



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME, & OTIENO - ODEK, J.J.A.)

Civil Appeal No. 194 Of 2011

BETWEEN

D N MAPPELLANT

AND

M K 1ST RESPONDENT

GHADIALLY & CO. ADVOCATES 2ND RESPONDENT

M W G 3RD RESPONDENT

GITONGA & CO. AUCTIONEERS 4TH RESPONDENT

KENYA COMMERCIAL BANK LTD. 5TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (Kasango, J.) dated 30th June, 2011

in

H.C.C.C NO. 24 OF 1983)

JUDGMENT OF THE COURT

1. The 1st respondent, (Mungania Kungania), was a customer of Kenya Commercial Bank, the 5th respondent. He borrowed money from the 5th respondent and executed a charge to secure the loan over his **Land Parcel No. [particulars withheld]**, (*hereinafter referred to as the suit or charged property*). The 1st respondent defaulted in the repayment of the loan whereupon the 5th respondent instructed its lawyers, the 2nd respondent, to sell by public auction the charged property. The public auction was conducted on 5th May, 1974, by the 4th respondent and the 3rd respondent bought the suit property. Subsequently, the 3rd respondent transferred the suit property to the appellant. It is not disputed that continuously from 1974 to date; the 1st respondent has been in occupation of the suit property.
2. The 1st respondent filed suit against the 5th respondent and all other respondents claiming that the statutory notice of sale issued by the 2nd respondent was fatally defective as it purported to give

- the 1st respondent a one month notice instead of the statutory three months' notice. Based on the defectiveness of the statutory notice, the 1st respondent's case is that the sale by public auction to the 3rd respondent was null and void and the 3rd respondent had no title that could legally be transferred to the appellant.
3. In the plaint filed before the High Court on 25th March, 1983, the 1st respondent sought the following declaratory orders and relief from the High Court:
- (a) A declaration that the sale by the third defendant to the second defendant was null and void.*
 - (b) The subsequent sale by the 2nd defendant to the 4th defendant was also null and void.*
 - c. Court order that Land Parcel No[particulars withheld] registered in the name of the 4th defendant be transferred to the plaintiff and in the alternative.*
 - d. The 1st, 2nd, and 3rd defendants be ordered to pay the plaintiff the value of [particulars withheld]*
 - (e) Costs of the suit.*
4. Upon hearing the parties, the trial Judge (*Kasango, J.*) delivered judgment and made the following declaratory orders:
- i. A declaration is hereby made that the sale of parcel no [particulars withheld], by the 5th defendant to the 2nd defendant was null and void.*
 - ii. A declaration is hereby made that the sale of the Parcel No. [particulars withheld] by the 2nd defendant to the 4th defendant was null and void.*
 - iii. An order is hereby issued for the rectification of the register of parcel no. [particulars withheld] to the effect that the registration in favour of M W G of 30th November, 1978, and the subsequent registration of D N M of 9th December, 1992, are hereby cancelled. The court orders that Parcel No. [particulars withheld] shall revert to the name of M K, now deceased.*
 - iv. The Land Registrar is granted leave by this court to dispense with the necessity of availing title documents of Land Parcel No[particulars withheld] in carrying out the rectification.*
 - v. The plaintiff is awarded costs against all the defendants in this suit.*
5. Aggrieved by the judgment and decree of the High Court, the appellant filed this appeal citing six (6) grounds of appeal to wit:
- (a) The learned judge erred in law and fact in the manner she considered the evidence of the appellant who was not privy to the auction by the 5th respondent and therefore occasioned the appellant miscarriage of justice.*
 - (b) The learned judge erred in law and fact by visiting the appellant with blame in an auction he did not participate in and therefore arriving at a wrong finding.*
 - (c) The learned trial judge erred in law and fact by finding that the sale herein by the 5th respondent was void when the 1st respondent herein had failed to honour his obligation.*

d. **The learned judge erred in law and fact by entertaining an auction that was time barred by virtue of the Limitation of Actions Act Cap 22 of the Laws of Kenya.**

(e) **The learned Judge erred in law and fact by disregarding the appellant's submissions and therefore arrived at a wrong finding.**

6. During the hearing of this appeal, learned counsel **Muia Mwanzia** appeared for the appellant while learned counsel **Myaga Nyamu** appeared for the 3rd respondent and learned counsel **Murango Mwenda** appeared for the 1st respondent. It was reported that the 2nd and 4th respondents were deceased and the 5th respondent was duly served. The suit against the 2nd and 4th respondents was discontinued.
7. Counsel for the appellant elaborated on the grounds of appeal. This Court was urged to set aside the judgment of the High Court. Counsel reiterated the background facts submitting that the 1st respondent had a contract with the 5th respondent whereby the 1st responded borrowed money and used the suit property as security. That the 5th respondent sold the property by public auction on 5th May, 1974. That the present suit was filed in 1983 and this was after the six year limitation period for any action based on contract. It was submitted that the issue of limitation had been raised in the submissions before the trial court but the Judge did not consider and address the same. Counsel submitted that the trial court erred in not finding that the appellant was a *bona fide* purchaser for value from the 3rd respondent who purchased the property at the auction. It was submitted that the appellant being a *bona fide* purchaser for value without notice acquired a good title from the 3rd respondent. Counsel submitted that the High Court erred in ordering cancellation of the appellant's title when the appellant did not participate in the public auction held on 5th May, 1974. It was submitted that the appellant was not privy to any irregularity in the statutory notice that gave rise to the sale by public auction. That the appellant came to know of the 3rd respondent five years after the auction and even if the 3rd respondent had knowledge of any irregularity in 1974, the same can not be imputed to the appellant. Counsel submitted that the learned Judge erred in making an inference and finding that the fact that the appellant went to the same church with the 3rd respondent implied that the appellant had notice of irregularity in the public auction where the said 3rd respondent purchased the suit property in public auction.
8. Counsel for the appellant pointed out to this Court that the 1st respondent's claim in the plaint against the 3rd and 5th respondents was based on fraud. That no allegation of fraud was made or proved against the appellant and the trial court erred in making an order to cancel the appellant's title to the charged property. That when the 1st respondent testified, he did not attribute any fault on the part of the appellant and it was an error on the part of the trial judge to make a finding cancelling the appellant's title to the suit property.
9. The appellant urged this Court to ask itself whether at the time of sale on 5th May, 1974, the statutory power of sale had arisen in favour of the 5th respondent bank. It was submitted that as at the date of the public auction on 5th May, 1974, the 1st respondent had not repaid the borrowed sum and the 5th respondent's chargee statutory power of sale had arisen and was exercisable.
10. Counsel for the appellant submitted that if there was any irregularity in the sale of the charged property, the remedy for the 1st respondent is in damages as provided in **Section 77 (3)** of the **Registered Land Act**. On the limitation period, the appellant submitted that the 1st respondent's claim was time barred as six years had lapsed from 1974 to 1983 when the suit was instituted. The appellant submitted various judicial authorities in support of its submission and distinguished the cases cited by the 1st respondent.
11. Counsel for the 3rd respondent supported the appeal submitting that the 3rd respondent was a *bona fide* purchaser of the suit property for value in a public auction conducted on 5th May, 1974. That there was no allegation of fraud made by the 1st respondent against the 3rd respondent. Counsel submitted that the trial judge did not fault the 3rd respondent and being a *bona fide* purchaser for value, the 3rd respondent did pass a clean title to the appellant. It was submitted that if at all

- there was any irregularity in the statutory notice, the remedy for the 1st respondent is in damages as provided in **Section 77 (3)** of the **Registered Land Act**. It was submitted that the trial court erred in not considering the submissions made by the 3rd respondent in arriving at its decision.
12. Learned counsel Mr. Mwenda for the 1st respondent in opposing the appeal submitted that at the heart of the appeal is whether or not a proper statutory notice was given to the 1st respondent by the 5th respondent bank to activate and accrue and exercise the statutory power of sale. Counsel submitted that the charge over the suit property was under the **Registered Land Act** and **Section 74 (1)** thereof mandated that the 1st respondent was entitled to a three month notice but the 5th respondent through the 2nd respondent firm of advocates gave a one month notice. It was submitted that the one month notice was irregular and there was no proper statutory notice that could enable the 5th respondent to exercise its statutory power of sale. It was submitted that since the purported notice was irregular, there was no statutory notice issued to the 1st respondent and the power of sale did not accrue and was not exercisable.
13. For the 1st respondent, it was submitted that the purported sale by public auction on 5th May, 1974, pursuant to an irregular notice was null and void. It was submitted that the foundation upon which the auction was held was a nullity and all subsequent actions based on the null and void sale were also null and void. It was emphasized that the 3rd respondent did not acquire any title to the charged property by auction and she did not have any title that could be transferred to the appellant as a subsequent purchaser. It was submitted that a transaction that is null and void cannot pass and confer any title.
14. On the issue of limitation of actions, it was submitted on behalf of the 1st respondent that the present claim is for recovery of land and the limitation period is 12 years from 1974. That the present suit having been filed in 1983, the 12 year limitation period had not lapsed. It was further submitted that the appellant in his defence filed in the High Court did not specifically plead limitation as is required under the provisions of the **Civil Procedure Act** and the **Limitation Act**. Counsel cited various judicial authorities in support of its submission and faulted the trial judge in not considering the alternative relief claimed in the plaint.
15. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle -vs- Associated Motor Boat Co., [1968] EA 123**, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions”.

This Court stated in **Jabane – vs- Olenja. [1986] KLR 661, 664**, thus:

“This Court ... will not lightly differ from the findings of fact of a trial judge ...and will only interfere with them if they are based on no evidence... see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870.”

16. We have considered the rival submissions made by counsel and examined the evidence on record and the judgment of the trial court. We have considered the authorities submitted by counsel in support of their respective submissions.

17. The learned Judge in granting the orders sought in the plaint expressed herself as follows:

“The 5th defendant through its agent gave the plaintiff one month’s notice instead of three months’ notice as required by the law. No valid sale of the charged property could proceed from such an invalid notice. In respect of the 1st issue, I find that the sale of the suit property to the 2nd defendant was unlawful and void. The 4th defendant pleaded that he was an innocent purchaser without notice. One of the special conditions of the agreement for sale between the 2nd and 4th defendant...recognized that there was

someone in occupation of the suit property. The 4th defendant in evidence also confirmed that he observed the suit property from the road side because he knew that the plaintiff was in occupation. In my view, the 4th defendant cannot be described as innocent. He said when he purchased the land from the 2nd defendant; he did so taking a risk. This would suggest that he knew the plaintiff had a right over the suit property but he chose in any event to take a risk with the purchase. I would state that the 4th defendant was obligated and had a duty to make inquiry in respect of the plaintiff's occupation of the suit property. In law, it would be taken that the 4th respondent had notice of the plaintiff's occupation and in failing to make further inquiries in respect of that occupation will lead this court to find that he purchased the suit property with notice. It is because of that notice that I determine the 2nd issue in the affirmative. That is, the unlawfulness of the 2nd defendant's purchase affects the 4th defendant's purchase of the suit property".

18. We hereby evaluate the appellant's contention that the learned Judge erred in finding that because the appellant and the 3rd respondent go to the same church, the appellant had knowledge of irregularity in the auction conducted on 5th May, 1974. With respect, we differ with the submission of the appellant on this assertion. It is clear from the judgment that the finding that the appellant had notice is based on the fact that the 1st respondent was in occupation of the suit property at the time when the appellant was purchasing the property from the 3rd respondent. The trial court stated correctly that the 4th appellant cannot be described as innocent because he knew the 1st respondent was in occupation of the suit property and the appellant had a duty to make inquiry in respect of the 1st respondents' occupation. It is our finding that the trial judge did not err in holding that the appellant was not an innocent purchaser; he had knowledge of the 1st respondents possession and occupation of the suit property. It was his obligation to inquire into the nature and extent of the 1st respondent's claim and right to occupation of the suit property. He failed to do so and equity does not assist the indolent.

19. We now consider the issue of limitation of actions. It was submitted that the relationship between the 1st respondent and the 5th respondent was borrower lender relationship juxtaposed on the bank customer relationship; that this is a commercial contractual relationship wherein the suit property was used to secure the borrowed sum. The appellant submitted that the 1st respondent claim against the 5th respondent is founded on contract and all other parties to this suit have their claims or defenses' based on contract. We note that there are different contracts that affect the suit property and the critical issue is at what point in time did the cause of action arise in this suit as against each and every defendant before the High Court? Was it when the public auction was conducted, was it when the 3rd respondent became the registered proprietor or was it when the 3rd respondent transferred the property to the appellant? From the facts of this case, it is not in dispute that the 1st respondent has always been in possession and occupation of the suit property. From the submission by the parties in this appeal, it is an arguable question of fact as to whether the cause of action relates to recovery of land or whether the cause of action is based on contract. The trial court did not pronounce itself on this issue and we have no benefit of its decision.

20. The final issue for our consideration is the submission by the appellant that if at all there was any irregularity in the sale by public auction, the remedy of the 1st respondent is in damages as provided under **Section 77 (3)** of the **Registered Land Act. Section 77 (3)** of the **RLA** provides as follows:

3. A transfer by a chargee in the exercise of his power of sale shall be made in the prescribed form and the Registrar may accept it as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising such power".

21. The appellant cited the several persuasive cases such as **David Ngugi Muthia – v- Kenya Commercial Bank & Another, HCCC No. 304 of 2001** in support of the submission that he had acquired

a good title despite defect in the statutory notice. The case of Hilton Walter Nabongo Osinya & another – v- Savings & Loans (K) Limited & Another Nairobi, HCCC No. 274 of 1993 was also cited. Other cases cited were John Nudati Kariuki t/Johester Merchants – v- National Bank of Kenya Limited, Civil Appeal No. 306 of 2005; Joseph Kinoti Marete – v- IDCD & 2 Others, Civil Appeal No. 89 of 2006 and Mrao Limited – v- First American Bank of Kenya Ltd. & 2 Others, Civil Appeal No. 39 of 2002.

22. Counsel for the 1st respondent distinguished the cases cited by the appellant stating that they were rulings in interlocutory applications for injunctions and most were High Court decisions not binding on this Court. On his part, counsel for the 1st respondent cited the case of Kyangavo –v- Kenya Commercial Bank Ltd. & Another, (2004) 1KLR 126 and Trust Bank Ltd. – v- Eros Chemistry Ltd., (2000) EA 550.

23. We note that the charged property is subject to the provisions of the Registered Land Act (now repealed). We are cognizant of the decision of this Court in the cases of Trust Bank Limited – v- Eros Chemist Ltd & Another, (C.A. No. 133 of 1999; Trust Bank Limited – v- Kirani Ramji Kotedia, (C.A. No. 64 of 2000) and Trust Bank Ltd. – v- George Ongiya Okoth, (C.A. No. 177 of 1998). In all these cases, the Court of Appeal held that the statutory notice must stipulate that the sale will take place after the lapse of three months from the date of the notice otherwise the notice will be invalid. In the instant case, the notice given was for one month.

24. In the case of Nyangilo Ochieng – v- Fanuel B. Ochieng, Civil Appeal No. 148 of 1995, the Court of Appeal dealing with an appeal concerning property registered under the Registered Land Act, Cap 300 of the Laws of Kenya, held that a statutory notice which did not comply with the provisions of Section 74 (1) of the said Act rendered the subsequent sale based thereon void and accordingly the auction purchaser did not acquire a proper title to the property sold to him at the auction. We note that the cases cited by the appellant relate to parcels of land whose substantive law is Transfer of Property Act (TPA). Guided by the decision in Nyangilo Ochieng – v- Fanuel B. Ochieng, Civil Appeal No. 148 of 1995, we find and hold that the sale by public auction conducted on 5th May, 1974 was null and void and was not capable of passing any proper and legal title to the 3rd respondent. The subsequent sale to the appellant by the 3rd respondent is also null and void. We find that the trial Judge did not err in the findings made. The upshot is that this appeal has no merit and is dismissed with costs. The appellant and 3rd respondent shall bear the costs of the 1st respondent. There is no order as to costs for or against the 5th respondent.

Dated and delivered at Nyeri this 19th day of March, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR