



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 244 of 2002

DIMKEN KENYA LIMITED

DICK MAINA GITHAIGA

SARAH GATHONI MAINA

JAMES WAHOME GITHAIGA

KELLYCHARD N. GITHAGA.....

....APPELLANTS

AND

BARCLAYS BANK OF KENYA.....1ST
RESPONDENT

MOSES KAMATU 2ND
RESPONDENT

(Being an appeal from the ruling/order of the High Court of Kenya at Nairobi (Hon. A.G.Ringera) dated 12th April, 2002

in

H.C.C.C. NO.186 of 2000)

JUDGMENT OF THE COURT

By a plaint dated 3rd February, 2000, the appellants, Dimken Kenya Limited, Dick Maina Githaiga, Sarah Gathoni Maina, James Wahome Githaiga and Kellychard N. Githaiga, the 1st, 2nd, 3rd, 4th and 5th appellants, respectively, brought action by plaint in the High Court, at Nairobi, seeking declaratory orders and an injunction, among other reliefs, against Barclays Bank of Kenya Limited, the 1st respondent in this appeal. The respondent had lent money to the 1st appellant against certain securities to wit corporeal hereditaments, and personal guarantees of its directors. It was also mutually agreed between the parties that the 1st respondent would guarantee to M/s. Amiran Kenya Limited, payment by the 1st appellant to it of

US\$181167.49 being the equivalent of Kshs.10 million for services to be rendered by M/s. Amiran Kenya Limited to the 1st appellant. The guarantee by the 1st respondent, was similarly to be secured by personal guarantees of 1st appellant's directors and certain corporeal hereditaments.

The 2nd, 3rd 4th and 5th appellants were shareholders and directors of the 1st appellant. They signed the personal guarantees, and at their company's request the 1st respondent enhanced the existing overdraft facility it had accorded the company on the same securities in the sum of Kshs.9,800,000.

The appellants' case as pleaded, more specifically as relevant to this appeal, was that the various charges created over the private properties in favour of the 1st respondent to secure repayment of loans it made to the 1st appellant were invalid for being ultra vires the powers of the company as no prior company resolution was passed by the company to use third party securities. They also complained that wrongful interest rates were charged and that the 1st respondent's threatened action to exercise its alleged statutory right of sale was oppressive, arrogant and malafide.

Filed with the plaint was a chamber summons which was expressed to be brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Act, for an order of injunction restraining the 1st respondent, then as the only defendant, from realizing its securities. The 1st appellant had defaulted in its loan repayment and the 1st respondent had threatened to exercise that right unless it was paid all the outstanding money due to it from the 1st appellant. In the chamber summons, aforesaid, the appellant was not only challenging the legality of the lending to the 1st appellant but also the legality of the threatened sale of securities. The details of the grounds for the application are not essential here as the determination of the appeal is limited to a narrow point which we will spell out later. Suffice it to state that the chamber summons was heard by Onyango Otieno J. (as he then was), and on 19th January 2001, he gave his ruling dismissing the chamber summons. He concluded his ruling in the following manner:

“In conclusion I do find that the applicants have not shown me that they have a prima facie case with a probability of success, nor have they shown that they stand to suffer irreparable damage if the order of injunction is not granted ...

The application is dismissed in its entirety with costs to the respondent as I had earlier on dismissed prayer (c) of the application. The Respondent is at liberty to proceed with the sale subject of course to the Provisions of Auctioneers Act being complied with strictly.”

The appellants were aggrieved and hence this appeal. In the course of arguing this appeal Mr. Amuga, for the appellant, conceded that the only major ground upon which determination of this appeal hinges, is whether in view of the fact that Onyango Otieno J.'s (as he then was) remark that the 1st respondent could proceed with the threatened sale of securities subject to the Auctioneers Act, its statutory right of sale by private treaty was thereby restricted.

Before we deal with that question, it is important to state that upon dismissal of the appellants' application as earlier stated, the 1st respondent later agreed with the appellants that it could sell the properties by private treaty to a buyer nominated by them. The appellant got a buyer who made a down payment for part of the properties but was not able to complete payment of the purchase price within the agreed period. His deposit was forfeited and the 1st respondent thereafter sold the property to Moses Kamatu, the 2nd respondent. Moses Kamatu was made a party in the High Court suit on the application of the appellants. The appellants case and submission before us now is that in view of the remarks by Onyango Otieno J. (as he then

was) , which we earlier on reproduced, the 1st respondent could not properly sell the securities or any part thereof as, in their view, the learned Judge had curtailed its right to sell by private treaty. Consequently, the sale to the 2nd respondent was in contempt of the court ruling and was therefore null and void.

The appellants' appeal is not against the ruling of the superior court dated 19th January, 2001, but against the ruling and order of the superior court dated 12th April 2002 in which Ringera J. (as he then was) dismissed with costs an application by chamber summons, by the appellants, dated and filed in court on 14th March 2002. In that application the appellants, had sought among other orders, an order that the sale by private treaty and registration of the transfer of land known as L.R. NO. 4953/22/IV by the 1st respondent to the 2nd, " be declared null and void" having allegedly been done fraudulently and in contempt of court, and an injunction against the 2nd respondent, restraining him from disposing of that property pending the hearing and final determination of the suit or further orders of the court.

Ringera J. (as he then was) in his ruling did not think declaratory orders could issue at interlocutory stage. He rendered himself thus in the matter.

“First, prayer (3) of the chamber summons seeking (sic) a declaration. A declaration is a final order and cannot be granted at the interlocutory stage.”

He did not, also, think that the appellants as the applicants had made out a prima facie case with any probability of succeeding upon trial. In his view, Onyango Otieno J. (as he then was), did not, in his ruling of 19th January, 2001, rule that the 1st respondent could only sell the property charged to it by the applicants by public auction, in view of the clear provisions of section 69(1) of the Transfer of Property Act, and the instrument of charge which gave the 1st respondent both a statutory as well as a contractual right to sell by private treaty as well as by public auction. It was further his view that the reference by Onyango Otieno J. (as he then was) as to compliance with the Auctioneers Rules was intended “as a direction to be followed if the sale was to be conducted by way of public action.”

Before we deal with the main issues in the appeal which, as we stated earlier, challenges the sale to the 2nd respondent of part of the charged property, we consider it necessary to outline facts relating to another ruling given on 20th March 2001. The ruling was pursuant to another application by the appellants, in which they sought an injunction pending the lodgment and hearing of an intended appeal against the ruling of 19th January, 2001, aforesaid. Onyango Otieno J. (as he then was) heard that application as well and granted it on terms that the appellant deposit Shs. 3 million into a joint bank account in the names of the advocates then on record for the appellants and the respondents, within 21 days. The period lapsed before the deposit was made. It was thereafter that the 1st respondent took steps to sell the property to the 2nd respondent.

Mr. Amuga for the appellant conceded before us that ordinarily the 1st respondent had a statutory power, assuming the charge was regular, to sell both by public auction as well as private treaty. In his view, however, the ruling of 19th January, 2001, curtailed the exercise of that power.

On the other hand Miss Waweru for the 1st respondent submitted that the 1st respondent was exercising a statutory power under **Section 69(1)** of the Transfer of Property Act, which provision allowed it to sell by public auction as well as by private treaty. In her view, what was before the court was an application to stop a threatened sale by public auction. In the result, she said, the remarks by the trial Judge earlier on reproduced in that connection, should be read in that context.

We agree with Miss Waweru that the remarks about compliance with the provisions of the Auctioneers Rules must be read in conjunction with the prayers in the application the learned Judge was seised of. The 1st respondent had given notice of its intention to realize its securities by selling the same by public auction. The learned Judge granted them liberty to proceed with the threatened sale. We doubt whether the learned Judge could properly restrict a statutory right of sale except where it is not being properly exercised or where it has not arisen.

Mr. Amuga again, submitted before us that assuming the 1st respondent's right to sell existed and had arisen, the 1st respondent could only sell by private treaty with leave of the court, without which the sale should have been declared null and void, for having been done in breach of a court order. Having earlier come to the conclusion that the learned trial Judge Onyango Otieno J. (as he then was), did not intend to curtail the exercise of a statutory power, we do not consider it necessary deal with this issue as doing so will not serve any purpose in the determination of this appeal.

In **Commercial Bank of Africa v. Isaac Kamau Ndirangu**, Civil Appeal No. 157 of 1991 (C.A) [unreported], which Mr. Amuga cited to us, there was a consent order that the sale of the charged property be stayed, but the respondent was authorized to sell it if he could find a buyer for it at a price exceeding Kshs.4 million within 60 days. The respondent failed to get such a buyer. This Court held that in that event the property reverted back "into the ambit of the order." The consent order did not permit the bank, in those circumstances, to go ahead and sell the property to a third party without the intervention of the Court. The consent order had given the parties liberty to apply.

The facts of the above case are clearly distinguishable from those of the case before us. In that case the fact that the Court gave liberty to apply, meant that the Court retained control of the parties actions over the property. Its leave was essential before the bank could sell to a third party, which the bank neither sought nor obtained before selling to the third party.

In our case the appellants were granted an injunction conditional on them depositing Kshs.3,000,000 in a joint account. The injunction was "subject to compliance with this order." There was no liberty given to apply. The Court did not want to continue exercising control over the parties actions. In those circumstances, the leave of the Court was not necessary.

Similarly, the appellants wanted to get a buyer of the suit property. The respondent consented to that. This was an arrangement which did not involve the Court. The appellants got a buyer but that buyer failed to complete the sale within the period agreed upon between the parties. In those circumstances there was no basis for going to Court to seek leave to sell to a third party. The court was not involved in the agreement between the parties. Consequently, the respondent's action cannot be said to have been in contempt of a Court Order.

The final point for consideration is the issue of Mala fides on the part of the 1st respondent. Mr. Amuga submitted that the 1st respondent did not act in good faith when it sold the charged property to the 2nd respondent. Mr. Amuga submitted that the sale was concluded and transfer effected within forty eight hours. The speed at which it was done, in his view, raised a doubt as to the bona fides of the transaction. The 1st respondent did not deny the sale was concluded within forty eight hours. Miss Waweru for the 1st respondent, however, clarified that the sale was not conducted immediately after the default by the appellant to satisfy the condition for the grant of a temporary interlocutory injunction, but about a year thereafter. It is quite clear from the record of appeal that the conditional injunction was granted on 20th March, 2001. Thereafter the appellants made a proposal to the 1st respondent to sell part of the charged property by private treaty to a relative. The 1st respondent received part payment for it by way of deposit, but the said relative could not complete the transaction with the result that his deposit was forfeited. It was thereafter that the 2nd respondent was brought into the picture. In

those circumstances, we are unable to read mala fides in the conduct of the 1st respondent. The appellants knew the conditional injunction they had been granted had lapsed and that there was nothing to stop the 1st respondent from selling the property. The appellants should consider themselves to blame for the predicament they find themselves in.

We find no basis for faulting the sale. In the result we order that this appeal be and is hereby dismissed with costs to the 1st respondent, but make no order as to costs regarding the appeal against the 2nd respondent as neither him nor his advocate attended the hearing of the appeal.

Dated and delivered at Nairobi this 8th day of June, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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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