



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPEAL 227 OF 2002

KENYA COMMERCIAL BANK LTD.....APPELLANT
AND
1 JEREMIAH MATOKE.....1ST RESPONDENT
2 WILLIAM WILHITE ANYENDA.....2ND RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Osiero, J) dated 6th May, 2002

in

HCCC NO 290 of 2002

JUDGMENT OF THE COURT

This is, indeed, a very short appeal. The gravamen of it is whether or not, this Court should interfere with the exercise of a discretion of the learned Judge, Osiero J. by which he allowed the appellant, Kenya Commercial Bank Ltd, to proceed and exercise its statutory power of sale over a mortgaged land being L.R. No. 7847/4 (the suit property); and at the same time, ordered that the 1st respondent, Jeremiah Matoke, should have quiet and uninterrupted occupation of a portion thereof measuring 10 acres delineated and marked as L.R. No. 7847/7 until the hearing of the suit.

The brief facts so far as may be relevant to this appeal may be stated as follows. In or about September 1990 the 1st respondent entered into an agreement with the 2nd respondent, William Wilhite Anyenda, to purchase from the latter 10 acres out of the 2nd respondent's 99.5 acres comprised in the suit property. Immediately after the execution of the sale agreement, the 1st respondent took possession and commenced development thereon. However, the 2nd respondent became evasive and dilatory in the process of sub-dividing and transferring the excised portion of the 10 acres in favour of the 1st respondent. Consequently, the 1st respondent filed suit being Kitale HCCC No 132 of 1997 by which he obtained an order for specific performance against the 2nd respondent, but, when it came to enforcing the decree he discovered that the title to the suit property had been charged to the appellant. A further shock awaited him when in or about February, 2002 the appellant advertised for sale the entire suit property in the exercise of its statutory power of sale. This action triggered the filing of suit, the subject matter of this appeal. Simultaneously with the suit, the 1st respondent also sought interim injunctive relief's under **Order 39 Rules 1, 2 and 3** of the Civil Procedure Rules, which the learned Judge granted, thus, leading to the instant appeal being filed.

Though the appellant had preferred ten grounds of appeal in its memorandum of appeal, its counsel Mr. Shivaji combined all of them and argued them as one ground which in essence attacked the discretion of the learned Judge which Mr. Shivaji contended, had been wrongly

exercised. Both Mr. Namada Simon, counsel for the 1st respondent and the 2nd respondent in person, vehemently opposed the appeal and submitted that the injunctive reliefs sought by the 1st appellant and granted by the learned Judge were correctly made and should be upheld. They lamented that by instituting this appeal, the appellant had caused an inordinate delay in the disposal of the suit which is still pending in the superior court.

It is plain from the ruling of the learned Judge that in arriving at his decision he drew guidance from the principles enunciated in the celebrated case of **Giella v Cassman Brown Ltd [1973] EA 358** as concerns the granting or refusal of injunctions. The learned Judge held, inter alia, that:

“The entire suit land is valued at Shs. 7,000,000/- while the outstanding loan owed to the 1st defendant is only shs. 2,000,000/- and the portion occupied by the applicant is valued at shs. 290,000/-. It is my considered opinion that the 1st defendant will not suffer any loss if it sold the entire suit and land of 99.95 (sic) acres less the 10 acres occupied by the applicant.”

This is one of the holdings that the appellant is aggrieved about.

In granting the injunctive reliefs, the learned Judge was exercising a discretion. It is now well settled that this Court will not interfere with the exercise of a discretion on an application such as that in the instant case unless the exercise was wrong in principle or the Judge acted perversely on the facts.

Upon a careful consideration of the material before us we are satisfied that there is no fault of principle exhibited by the learned Judge, nor was the exercise of his discretion perverse. Consequently there is no ground on which this Court can interfere with his discretion.

We do not think that it is proper for us to consider other grounds of appeal raised by the appellant because the suit in the superior court has not been heard and consequently, material facts have not been determined and this may pre-empt or prejudice whatever decision the trial Judge may reach. The issue which we decline to determine at this stage is whether the 2nd respondent having charged the suit property to the appellant he had no right to sell or dispose of any portion of it without first having sought and obtained the consent of the appellant. Another issue is whether the appellant, who was not a party to the suit in Kitale HCCC No 132 of 1997 was or was not bound by any orders emanating from it.

For the reasons above stated the appeal fails and is dismissed with costs to the 2nd respondent.

Dated and delivered at Nairobi this 4th day of December, 2009.

P.K. TUNOI

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR