IN THE COURT OF APPEAL AT MOMBASA

CORAM; KARANJA, OUKO & KIAGE JJ.A

CIVIL APPEAL NO.43 OF 2011

BETWEEN

DAVID KATANA NGOMBE.....APPEALLANT

SHAFI GREWAL KAKA.....RESPONDENT

(Appeal from Judgment and Order of the High Court of Kenya at Malindi (Lady Justice H.A Omondi) dated 14th December,

2010

in

H.C.C.C. NO. 66 OF 2006)

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JUDGMENT OF THE COURT

This is an appeal against the judgment of the High Court (H. A. Omondi, J) delivered on 14th December, 2010 declaring Shafi Grewal Kaka (the respondent) the registered owner of the suit property, ***KILIFI/ROKA/1098*** and an order directing ***David Katana Ngoma*** *(the appellant)* to vacate the said property within ninety (90) days of the date of the judgment.

The relevant antecedent facts giving rise to this appeal as can be discerned from the pleadings are not contested. The respondent's case was that he learned through a public advertisement in two local daily newspapers that the appellant's property known as ***KILIFI/ROKA/1098***, measuring

5.017 hectares or thereabouts together with all the developments thereon was due for sale in a public auction on Friday of 30th August, 1996 at 11.00am at the offices of the auctioneers known as ***Nadhia Limited*** situated at Utalii House, 1st floor, room 101. The advertisement was to the effect that the auctioneer had been instructed to sell the suit property by the Industrial & Commercial Development Corporation *(ICDC)* the *Chargee*, (not a party to the suit) who were exercising their statutory power of sale. The respondent being interested attended the auction on the date, at the time and place advertised and upon emerging the highest bidder, did purchase the property at Kshs. 530,000/=, whereupon he was issued with the Certificate of Sale dated 5th December, 1996 by the said auctioneer and subsequently upon transfer issued with certificate of title. Following this transfer, the respondent issued demand notices through his then advocates to the appellant to vacate the property, but the appellant sought his indulgence which he acceded to on humanitarian grounds and granted him six months to vacate the suit property.

The respondent's further contestation was that after waiting for over ten years, the appellant not only reneged on his promise to vacate the property but also reasserted his claim to be the registered owner of the suit property.

The appellant on his part admitted that the suit property was used as security for a loan of Kshs. 200,000 advanced to Tototo Maize Millers in which he was a director but maintained that the loan was fully repaid and the account had a credit of Kshs. 977/= . He also denied ever asking for indulgence from the respondent to stay on the property while making arrangements to vacate; that if the subject property was advertised and sold to the respondent through a public auction as alleged, then the sale was not only fraudulent but also fundamentally flawed as he was never issued with the requisite statutory notices before the sale and that the auction was conducted in an office (not a public place) in Nairobi far away from Kilifi where the suit property is situated.

Having been frustrated by the appellant in the manner outlined above, the respondent instituted HCCC NO. 66 of 2006 against the appellant for vacant possession.

After hearing the parties and their advocates' submissions, and upon consideration of the authorities cited by counsel, the learned Judge entered judgment in favour of the respondent and made the following determination on the broad issues raised in the action.

> **"What is presented before this court is a printed cutting purporting to be an advertisement- it is not clear which newspaper carried out the advertisement or even the date of such advertisement. I however agree with Mr. Wameyo that it was not the duty of the Plaintiff to issue a Statutory Notice to the Defendant, that lay squarely with ICDC. However the existence of the statutory notice becomes crucial because the validity of the sale revolves around it as was aptly observed in the HCCC 293 of 2006, Elizabeth Wambui Njuguna v. Housing Finance of Kenya Limited...**
>
> **...The omission to serve a valid statutory notice is a fundamental breach of statute. The only catch here is that Defendant has not joined ICDC to this suit, so as to make them accountable regarding the statutory notice and this is what distinguishes the present scenario from Wambui Njuguna case, because in the earlier case, the finance institution was actually a defendant.**
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> **..Another distinguishing feature is that the Defendant here has not filed any application or counter claim to set aside the sale or declare the same null and void. If ICDC had been enjoined as party to this suit, it would have been under an obligation to show how the statutory notice of sale was served, and its non joinder, thus making the issue raised by the defendant on mandatory statutory notice of sale between him and the Plaintiff, to be a non-starter.."**
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> On the contention that the sale was vitiated by fraud, the learned

Judge said:

> ***"..Was this a fraudulent deal between the Plaintiff, the auctioneer and ICDC? The particulars of fraud were not pleaded by the defendant..again the non joinder of the finance institution and the auctioneer makes his claim end up being a chase after the wind...***
>
> ***...Mr. Kiarie argues that this was just an arrangement in the offices of an auctioneer based in Nairobi and which is why land in Kilifi was being sold in Nairobi...yet again without***
>
> ***pleading the particulars of fraud and ICDC, that remain allegations from the bar...what is presented is that the defendant did secure a loan from ICDC using his title as security...the loan was for Ksh.200,000/= and he executed...***

...Plaintiff has produced the charge instrument to demonstrate how he acquired the property by way of transfer from ICDC after the auction. Really the Defendant can only have himself to blame. If he was dissatisfied with the actions by ICDC, then he should have made them a party..No fault can be visited upon the Plaintiff for all the woes Defendant alleges...."

It is this finding that provoked this appeal in which eleven grounds have been raised. By a consent order of this court dated 20th March, 2014, both parties agreed to have the appeal determined by way of written submissions. Both parties appeared before us on 21st of July 2014 when Mr. Omagwa Angima for the appellant and Mr. William Wameyo for the respondent further found no need, in view of the clear issues in controversy, to highlight the written submissions but simply adopted them.

This is a first appeal. We are, in law obliged to analyze the evidence presented in the superior court afresh, in order to come to our own

independent conclusion, as was observed in the case of ***Selle and Another***

vs. Associated Motors Boat Company Ltd and Others (1968) EA 123, where the court stated the jurisdiction of this court on first appeal as follows:

"An appeal to this Court from a trial of theHigh 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hemeed Seif vs. Ali Mohamed Sholan (1955), 22

E.A.C.A. 270)."

We have read and considered the record of appeal, the rival submissions and the relevant law as articulated in the written submissions. Of the eleven (11) grounds raised in this appeal, we consider the following four to sum up the appellant's grievance with the decision of the High Court. *(1)* Whether the statutory power of sale was properly exercised by

ICDC.

(2) Whether fraud was committed and whether the respondent was involved.

(3) Whether failure to join ICDC in the suit was fatal.

(4) Whether the learned Judge misdirected himself on the evidence thereby arriving at a wrong conclusion.

The appellant in this case was one of the directors of Tototo Maize Millers who had applied for a credit facility in the sum of Ksh. 200,000/= from ICDC. The said loan was secured by the suit property owned by the appellant. It appears that Toto Maize Millers failed in its obligation to service the loan provoking the chargee (ICDC) to exercise its statutory power of sale under ***Section 74*** of the repealed Registered Land Act (Cap

300) by selling the suit property through an auction.

Section 74 of the ***Registered Land Act Cap (300)*** which was applicable at the time provides as follows:

> ***74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.***
>
> ***(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –***
>
> ***(a) appoint a receiver of the income of the charged property; or***
>
> ***(b) sell the charged property:***
>
> ***Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.***(Emphasis ours)

From the above provision the c*hargee,* in this case ICDC was entitled to two remedies following the default by the chargor, either,

(a) to appoint a receiver ; or

(b) to exercise its statutory power of sale.

Before the *chargee* invokes the use of any of the two remedies above, by dint of ***Section 74(1) of RLA***, the chargor must be in default for a continued period of one month and having been served with a notice in writing requiring him to pay the principal sum. Even then, it is only after the chargor fails to comply within **(3)** three months of the date of service with the aforementioned notice, that the chargee may either appoint a receiver or sell the property charged in exercise of its power of sale.

The sole accusation against the respondent is that he participated in a fraudulent sale. Mr. Angima, submitted that there were no statutory notices hence ***Section 74*** of the Registered Land Act was not complied with. He also submitted that before participating in the sale, the respondent should have investigated the title or made inquiries to ensure that indeed requisite default notices were issued to the appellant.

Mr. Wameyo on the other hand argued that the respondent is an innocent purchaser for value without notice; that it was the chargee, (ICDC) and not the respondent that was duty-bound to issue the requisite notices. We respectfully agree that the obligation to issue statutory notices ahead of imminent exercise of power of sale rests with the chargee. The question that naturally follows is whether ICDC complied with **Section 74** of the RLA.

That question ought to have been put to ICDC. But ICDC was not a party to the suit and we cannot assume either way that there was or there was no compliance with **Section 74** aforesaid. We, however, know that in terms of **Section 77 (3)** and **(4)** even if we were to find that there was irregularity in the exercise of the respondent's power of sale, in the circumstances of this case the appellant's remedy would only be in an award of damages. The section provides that:

> ***77. (3) A transfer by a chargee in 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 the power.

(4) 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, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee has consented in writing). (our emphasize)

The expression of this Court in the case of ***Mbuthia vs. Jimba Credit Finance Corporation & Another*** [1988] KLR 1 bears repetition. In that appeal Platt and Masime, JJA held in the Court's majority decision that a purchaser who had not registered his interest would be treated differently from one who had concluded the conveyance by registration of the transfer in his name. It is illustrative however that the entire bench was in agreement that the equity of redemption is lost on the completion of a valid agreement for a valid sale and eventual registration.

We cite the case of ***Captain Patrick Kanyagia and Another vs. Damaris Wangechi and others*** 1995 eKLR, Civil Appeal No. 140 of 1993 only to emphasize this point. Shah, JA who delivered the leading judgment reiterated that:-

"Although Apaloo, J.A. (as then was) differed with Platt, J.A. and Masime, Ag. J.A. (as they then were) (in the Mbuthia vs. Jimba Credit Finance Corporation) case) in the end result, all three Judges were ad idem on the issue as to the extinguishment of the equity of redemption upon the execution of a valid contract of sale in the exercise of Statutory Power of Sale. That is the law when the land is held under Registered Land Act (Cap 300)."

The learned Judge was categorical that no duty was cast on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. Accordingly, we find support in the above authorities and hold that the respondent as an intending purchaser at an auction sale had no duty to inquire into the rights of the c*hargee* to sell. The appellant lost his right of redemption under ***Section 72*** of the ***RLA*** when the property was sold by public auction, transferred and consequently registered in the respondent's name. In this case, by seeking remedies from the respondent and not ICDC, the respondent's sword is directed at the wrong target, insulated by a statute.

Contrary to the appellant's submissions, the record reveals that the evidence submitted by the respondent in support of his case included a copy of the advertisement from a newspaper, a Certificate of Sale from the auctioneer dated 5th December, 2006, transfer by chargee in exercise of power of sale and a Title Deed No. **KILIFI/ROKA/1095** in the name of the respondent. The respondent gave oral evidence that the advertisement was carried in both the Nation and the Standard Newspapers. The evidence was examined by the learned Judge who had the benefit of a firsthand evaluation of the documents to ascertain their authenticity and veracity and in the absence of any contradictory evidence from the appellant, we are convinced that the learned Judge made a proper determination that the sale was regular.

Regarding submissions that the property was sold in Nairobi and not at the coast where it is situated, we note that the Auctioneers Act (No. 5 of 1996) which was in force at the time of the sale did not specifically restrict the business of an auctioneer to a particular area. It would, however, appear from the provisions of **section 20** of that Act the place of business in respect of which the licence is granted and the district or districts to which it related had to be shown in the register of licences. From this, therefore,an auctioneer would have multiple places of business in various districts. The auctioneer in this appeal was not a party to the suit the subject of this appeal and there is no evidence that his licence did not cover Nairobi and/or Kilifi.

Under that law, it was enough to advertise the date, time and place of sale. **Section 21** only required that such sale had to take place on the date, at the time and place so advertised. This, from the evidence on record was complied with. Fraud as against the respondent was neither particularized, nor proved

although pleaded. No evidence was presented to show that the respondent, either alone or in collusion with ICDC and/or the auctioneer did any act that amounted to fraud.

Section 143(1) of ***RLA*** provides that:

> ***"(1)*** **Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**
>
> **(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.*"***

Further, by the provisions of ***Sections 108 & 109*** of the ***Evidence Act (Cap 80),*** the burden of proof of the allegations squarely fell on the appellant who failed to discharge it.

It is a firmly established rule of pleading that a judgment and remedies must flow from pleadings and that a court of law will determine

only pleaded issues .In ***Galaxy Paints Company Ltd V. Falcon Guards Ltd,*** Civil Appeal No. 219 of 1998, the Court stressed this point saying:-

> ***"The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising or such issues as the parties framed for the court's determination."***

The record in this case does not show any statement of defence or amendment to the statement of defence or counter claim requesting for the cancellation of the title or a nullification of the sale.

The appellant did not file any counter claim or an application to cancel the sale and declare it null and void. The judge was therefore correct in limiting her determination to matters set out in the pleadings and canvassed for determination before her.

A court of law in adversarial system as ours cannot venture into the arena of litigation on behalf of the parties. The presumption is that the parties understand their claims, their cause of action and those whose actions have aggrieved them. It is not the business of the court to invite parties for contestation before it and thereafter declare the winner in a judgment.

It is noteworthy that, in **Paragraph 8** of his statement of defence the appellant intimated as follows:

> **[8] The Defendant further states that he shall at the appropriate time seek leave to enjoin Industrial Commercial Development Corporation as a third party so that the court can conclusively determine the issues raised in the plaint and what is herein above pleaded.."** (emphasis ours)

The appellant was well aware of the need to join ICDC in the suit but failed to do so.

It is a cardinal rule of evidence that where a party fails to call a critical witness, the court is free to draw

an inference that the witness if called would have given adverse evidence against the party who failed to call the witness.

This matter being so much about a residential property, the only inference that can be drawn from the appellant's reluctance or failure to join ICDC or the auctioneer is that the evidence that would have been presented to the court as a result of such joinder would not have been favourable to the appellant. From the moment the respondent visited the suit land and the subsequent exchange of letters between his advocates and the appellant's advocates, if indeed the appellant was aggrieved, he ought to have been the

first party to institute an action against ICDC and all those involved in the sale of the suit property.

Finally, the appellant's claim that he had settled the loan account with ICDC which reflected a credit balance of Kshs. 977/- is, once again without evidence. The evidence accepted by the learned Judge, that the credit balance in the appellant's account was the effect of credit into that account with the sale proceeds, appears to us to be more plausible.

There was, we hold, no duty on the part of the learned Judge to order the joining of any party to the proceedings.

For these reasons, this appeal lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 10th day of October 2014.

W. KARANJA

…… JUDGE OF APPEAL

W. OUKO

…… JUDGE OF APPEAL

P.O. KIAGE

…… JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mgkm