IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO.34 OF 2015

BETWEEN

EDWARD CHARLES NGINYO ……..……APPELLANT

AND

HANS JURGEN ZAHLTEN…….....……1ST RESPONDENT

MELB NEKESA MASIKA…….....……...2ND RESPONDENT

FARID AHMED SWALEH…….....……..3RD RESPONDENT

HILMA ABDULLA AMIN…….....……4TH RESPONDENT

THE LAND REGISTRARKILIFI DISTRICT……..5TH RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Malindi (Angote, J.) dated 26th September, 2014

In

ELC NO.61 of 2011)

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JUDGMENT OF THE COURT

In this appeal, the following factual statements are uncontroverted. On 5th August, 1996 the appellant entered into a written agreement with the 1st respondent in which the latter advanced to the former Kshs.3,000,000/= as a loan at the interest rate of 22% per annum to be repaid by instalments within one year.

It was a term of the agreement that the loan would be secured by the appellant's property known as **KILIFI/MTWAPA/79** (the suit property). The appellant made only two instalments totaling Kshs.70,000/= and defaulted thereafter. Following this default the 1st respondent's advocates wrote several letters to the appellant drawing his attention to this fact and demanding that should he fail to settle the loan, allegedly standing at Kshs.101,000,000/=, the suit property would be sold in a public

auction. There was an attempt to sell the suit property to the 2nd respondent by a stranger called Quintos Maloba, who curiously succeeded in transferring it to the 2nd respondent, even though the original title document was with the 1st respondent's advocates pursuant to the aforesaid agreement. When this strange transaction was discovered the transfer to the 2nd respondent was nullified and the title reverted to the appellant. The 2nd respondent has not participated in this matter since it was filed. In 2010 over 14 years since the creation of the charge, things began to move very fast.

The 1st respondent sent a fresh notice after these events to the appellant once more threatening to sell the suit property if the loan remained outstanding. There was no response from the appellant to this or earlier notices leading the 1st respondent to instruct Jeneby's Auction to advertise the sale of the suit property. In ***The Star*** newspaper of Tuesday, the 10th August, 2010 the suit property was advertised to be sold by a public auction on 26th August, 2010. Rattled, the appellant instituted an action in the Chief Magistrate's Court, Civil Suit No.2178 of 2010 along with an application intended to stop the impending auction.

For reasons that are not readily apparent the suit was discontinued. In the meantime the suit property was sold to the 3rd respondent and a certificate of sale issued to him indicating that he was the purchaser with a bid of Kshs.12,000,000/=. Subsequently the suit property was transferred, registered in the name of 3rd respondent and a certificate of lease duly issued on 22nd December, 2010. Out of the 12 acres comprised in the suit property the 3rd respondent applied and was allowed to subdivide and sell 4 acres to the 4th respondent. The sub-division was registered in the name of the 4th respondent as **KILIFI/MTWAPA/3188** on 14th May, 2012. Attempts by the appellant to lodge a caution was rejected by the 5th respondent. Like the 2nd respondent, the 5th respondent has also not participated in these or earlier proceedings.

As a last resort the appellant returned to court and filed Malindi ELC No.61 of 2011 in which he claimed that although he owed the 1st respondent Kshs.3,000,000/=, the latter caused him to execute an illegal charge; that the 1st respondent lacked *locus standi* in law to create a charge; and that acting in collusion the 1st and 5th respondents unlawfully caused the suit property to be transferred to the 2nd respondent and subsequently to the 3rd and 4th respondents. He contended further that as a result, he suffered loss of user of the suit property for which he was entitled to damages. He also prayed that the respondents be restrained by an order of permanent injunction from wasting, constructing, building, cultivating or in any way interfering with the suit property, and a mandatory injunction directed to the 5th respondent compelling him to cancel the title issued to 2nd, 3rd and 4th respondents, a declaration that the appellant is the *bona fide* registered proprietor of the suit property, and an order to evict the 3rd and 4th respondents from the suit property.

In resisting the action the respondents, save for the 2nd respondent, filed statements of defence whose combined effect was that the charge was duly executed by the appellant, properly and lawfully created and registered; that the 3rd and 4th respondents were *bona fide* purchasers; that there was no collusion between the 1st and 5th respondents; and that the appellant's suit was statute-barred.

Before **Angote, J** the parties called evidence to advance their respective positions, marking the point of departure. The appellant reiterated that although he owed the 1st respondent Kshs.3,000,000/= he did not understand the implications of signing the charge; that a stranger, Daniel who presented himself as the 1st respondent's agent stole from him his passport size photographs and identification card. He later learnt that these documents were used to transfer the suit property to the 2nd respondent as explained earlier. Thereafter the 1st respondent continued to press on with his demand to the appellant to pay or lose the suit property; that all along the appellant was ready and willing to pay Kshs.3,000,000/=, the principal sum but the 1st respondent was adamantly demanding Kshs.101,496,841.70. At some point the appellant's attention was drawn to a newspaper advertisement in which the suit property was set to be sold in a public

auction. He however, maintained that he was never served with any notice regarding this sale. Subsequently he learnt that the suit property had been transferred to the 3rd respondent and later on to the 4th respondent. It was his contention that the property was not sold in a public auction.

The 1st respondent, on his part testified of his frustration to recover the loan advanced to the appellant, after the latter paid only two instalments of Kshs.55,000/= at the beginning. For over ten (10) years the 1st respondent followed up the appellant to settle the debt without success. The appellant went as far as colluding with a conman to dispose of the suit property which he did to the conman's wife the 2nd respondent, that this sale was in the end nullified and the ownership of the suit property returned to the appellant; that when it became apparent that the appellant was not able or willing to repay the loan the 1st respondent gave him a final notice, instructed the auctioneers and the suit property was eventually sold to the 3rd respondent.

The 3rd and 4th respondents' position at the trial was simply that, as innocent purchasers for value and without notice the titles conveyed to them through a sale cannot be impeached; that they purchased after conducting due diligence that revealed the suit property was free for transfer. Both also confirmed that they are in possession of and have developed their respective portions of the suit property.

The learned Judge considered this evidence and was persuaded by it that, as a matter of fact the 1st respondent advanced to the appellant Kshs.3,000,000/= on 5th August, 1996 to be repaid together with interest at 22% per annum by 31st July 1997. On the same day the agreement was signed the appellant also executed a charge. From the arguments by the parties the learned Judge was of the view that the two questions before him for determination were whether the 1st respondent could legally create a charge over the suit property and whether the subsequent sale and transfers of the suit property were lawful.

On the first question the learned Judge held that from the definitions of the terms "*chargees"* and "*proprietor*" under the Registered Land Act (repealed) an individual could infact charge another person's land the same way a financial institutions would; and that an owner of land under the Registered Land Act could charge his land for securing payment of money from a person who is not engaged in banking business under the Banking Act. The learned Judge concluded, on this first question, that the charge created and registered in favour of the 1st respondent was therefore legal.

On the second aspect the learned Judge held that the provisions of **sections 74** and **77** as to notice and sale by auction were complied with. In dismissing the suit he concluded by explaining his decisions as follows;

> ***"Having voluntarily signed the charge, the plaintiff was bound by its terms and cannot now claim that his property was unlawfully sold when the 1st Defendant complied with the provisions of the RLA in selling the said property.***
>
> ***Having been served with the mandatory statutory notice, and the property having been advertised in the newspaper for sale by public auction, I find that the sale of the suit property was lawfully sold*** *(sic)* ***to the 3rd Defendant who subsequently sub-divided it and sold a portion thereof to the 4th Defendant. In any event, the Plaintiff has not challenged the sale of the suit property by way of auction in his pleadings. The court can only grant that which has been pleaded"***

The appellant now challenges that conclusion and the decree principally on the grounds that the learned Judge erred in finding that the charge and the sale were legal. On the issue of sale Mrs Ngugi, learned counsel for the appellant submitted that had the learned Judge reviewed the evidence, it would have become apparent to him that although the suit property was agricultural land, the consent of the relevant Land Control Board was not obtained; that from the evidence it ought to have been clear to the learned Judge that no public auction was conducted on account of contradicting dates of the sale. Regarding the

charge, learned counsel argued that the 1st respondent could not, in law create a charge.

Mr.Hamza, learned counsel for the 1st and 3rd respondents and with whose submissions Mr.Taib, learned counsel for the 4th respondent agreed, submitted that the question of Land Control Board consent was never before the trial court and could not be raised for the first time in this Court. On the contradictions on the date the auction is alleged to have been conducted, it was the view of both counsel, relying on the case of **Krobought Grant** v **Kenya Commercial Bank Ltd** Civil Appeal No.227 of 1995, that an irregularity in the auction will not vitiate the innocent purchaser's title and that the chargor can only pursue a remedy in damages; that the sale was never challenged in the High Court; that no fraud was proved and that the 3rd and 4th respondents were purchasers for value and without notice, darlings of the court, a phrase used in past decisions to describe innocent purchasers for value and without notice.

Although an old hat, it bears repeating that on first appeal this Court will treat the appeal as a retrial by reconsidering the evidence a fresh and drawing its own independent conclusion, and will not be bound to follow the trial court's findings of fact if it appears that those findings did not take into consideration material facts or took irrelevant facts into consideration. See **Selle & Another** v **Associated Motor Boat Co.Ltd and others** (1968) EA 123. It is common ground that on 5th August, 1996 the appellant executed an agreement in which he acknowledged receipt of Kshs.3,000.000/= from the 1st respondent as a loan. It was a term that the loan which was subject to 22% per annum interest would be fully paid by 31st July 1997. The loan was secured by a fixed mortgage over the suit property. In default of settlement, it was further agreed, the terms contained in the legal charge would apply. On the same day the parties executed a charge in which the appellant undertook to repay the loan together with interest. In clause 7.1 it was agreed that, subject to the provisions of **sections 74** and **79** of the Registered Land Act, the debt and interest thereon shall immediately become payable and the statutory power of the lender to either appoint a receiver or sell the suit property shall forthwith become exercisable if, among other things, the appellant defaulted in the repayment after a notice had been served on him. In clause II.I the appellant confirmed that;

> ***"11.I The Chargor hereby acknowledges that he understands the effect of Section 74 and 79 of the Registered Land Act and hereby agrees that the Lender may exercise its statutory powers of sale and of appointment of a receiver with such express variations and additions as contained in this Charge."***

We shall revert to this provision shortly, suffice, however to say here that the appellant in his testimony maintained that the effect of this clause was not explained to him. The appellant expressly admitted though that he was unable to make payments towards settling the debt due to financial difficulties. He also blamed the 1st respondent for imposing exorbitant interest.

To answer the twin issues raised in this appeal we observe from the onset that the appellant having accepted the loan along with its terms and having benefited from it cannot be heard to question its legality or even suggest that the 1st respondent, not being a bank or financial institution, could not lend money, charge interest or create a legal charge over private property. The Court in **Standard Chartered Bank (K) Ltd** v **Intercom Services Ltd & 4 others** Civil Appeal No.37 of 2003, cited with approval the following passage from **Holman** v **Johnson** (1775-1802) all ER 98 where Lord Mansfield, CJ. said:

> ***"The principle of public policy is this: Ex dolo malo no oritur actio. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."***

The appellant cannot invoke the court's protection while claiming, indeed admitting that he benefited from an illegality. We are not saying here that the transaction was illegal but simply illustrating the folly of the appellant's claim. The relationship created by the two documents in question was purely

contractual and it is their interpretation that this appeal, and indeed the trial was all about. Because the suit property was registered and a certificate of lease issued under the Registered Land Act, (repealed) its disposal could only be in accordance with that Act and any other relevant laws. Relevant to this appeal however is **section 65** of the Act, which stipulated that;

> ***"65 (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money worth or the fulfilment of a condition and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.***
>
> ***(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the charge on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.***
>
> ***(3) The charge shall be completed by its registration as an encumbrance and <u>the registration of the person</u> in whose favour it is created as its proprietor and by filing the instrument.***
>
> ***(4) A charge shall not operate as a transfer but shall have effect as a security only." (****Emphasis supplied****)***

Section 65 (5) alludes to the chargee's power of sale in case of a default. But **section 77** is the main provision for the exercise of this power. In terms of **section 65** aforesaid it was perfectly in the appellant's power to execute the agreement and charge the suit property to secure a loan so long as he acknowledged the effect of **section 74. Section 74** provides for two remedies for the chargee where there is default. After appropriate notice has been served on the chargor and still there is no compliance, within three months of the date of service, the chargee may appoint a receiver of the income of the charged property, or sell it. Of course the chargee can also elect to sue for the loan under certain conditions which are not relevant in this appeal. If the charge exercises the power of sale under **section 77** it must be done in good faith having regard to the chargor's interest. Of importance is the provision that the chargee can himself buy the charged property at an auction without being answerable for any loss occasioned thereby. Any person suffering damage by an irregular exercise of the power shall have remedy in damages. Upon registration of the transfer following a sale, the chargee shall be freed and discharged from all liabilities arising from the charge. The term "chargee" as should be apparent now is not restricted to a bank or a financial institution contrary to submissions by the appellant. A chargee is defined in **section 3** to mean;

> ***"..a proprietor of a charge".***

A proprietor, on the other hand is;

> ***"3 (a) ….***
>
> ***(b) in relation to a charge of land or lease, <u>the person</u> named in the register of the land or lease as the person in whose favour the charge is made." (***our emphasis***)***

Reference to "the person" here and in section **65 (3)** can be a natural or juristic person.

The charge in respect of the suit property was registered and appropriately entered in the register in the encumbrances section, on 29th August, 1996 with the 1st respondent as the chargee. **Section 3** of the Banking Act only prohibits persons from transacting any banking, financial or mortgage business, that is to say, the business of accepting money from members of the public on deposit repayable on demand or on the expiry of a fixed period, on current account and payment on acceptance of cheques, lending, and

investing part of the funds held on behalf of customers, unless it is an institution or approved agency, doing so with the consent of Central Bank. The 1st respondent was not in such business, neither was he a money lender or shark. The appellant himself confirmed this when he stated in evidence that the 1st respondent was his longtime friend who on occasion would lend him money and he would pay back; that on this occasion when he got an order for supplies (of goods or services) to the Government he once more approached the 1st respondent to advance him funds. This time the 1st respondent insisted on this elaborate course, executing a charge, perhaps on account of the amount involved.

On the law and evidence we answer the first ground of appeal in the affirmative; that the 1st respondent could legally create a charge on the suit property. Was the sale irregular for want of agreement on the date when it was held and in the absence of consent of the Land Control Board? On the first limb of the question we have provided the answer in the preceding paragraphs. The appellant's remedy is in damages. The transfer to the 3rd respondent was sufficient evidence that the statutory power was duly exercised and the remedy of any damage suffered as a result of irregular sale would only be in a claim for damages. See **section 77(3)** of the Act.

The uncontroverted evidence presented by the 1st and 3rd respondents was that the advertisement of the sale by public auction scheduled for Thursday 26th August 2010, was carried in ***The Star*** of Tuesday 10th August, 2010. It is their firm position that indeed the sale was carried out as scheduled. We note however that the certificate of sale dated 20th December, 2010 shows that the sale was on 5th November, 2010. This is an irregularity that, in terms of **section 77** would not affect the sale. In any case the burden was on the appellant to show that no public sale took place at all or that the sale was by private treaty. Further in the entire suit the sale was never challenged. No averment was made in the plaint to the effect that the sale was flawed. Finally clause 8.5 of the charge, the chargee was permitted, in exercising his statutory power of sale to sell the suit property even by private treaty subject only to **section 79,** on the variation of the charge.

Finally the issue of consent from the Land Control Board was brought up for the first time in the memorandum of appeal. It cannot be for us to determine it here without the trial court having considered and determined it. For these reasons we find no merit in this appeal. It is accordingly dismissed with costs.

Dated and delivered at Malindi this 30th day of October, 2015

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