REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPEAL NO. 270 OF 2002

1. MUMBY'S FOOD PRODUC

2. JOSEPH ALEX GICHUHI

3. FELISTAS M. GICHUHI ……..……..……. APPELLANTS

AND

CO-OPERATIVE MERCHANT BANK LIMITED ……..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya

Milimani, Nairobi (Hewett J) dated 8th March, 2001

in

H.C.C.C. NO. 604 OF 2000)

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JUDGMENT OF THE COURT

This is an appeal against the ruling and order of the superior court (Hewett J) dated 8th March, 2001 dismissing the appellants' application for review of the earlier ruling and orders of 13th November, 2001 allowing the respondent's suit and striking out the 1st appellant's counter claim.

The suit in the superior court was instituted by Co-operative Merchant Bank Ltd, the respondent herein against the three appellants. The respondent averred in the plaint, inter alia, that on 26th January, 1995 Mumby's Food Products Limited (1st appellant) charged its land title number Dagoretti/Uthiru/T.71 to secure a loan of Shs.2,000,000/= advanced to it by the respondent; that the loan was further guaranteed by both Joseph Alex Gichuhi (2nd appellant) and Felistas M. Gichuhi (3rd appellant) who each executed a guarantee dated 31st January, 1995 limited to a maximum sum of Shs.2,000,000/=; that in due course, the 1st appellant defaulted in the servicing of the advanced sum; that the 1st respondent has been unable to sell the charged property by public auction in exercise of its statutory power sale and that the appellants had failed to pay the sums due on demand. By the suit, the respondent sought judgment against the 1st appellant for Shs.8,852,097.55 together with interest and as against the 2nd and 3rd appellants jointly and severally, Shs.2,000,000/= together with interest and cost.

All the three appellants filed a joint defence which contained a counter – claim by the 1st appellant. By the defence, the 1st appellant denied executing the charge or receiving the sum of Shs.2,000,000/= and the 1st appellant's counter – claimed for a declaration that there was no legal or valid charge; an order

cancelling the purported charge and a permanent injunction to restrain the respondent from selling L.R. No. Dagoretti/Uthiru/J.71. On their part, the 2nd and 3rd appellants who are husband and wife each denied executing any guarantee in favour of the respondent.

On 17th October, 2000 the respondent filed an application under Order VI Rule 13 (1) (b) and (d) Civil Procedure Rules (CPR) for orders that the appellants' defence and counter – claim be struck out and judgment be entered for the respondent as prayed in the plaint on the grounds that the appellants had admitted their indebtedness and further that their defence was frivoulous and vexatious. The respondent annexed the charge and guarantees executed by the appellants and other relevant documents to support the application. The 2nd respondent filed a replying affidavit to the application on behalf of the appellants.

The superior court allowed the application in its entirety by a terse ruling delivered on 13th November, 2000, saying in part:

"The 1st Defendant clearly executed a charge which was stamped and registered. It was not for some obscure (sic) – reason not dated as such. But it was registered against the title at the latest on 20th January, 1995. The 2nd and 3rd defendants executed a guarantee dated 31st January, 1995. The loan proceeds were advanced on 9.2.95. The documents are substantially in order. I think this defence is frivolous and sham ……".

Subsequently, by an application filed on 5th January, 2001, the appellants applied under section 80 of the Civil Procedure Act for the review of the orders of 13th November, 2000 on the grounds that:

"There is sufficient reason to have the orders and decree of 13th November, 2000 reviewed and set aside in view of the provisions of section 65, 74 and 110 of the Registered Land Act" (RLA).

The point of law raised by the appellants in support of the review application was essentially that the money secured by the charge or guaranteed by the instrument was not recoverable as the charge did not contain a special acknowledgement that the chargor understood the effect of section 74 RLA as stipulated in section 65 (1) RLA. Section 65 (1) RLA relied on, provides:

"A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent or other money or moneys' worth or the fulfillment of a condition and the instrument shall, except where section 74 has by instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section and the acknowledgement shall be signed by the chargor, or where the chargor is a corporation, by one of the persons attesting the affixation of the common seal".

Section 74 RLA provides for remedies of the chargee in case of default by the chargor in payment of the principal sum or interest which remedies include selling the charged property.

The superior court dismissed the application again in a terse ruling, saying:

"I have looked at my record. It seems clear to me that the charge documents were availed at the time of hearing. While I have a record that the acknowledgement under section 74 Cap. 300 was missing (sic). No argument was advanced to me as to what the effect of that was. What the Defendants now want to do is to re-open the matter with a new point of law which was not argued before me in November, 2000. That is not permissible under the rules for review. It is not for me to speculate what the effect of that argument might be".

There are five grounds of appeal. However, Mr. Kimani for the appellants relied mainly on grounds 4 and 5 to the effect that the non compliance with section 65 (1) of the RLA constituted a sufficient cause and that the learned Judge having acknowledged that the special acknowledgement had not been incorporated in the charge was duty bound to review his orders on summary judgment.

On the other hand, Mr. Nyamunga for the respondent contended that a mistake in law or omission to consider a point of law is not a ground for review but a ground of appeal and that it had not been shown that the learned Judge misdirected himself in the manner he exercised his discretion.

The basic principles which govern the review jurisdiction under Order XLIV of the Civil Procedure Rules were stated by this Court in National Bank of Kenya Limited vs. Ndungu Njau – Civil Appeal No. 211 of 1996 (unreported), thus:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of law cannot be a ground for review".

In this case, the charge executed by the 1st appellant and registered on 26th January, 1995 shows that land title No. Dagoretti/Uthiru/T.71 is registered under the RLA. It follows therefore, that the provisions of RLA relating to charges including section 65 and section 74 apply to the land. By a plain reading of section 65 (1) RLA the charge is required to contain a special acknowledgement that the chargor understands the effect of section 74 RLA except where section 74 has been expressly excluded by an instrument. Indeed, the prescribed form No. RL9 at page 85, 86 of the Act contains the special acknowledgement. However, as correctly stated by Mr. Nyamunga, the appellants defence and counter – claim did not raise the issue that the respondent was not entitled to remedies under section 74 RLA because the charge did not comply with section 65 (1) RLA. The appellants by Order VI Rule 4 (1) CPR were required to plead any fact showing illegality which made the respondents claim not maintainable. The issue should have been pleaded and used as one of the grounds to oppose the application for striking out the defence and counter – claim. With respect, the finding of the learned Judge that by the review application the appellants were re-opening the matter with a new point of law which had not been argued before him in the application for striking out the defence and counter – claim is undoubtedly correct and unassailable. The discovery of such a new point of law is not a sufficient ground for reviewing the previous decision.

In the result, the appeal is unmeritorious. We dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 8th day of February, 2008.

S**. E. O. BOSIRE**

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR