



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI**

**Civil Appeal 155 of 2006**

**ELIJAH KIPNGENO ARAP BII ..... APPELLANT**

**AND**

**SAMWEL MWEHIA GITAU KENYA COMMERCIAL BANK  
..... RESPONDENTS**

**(Appeal from the ruling and decree of the High Court of Kenya at Nairobi (Mugo J) dated 22<sup>nd</sup>  
September, 2004**

**in**

**H.C.C.C. NO. 882 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal against the ruling of the superior court (M. G. Mugo, Ag. J – as she then was) delivered on 22<sup>nd</sup> September, 2004 allowing an application for summary judgment filed by Samuel Mwehia Gitau (1<sup>st</sup> respondent) against the appellant.

The dispute in the superior court related to land reference No. 209/9854 a leasehold property comprising of 0.1122 of a Hectare on which a dwelling house was erected (suit property). The appellant was originally the registered proprietor of the property which property was registered under the Registration of *Titles Act* (Cap 281 Laws of Kenya) (RTA). By a charge dated 18<sup>th</sup> April, 1986 and two later further charges the appellant charged the property to Kenya Commercial Bank Ltd. (bank) – 2<sup>nd</sup> respondent herein to secure an aggregate loan of Shs.3,405,000/= together with interest and other monies. The appellant subsequently defaulted in the repayment of the loan after which the bank gave a statutory notice of its intention to realize the security under its statutory power of sale conferred by the Transfer of Property Act (TPA).

On 20<sup>th</sup> February, 2003, the bank entered into an agreement with the 1<sup>st</sup> respondent to sell the property apparently by private treaty for a consideration of Shs.3,800,000/=. The agreement of sale acknowledged the payment of Shs.950,000/= prior to the execution of the agreement and stipulated the completion date as nineteenth (19<sup>th</sup>) day after the date of the agreement. However, by proviso to clause 8 of the agreement the bank had the sole and absolute discretion to extend the period for completion and payment of the balance of the purchase money on condition of payment of interest on such sums by the purchaser.

By a transfer dated 4<sup>th</sup> June, 2003 the bank transferred the suit property to the 1<sup>st</sup> respondent for a consideration of Shs.3,405,000/= and the 1<sup>st</sup> respondent was registered as proprietor on 18<sup>th</sup> June, 2003. On 22<sup>nd</sup> August, 2003, the 1<sup>st</sup> respondent filed a suit in the superior court against the appellant for vacant possession and other reliefs. By paragraph 5 of the plaint, the 1<sup>st</sup> respondent pleaded thus:

**“The plaintiff states that he attended the public auction of the suit premises on 17<sup>th</sup> January, 2003 and was the highest bidder at the auction”.**

The plaint was subsequently amended with leave given by the Deputy Registrar on 3<sup>rd</sup> February, 2004. By paragraph 5 of the amended plaint, the 1<sup>st</sup> respondent pleaded:

**“The plaintiff states that he attended the public auction of the suit premises on 17<sup>th</sup> January, 2003 and was the highest bidder at the auction but was informed by the auctioneers that the auction sale could not take place, and instead, the Bank would sell the suit premises in writing”.**

The 1<sup>st</sup> respondent pleaded further in paragraph 6 of the Amended Plaint that he submitted a bid to pay Shs.3,800,000/= which the bank accepted and subsequently entered into an agreement of sale.

The 1<sup>st</sup> respondent sought four reliefs in the amended plaint, namely:

- (a) Vacant possession of suit premises,
- (b) Damages for trespass until possession is delivered up,
- (c) Costs of the suit,
- (d) The sum of Shs.2,890,000/= comprising of Shs.540,000/= as loss of rental income; Shs.150,000 as legal fees; Shs.1,500,000/= being value of items removed from the premises; Shs.500,000/= being the costs of repairs and Shs.200,000/= being the cost of paving blocks removed.

The appellant filed an Amended Defence and counter-claim. He pleaded in paragraph 5 thus:

**“In reply to paragraph 5 of the amended plaint, the defendant states that the plaintiff’s allegations that he was informed by the auctioneers that the auction would not take place is false because:**

- (a) **the plaintiff admits in paragraphs 4 of the amended plaint that the bank had advertised the suit premises for sale by public auction on 17/1/2003.**
- (b) **The Plaintiff admits in paragraph 5 of the amended plaint that the said public auction took place as shown by the facts that:**
  - (i) **he attended the public auction on 17/1/2003.**
  - (ii) **he was the highest bidder and he bought the suit property in the said auction..**
  - (iii) **he paid Kshs.1,128,971.15 being 25% deposit of the sale price.**
- (c) **The Plaintiff was not asked to submit a bid as he alleged but he got into fraudulent arrangement to offer a price of Shs.3,8 million which is lower than Kshs.4,515,884.60 bided in the said public auction.**
- (d) **The plaintiff offered Kshs.3,8 million to auctioneers yet auctioneers do not conduct private treaty negotiations.**

- (e) **The purported agreement for sale refers to an agreed price of Shs.4,405,000/= million.**
- (f) **The purported sale was therefore not by a privately negotiated agreement for sale but was by way of a fraudulent public auction.**
- (g) **The purported privately negotiated agreement for sale of the suit property was a fraud perpetuated to reduce the auction price and give the plaintiff more time to raise the required funds”.**

By the counter-claim, the appellant pleaded further in paragraphs 15 and 16, thus:

**“15. Having sold the suit property to the 2<sup>nd</sup> defendant in a fraudulent public auction, the 1<sup>st</sup> defendant purported to sell the property again to the 2<sup>nd</sup> defendant for a price by private treaty.**

**16. It is the plaintiff’s case that the purported sale by a privately negotiated treaty is a fraud and subsequent sale to the 2<sup>nd</sup> defendant should be rendered null and void”.**

By the counter-claim, the appellant sought a declaration that the sale to the 1<sup>st</sup> respondent was null and void *ab initio*; special and general damages.

The bank in its defence to the counter-claim denied that it sold the suit property by public auction and claimed to have sold it by private treaty for Shs.3,800,000/= which was the best price. It denied the allegations of fraud.

The 1<sup>st</sup> respondent also filed a defence in reply to amended defence and defence to the counter-claim in which he stated, among other things, that the advertised auction scheduled for 17 January, 2003 was cancelled by the bank; that he did not purchase the suit land at the public auction but by private treaty; that the cheque for shs.1,128,971.15 which he paid to his advocates M/s. Oraro & Co. Advocates was prepared in preparation for the auction scheduled for 17<sup>th</sup> January, 2003 which was cancelled; that the money was not paid as 25% of the sale price; that he did not make a bid for Shs.4,515,884.60 at the public auction; that sale by private treaty was not fraudulent; that the bid for Shs.3,800,000/= was made in good faith and accepted and that he is a bona fide purchaser for value and his title is unimpeachable.

The 1<sup>st</sup> respondent subsequently filed a notice of motion dated 11<sup>th</sup> February, 2004 for summary judgment under **Order XXXV Rule 1 (b)** and **2 Civil Procedure Rules**. The appellant filed a replying affidavit in opposition to the application.

The superior court allowed the application in toto and entered judgment:

**“as prayed in the Amended Plaintiff dated 6<sup>th</sup> February 2004”.**

The decision of the superior court was based on the construction **section 69 (1)** of the TPA which, among other things, gives the mortgagee after the mortgage money has become due power to sell the mortgaged property either by public auction or by private treaty without being answerable for any loss occasioned thereby; construction of **Section 69B (1)** of TPA which, among other things, authorizes the mortgagee after exercise of power of sale to transfer the property sold and construction of **Section 69B (2)** and **(3)** of TPA. The later section provides:

**“69B (2): where a transfer is made in exercise of the mortgagees statutory power of sale, the title of the purchaser shall not be impeachable on the grounds –**

- (a) that no case has arisen to authorize the sale; or**
- (b) that due notice was not given; or**

**(c) the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power”.**

**Section 60** of the TPA as amended by *Act No. 20 of 1985* is also relevant. It gives the mortgagor a right of redemption. Proviso to that section states:

**“provided that the right ..... has not been extinguished by act of the parties or by order of the court and is exercised before the mortgagee has under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property”.**

It was contended in the superior court, *inter alia*, that the grounds on which the appellant sought to impeach the sale of the mortgaged suit property fell under the purview of the provisions of **Section 69B (2)** of TPA. The appellant’s counsel however contended in the superior court that the plaintiff sought to nullify the sale on the ground of that there was fraudulent transfer of the suit property. The superior court agreed with the construction of **Section 69B (2)** by the respondents and made a specific finding that fraud or allegation of it falls under the rubric that the *“power was otherwise improperly or irregularly exercised”* in **Section 69B (2) (c)** of TPA.

For better appreciation of the decision of the superior court we quote an excerpt of the ruling, thus:

**“In his submission on behalf of the respondent counsel clearly admits the operation of section 69B of the ITPA but challenges the transfer to the plaintiff/applicant as having been fraudulent and therefore null and void.**

**I find that the respondent is attempting to do exactly what is prohibited by section 69B (2) which specifically states that a title conferred by the transfer made in exercise of the mortgagee’s power of sale shall not be impeachable on the grounds:**

- (a) that no cause had arisen to authorize the sale; or**
- (b) that due notice was not given; or**
- (c) that the power was otherwise improperly or irregularly exercised.**

**The defence along these lines is not one that the court will entertain or require evidence to be adduced. Fraud or the allegation of its existence, in my view, falls under sub-section 68B (c) (*sic-should be 69B 2 (c)*) and cannot form a basis of either a cause of action against a party who has bought a property in the exercise of a statutory power of sale however conducted, nor can it afford a defence to an action for delivery of possession subsequent to such a sale”.**

That is indeed a bold statement of the law as perceived by the learned Judge.

The 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are the main grounds of appeal. They state:

- 1. THAT the Honourable judge erred in law and misdirected herself by deciding that fraud is not a ground for setting aside and/or nullifying a sale conducted in exercise of a mortgagee’s statutory power of sale in accordance with section 69 of the Indian Transfer of Property Act.**
- 2. THAT the Honourable judge erred in law by misinterpreting the provisions of the said section 69 of the India Transfer of Property Act thereby making a finding that is not available in law”.**

Mr. Sumba, learned counsel for the appellant submitted, *inter alia*, that the finding of the learned Judge that fraud is not a ground for setting aside the sale is incorrect in law; that the decision contradicts the

law; that court can go beyond the registration and rescind a registration if fraud is discovered and that the appellant should have been heard on the issue of fraud.

Mr. Ngugi, learned counsel for the 1<sup>st</sup> respondent on his part submitted, among other things, that the appellant lost his right of redemption at the moment the transfer was registered; the particulars of fraud pleaded by the appellant do not constitute fraud as defined in **section 2** of the RTA – that is, proven knowledge of an unregistered interest; that the ground of fraud pleaded fall within the exemptions in **Section 69B (2), (a), (b) and (c)**; that the appellants remedy is in damages and that there is nothing to be heard on the question of vacant possession.

Mr. Njagi, learned counsel for the 2<sup>nd</sup> respondent also opposed the appeal and submitted that the grounds pleaded in support of fraud fall in the realm of irregularities in **Section 69B (2)**.

It is clear that the application for summary judgment was decided on the basis of a point of law – whether or not fraud is a ground for setting aside a sale by a mortgagee in exercise of statutory power of sale.

In **Home and Overseas Insurance Co. Ltd. vs. Mentor Insurance Co. (U.K.) Ltd.** (In Liquidation) [1990] 1 WLR 153 Parker L.J. said at page 158 paragraph D – F in relation to an application for summary judgment where defence is a point of law thus:

**“The purpose of Order 14 (that is summary judgment) is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But Order 14, proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Order 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision”.**

It is trite law that a mortgagee exercising statutory power of sale has some duties which equity imposes on him for the protection of the mortgagor. The duties can also be imposed by the express terms of the transaction or by the statute. The general duties of a mortgagee were enunciated by this Court in **Mbuthia vs. Jimba Credit Finance Corporation** [1988] KLR 1. Those duties are not inflexible and what a mortgagee should do to discharge them largely depends on the peculiar facts of each case.

However, it can be stated generally that the duty of the mortgagee is to act in good faith and to see that the sale is not tainted by some kind of impropriety. The duties of the mortgagee in the context of **Section 104 (2)** of the *Law of Property Act, 1925* of England which is in *pari materia* to **Section 69B (2)** of TPA were comprehensively discussed in **Corbett vs. Hatifax** PLC [2003] 4 All ER 180. In earlier case, **Lord Waring vs. London and Manchester Co. Ltd.** [1935] ch 310 at 318 Crossman J said of purpose of **Section 104 (2)** of *Transfer of Property Act, 1925* of England which as we have already observed is in *pari materia* to the entire **Section 69B (2)** of TPA:

**“Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course if the purchaser becomes aware, during that period of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance”.**

That decision of Crossman J was approved by the English Court of Appeal in **Property and Bloodstock Ltd. vs. Emerton** [1967] 3 All ER 321.

In **Tse Kwong Lam vs. Wong Chitsen** [1983] 1 WLR 1349, the Privy Council said at page 1359 paragraph H – 1360 paragraph A:

**“where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for sale to be set aside”.**

The suit land is registered under the RTA. **Section 2** of that Act defines what constitutes fraud as including proven knowledge by a person obtaining registration, of the existence of unregistered interest on the part of some other person whose interest he knowingly and wrongly defeats by that registration. That definition refers to statutory fraud. Further **Section 75** of RTA provides:

**“Nothing in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud”.**

Lastly, **Section 23 (1)** of RTA provides that a certificate of title issued to a purchaser of land upon transfer or transmission by a proprietor is conclusive evidence that the person so registered is the absolute and indefeasible owner thereof and that the title cannot be impeached except on the ground of fraud or misrepresentation to which the registered owner is proved to be a party.

Those provisions of RTA were considered by this Court in **Russel Co. Ltd. vs. Commercial Bank of Africa Ltd. & Another** [1986] KLR 633. In that case, the respondent bank had sold by public auction the mortgaged land in dispute, registered under RTA to the 2<sup>nd</sup> respondent in exercise of its statutory power of sale. The appellant company filed a suit for, among other reliefs, a declaration that the purported sale of the suit premises was fraudulent and therefore null and void. The appellant company’s interlocutory application for an injunction to restrain the purchaser from further transferring the property to another buyer pending the determination of the suit was dismissed by the superior court holding that the appellant’s remedy lay in damages under **S. 69B (2)** of TPA.

On appeal against the refusal to grant an interlocutory injunction the appeal was allowed. This Court said in part at page 648 line 35 – 40:

**“The second observation that we would make is that section 75 of the Registration of Titles Act was not brought to the attention of the learned Judge which provides that nothing contained in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud. Therefore it could be argued that section 23 of Cap 281 may refer not only to fraud as defined but to actual fraud as referred to in section 75. It is possible to argue that if the Court’s jurisdiction remains intact, it could set aside registration apart from damages which may be claimed under Section 24 of the Act. It is for consideration whether Section 75 preserves common law fraud .....**

**Thirdly, we would notice that although Jandu vs. Kirpal [1975] EA 225) is an *obiter* decision of the High Court, it is some authority that even fraud as defined in Section 2 of the Act could have the effect of setting aside the registration”.**

From the above survey of the case law, it is clear that the issue whether or not the impugned sale by the 2<sup>nd</sup> respondent in exercise of its statutory power of sale can be set aside on ground of fraud is a complex legal issue. It is an issue which has to be determined in the perspective of the general duties of a mortgagee, the relevant provisions of RTA and TPA, the relevant case law and upon consideration of evidence as to whether the sale was tainted with impropriety amounting to fraud.

The learned Judge construed **Section 69B (2)** in abstraction and without the benefit of full arguments, authorities or evidence. The complex legal issue in our view could not be appropriately determined in a summary judgment application and by doing so the learned Judge in effect prematurely held an immediate trial. The case law referred to above shows *prima facie* that the correctness of decision of the learned Judge is questionable.

That is not the only error that the trial Judge committed. The learned Judge also, in a summary manner, granted all the prayers in the plaint including damages for trespass and special damages of Shs.2,890,000/= without proof. It is no surprise that the appeal against the award of Shs.2,890,000/= has been conceded. The learned Judge did not also make an order disposing of the counter-claim one way or another.

For avoidance of doubt, we would make it clear that we have not on our part decided the legal issue raised – whether or not fraud as pleaded is ground for setting aside the particular sale. Indeed, if we did so, we would fall into the same error committed by the trial Judge. We have merely referred to case law to demonstrate that the issue is a complex legal issue fit for determination at the trial of the suit.

That being our view, it is not necessary to consider the other grounds of appeal.

In the result, we allow the appeal, set aside the ruling and order of the superior court dated 22<sup>nd</sup> September, 2004 with costs to the appellant and substitute therefor an order dismissing the notice of motion for summary judgment dated 11<sup>th</sup> February, 2004 with costs to the appellant. It is just in the circumstances of this case, that the long standing dispute on the ownership of the suit land should be determined as soon as practicable. Accordingly, we order that the suit be tried on priority basis by another Judge.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2009.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR