



**K-Rep Bank Limited v Ejakait (Civil Appeal E002 of 2023)
[2024] KEHC 2923 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E002 OF 2023
WM MUSYOKA, J
MARCH 22, 2024**

BETWEEN

K-REP BANK LIMITED APPELLANT

AND

MOSES EJAKAIT RESPONDENT

*(An appeal arising from the judgment of Hon. L. Ambasi, Chief Magistrate,
CM, delivered on 8th December 2022, in Busia ELC Case No. 172 of 2013)*

JUDGMENT

1. The primary suit was filed by the respondent, against the appellant, for a permanent injunction to restrain disposal or dealings with South Teso/Angoromo/21, a declaration that the loan amount had been fully paid, and or to compel the appellant to discharge South Teso/Angoromo/21. It was alleged that the entire loan amount had been paid, but the appellant went ahead and purported to sell South Teso/Angoromo/21. The suit was resisted by the appellant, who filed a defence. It was averred that South Teso/Angoromo/21 was used to secure the loan in question, there was default, hence the exercise of the statutory power of sale. It was asserted that the auction sale was conducted fully in accordance with the law. The plaint was later amended, to introduce a prayer for compensation to the extent of the value of the suit land.
2. A trial was conducted. Only the respondent testified. He stated that the loan had been repaid fully, and the appellant was not justified to sell the security.
3. An initial judgment was delivered on 17th August 2015, in favour of the respondent, after the appellant failed to offer defence at the defence hearing. That judgment was set aside, and the appellant was given a chance, on 17th November 2022, to defend the suit, which chance was passed up, as the appellant did not show up on the date allocated for defence hearing. The trial court eventually delivered a judgment, on 8th December 2022, on grounds that the respondent had proved his case on a balance of probability.



4. The grounds of the appeal herein are:
 - a. the amended petition had been overtaken by events,
 - b. the compensation orders were not supported by a valuation report,
 - c. the evidence of the appellant was not considered,
 - d. the trial court did not exercise discretion properly,
 - e. the respondent had no locus to file the suit, and
 - f. the trial court did not adhere to the principle of stare decisis.
5. I will start with the ground on jurisdiction, for it would go to the core of the matter. The allegation is that the respondent had no locus to institute the suit. I have scoured the defence filed by the appellant, and I noted that that issue was not raised. It would appear to have dawned on the appellant only after the trial court allowed the respondent's claim. Anyhow, it is a critical issue that a trial court should consider, whether it has jurisdiction to entertain a suit before it, and whether the party filing the suit is properly before the court.
6. From the language of the plaint it should be plain, from paragraph 4, that the property in question belonged to a dead person. That should raise questions as to whether the respondent had the appropriate locus to initiate the suit. It is trite that the property of a dead person vests in his personal representative, who holds a valid grant of representation. It is pleaded in paragraph 4, that the deceased died on 30th March 2013, the suit was filed on 14th May 2013. The question is, as at 14th May 2013, had the respondent obtained representation to the estate of the deceased proprietor of South Teso/Angoromo/21, to vest him with authority or locus to file a suit on 14th May 2013, with respect to the said property? That issue was raised by the appellant, by way of a notice of preliminary objection, dated 5th September 2014, and it was one of the issues addressed by the respondent, when he testified on 22nd June 2015. He stated that he had obtained a grant of letters of administration ad litem, on 11th April 2013. A copy of that grant ad litem is on record. It was produced as P. Exhibit No. 2. There was, therefore, locus to file the suit. There is also evidence that a full grant was subsequently obtained in 2016.
7. On its defence evidence not being considered, I have noted from the record, the appellant did not turn up in court on the date fixed for defence hearing. The respondent testified on 22nd June 2015. That date was fixed on 27th March 2015, at the registry, in the presence of representatives of the Advocates for both parties. The Advocate for the appellant was not in court on 22nd June 2015, so the matter proceeded in his absence, and that of his client or representative. The respondent closed his case. Submissions were subsequently filed, before judgment was delivered on 17th August 2015. There was no intervention by the appellant between 22nd June 2015 and 17th August 2015. The ex parte judgment was set aside, by consent, on an application, on 23rd November 2015, on the understanding that the appellant would have a chance to cross-examine the respondent. Hearing was fixed for 21st March 2021. The matter was adjourned on 21st March 2021, for the parties to explore settlement. The matter came up several times. On 6th September 2022, it was fixed for defence hearing on 17th November 2022, at the behest of the appellant. On the said 17th November 2022, the Advocates for the appellant, together with a representative of the appellant, did not attend court, and the trial court ordered closure of the defence case. Judgment followed on 22nd November 2022. The appellant did not tender any evidence, as there was no defence hearing. The issue of the defence evidence not being considered does not, therefore, arise, as no such defence evidence was tendered. The issue of being condemned unheard also does not



arise. It is the appellant who fixed the matter for defence hearing on 17th November 2022, yet on that date the appellant did not attend court for its defence to be heard. It wasted its chance of being heard. It cannot complain of being condemned unheard.

8. On the court not properly exercising discretion, I am not very clear on what this is about. The trial record indicates that whenever the matter came up for trial, on many occasions the appellant would be absent. I see that the respondent got an ex parte judgment in 2015, but was magnanimous enough to have it set aside, by consent, to allow the appellant present its case, but to no avail. I wonder what discretion the trial court was expected to exercise in view of that record.
9. On compensation being awarded without a valuation, and special damages not being proved, the appellant did not present itself in court to argue its case, the trial court heard the respondent, and allowed his case based on the material presented, which was unchallenged or uncontroverted.
10. Overall, I find no merit in the appeal herein, and I hereby dismiss it, with costs to the respondent.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 22ND DAY OF MARCH 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Alovi, instructed by ABK Advocates LLP, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.

