REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 228 of 2000

JOSE ESTATES LTD ……....……APPELLANT

AND

MUTHUMU FARM LTD ……..…...……1ST RESPONDENT

JOSEPH NJOGU NJUGUNA …….…… 2ND RESPONDENT

NATIONAL BANK OF KENYA LIMITED ….……....…3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Gacheche, C.A) dated 21st June 2000

in

H.C.C.C. NO. 618 OF 2000)

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JUDGMENT OF THE COURT

This is an interlocutory appeal against the decision of the superior court (Jean Gacheche, Commissioner of Assize - *as she then was*) given on 21st June, 2000 in **Nairobi High Court Civil Case No. 618 of 2000**. In that decision the superior court granted Muthumu Farm Limited (*1st respondent*) and Joseph Njogu Njuguna *(2nd respondent*), as plaintiffs in the suit, a restraining injunction against Jose Estates Limited (*the appellant*), as 2nd defendant in the suit, and National Bank of Kenya Limited (*3rd respondent*) as 1st defendant in the suit. The injunction granted was to restrain both the defendants from selling, disposing, transferring and or alienating property known as L.R. NO. 10551/3; and also from taking possession of and or in any way interfering with the plaintiffs' possession and occupation of the property, pending the hearing and determination of the suit.

The aforesaid suit was commenced by plaint, on 5th April, 2000. There are detailed averments in that plaint which give the background to the dispute between the parties. Filed with the plaint was a chamber summons dated 4th April 2000, expressed to be brought under **O.39 rule 1 of the Civil Procedure Rules,** in which in the main, the named plaintiffs prayed for a restraining injunction in terms as hereinabove stated, and a declaration that "the purported sale and transfer of L.R. No.10551/3 by the 3rd respondent to

the appellant is null and void, and for an order that the Registrar of Titles delete the entry relating to the said transfer. There were, also, prayers for, among other things, general damages for fraud.

The background facts as can be gleaned from the plaint are that the 2nd respondent requested for and was granted a term loan facility of Kshs.4,200,000/= from the 3rd respondent which was secured by a charge over L.R. No.10551/3, Rongai, Nakuru District, then registered in the name of the 1st respondent. The estimated value of the property was then Kshs.11,000,000. The security was to cover a maximum of Kshs.5 million with interest thereon of 15% per annum. The loan was given on or about October, 1988.

About December, 1988, the 3rd respondent extended to the 2nd respondent, an overdraft facility of up to Kshs.1.1 million, and allegedly used the above property as security without any fresh charge over it. It is averred in the plaint that the 1st respondent was not notified of this, and no authorization of it was given by the 1st respondent.

Apparently the 2nd respondent fell into arrears in repayment, and on 7th March, 1994, the 3rd respondent through its lawyers, Mereka and Company Advocates, impleaded the 2nd respondent in **Nairobi High Court Civil Case No.892 of 1994 (O.S**) for orders that the bank be considered as a legal chargee of the 2nd respondent's properties, namely, **L.R. Nos. 209/10504/23** and **209/10504/24** and alleging that it was owed Kshs.14,812,725/55 by the 2nd respondent as at 3rd December, 1993, with interest at 40% per annum.

Then in or about 29th September, 1994, the 3rd respondent brought another action against the 2nd respondent, to wit **Nairobi High Court Civil Case No.3415 of 1994** seeking judgment for a sum of Kshs.18,821,613/05 with interest at 40% per annum from 30th July 1994 until payment in full. Judgment was obtained ex parte, against the 2nd respondent, decree issued and steps were taken to execute decree. The said suit as well as the previous one were filed by the Firm of Mereka and Co. Advocates on behalf of the 3rd respondent.

For some reason, the aforesaid firm of advocates did not complete execution of decree in the above suit, and on or about early 1996, the same firm issued and served upon the 2nd respondent a notice dated 5th January, 1996, demanding payment within 14 days of the decretal sum in the above suit and threatening to sell the charged property in default of payment. An auctioneer was instructed to sell the property when payment was not made as demanded. The 2nd respondent decided to forfeit a fixed deposit of Kshs. 4 million he had with the 3rd respondent in order to forestall the sale. The 2nd respondent also requested for permission from the bank to sub-divide the charged property, sell 200 acres of it in order to raise about Kshs.20 million to liquidate any outstanding debts with the 3rd respondent but the 3rd respondent withheld its consent.

Those are the background facts. It is also clear from the record that the 2nd respondent is a director of the 1st respondent, and alleges that he used to reside on the charged property before the appellant forcibly evicted him. And in his affidavit in support of the chamber summons we alluded to earlier, he depones, inter alia, that he has fully settled his indebtedness to the 3rd respondent, what is being claimed is excessive and illegal interest and unauthorized debits made by the 3rd respondents, and that when the 3rd respondent decided to sue for its money it waived and or relinquished its statutory right of sale conferred upon it by the charge instrument.

What provoked **Civil Suit No.618 of 2000**? Property L.R. 10551/3 was sold by the 3rd respondent in purported exercise of its statutory right of sale. The sale was by private treaty, and the appellant was allegedly the purchaser. The 2nd respondent has deponed in his aforesaid affidavit that neither him nor the 1st respondent was served with a statutory notice, that he did not realize the property had been sold until he saw strangers coming to check on the land which prompted him to carry out a search in the Land Registry where he learnt for the first time that the property had been sold and transferred to the appellant

and that he considers that the sale and subsequent transfer of the property to the appellant was to the appellant's knowledge fraudulent, and therefore void.

Mereka & Co. Advocates filed grounds of objection to the chamber summons for injunction for "the defendants" but at the same time Wairagu & Wairagu Advocates filed grounds of opposition on behalf of the appellant. That firm also filed a Notice of Change of Advocates without stating whether or not the grounds of objection which Mereka & Co. had filed on the appellant's behalf had been superseded. The gist of the grounds filed by both the appellant and the 3rd respondent, was that the appellant was a bona fide purchaser for value without notice of the 1st and 2nd respondents' causes of action against third parties, that the charge documents were subject to the provisions of **Section 69** of the **Transfer of Property Act**, which provides, inter alia, that a purchaser's title is indefeasible on grounds that the statutory power of sale was improperly exercised. They also indicated that the right of redemption of the subject property had been extinguished. There are other issues they raised but we do not consider it essential to outline all of them here.

In a replying affidavit sworn on 17th April 2000 by one Josiah Njoroge Njuguna, who describes himself, as a director of the 1st respondent, the appellant's case is that it learnt about the sale of the subject property from an advertisement by a Land Agent known as **Milano Land Agency** which notice was pinned on a notice board at Nakuru; the land agent referred its director, the deponent, to the firm of Mereka & Co Advocates with whom he negotiated the price; a price of Kshs.15.5 million was agreed upon which included a sum of Kshs1.5 million as finders fees, advocates fees and commission; that thereafter a sale agreement was executed; Land Control Board consent from **Njoro Land Control Board** was obtained and a transfer was executed by the 3rd respondent in exercise of its statutory power of sale, and it thereafter obtained title on payment of the requisite fees after which it took possession of the property. The appellant's director deposed further, inter alia, that in the foregoing circumstances the applicants were not entitled to an injunction. The 3rd respondent's grounds of opposition were more or less to the same effect.

In a reserved ruling Jeane Gacheche, a Commissioner of Assize held that the statutory power of sale under **section 69A** of the **Transfer of Property Act (TPA**) was not exercisable unless and until a statutory notice under that section has been given and default has been made in payment; that notifications of sale which were exhibited were defective as they indicated that the 2nd respondent instead of the first was the registered owner of the property; that no statutory notice was served on the 1st respondent as guarantor; the letters of notice the 3rd respondent was relying on were invalid as they gave only 14 days notice instead of the stipulated three months; that no notices were served on the District Commissioner before sale; that **section 23** of **The Registration of Title Act, Cap 281 Laws of Kenya,** was not available to the appellant as a defence where fraud and misrepresentation are pleaded and proved against the purchaser and in her view the appellant was, prima facie, not an innocent purchaser for value in view of the manner and speed with which the sale was conducted and transfer effected; and that the appellant appears to have been incorporated in suspicious circumstances as led to suspicion that the appellant was party to a fraud in the sale and transfer of the property.

She then proceeded to grant injunctive relief as earlier on stated and thus provoked this appeal.

In its memorandum of appeal the appellant essentially attacks the foregoing findings, and in particular that on the basis of the chronology of events the appellant was not obliged to inquire further on the 3rd respondent's right to sell the property, more so when the 3rd respondent has not at any time denied it put up the property for sale; that upon being registered as proprietor the equity of redemption which was earlier available to the 1st respondent became extinguished and if anything, the 1st and 2nd respondents' remedy lay in damages, that the appellant had already taken possession and in absence of a prayer for a mandatory injunction the prayer for a restraining injunction had been overtaken by events and that the court erred in making a preliminary finding of fraud against the appellant.

Mrs Wairagu for the appellant anchored her submissions on those grounds. She cited several authorities

in support of her client's case.

Mr. Rachuonyo for the 3rd respondent expressed the view that **section 69 B(2) TPA** limits the power of the court to impeach title once it passes to the purchaser whether or not the right to sell had arisen. In his view to the extent that the plaint makes allegations of fraud against the 3rd respondent and not the appellant the latter's title to the suit property is unimpeacheable. In his view the remedy of 1st and 2nd respondents lies in damages.

Mr. Mwangi for 1st and 2nd respondents took us through the issues raised by the entire litigation and submitted inter alia, that the prayers in the Chambers Summons were intended to preserve the property, that as at the date of the ruling of the superior court his clients were in possession and it could not, therefore, be said that the prayer for injunction had been overtaken by events, that the 3rd respondent having had recourse to civil action against 2nd respondent to recover its money behind the back of the guarantor the latter stood discharged from all liability under the charge, that the alleged statutory notice given was invalid as it gave 14 days instead of 90 days notice and consequently the statutory right of sale had not accrued, and finally that the appellant was not an innocent purchaser for value without notice. Counsel chronologically took us through the sale transaction to demonstrate the point.

We have carefully combed the record of appeal and considered the rival submissions presented to us. We have also carefully gone through the ruling of the superior court. We remind ourselves that this is an interlocutory appeal. The suit in the superior court is still pending. We caution ourselves that it might not be appropriate to express concluded views on the main issues in the case. But we also bear in mind that in certain instances such views may not be avoided more particularly in cases, as here, where the appellant is lamenting that it has been condemned without fault and has come to us to overturn a ruling which bars it from dealing in the subject property. But whether or not the 2nd respondent had settled his indebtedness to the 3rd respondent is not for consideration here. We leave that to the superior court. We will largely confine ourselves to the question whether on the facts and circumstances of this matter, the 1st and 2nd respondents were entitled to the orders they got from the superior court.

Our starting point in the consideration of the matter is the issuance and service of a statutory notice upon the 1st and 2nd respondents. It appeared to us not in dispute that the notice served gave the 2nd respondent 14 days to pay the balance of money the 3rd respondent alleged was due and owing from him. It was also not denied by the 3rd respondent that it sued the 2nd respondent twice in an attempt to recover money allegedly owing from him to it without due notice to the 1st respondent, as guarantor of the money allegedly owing. That prima facie, raises the question whether in the circumstances the 3rd respondent could properly exercise its statutory right of sale against its property. More importantly, is the way the 3rd respondent through its advocates, Mereka and Co. handled the matter.

It was that firm which, according to the material before us advised the bank to sell the property in question by private treaty. It was the said firm which sourced for the purchaser, the appellant herein. It was that firm which claimed and received a finder's fee and commission for doing that. It was the said firm which signed the application for Land Control Board consent on behalf of the 3rd respondent, and it was the same firm which initially represented the appellant in this suit.

Coupled with the foregoing, there are certain aspects of the matter which are curious. The appellant was incorporated and registered on 12th November, 1999, and on 22nd November, 1999, its director made an offer to purchase the suit property. It was in November, 1999 that the said director allegedly saw an advertisement for the sale of the suit property. It is noteworthy that the letters of offer and acceptance are dated 23rd November, 1999. The letter of consent of the Land Control Board is dated 25th November, 1999, and is signed by the District Commissioner, Nakuru District. The appellant's director, in his affidavit, which we referred to earlier, deposed that the consent letter was given by the **Njoro Land Control Board**, but the letter itself shows consent was given by the **Molo Land Control Board**. An issue arises as to whether it was the **Njoro** or **Molo Land Control Board** which was expected to give the

consent to the sale transaction.

The land was later, on 25th February 2000, transferred to the appellant. It is noteworthy that on 7th March, 2000, Mereka and Co. Advocates addressed a letter to the District Officer, Rongai, requesting him to assist the appellant to peacefully "take over possession of their property which is currently occupied by the previous owners workers." Here again that firm of advocates is trying to help the appellant.

The superior court was quite unimpressed by the manner and speed at which the sale transaction was handled and rendered itself thus:

"**Considering the speed with which the transaction was completed, one is left with no alternative but to suspect fraud, involving both the defendants."**

Later still the court said:

"**I find that the fear of fraud is further evidenced by the fact that the agreement of sale was actually dated 25/11/99 two days after an application had been made to and issued by the Land Board [sic]; That, in my mind was a transaction that was performed with what I would call, lightining speed. It involved both the defendants. The 2nd defendant would thus be hard pressed to prove that he is a bona fide purchaser for value and that it is a stranger to the matters raised by the plaintiffs against the 1st defendant."**

We find no basis for faulting the learned Commissioner of assize on that. Her conclusion was inescapable in the circumstances. The history of the matter strengthens that conclusion, and we cannot but hold that there is overwhelming evidence to show that the 1st and 2nd respondents had demonstrated the existence of a strong prima facie case with the probability of succeeding upon trial as entitled them to the orders they got. We find no basis for interfering with the learned Commissioner's exercise of judicial discretion under **Order 39 rule 1** of the **Civil Procedure Rules**.

We have avoided discussion of the authorities cited which we are aware of as any discussion of them would have meant reaching conclusions which in the circumstances of this case would improperly conclusively deal with the matters in issue before the superior court.

In the result we dismiss this appeal with costs to the 1st and 2nd respondents.

Dated and delivered at Nairobi this 14th day of July 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

…….……

JUDGE OF APPEAL

W.S. DEVERELL

…….……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.