IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 66 OF 2018

BETWEEN

1. TSS INVESTMENTS LIMITED

2. JUJA COFFEE EXPORTERS LIMITED.....APPELLANTS

AND

NIC BANK LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Mombasa (P.J.O. Otieno, J.) dated 31st January, 2018

in

ELC No. 142 of 2017)

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JUDGMENT OF THE COURT

1. By a plaint dated 20th April, 2017, and filed in the Environment and Land Court at Mombasa, the appellants stated that sometimes in 2015 they were granted by the respondent banking facilities that were secured by legal charges over two properties known as **MOMBASA/BLOCK XX/95** registered in the 1st appellant's name and **L.R. No. MN/1/5207** registered in the 2nd appellant's name **("the suit properties")**; that the negotiations for the banking facilities were conducted on behalf of the appellants by Ahmed Tahir Sheikh Said, (now deceased), then principal director and shareholder of the two appellant companies, who died on 10th January, 2017.

2. Following the demise of the principal shareholder, the appellants, who were in arrears in their repayment of the said facilities, engaged the respondent in negotiations regarding settlement of the outstanding amounts without success. Consequently, the appellants alleged, on 18th April, 2017 the respondent **"wrongfully, unlawfully, in bad faith, in breach of contract and in**

breach of trust of existing engagements" proceeded to advertise the sale by public auction of the suit properties.

3. The appellants alleged that they were not served with statutory notices as required under **section 90(2) (b)** of the **Land Act** and sought judgment against the respondent for:

"1. A Declaration that the sale by auction as advertised in the Daily Nation dated 18/04/2017 is fatally premature, irregular, wrongful, unjustified, null and void.

2. An Order that the sale by auction as advertised in the Daily Nation dated 18/04/2017 be revoked, cancelled and/or withdrawn for all purposes.

3. An injunction do issue to restrain and prevent the Defendant by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the Plaintiffs' quiet possession of or marketing and/or advertising for sale or selling, leasing, subdividing, receiving or taking possession of the charged suit properties being the Title Numbers MOMBASA/BLOCK XX/95 registered in the 1st Plaintiff's name AND LAND REFERENCE NUMBER MN/1/5207 registered in the 2nd Plaintiff's name pending a consent settlement with the Defendant.

4. An injunction do issue to restrain and prevent the Defendant by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the 1st and 2nd Plaintiffs' quiet possession of or marketing and/or advertising for sale or selling, leasing, subdividing, receiving or taking possession of the ANY charged suit properties or interests in its possession and registered to the 1st and 2nd Plaintiffs.

5. In the Alternative and Without Prejudice to para.3 and 4 above, an Order that Parties do continue in good faith negotiations for a structured consent settlement.

6. Costs and interest."

4. On 4th May, 2017 the matter was transferred to the High Court and parties recorded a consent to the effect that the suit do proceed by way of case stated for determination of only one substance issue:

"Whether the defendant has complied with and fulfilled the statutory provisions in seeking to realize the security given to it by the plaintiff."

5. The High Court (P.J.O. Otieno, J.) found and held that the respondent served the appellants with statutory notices dated 11th January, 2016; that the notices were in full compliance with the requirements of **section 90** of the **Land Act**; and therefore the only basis for challenging the exercise of statutory power of sale was wholly misconceived and unsustainable.

Consequently, the learned judge dismissed the appellants' suit with costs to the respondent.

6. Being aggrieved by the said decision, the appellants preferred this appeal on grounds that the learned judge erred: i accepting the transfer of the suit to the High Court which, under **Article 165 (5)** of the **Constitution**, **section 150** of the **Land Act** and **section 101** of the **Land Registration Act** has no jurisdiction to hear such a matter; in excluding other relevant statutory provisions in his consideration of the issue whether the respondent complied with the law in the steps it took to realize the security; in finding that the statutory notices under **sections 90** and **96** of the **Land Act** had been served; in failing to consider whether the provisions of **section 96(3)(b)** of the **Land Act** had been complied with; and in failing to find that the notices served were fatally defective for including inconsistent amounts.

7. Parties filed written submissions and list of authorities and their respective learned counsel briefly highlighted their submissions. **Mr. Ngibuini**, learned counsel for the appellants, submitted that although the issue of jurisdiction was not raised before the learned judge, it was the trial court's duty to satisfy itself that it had jurisdiction since jurisdiction cannot be conferred by acquiescence or waiver. In his view, the High Court did not have jurisdiction to hear and determine the suit, only the Environment and Land Court had such jurisdiction.

8. Secondly, counsel submitted that apart from **sections 90(1)** and **(2)** and **96(2)** of the **Land Act**, which the learned judge cited, the Court failed to take into consideration the provisions of **section 98(2)** of the **Land Act** which states:

"If a sale is to proceed by public auction, it shall be the duty of the chargee to ensure that the sale is publicly advertised in a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land are, as near as may be, followed in respect of that sale."

The appellants' counsel contended that **rules 11 (1) (b)** and **15** of the **Auctioneers Rules of 1997** were not complied with.

9. Regarding service of the statutory notices, which the respondent said was done by way of registered post, since a dispute arose as to service, it was incumbent upon the respondent to prove service but did not, the appellants submitted. Further, it was argued that the statutory notices did not comply with **section 90(2)** of the **Land Act,** in that they did not inform the appellants about their right to apply to the court for certain remedies or relief.

10. Regarding L.R. No. M.N/1/5207, it was submitted that the 2nd appellant is a lessee from the Government of Kenya for a term of 99 years from 1st November, 1987 and pursuant to **section 96(3) (b)** of the **Land Act**, a copy of the statutory notice should have been served upon the Government.

11. Lastly, the appellants' learned counsel submitted that the amounts in the statutory notices were inconsistent, contrary to the provisions of **section 90(2)** of the **Land Act** that requires a borrower to be notified of the **"nature and extent of the default"**; and the amount that must be paid to rectify the default. The statutory notice dated 11th January, 2016 indicated that the arrears on the amount advanced to the 2nd appellant stood at Kshs.137,415,631.21 as at 16th December, 2015 while the total outstanding balance stood at Kshs.154,500,631.21. On the other hand, the notice dated 12th May, 2016 indicated that the entire outstanding debt was Kshs.2,004,959,636.38 as at 11th May, 2016. The amount due and payable was not clear, it was argued.

12. **Miss Mburu**, learned counsel for the respondent, submitted that the High Court had jurisdiction to hear and determine the suit. Counsel stated that the pre-dominant cause of action in the suit was the challenge of the exercise of the respondent's statutory power of sale and not the use of land. She cited this Court's decision in **CO-OPERATIVE BANK OF KENYA LIMITED v PATRICK KANGETHE NJUGUNA & 5 OTHERS [2017] eKLR** where it was held that the creation of a security over land does not constitute land use as provided for under **Article 162(2)** of the **Constitution** and therefore does not fall under the jurisdiction of the Environment and Land Court.

13. With regard to provisions of law relating to issuance of statutory notice, counsel submitted that in his submissions before the High Court, the appellant's counsel limited himself to alleged non-compliance with the provisions of **section 90** of the **Land Act.** It is disingenuous for the appellant's counsel to now argue that the trial court did not look at other provisions of the law, especially **section 96(3) (b)** of the **Land Act**, which did not feature at all before the High Court, counsel submitted.

14. Regarding service of the statutory notices under **sections 90 and 96** of the **Land Act,** Miss Mburu submitted that there was evidence that the appellants were served with a statutory notice dated 11th January, 2016 by way of registered post; the notices in respect of the two suit properties were contained in the respondent's list and Bundle of documents; the notice under **section 96** was personally served upon the Directors of the appellants who acknowledged receipt by affixing their signatures/stamp on copies of the notices. An affidavit to that effect was also filed by **Samuel Ngunjiri Wambugu**, a Court Process Server.

15. Responding to the ground that the statutory notices were fatally defective for showing inconsistent amounts, the respondent's counsel submitted that the ground was neither pleaded nor canvassed before the trial court and so cannot now be argued before this Court. This Court's decision in **OPENDA v AHN [1983] KLR 165** was cited for the proposition that the Court cannot consider or deal with issues that were not canvassed, pleaded or raised before the trial court.

16. On the strength of those submissions, we were urged to dismiss the appeal with costs.

17. We have considered the record of appeal, submissions by counsel and the cited authorities. We shall start with the issue of jurisdiction. As earlier stated, the appellants filed their suit before the Environment and Land Court. The court, on its own motion, having considered the nature of the claim, transferred it to the Commercial Division of the High Court. When counsel appeared before the learned judge of the High Court, none of them raised any issue about the court's jurisdiction to hear and determine the matter. We are not saying that the appellants are estopped from raising the issue before this Court; far from it. We are in agreement with the appellants' argument that the normal rule that a party cannot raise for the first time on appeal a point he failed to raise in the High Court does not apply when the issue sought to be raised for the first time goes to jurisdiction. See **FLORICULTURE INTERNATIONAL LIMITED v CENTRAL KENYA LIMITED & 3 OTHERS, [1995] eKLR,** and **KENYA PORTS AUTHORITY v MODERN HOLDINGS [E.A.] LIMITED [2017] eKLR.**

18. Our view on the issue of jurisdiction is that the matter was rightly transferred to the High Court since the substantive dispute was about creation of security over land, which does not constitute land use, as provided in **Article 162(2)** of the **Constitution** and does not therefore fall under the jurisdiction of the Environment and Land Court. This Court pronounced itself on a similar issue is **CO-OPERATIVE BANK OF KENYA LIMITED v PATRICK KANGETHE NJUGUNA & 5 OTHERS** (supra). The Court held, *inter alia*:

"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."

We respectfully agree with that holding. We therefore dismiss the first ground of appeal.

19. We now turn to the crux of the appeal regarding the sole issue for determination that was by consent framed by the parties. The court was asked to determine whether the respondent had complied with the statutory provisions in seeking to realize the securities. Parties also agreed that the above issue would be determined by way of case stated and by evidence in the witness statements; documents filed; and submissions.

20. In the plaint, the appellants contended that they were not served with statutory notices pursuant to **section 90 (2) (b)** of the **Land Act.** The appellants' counsel highlighted the mandatory contents of the notice under the aforesaid section. The record is clear that the court was not addressed on the provisions of **section 96 (3) (b)** that require the holder of the land out of which a lease has been granted to be served with a copy of the statutory notice. This issue, not having been pleaded, canvassed or raised before the trial court, and considering that the issue was to be determined by way of a case stated, it cannot be raised for the first time before this Court. See **OPENDA v AHN** (supra).

21. The record of appeal shows that the appellants were served with statutory notices on 11th January, 2016 and 12th May, 2016. The first notice demanded payment of the outstanding balance within a period of 3 months from the date of service of the notice as per the provisions of **section 90** of the **Land Act**; whereas the second notice informed the appellants that the respondent would exercise its statutory power of sale of the charged properties within 40 days from the date of service unless the outstanding balance would have been paid in full. This was in compliance with the provisions of **section 96(2)** of the **Land Act**.

22. We however agree with the appellants that the first notice did not inform the appellants of their right to apply to court for relief against the chargee's intended remedy. That omission did not however prejudice the appellants in any way because they moved to court on their own initiative and obtained interim orders that restrained the respondent from exercising its statutory power of sale of the suit properties pending hearing and determination of the suit.

23. Regarding the appellants' contention that the amounts stated in the statutory notices are inconsistent, we must reiterate that parties are bound by their pleadings and that for a matter to be a ground of appeal it ought to have been sufficiently raised and made an issue before the trial court. The alleged inconsistency of the amounts due and payable between the two notices was never canvassed before the learned judge. We cannot therefore entertain it. But even if we were to consider it, we do not think that it would be of any benefit to the appellants. In **TRANS-WESTERN CANE HARVESTERS LIMITED & ANOTHER v BARCLAYS BANK OF KENYA LIMITED [2009] eKLR,** this Court held as follows:

"… it is now settled law that a dispute as to the exact amount repayable is not a ground upon which a borrower who was served with a valid statutory notice can obtain an injunction to restrain a bank from exercising its statutory power of sale."

We respectfully concur with that finding.

24. All in all, we find this appeal devoid of merit and dismiss it with costs to the respondent.

Dated and delivered at Malindi this 28th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR