person suffering damage by an irregular exercise of the power of (sale) shall have his remedy in damages only against the person exercising the power.

Further, Section 77 (4) provides that:

“Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge....”

I find that in view of the above provisions, the respondent cannot claim to have any valid defence to the applicant’s suit his defences being thus ousted by statute. ... I am of the considered view that the defence against the plaintiff is not a valid defence in law, it is scandalous, frivolous and vexatious and an abuse of the process of the Court. On the same premises, the counterclaim too cannot stand as against the plaintiff. I allow the application and strike out the defence and counterclaim in so far as the same are in answer to the plaintiff’s claim for possession of

LR No. Kericho/Kabianga/1824....”

10. Aggrieved by the striking of his defence and counterclaim the appellant has lodged this appeal citing various grounds in his Memorandum of Appeal which can be compressed as follows:

- “(i) That the honourable judge erred in law and misdirected herself by striking out the appellant’s defence and counterclaim and disregarding the allegation of fraud as pleaded in the defence and counterclaim;*
- ii. The honourable judge erred in law by failing to consider the fact that she needed to give the appellant an opportunity to prove fraud as pleaded in his defence;*
- iii. The learned judge erred in law by failing to appreciate the fact that since the appellant had pleaded in his defence and counterclaim that he was not served with a notification of sale and the mandatory 90 days statutory notice, it did not then matter whether the same was deposed in the replying affidavit and she erred in ignoring this matter;*
- iv. The learned judge erred in law by holding that the respondent’s acquisition of LR No. Kericho/Kabianga/1824 was absolute and disregarded the fact that the transfer was executed on 21st March 2003, and stamp duty paid while the Land Control Board consent was granted on 8th May 2005 much after the transfer had been effected;*
- v. The honourable judge erred in law by concluding that a sale pursuant to the provisions of Section 77 of the Registered Land Act is absolute and cannot be challenged on any other ground;*
- vi. That the honourable judge erred in law and fact and showed bias against the appellant by refusing to disqualify herself from the hearing of civil case no 1252 of 2003 (appealed against) when she had on 22nd September 2004 delivered a similar ruling in Civil Case no. 882 of 2003 which was more or less a similar matter involving two similar parties in a similar cause of action.”*

11. At the hearing of this appeal, learned counsel Mr. Nicholas Sumba appeared for the appellant while learned counsel Mr. A. Ojiambo appeared for the 1st respondent and learned counsel Mr. C.M. Njagi appeared for the 2nd respondent.

12. Counsel for the appellant reiterated the grounds in support of the appeal. He submitted that the learned judge erred in law and fact in striking out the appellant's defence and counterclaim which raised triable issues; that the judge ought to have allowed the suit between the parties to proceed to a full trial; that the defence and counterclaim raised issues of fraud, inordinately low price at which the suit property was sold and obtaining consent of the Land Control Board from a Board different from where the suit property is located; that the consent of the Board and transfer instruments were executed before the alleged sale of the suit property by public auction; that the issues canvassed before the High Court were not plain and obvious to warrant striking out of the defence and counterclaim; that the learned judge ought to have disqualified herself in hearing the matter since she had heard and determined a similar matter involving two parties to the present suit; that the learned judge ignored the contents of the Replying Affidavit in arriving at her decision; that the decision of the High Court is not in tandem with various decisions made by this Court.

13. Counsel for the applicant cited the following cases in support of his submissions: **Elijah Kipngeno Arap Bii -v- Samuel Mwehia Gitau & Kenya Commercial Bank, Nairobi Civil Appeal No. 155 of 2006**; **Nyangilo Ochieng & Another and Fanuel Ochieng & 2 Others, Kisumu Civil Appeal No. 148 of 1995**; **Industrial & Commercial**

Development Corporation -v- Daber Enterprises Limited, Nairobi Civil Appeal No. 41 of 2000; **Westmont Power Kenya Limited -v- Bosely Fredrick & Another Nairobi Civil Application No. 135 of 2003** and **Kipkoech Kangongo & 62 Others -v- The Board of Governors of Sacho High School & 5 Others Nairobi Civil Appeal No. 75 of 2011.**

14. The 1st respondent opposed the appeal and urged this Court to find that **Section 77** of the **Registered Land Act** is absolute and if at all the appellant has any claim, his claim and remedy is against the 2nd respondent Bank that sold the suit property to the 1st appellant in a public auction. Counsel submitted that the learned judge was not biased in arriving at the decision she made; that even if the judge had heard a similar application before, between two parties to this case, the learned judge arrived at the same conclusion and this demonstrates that the judge was consistent in her interpretation and application of the law; that when the appellant applied for stay of execution, this was granted and this illustrates the impartiality of the judge towards the appellant; on the issue of fraud, the 1st respondent contended that the particulars given in proof of fraud did not disclose any triable issue; that the appellant made two allegations on fraud one being that the auction price was inordinately low although the appellant did not present a valuation to prove the allegation. The other being that the consent of the Land Control Board was obtained by fraud after the instrument of transfer had been executed which is not supported by the documents.

15. For the 1st respondent it was submitted that in the record of appeal, there is a valuation report that was prepared prior to the sale by public auction and the forced sale value of the suit property is given as Kshs.1,280,000/=; that the 1st respondent purchased the suit property at Kshs.1,310,000/= which was above the reserve price and forced sale value; that if the appellant is of the view that the purchase price was inordinately low, it was open to the appellant to prepare and produce a new valuation report and he failed to do this.

16. On the allegation that the consent of the Land Control Board was obtained after the instrument of transfer was executed, counsel submitted that this allegation is erroneous; that the sale by public auction was conducted on 20th November 2002 and the application for consent of the Land Control Board was made on 27th March 2003; that it is the practice that when an application for consent is made, the instrument of transfer must be signed by all parties and that is why the instrument of transfer is signed and dated 21st March 2003 which enabled the application for consent to be lodged. Counsel submitted that it is erroneous for the appellant to state that the consent of the Land Control Board was applied for on 22nd September 2003, that this date refers to the date in which the certified copy of the original application was issued; that it is clear from the certified copy that consent of the Land Control Board was applied for on 27th March 2003 and

approval given on 8th May 2003 and the letter of consent is dated 12th May 2003.

17. In supporting the learned judge's ruling, counsel for the 1st respondent submitted that no fraud was proved and the judge correctly interpreted **Section 77** of the **Registered Land Act** and found that the appellant had no good defence to the suit; that if at all there were any irregularities in the service of the statutory notice or conduct of public auction, a purchaser is not answerable but it is the selling Bank that is answerable; that the 1st respondent being a buyer is excused from making any inquiry as to the validity of the public auction conducted on 20th November 2002. Counsel noted that the appellant is contending that there was no proof that the purchase price was paid at the public auction. In response, it was submitted that the 2nd respondent Bank has acknowledged receiving the purchase price and it has never complained that monies were never paid to it. Counsel reiterated that the learned judge properly observed that there was no proper suit worthy of being sent for trial; that if the appellant suffered any loss as a result of the 2nd respondent's Bank exercise of its statutory power of sale, the appellant was at liberty to seek remedy against the 2nd respondent; that the 1st respondent's title is protected under **Section 77** of the **Registered Land Act**. As regards the service of the mandatory statutory notice, it was submitted that this was not an issue pleaded and canvassed before the High Court.

18. Counsel for the 1st respondent cited the following authorities to support his submissions:

Mbuthia -v- Jimba Credit Finance Corporation & Another (1988) KLR 1; Hilton Walter Nabongo Osinya & another -v- Savings & Loans Ltd & Another HCCC No. 274 unreported; Elijah Kipngeno arap Bii -v- Kenya Commercial Bank Ltd HCCC No. 324 of 2000 unreported.

19. Counsel for the 2nd respondent Bank associated himself with submissions made by the 1st respondent; that the aspect of service of the statutory notice had not been mentioned in the replying affidavit and this was being raised from the bar; counsel pointed out to this Court that the record at pages 119, 120 and 121 show that the statutory notices were issued and served on the appellant.

20. In reply to the respondent's submissions, counsel for the appellant stated that all the arguments advanced by the respondents were issues that could be canvassed and determined at a full trial; that it is clear that triable and arguable issues of fact and law have been raised and this is why the learned judge erred by summarily striking out the defence and counterclaim without according the appellant an opportunity to give evidence and be heard in a trial. Counsel citing the case **Nyangilo Ochieng & Another and Fanuel Ochieng & 2 Others, Kisumu Civil Appeal No. 148 of 1995,** submitted that want of proper service of the statutory notice is a ground upon which a sale by public auction can be set aside.

21. We have considered the grounds of appeal as well as submissions by counsel on this matter and the authorities cited. On the issue of bias on the part of the High Court, we have considered submissions by both counsel and are convinced that the learned judge was consistent in her interpretation and application of the law as she understood it to be. We make a finding that allegations of bias on the part of the judge were without any basis.

22. The critical question for our consideration and determination is whether the trial judge erred in summarily striking out the appellant's defence and counterclaim without allowing the suit to proceed to a full hearing and trial. In answer to this question we seek to ascertain if there were any triable issues disclosed by the defence and counterclaim. We concur with the *dicta* in **Commercial Advertising and General Agencies Ltd. -v- Qureishi (1985) KLR 458** where it is stated that on an application for summary judgment, the plaint, defence, counterclaim and reply to defence, if any, and affidavits in support and in reply as well as all relevant issues and circumstances are all proper material for consideration. We take cognizance of the *dicta* by Madan, J. in **CA Civil Appeal No. 33 of 1977 B. Gupta -v- Continental Builders Limited** where he stated that if a

defendant is able to raise a prima facie triable issue, he is entitled in law to defend.

23. At paragraph 11 (d) of the Statement of Defence and Counterclaim there is a pleading that the appellant was not served with the mandatory notification of sale and statutory notice by the 1st respondent. In answer to this averment, counsel for the 1st and 2nd respondents submitted that the issue of want of service was not stated in the replying affidavit deposited by the appellant in response to the application for vacant possession. In ***Nyangilo Ochieng & Another and Fanuel Ochieng & 2 Others (supra)***, this Court stated that a bank should be more careful in proving service of the statutory notices and failure to prove may result in an innocent purchaser for value being deprived of the title to the property purchased in an auction.

24. In the instant case, counsel for the 2nd respondent referred this Court to pages 119, 120 and 121 of the record where it is alleged that statutory notices were served to the appellant by postal mail. We have examined the letters on these pages and the record shows that the statutory notices were mailed to three different postal addresses namely P. O. Box 22333 Nairobi; P. O. Box 48400 Nairobi and as stated at paragraph 17 of the replying affidavit, P. O. Box 157 Kericho. It is trite law that once a chargor alleges non- receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Whether the statutory notice was actually sent and served is a question of fact to be determined through hearing; the respondents submitted that the issue of service of the statutory notice was not raised in the replying affidavit; paragraph 17 of the replying affidavit deposited on 18th May 2004 by the appellant denies receipt of the letter sent to an address that does not belong to the appellant. It is not clear from the record whether the letters in question were sent by ordinary mail or registered post. As stated in the case of ***Shah - v- Padamshi (1983) KLR 531***, it is a triable issue whether an appellant has received a letter giving him notice if he has denied receipt of such notice; that a presumption that a letter would reach its addressee in due course would only arise in the case of a letter sent by registered post – See ***Section 3 (5)*** of Interpretation and General Provisions Act, Cap 2. From the foregoing reasons and case law, we are convinced that a triable issue of proper service of the mandatory statutory notice was pleaded at paragraph 11 (d) in the Statement of Defence and Counterclaim and in paragraph 17 of the Replying Affidavit.

25. The next issue for our consideration is whether the learned judge erred in law in holding that the Defence and Counterclaim filed were scandalous, frivolous and vexatious and that the allegation of fraud as pleaded in the counterclaim was not worthy of hearing and trial. In the case of ***Elijah Kipngeno Arap Bii -v- Samuel Mwehia Gitau & Kenya Commercial Bank, Nairobi Civil Appeal No. 155 of 2006***; this Court stated as follows:

“... it is clear that the issue whether or not the impugned sale by the 2nd respondent in exercise of its statutory power of sale can be set aside on ground of fraud is a complex legal issue. It is an issue which has to be determined in the perspective of the general duties of a mortgagee, the relevant provisions of RTA and TPA, the relevant case law and upon consideration of evidence as to whether the sale was tainted with impropriety amounting to fraud... The complex legal issues in our view could not be appropriately determined in a summary judgment application and by doing so the learned judge in effect prematurely held an immediate trial (emphasis ours). ... In the result, we allow the appeal and set aside the ruling and order of the superior court....”

26. The 1st respondent cited the case of ***Mbuthia -v- Jimba Credit Finance Corporation***

- ***Another (1988) KLR 1***. We have considered this case in light of submission by the appellant that the suit property was sold at an inordinately low price. In the ***Mbuthia case (supra)*** this Court stated :

“...the question for the trial court was whether the plaintiff/appellant could show that

the defendant had exercised his powers in a fraudulent way. It would be a matter of evidence whether the sale price was a little over half of the true value of the charged property. In that regard, there was a dispute of fact to be resolved... The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits."

27. This Court's *dicta* in the ***Mbuthia case*** is that it would be a matter of evidence whether the sale price was a little over half of the true value of the charged property. Evidence means that hearing and trial must be conducted; in the instant case, the learned judge erred in failing to give an opportunity for a hearing and trial to be conducted for evidence to be adduced. In **Kenya Commercial Bank Ltd. -v- Osebe (1982) KLR 296**, this Court stated that the question of whether or not the sale was at an under value and whether it was mismanaged, are disputed matters of fact and should not be resolved on affidavit evidence (**see also Kennedy – v de Trafford {1896} 1 Ch 762**).

28. The 1st respondent also cited the case of **Hilton Walter Nabongo Osinya & Another -v - Savings & Loans Ltd & Another HCCC No. 274 unreported**. The case deals with interpretation and application of **Section 77** of the **Registered Land Act**. The distinction between the ***Hilton Case (supra)*** and the present case is that the Hilton decision was made after a full hearing and trial and the parties adduced evidence before the trial court. In the instant case, there was no hearing and trial. In **Sunderji -v- Clyde House Company Limited, (1984) KLR 499** this Court stated that where an issue raised requires reference to applicable case law in order to reach a decision, such an issue should be tried with full argument on the law and should not be dealt with summarily. In the instant case, whether **Section 77** of the **Registered Land Act** applies to the facts of this case in light of the allegation that the suit property was sold at an inordinately low price and whether there was service of the statutory notices are disputed facts that must be canvassed considered and determined by way of trial.

29. This Court takes cognizance of the *ratio decidendi* in **Elijah Kipngeno Arap Bii -v- Samuel Mwehia Gitau & Kenya Commercial Bank, Nairobi Civil Appeal No. 155 of 2006**. Counsel for the respondents neither distinguished the case nor give us good reasons to depart from the same. It is instructive to note that the facts and issues raised in the **Elijah Kipngeno Arap Bii -v- Samuel Mwehia Gitau & Kenya Commercial Bank, (supra)** are *in pari materia* with the facts and legal issues in the instant case. We are obliged to follow the doctrine of precedent as we emphasize that like cases should be decided alike. A general principle of law emanating from the above decision is that whenever fraud is pleaded, this issue should not be determined summarily but upon consideration of evidence. In the instant case, the learned judge erred in summarily dismissing the issue of fraud and did not give an opportunity for the matter to be canvassed in a hearing.

30. In the result, we allow the appeal; set aside the ruling and order of the High Court dated 13th May 2005 with costs to the appellant. In its place we substitute an order dismissing the Chamber Summons Application dated 17th March 2004 with costs to the appellant. We order that the dispute on the ownership of the suit property should be heard and tried on priority basis by any other judge with jurisdiction excluding **M. G. Mugo, J.**

Dated and delivered at Nairobi this 31st day of July, 2015.

W. KARANJA

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR