



Thomas v Agricultural Finance Corporation & 2 others (Environment and Land Appeal E041 of 2021) [2023] KEELC 15786 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15786 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E041 OF 2021
MN KULLOW, J
FEBRUARY 21, 2023**

BETWEEN

CHARLES OGOLA THOMAS APPELLANT

AND

AGRICULTURAL FINANCE CORPORATION 1ST RESPONDENT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 2ND RESPONDENT

SAKOG HOLDINGS LIMITED 3RD RESPONDENT

(This Appeal emanates from the Judgment and Decree of Hon. D.O. Onyango dated and delivered on 27th September, 2021 in Migori CMC ELC No. 144 of 2019.)

JUDGMENT

1. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence failed to capture and decipher the salient issues and/or features of the suit before him (Trial Magistrate) and thus arrived at an erroneous and/or slanted conclusion, contrary to and in contradiction of the evidence adduced.
 - ii. The Learned Trial Magistrate erred in fact and law in finding that the Appellant failed to prove the averments contained in the Amended Plaint as against the Respondents herein on a balance of probabilities thus dismissing the suit against the Respondents.



- iii. The Learned Trial Magistrate erred in fact and law in finding and holding that the 1st Respondent served and/or issued a Secondary Notice on the 12th day of October, 2012 pursuant to the provisions of the Land Act No 6 of 2012 while it was admitted during the trial that there was no second notice served on the Appellant.
- iv. The Learned Trial Magistrate erred in fact and law in finding that there was no evidence adduced by the Appellant in regards to under valuation of the suit property during the purported sale while ignoring that it was the duty of the 1st Respondent to prove and/or rebut the said evidence thus the trial court misdirected itself by shifting the burden of proof on the Appellant.
- v. The Learned Trial Magistrate erred in fact and law in finding that it was necessary for the Appellant to call one Mr. Benjamin H.O. Were to cross-examine him on the averments of his affidavit of service while ignoring that the averments in the said document were not contested by the Respondents who failed to have the said person cross-examined on the contents of his Affidavit.
- vi. In holding that it was the Appellant to test the averments by one Mr. Benjamin H.O. Were vide cross-examination, the Learned Trial Magistrate misdirected himself and arrived at a slanted decision noting that the evidence contained in the affidavit of service therein confirmed that there was no Public Auction conducted by the 2nd Respondent.
- vii. Thus the Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant and ignoring the fact that the evidence contained in the affidavit of service by Mr. Benjamin H.O. Were were not controverted by the Respondents herein.
- viii. The Learned Trial Magistrate erred in fact and law in finding that the 3rd Respondent was a Bonafide and/or protected Purchaser by virtue of section 99 of the Land Act thus declined to cancel the title of LR No Suna East/ Area 'B' KWA/521 (hereinafter referred to as the suit property) while ignoring the glaring evidence adduced by the Appellant in regards to non-issuance of second statutory notice and non-existence Public Auction.
- ix. The Learned Trial Magistrate erred in fact and law in awarding costs of the suit to all the Respondents herein noting that the 3rd Respondent despite being served with Summons to Enter Appearance and Plaint neither entered appearance nor participated in the said suit thus not deserving of any costs.
- x. The Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit while there were glaring evidence adduced in court that confirms the suit property had been illegally sold to the 3rd Respondent.
- xi. The Judgment of the Learned Trial Magistrate does not capture the issue(s) for determination, the determination thereof and the reasons for such determination. Consequently, the Judgment of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.



2. Consequently; the Appellant's sought the following orders against the Respondents: -
- a. The Judgment and Decree of the Learned Trial Magistrate dated September 27, 2021, be set aside and/or quashed and the same be substituted with an Order allowing the Appellant's suit vide Migori CMC ELC No 144 of 2019.
 - b. The Respondents herein be condemned to bear costs incurred in the Subordinate Court.
 - c. Costs of the Appeal be borne by the Respondents.
 - d. Such further and/or other orders be granted as this Honourable Court may deem fit and expedient.
3. A brief background to contextualize the Appeal herein; the Plaintiff/ Appellant filed a suit against the Defendants/ Respondents vide a Plaint dated April 12, 2012 and Amended on 12/04/2013; seeking the following Orders; a declaration that the exercise by the 1st Defendant of its statutory power of sale under the Land Act is premature, a permanent injunction restraining the Defendant from putting up for sale or selling the property Suna East/ Area 'B' Kwa/512, a declaration that the sale of the property LR No Suna East/ Area 'B' Kwa/ 512 by the 1st and 2nd Defendants to the 3rd Defendant is illegal, null and void and an Order be made for the cancellation of the registration in the names of the 3rd Defendant and reversion to registration in the Plaintiff's names and costs of the suit.
4. It was the Plaintiff's contention that he entered into a loan agreement with the 1st Defendant, wherein the 1st Defendant agreed to advance a loan of Kshs. 988,000/=. That as part of the said agreement; it was agreed that the plaintiff would execute an irrevocable order with Sony Sugar Company Limited, for the 100% loan recovery from the Plaintiff's sugarcane deliveries to South Nyanza Sugar Company Ltd. In addition, a Charge was executed against the suit property and in favor of the 1st Defendant. Having been unable to redeem the loan advanced within he agreed timelines, he received a notification of sale from the 1st Defendant of the intention of selling the suit land in exercise of its statutory powers of sale and hence the instant suit.
5. The 1st and 2nd Defendants/ Respondents filed their responses vide a Statement of Defence dated February 4, 2013 wherein they denied all the allegations levelled against them. It was the 1st Defendant's contention that they entered a loan agreement with the Plaintiff for a sum of Kshs. 988,000/= repayable within 24 months, the Plaintiff offered the title of the suit property as security and the 1st Defendant registered a Charge against the same. It was their claim that upon the Plaintiff's default in repayment of the advanced amount within the agreed timelines, they exercised their statutory power of sale and sold the sit parcel hence the suit. The matter proceeded for hearing and judgment was delivered on the September 27, 2019 and whose effect was to dismiss the Plaintiff's suit with costs to the Respondents. Aggrieved by the said decision, the Plaintiff/Appellant lodged the instant Appeal.
6. The Appeal herein was canvassed by way of written submissions. Both Parties filed their rival submissions together with authorities, which I have read and taken into consideration.

Analysis and Determination

7. I am of the considered view that the issues arising for determination are as follows: -
- i. Whether this court has the requisite jurisdiction to entertain the instant Appeal.



- ii. Whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its Judgment and Decree dated and delivered on September 27, 2021.
 - iii. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
8. This being a first Appeal, it is this court's duty to analyze and re-assess the evidence on record and reach its own conclusions in the matter. This was succinctly stated by the Court of Appeal in [*Selle v. Associated Motor Boat Co.*](#) [1968] EA 123 where the court held as follows: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally....”

Whether this court has the requisite jurisdiction to entertain the instant Appeal

9. The Parties herein did not raise the issue of jurisdiction either at the trial court or at the Appellate stage. This court is however cognizant of the fundamental nature of jurisdiction and the fact that a court can raise the same suo moto. The Court of Appeal in [*Kenya Ports Authority vs Modern Holding \[EA\] Limited*](#) [2017] eKLR stated as follows: -
- “We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself....”
10. It is now well established that jurisdiction goes to the root of a case and without it a court must down its tools. A court's jurisdiction flows from either, the [*Constitution*](#) or legislation or both and the Court cannot arrogate to itself jurisdiction where none exists or in excess of that which is conferred upon it by law. (See [*Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others*](#), SC Civil Application No 2 of 2011.)
11. The jurisdiction of this Court flows from Article 162 (2) and (3) of the [*Constitution*](#), Section 150 of the [*Land Act*](#) and Section 13 of the [*ELC Act*](#). Article 162 (2) & (3) of the [*Constitution*](#) provides that the ELC shall be established to hear and determine disputes relating to the environment, use and occupation of and title to land. Section 150 of the [*Land Act*](#) on the other hand also provides that; the ELC shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.



12. Section 13(2) of the ELC Act on the jurisdiction of the court provides as follows: -

“(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes——

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.

- 13. The dominant issues at the centre of the Appeal herein is on the service of the Statutory Notices and the requisite timelines as stipulated in law; the legality of the alleged second statutory notice, the Valuation Report and the sale by public auction by the 1st Respondent in exercise of its Chargee’s interest in recovering the loan arrears.
- 14. The Appellant contends that he was not served with the requisite statutory notices as provided in law before the alleged sale by public auction. He further faulted the said sale for the failure to provide the force sale valuation and thus maintained that the suit land was significantly undervalued.
- 15. The 1st and 2nd Respondents on the other hand aver that maintained that it served the various notices as required and in accordance with the provisions of the law and the resultant sale by public auction was conducted within the purview of the law.
- 16. The question that therefore follows is whether the Appellant’s claim and/or Appeal falls within the contemplated jurisdiction of the ELC as outlined above.
- 17. The Court of Appeal in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR faced with a similar issue of determining whether the issue of statutory notices fell within the jurisdiction of the High Court or the ELC held as follows: -

“35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.

36. By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition (see Section 2 of the Land Act). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so



advanced (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of the Constitution fails....”

18. Guided by the decision in the Kangethe Case; I find that the dominant issue in the Appeal is on the legality of the statutory notices in the exercise of the 1st Respondent’s power of sale and the alleged public auction is purely a commercial issue/dispute and this court is therefore not vested with the requisite jurisdiction to determine the same.

19. Having held that this court does not have requisite jurisdiction to determine the issues raised herein, it is trite law that I must down my tools.

Conclusion

20. The upshot of the above is that the Memorandum of Appeal dated October 25, 2021 is hereby struck out with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 21ST DAY OF FEBRUARY, 2023.

MOHAMMED KULLOW

JUDGE

In presence of; -

Ms. Ochwal for the Appellant

Nonappearance for the 1st and 2nd Respondents

Nonappearance for the 3rd Respondent

Court Assistant - Tom Maurice/ Victor

