



IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, LAKHA & OWUOR, J.J.A
CIVIL APPEAL NO. 254 OF 1999

BETWEEN

DOWNHILL LIMITED APPELLANT

AND

HARITH ALI EL-BUSAIDY 1ST RESPONDENT

CITY FINANCE BANK LIMITED 2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi the (Hon. Mr. Justice Mitey) dated 6th October, 1999

in

H.C.C.C. NO. 2599 OF 1997)

JUDGMENT OF THE COURT

This is an appeal from the ruling and order of Mitey J given on 6th October, 1999 by which the learned Judge restrained *Downhill Limited (the appellant)* and City Finance Bank Limited (the Bank) from transferring, alienating or otherwise dealing with or interfering in any manner with Harith El-Busaidy's (the borrower) possession or occupation of a piece of land known as Plot LR No. 1870/IV/175, *Pilipili Road, Westlands, Nairobi, (hereinafter called "the suit premises")* pending the hearing of the suit filed by the borrower. The borrower was until 21st July, 1997 the registered proprietor of the suit premises. In August 1994 he borrowed a sum of Shs 3m from the Bank which he secured with a mortgage in favour of the Bank over the suit premises. It was an English mortgage under the provisions of the Transfer of Property Act, 1882 (the Act). The borrower defaulted and by a letter dated 21st January, 1997 notice was given on behalf of the Bank of its intention to realise its security by the exercise of the statutory power of sale. According to the notice, the debt stood at Shs 4,947,311.80 and attracting interest.

The suit premises were sold to the appellant at a public auction on 12th June, 1997, for Shs 7.5m. The appellant was the highest bidder. After payment of the full purchase price, an instrument of transfer was prepared and executed by the Bank and registered at the Land Titles Registry in Nairobi on 21st July, 1997 thereby completing the process of transfer of the suit premises to the appellant. As this was an English mortgage the registration of the appellant as proprietor **completely** wiped out the borrower's equity of redemption. But the borrower was not deterred.

In October 1997 the appellant moved to evict the borrower and obtain vacant possession but this was

resisted by the borrower. He filed a suit against the Bank and the appellant in the superior court on 17th October, 1997, more than 4 months after the suit premises were sold to the appellant, seeking, among other reliefs, a declaration that the sale and transfer of the suit premises to the appellant was irregular, unlawful, null and void. This relief was sought on the basis that the sale to the appellant was in breach of the Bank's duty of care to the borrower and was also fraudulent. Particulars of alleged fraud and breach of statutory provisions were given. Both the Bank and the appellant filed separate defences denying the borrower's claim and allegations of fraud and breach of statutory duty. Simultaneously with the filing of the plaint, the borrower applied for a temporary injunction under Order 39 of the Civil Procedure Rules supported by his own affidavit in which he repeated and expanded on the averments made by him in the plaint. Affidavits in opposition to the application were sworn by Daniel Muoki, Credit Manager, on behalf of the Bank, and by M.H. Moti one of the directors of the appellant. It is that application which the learned Judge heard and at the conclusion of which he issued the injunction which has given rise to this appeal.

In his ruling the learned Judge directed himself that the only points he had to determine were whether the suit property was sold at a gross undervalue so as to amount to fraud, and whether the sale to the appellant was through collusion. He noted that when the property was given as security for the debt it was valued at Shs 7.4m and in January, 1996 the borrower had it valued at Shs 15.6m. At the date of sale the borrower put on it a value of Shs 25m. The learned Judge accepted these figures because there was no evidence that the Bank had had the suit premises valued before sale, and in his view a reserve price of Shs 7.4m was far too low, and in those circumstances, fraud could not be ruled out. He also thought that the dates on which the purchase price was paid were suspect and held this to be indicative of collusion between the Bank and the appellant. For these reasons alone he held that the borrower had established a prima facie case with a probability of success and issued the temporary injunction. There are 9 grounds of appeal but for the purposes of our decision we shall deal only with grounds 1 and 5. The complaint in ground 1 is that the learned Judge misapprehended the provisions of section 69 of the Act. In his ruling the learned Judge referred only to section 69A of the Act in relation to the statutory notice which he found as a fact was issued and served. He did not at all direct his mind to section 69B(2) of the Act which provides -

"(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title to the purchaser shall not be impeachable on the ground-

(a) that no case has arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that 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 unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power." (emphasis added).

As far as we can glean from the pleadings, affidavits and the ruling itself, the borrower's case was that the statutory power of sale had been improperly and irregularly exercised. Even assuming without deciding that these allegations were true, they could not give rise to any claim against the appellant by the borrower. The law gives him only one remedy against the mortgagee (the Bank) and for the specific relief of damages. He is not entitled to any other relief. In issuing a temporary injunction against the Bank and the appellant it is plain beyond peradventure that the learned Judge wrongly exercised his discretion and we are bound to interfere. This ground of appeal accordingly succeeds.

The complaint in ground 5 of appeal is that the learned Judge erred in law and fact by finding that the purchase price of Shs. 7.5m was low and because of that fraud could not be ruled out. As the law stands even if this allegation was found to be true it would only give the borrower a cause of action in damages

against the Bank. It would not entitle him to an injunction restraining the Bank from selling and transferring the suit premises to the appellant. One aspect of the matter which the learned Judge does not seem to have taken into account was the fact that the borrower went to sleep for 4 months before going to court to seek an injunction. If, as the borrower contends, the suit premises were sold at an undervalue, that is a valid ground for recovering damages from the Bank. It is no ground for stopping the sale and transfer to the appellant. We note that the borrower instituted proceedings after his equity of redemption had been extinguished. He could have paid the amount demanded even after the sale to the appellant but before he was registered as proprietor.

In the result we allow this appeal set aside the ruling and order of Mitey J . and substitute therefor an order dismissing with costs the borrower's application dated 17th October, 1997. The borrower will also pay the appellant's costs of this appeal and one third of the Bank's taxed costs.

Dated and delivered at Nairobi this 8th day of December, 2000.

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR