IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, BOSIRE & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 164 OF 2002

BETWEEN

MARCO MUNUVE KIETI …….…….....APPELLANT

AND

OFFICIAL RECEIVER AND INTERIM LIQUIDATOR RURAL URBAN

CREDIT FINANCE …….1ST RESPONDENT

JAMES MWANGI WAINAINA ……...…..2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Shah, J.) dated 13th August, 1995

in

H.C.C.C. NO. 5152 OF 1990)

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JUDGMENT OF THE COURT

This is a first appeal. The appellant ***Marco Munuve Kieti*** was the plaintiff in the High Court Civil Suit Number 5152 of 1990 filed at Nairobi. He sued the ***Official Receiver*** and ***Interim Liquidator (Rural Urban Credit Finance)*** and ***James Mwangi Wainaina***, the first and second respondent respectively vide a plaint which was amended on 5th February 1992. The first respondent denied the allegations against him in that plaint in a statement of defence dated 9th February 1993. The second respondent filed a defence and a counter-claim dated 15th January 1993. In the counter-claim, the second respondent, while praying for dismissal of the claim against him, also sought two orders against the appellant which were that the appellant be evicted from the suit premises and that the appellant be condemned to pay *mesne* profits to him with effect from 26th June, 1991. The suit was placed before Shah J. (as he then was). After hearing the appellant, the representatives of the first respondent, and of the auctioneer together with the evidence of the second respondent and submissions by respective counsel, Shah J. in a judgment delivered on 18th August 1995 pursuant to the provisions of ***section 64 (4)*** of the Constitution of Kenya, (as he had by that date been promoted to the Court of Appeal), dismissed the appellant's suit with costs but allowed the second respondent's counter-claim with costs. In doing so, the learned Judge stated inter alia as follows:-

"In the end result the plaintiff's suit is dismissed with costs. The plaintiff will pay mesne profits to the second defendant by way of interest at 12% per annum on the sum of Kshs.420,000/= from 1st July 1991 until the date the plaintiff vacates the suit premises (Nairobi/Block 74/91). The plaintiff will vacate the said suit premises on or before 30th September 1995, failing which the second defendant will be at liberty to have the plaintiff or any other person or persons in occupation of suit property evicted by court bailiffs. To leave no room for doubt I say that the plaintiff will pay costs of both defendants, such costs to be taxed."

The appellant was not satisfied with that judgment and hence this appeal before us premised on eleven (11) grounds. Mr. Kabaka, the learned counsel for the appellant, told us at the beginning of his submissions before us, that he was abandoning 1st,2nd, 3rd, 4th 5th, 8th and 9th grounds of appeal and would address us on the 10th and 11th grounds only. However, halfway in his submissions, he realized that he needed to address us on the 1st, 2nd, 3rd and 4th grounds as well and we obliged him to do so. We will reproduce all grounds upon which the appeal before us was based. They were that:-

"1. The Judge erred in holding that there was clear evidence of the amount of money that was advanced to the appellant as a loan.

2. In the alternative the learned Judge erred in holding that the money advanced by way of a loan to the appellant had been proved or ascertained.

3. The learned Judge erred in not believing evidence adduced by the appellant at the hearing of the suit.

4. The learned Judge erred in holding that the whole loan had not been paid.

5. The learned Judge erred in speculating that documents had been given away to the appellant in a fraudulent manner in the absence of concrete evidence.

6. The learned Judge erred in holding that the Official Receiver and Interim Liquidator (O.R) was entitled to sell the suit property by public auction, as such right, had in law arisen.

7. The learned Judge erred in holding that the suit property was lawfully and properly registered in the name of the second respondent Mr. James Mwangi Wainaina.

8. The learned Judge erred in holding that the second respondent Mr. Wainaina is bonafide purchaser of the suit property without notice and for good consideration and he is properly registered proprietor of the property.

9. The learned Judge erred in holding that there was a proper auction and duly advertised.

10. The learned Judge erred in invoking bank interest at the rate of 12% per annum as way of mesne profit to Mr. James Mwangi Wainaina the second respondent in absence of valuation report and contrary to the evidence of the second respondent as to the current value.

11. The learned Judge erred in dismissing the suit with costs and holding that the appellant is to pay mesne profits to the 2nd respondent by way of interest at 12% per annum on the sum of Shs.420,000/= (shillings four hundred and twenty thousand only) from 1st July 1990 until the date the appellant vacates the suit premises (Nairobi/Block 74/91). The discretion so exercised was unjudicial and based on wrong mathematical principle."

As we have stated above, we were not addressed on all these grounds but we have reproduced them all because, Mr. Kabaka, was not, with respect clear during his submissions as to which grounds he was urging. We will revisit that later.

The appellant applied for a loan of Ksh.200,000/= from Rural Urban Credit Finance, in June 1984. He said in the plaint and in his evidence, that only Ksh.179,992/= was actually advanced to him in two installments of Ksh.89,992/= and Ksh.90,000/=. This was disputed by the first respondent who was appointed Receiver and interim Liquidator in December 1984 after the loan by Rural Urban Credit Finance Company had been advanced to the appellant. The first respondent maintained in its statement of defence and in evidence that the amount disbursed to the appellant was Ksh.260,000/= composed of Ksh.200,000/= advanced on first request and Ksh.60,000/= advanced through its Tom Mboya branch after the main office had refused to advance it. The first respondent however stated that legal fees was deducted from the first loan leaving Ksh.189,992/= which was paid to the appellant by cheque of Ksh.100,000/= and a credit of Ksh.89,992/= to his Savings Bank Account. Whatever the exact amount that was actually released to the appellant was, the first advance was secured by a charge upon his property Number Nairobi/Block 74/91. The second advance of Kshs.60,000/= was secured through chartels mortgage on his motor vehicle KUX 918. The appellant claimed that the entire loan outstanding was duly repaid by him and payment completed by 28th November 1984 just about six months after the loan was advanced and only one month after he applied for a second loan of Ksh.60,000 which was refused by the first respondent. He produced the title deed as evidence that the loan had actually been repaid and the title deed charged to secure it had indeed been released to him vide the note dated 28th November 1984 purportedly signed by him acknowledging receipt of the subject land certificate. The first respondent, on the other hand, would hear none of that allegation. He maintained that not even a single cent of the entire loan had been repaid. His stand was that the appellant could have accessed the title deed to the property at a time when Rural Urban Credit Finance was placed under receivership and confusion took charge of the events such that members of staff and loan defaulters accessed the securities and several of them were stolen. The first respondent therefore proceeded to have the property put on sale, but after complying with the legal requirements. The subject property was handed over to the auctioneers for sale. The appellant moved to court by way of a plaint referred to above, accompanied by chamber summons seeking an injunction to stop the sale and did, on two occasions, stop the sale through interim exparte injunctive orders issued by the superior court. Thereafter, the first respondent's agents namely the Auctioneers advertised the property for sale and there being no further court order against the sale, the property was duly sold to the second respondent at a price of Ksh.420,000/=. The whole of this money was paid over to the auctioneers four days after the auction. No payment was made at the fall of the harmer. The second respondent had the property registered in his name and thus he became the registered owner of the suit property. The main suit proceeded to hearing even though the suit property had exchanged hands. The appellant however, continued to live in the property despite demands from the second respondent that he vacates the property. That is what gave rise to the counter-claim filed by the second respondent. In his address to us, Mr. Kabaka submitted that the first respondent's statutory powers of sale had not crystallised by the time the suit property was sold as the statutory notices issued to the appellant pursuant to ***sections 65 (2)*** and ***74 (1) (a)*** of the Registered Land Act Chapter 300, Laws of Kenya, were defective and could not confer that power. He thus urged us to declare the sale of his property which took place pursuant to those defective statutory notices illegal and of no effect and to order rectification of the register by directing the reinstatement of the appellant as the rightful registered proprietor of the suit land. On the provisions of ***section 77 (4)*** of the Registered Land Act Chapter 300, being drawn to his attention, Mr. Kabaka conceded that as second respondent had been registered the proprietor of the same parcel of land, it might be difficult in law to make the orders he was seeking. That is what prompted him reneging on his earlier proposal to abandon grounds 1, 2, 3 and 4 of the grounds of the memorandum of appeal. He thus urged those grounds submitting that the learned Judge was biased when he made a finding that the loan advanced was not repaid. In his view the evidence of repayment was watertight as otherwise the land certificate would not have been returned to the appellant and in any case, the note acknowledging return of the same land certificate to the appellant were all proof that the loan was repaid in full. Lastly, Mr. Kabaka challenged the order made by the superior court in respect of the prayer in the counter-claim for *mesne* profits. He contended that that order was erroneous as the award of interest at the court's rate was not equivalent to the award of *mesne* profits which was prayed for. On his part, Mr. Miriti, the learned counsel for the first respondent referred us to the record and

particularly to the appellant's evidence in cross-examination and submitted that the appellant admitted that he never repaid the loans advanced to him. Further, he said, the appellant sought a further loan very close to the date he claimed he repaid the first loan. That application was refused on the grounds that he had not repaid any part of the first loan. As to the issue of statutory notice, Mr. Miriti's submission was that, that was not an issue raised in the superior court and so was not an issue for consideration in that court. Further, he referred us to the alleged defective notices and submitted that they were clear. Finally he referred to the provisions of ***section 77 (3)*** and ***(4)*** of the Registered Land Act and stated that as the property had been registered in the name of the second respondent, the only remedy available to the appellant in law was damages which were pleaded but not proved in the superior court. Mr. Kimani, the learned counsel for the second respondent submitted that the appeal lacked merit as the appellant's equity of redemption had been extinguished by the transfer of the suit property and the second respondent is already in occupation having entered the suit property one year after the sale of the suit property to him. He stated further that there was ample evidence that the documents of title were not properly obtained by the appellant as he had not repaid the loan. The argument as to whether the statutory notices were valid or not was no longer obtaining as they were not challenged in the pleadings and at the trial in the superior court and lastly, on the *mesne* profit, he submitted that the amount awarded by way of interest at court rates was in favour of the appellant as it resulted in less amount being awarded to the second respondent than would have been awarded if the award was based on proper rent the property would have been fetching during the period the appellant was in the suit property.

The above, were the facts and the submissions before us. We have considered them, together with the entire record and the law. As we stated at the beginning of this judgment, this is a first appeal. That being the case, we are in law enjoined to revisit the evidence that was adduced in the trial court afresh, analyse it, evaluate it and come to our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing the witnesses, hearing them and assessing their demeanour and to give allowance for the same – see the case of ***Selle and another vs. Associated Motor Boat Company Ltd and others (1968) EA 123.*** The first complaint to look into is whether or not the loan advanced, were two loans or one and of whatever amount, was repaid as claimed by the appellant. The first respondent says the loan was not repaid. The appellant says he repaid the loan fully and he says that had he not repaid the loan he would not have received back his title deed. He also relies on a note in which he acknowledged receipt of the same title deed. The respondent counters that by saying that the loan was given to the appellant before the first respondent was put under Receivership. Thereafter, it was put under receivership and in the transitional period i.e. when the receivers were taking over, there was confusion, and staff together with some loan defaulters took advantage, accessed securities, removed them and thus the appellant's title deed could have been one of those, but the appellant never repaid the loan. The learned Judge of the superior court considered the evidence that was before him on this issue at length and made findings as follows:-

> ***"I was not impressed at all with Mr. Kieti's evidence. I felt whilst he was giving evidence, that he was a consummate actor. I am unable to accept that he repaid the whole loan in one month or so when on 24th October, 1984 he was still seeking a further loan of Shs. 60,000/=. Certainly there was no payment made by him in September when in October he was seeking further loan."***

The learned Judge then considered withdrawals from the Savings Account passbook of the appellant and having done so the learned Judge continued:-

> ***"Such withdrawals do not give credence to his version of full payment within a month. I hold therefore that Mr. Kieti had not paid the amounts he said he paid towards settlement of the sums advanced to him by RUCF."***

On our own, we observe from the record that in his evidence, the appellant stated in part:-

> ***"Title was given to me – original when I paid the money. There was no other document given to me to show that I had paid. "***

and further he said:-

> ***"I did not sign a discharge as I did not know the procedure…….***
>
> ***I paid the loan in cash. For two occasions I was given a receipt. As a journalist, I have a lot of papers. I have misplaced the receipts."***

and lastly on that:-

> ***"I see a schedule. I never paid any monthly sums simply because my intention was to clear the loan once and for ever."***

When all the above is considered against the backdrop that in his evidence in chief he said that he repaid part of the loan in ***September 1984*** and cleared the balance in November 1984, yet in a letter dated 24th October, 1984, he applied for additional loan of Ksh.60,000/= which was instantly refused vide a letter from second respondent dated the same date, one is bound to ask oneself an obvious question which is, if he had sufficient funds in September 1984 and thus repaid bulk of the loan in that month, how come in October 1984, he required additional loan and when refused he moved to Tom Mboya branch for the same loan. From where did he all of a sudden muster enough funds in November, 1984, one month after he needed additional loan to clear the balance of the original loan of Ksh.200,000, he claimed was not given to him in full? In any event why was the charge not discharged if the title deed was legally released to him? We have seen the letter which he alleged was used by the first respondent as authority for releasing the title to him. That was a document purportedly issued to him to acknowledge receipt of the Land Certificate. He signed it but the name of his witness and his designation are not stated. The record shows that the person purported to have signed it as a witness denied having appended his signature to it. Finally, it is not a proper legal document and would, in our view support the contention that the title deed did not get into the appellant's hands through proper legal channels. We agree with the trial Judge that there was no evidence of the loans having been fully repaid by the appellant.

That being our view of the matter and the loans advanced being one secured by the charge over the appellant's land parcel Number Nairobi /Block 74/91 and the other secured by vehicles log book, whatever amount the total was, having not been repaid, the first respondent had a right to seek to sell the securities. That the loan was advanced was certain. The appellant admitted that much. That the loan remained unrepaid was proved as we have indicated above. The above answers ground 1, 2, 3, 4, 5 and 6 of the grounds of appeal.

The next matter we need to consider is whether the suit property was properly registered in the name of the second respondent. As we have stated above, the loan was not repaid and the first respondent was entitled to take necessary procedures to sell the securities. It issued statutory notice to the appellant of its intention to do so. A copy of that notice appears in the record and it was dated 15th September 1989. Mr. Kabaka states that that notice was defective and raises that as his main ground of attack against the decision of the learned Judge. Mr. Miriti and Mr. Kimani, both respond by saying that the issue is no longer available as it was not raised and canvassed as an issue before the superior court. In any case they say it is a proper notice. We have carefully perused the record. It cannot be disputed that in the trial court, the validity or otherwise of the statutory notice was never raised. The statement of issues agreed and signed by all the advocates for all the parties was dated 20th September 1993 and filed on 24th September 1993. We have perused it carefully. We have not seen any matter raised on the validity of the statutory notice. We have also thoroughly perused and considered the pleadings, the evidence and the submissions in the record. The issue as relates to validity of the statutory notice was neither pleaded nor canvassed. The law is clear, that a court of law would normally base its decision only on the pleaded issues. The case of ***Odd Jobs vs Muhia (1970) EA 476*** decided by the Court of Appeal for East Africa, provided the only exception to that rule. It was held there as follows:-

> ***"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."***

In the matter before us, the issue of the validity of the statutory notice was neither pleaded nor left to the trial court for decision. We cannot say here what the trial court would have decided on that issue had it been an issue before it. It is however certain, that the trial court cannot be blamed for what it was never asked to decide upon. It is also certain in our minds that the appellant proceeded on grounds that nothing was wrong with the statutory notice and he cannot be heard to raise that issue here. He is estopped from doing so.

In any event, even if we were minded to decide on it and even if we were to find that the notices were not valid, still nothing would turn on that. This is because, by the time the matter went for hearing in the superior court, the suit property had long been registered in the name of the second respondent pursuant to a public auction properly carried out by the auctioneers as found by the trial court. As at the time the auction proceeded, there was no injunction order existing against the sale. That meant that as far as the suit land was concerned, the appellant's equity of redemption had long been extinguished. ***Section 77 (3)*** and ***(4)*** of the Registered Land Act (supra) state as follows:-

> ***"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 charge has consented in writing.)"***

The registrar accepted the form in which the transfer to the second respondent was made and duly registered the suit property in the name of the second respondent. In law, the appellant's equity of redemption had been extinguished and all he could possibly pursue was a remedy in damages. Mr. Miriti and Mr. Kimani cannot be faulted on their submission to that effect. Although in the amended plaint, there was a prayer for general damage, there was no attempt whatsoever made to canvass that aspect as an alternative issue at the trial of the suit. That answers grounds 7 and 8.

The appellant further raised the issue of whether the public auction was proper, particularly as the 25% was not paid on the fall of the harmer. The learned Judge of the superior court considered this issue at great length. He set out the facts and the circumstances that gave rise to the non payment of the 25% at the fall of the harmer and receipt immediately thereafter of the entire amount. He posed a question for himself which was:-

> ***"Does the auctioneer have a right to accept full payment four days later as opposed to 25% on the fall of the harmer, and the balance 60 days later?"***

After fully considering the issue in the light of the facts of this particular case, he found that in the auctioneer accepting to wait for four days and receiving the entire amount as he did instead of accepting 25% of the amount at the fall of the harmer and waiting for another 60 days to receive the balance, the auctioneer acted on the interest of all the parties and answered that question as follows:-

> ***"I see nothing in the conduct of the auctioneer and Mr. Wainaina which could amount to vitiating of the contract and I reject that argument."***

On our own, we also agree that in the circumstances of this case, where the second respondent told the auctioneer that money was available in full but he would rather pay it through his advocate which resulted into about four days lateness and full purchase price was received at once within four days, the auctioneer, who was the first respondent's agent exercised his discretion properly in not insisting on 25% down payment which would have possibly resulted into waiting for sixty days to receive the balance. We however, emphasise that this was proper only in the circumstances of this case where apparently full

payment was assured in four days time. We reject this complaint.

Lastly, on *mesne* profits, there was no dispute that the appellant continued living on the suit premises long after the second respondent had been duly registered the proprietor of the suit premises. In law, he was required to pay something for the use of the suit property which, after registration, was no longer his but was the property of the second respondent. The second respondent prayed for *mesne* profits in his counter-claim, but was unable to prove the rent payable during the period the appellant was in possession. That being the case, the learned Judge, being convinced that the second respondent, having used his Ksh.420,000/= to purchase the suit property and having had no benefits from the same property during the period the appellant remained there, was entitled to some compensation for that loss. He settled for an award of interest at court rates, which was 12%. We have agonized over this, but we are of the view that in the circumstances of this case, the learned Judge had no alternative and we have no reason to disturb that finding as indeed the said respondent was entitled to be compensated in respect of the period the appellant knowingly remained on the suit premises after it had been transferred to the 2nd respondent. There was no evidence that the appellant paid him any rent during the whole of that period he continued living therein. The clear underlying objective of any court is to do justice to parties before it and no court should ignore that.

In conclusion, having revisited the entire evidence afresh and having considered the matters of law, we find that the learned Judge's judgment was based on sound law. We have no basis for interfering with it. The appeal cannot succeed. It is dismissed with costs to both respondents.

Dated and delivered at Nairobi this 28th day of May, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR