IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, KEIWUA & NYAMU, JJA)

CIVIL APPEAL NO 253 OF 2004

BETWEEN

CAPTAIN J.N. WAFUBWA.....APPELLANT

AND

HOUSING FINANCE CO. OF KENYA.....RESPONDENT

(An appeal from the decree of the High Court of Kenya at Nairobi (Njagi, J) dated 23rd September 2003

in

H.C. MISC. C. NO. 660 OF 1997

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JUDGMENT OF OLE KEIWUA, J.A.

The appellant, Captain James Nyongesa Wafubwa, sued the respondent, Housing Finance Company of Kenya Limited, in a suit brought under **Order XXXVI** of the Civil Procedure Rules. The Originating Summons was filed in the superior court on 3rd July 1997, seeking a declaration that the charge dated 16th October 1989 over land parcel Number 109/20481/85, Nairobi **(charged property),** charged to the respondent by the appellant has been fully redeemed and that the respondent be ordered to re-convey to the appellant the aforesaid land and that the respondent executes all requisite documents to facilitate the registration of the re-conveyance and that the costs of the suit be borne by the respondent.

The appellant swore an affidavit in support of his originating summons in which he affirmed that he was the registered owner of the charged property, which he charged to the respondent on 10th October 1989. The appellant also averred in that affidavit, that due to financial constraints, he was unable to keep up with the loan monthly repayments. Though the appellant made attempts to clear the loan, he was unsuccessful in that regard and the respondent threatened to realize the security and indeed gave instruction for that purpose on 5th September 1996, in consequence of which the charged property was sold on 8th November 1996, for Kshs. 4,500,000/= of which Kshs 1,125,000/= was paid as deposit, representing 25% of the purchase price.

The appellant indicated that on the date of the auction of the charged property, the amount of the loan still outstanding was Kshs 1,006,434.45. He also stated that the deposited amount of Kshs 1,125,000/= was

credited to the loan account with the result that the outstanding loan, auctioneer's and advocate's charges were debited to the same account. The appellant also stated that the purchaser, has not to the best of his knowledge, completed the sale and as a result the appellant has not been paid the balance of the purchase price.

The appellant says he is also aware that the 25% deposit has been forfeited upon failure of the purchaser to complete the sale. The appellant is also aware that the respondent had on 30th May 1997, instructed for the charged property to be put up again for public auction which the auctioneer notified that it will be sold on 11th July 1997.

The appellant appears to have gone silent as to whether the property was sold or not. For his next complaint is that since the payment of the 25 % deposit, the respondent has never made any demand on him to repay the loan. He believed the reason for that is because the deposit paid in the first sale, covered the loan and all incidental costs to leave a credit of Kshs 20,662.80.

This meant that the mortgage is fully paid and the respondent therefore has no legal basis upon which to sell the charged property again. The appellant said he resided in the charged property and prayed that the respondent be restrained from illegally selling the same before the hearing and determination of the suit.

The respondent filed grounds of objection to the application for injunction. It indicated that the appellant was not entitled to redeem the charged property in that he has not cleared the total outstanding and had not met the conditions set out in the charge document which are clear. The charged property will only be re-conveyed to him upon payment of the total amount outstanding and until that happens the respondent was entitled to sell the same by public auction.

The respondent draws attention to the default clause in the particulars and conditions of sale. The clause stipulated that the deposit will be forfeited to the chargee absolutely in the event that the purchaser fails to pay the balance of the purchase price. The respondent also avers that the deposit was never credited to the appellant's account; the same was put in a suspense account awaiting completion of the transaction. The purchaser was unable to complete and there is a dispute between the purchaser and the respondent herein.

The deposit by the intending purchaser cannot be resorted to clear the appellant's account with the respondent because the same is being demanded back and in any event, that amount was not paid by the appellant, whose account with the respondent at the time of going to court, reflected an outstanding amount of Kshs 1,378,202.45. That translates to outstanding arrears of Kshs 628,936.05. The appellant was advised to repay the total amount of the loan or sell the property by Private Treaty but declined to pursue any of the options.

The foregoing sets out in summary the issues which were before the learned Judge, who in a judgment delivered on 23rd September 2003, found as follows:-

"Whatever other remedies that the plaintiff may be entitled to, such a claim for damages, I do not think that he is entitled to the prayers he has sought. His action must therefore fail for the simple reason that he failed to redeem his property. The same was sold in the exercise of a statutory power of sale, and his right of redemption was extinguished upon the fall of the hammer at the auction sale. Therefore he is not entitled to a re-conveyance of the same. This case is dismissed with costs."

It is from these determinations that the appellant has preferred this appeal to this Court, in respect whereof he has mounted some fifteen grounds of appeal. The grounds ranged from complaints that the learned Judge misapprehended the type of charge instrument involved and the type of power of sale applicable and misconceived the fact that the law must be applied selectively from one chargee to another. The learned Judge is being faulted for invocation of laws which have since ceased to have application to the charged property or applied statutes like the Registration of Titles Act whose charge instrument is statutorily inapplicable to the respondent which falls under the mortgage finance institutions.

The other group of grounds is that the learned Judge erred when he failed to order a re-conveyance of the certificate of title due to the fact that the charge instrument was tainted with fraud or misrepresentation to give the false impression that the respondent is lawfully in possession of the charged property. The learned Judge is also faulted for not ordering the re-conveyance for the mere fact that the appellant failed to abide by the conditions of the charge instrument and misdirected himself in not ordering a re-conveyance after the chargee lost the statutory power to sell and lost any interest in the property after the fall of the hammer.

The learned Judge is also said to have misdirected himself in failing to appreciate that the Registration of Titles Act, the Registered Land Act and the Indian Transfer of Property Act do not apply to the type of charge created herein. The learned Judge is further said to have erred for ordering the appellant to pay the costs of the suit when the only means open to the appellant to protect his interest is by way of that originating summons.

The respondent submitted before us, that the right on the part of the appellant to redeem the charged property, was lost because the statutory notice as required by law has been served and service thereof admitted by the appellant who also admits that the auction of the charged property has been validly held. It is also important to note that since the appellant's claim is for a re-conveyance of the charged-property, there is therefore no basis in his pleadings for a claim for the payment of money. It is simply not pleaded.

The charge over the charged property was made on 16th October 1989 and it is made under the Registration of Titles Act Cap 281 of the Laws of Kenya. That charge was signed by the appellant. The same charge has a certificate by Mr. M. N. Nganga advocate, who certified having explained to the appellant the effect of sub-**section 1** of **Section 69** and **sub-section (1)** of **section 100A** of the Transfer of Property Act of India as incorporated therein by the Indian Transfer of Property Act (Amendment) Act 1959 of Kenya.

It is therefore incorrect to state, as the appellant does, that the Registration of Titles Act or the Indian Transfer of Property Act as applied aforesaid has ceased to have application to the charged property. Needless to point out, the appellant did understand the invocation of these provisions under the charge and after which he willingly accepted their application and his signature was appended thereon.

The main prayer in the suit is for a declaration that the charge herein has been fully redeemed. Turning to the judgment of the learned Judge, we think he correctly found that the charged property was sold after the appellant acknowledged his own failure to redeem the same and as a consequence thereof, the same was sold in exercise of the statutory power of sale. We also do not think that in all the circumstances of this case, there is any justification for any aspersion of fraud or misrepresentation against the respondent.

There is accordingly no ground upon which we could order the respondent to re-convey the charged property to the appellant. That being the position, we see no reason of awarding costs to the appellant because costs usually follow the event and nothing has been shown to persuade us to depart from that well established principle. In which event, we dismiss the appeal with costs and it is so ordered.

Dated and delivered this 11th day of February 2011.

M. OLE KEIWUA

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JUDGE OF APPEAL

JUDGMENT OF NYAMU, J.A.

I have had the advantage of reading in draft the judgment of Keiwua, JA. While I agree with the outline

of the facts as per the judgment, I do not agree with the conclusion. The reason for my respectful dissent, is that since the sale transaction which is said to have extinguished the appellant's right of redemption has not been finalized and there is a pending suit in the superior court between the respondent as chargee and the purchaser and one of the issues pertains to whether or not the purchaser did complete the transaction, a doubt exists as to whether the right of redemption could in the circumstances be said to have been extinguished. My understanding of the law on the point is that the right of redemption is only extinguished by the existence of a valid contract of sale. It follows therefore if the validity of the contract is under challenge in the superior court one cannot conclusively state at this stage that the right of redemption has been extinguished.

I have reached this decision by applying the substantive dimension of the overriding objective (***O_2 principle***) because in the circumstances it is my belief that this is the decision which on the facts of the case satisfies the demands of justice. In my view procedural inhibitions should not be allowed to defeat the demands of substantive justice which in this case calls for a final determination by the superior court on the issue of the right of redemption and an order for accounts as between the two parties.

In the circumstances, the order which commends itself to me is to remit the matter to the superior court which I hereby do for the court to take accounts as between the two parties and to make such orders as it may deem fit concerning whether or not the right of redemption had in the circumstances been extinguished bearing in mind that the appellant has also been in possession of the premises to-date.

In the circumstances I would give no order as to costs.

DATED and delivered at Nairobi this 11th day of February 2011.

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF TUNOI, J.A.

I have had the advantage of reading in draft the judgment of Keiwua, J.A. with which I am in entire agreement and I have nothing useful to add.

I also agree with the orders proposed by him.

Consequently, the order of the Court is that this appeal be and is hereby dismissed with costs.

Dated and delivered this 11th day of February, 2011.

P. K. TUNOI

JUDGE OF APPEAL