**Harnam and others v Kirpal and another**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 6 March 1974

**Case Number:** 1/1974 (27/74)

**Before:** Sir William Duffus P, Law Ag V-P and Mustafa JA

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**Appeal from:** High Court of Kenya – Chanan Singh, J

*[1] Civil Practice and Procedure – Execution – Sale – Whether incorrect advertisement of auction*

*nullifies sale.*

*[2] Rating – Decree for rates – May either be executed or leave of High Court may be obtained – Rating*

*Act* (*Cap.* 267), *s.* 19 (*K.*).

**JUDGMENT**

The following considered judgments were read.

**Law Ag V-P:** This is an application for leave to appeal from a decision of the High Court of Kenya made on an originating summons taken out under s. 57 (5) of the Registration of Titles Act (Cap. 281) by the respondents to the present application. The history of the matter is as follows: In 1969 the City Council of Nairobi obtained judgment against one Gurdial Singh, the registered proprietor of eight plots of land in Nairobi, for unpaid rates on those eight plots, and attached those eight plots. In due course the court (which was that of the resident magistrate, Nairobi) ordered the sale of the attached land by auction through Messrs. Kirima and Sons, auctioneers and court brokers. The sale was duly advertised and took place on 4 August 1971. The present applicants (to whom I shall refer hereinafter as the caveators) had registered caveats against all eight titles as long ago as 1955, to protect certain unspecified rights. The respondents were the successful bidders. The sale was in due course confirmed by the court, after all interested parties including the caveators had been notified, and no objection or application to set the sale aside received by the court. The respondents have applied to the Registrar of Titles to be registered as proprietors of the eight plots. He has refused to do so unless the caveats are withdrawn. The respondents accordingly moved the High Court for an order that the caveats be withdrawn. After a protracted hearing the High Court made the order prayed for. He held in effect that the caveats were spent, that any rights they might once have protected must have lapsed by limitation, and that the only purpose they now serve is to block the respondents’ right to registration. The judge refused leave to appeal, and the caveators through Mr. S. Gautama have not applied to this court for such leave. Mr. Gautama put forward three grounds which he said justified leave to appeal being given. Firstly, he submitted that the respondents did not fall within the definition of the words “the proprietor or other person claiming land” within the meaning of s. 57 (5) of The Registration of Titles Act, for reasons I shall go into later, and that they accordingly were not entitled to move the High Court for an order that the caveats be withdrawn. His second ground of complaint was that there were such grave and unauthorized misstatements in the auctioneer’s advertisement as to discourage potential buyers, result in an unrealistically low price being realized, and involve the sale being a nullity. Mr. Gautama’s third submission was that the whole procedure of sale in execution of land, to satisfy a decree in favour of the City Council for unpaid rates due in respect of such land, was contrary to law and a nullity ab initio. I will deal first with the second ground. The final paragraph of the auctioneer’s advertisement, which was read out prior to the sale as part of the conditions of sale, was as follows: “These plots are being sold subject to caveats and prohibitory orders registered against these titles and also subject to rates (annual ground rent) payable to the Commissioner of Lands, Nairobi and further rates payable to Judgment Creditors (City Council of Nairobi) up to half of 1971.” I see nothing wrong in the first part of this passage. Registered land is always transferred subject to caveats and prohibitory orders registered against the title. The first reference to rates is unfortunate, but the auctioneer has made it clear that he meant the annual ground rent payable to the Commissioner of Lands. There is nothing on the record to indicate that this statement was incorrect, and that ground rent was not owing on the plots. As regards rates owing to the City Council, the auctioneer has qualified the word “rates” by the word “further”, which I take it to mean subsequent to the rates recovered in the decrees obtained by the City Council. Again this statement seems to me factually correct. But even if the addition of this paragraph to the court’s order was unjustified, this in itself amounted in my view to no more than an irregularity, not going to the root and vitiating the sale. I see no merit in this proposed ground of appeal. The other two grounds can be considered together. They flow from the proposition that, as by s. 19 of the Rating Act (Cap. 267), rates due are a charge against the land on which the rate was levied, and as by s. 100 of the Transfer of Property Act a charge is equated, for the purposes of enforcement, to a mortgage, the only course open to a rating authority who wishes to enforce a claim for rates against the land in respect of which they are due is to institute a suit for the sale of the land as if he were the mortgagee thereof. The rating authority, in Mr. Gautama’s submission, is debarred from obtaining a money decree for rates due and instituting execution proceedings under O. 21 of the Civil Procedure (Revised) Rules for the satisfaction of that decree by sale of the land in respect of which the rates were due, with the consequence: (*a*) that the sale of the eight plots in execution was a nullity, and (*b*) that the respondents have no interest in those plots entitling them to take action under s. 57 (5) of the Registration of Titles Act. This is, on the face of it, an attractive argument, but the special position of a rating authority must be considered in the light of s. 17 of the Rating Act, which is much more recent in date than the Transfer of Property Act, which was applied to Kenya in 1897. By s. 19 (6) of the Rating Act: “(6) A decree granted by a subordinate court in favour of the rating authority plaintiff under this section may be enforced by any mode of execution authorized by any Rules made under the Civil Procedure Act and, if the sum due under such decree is secured by a charge over the land by virtue of section 19 of this Act, the decree holder may apply to the High Court by originating summons to order the sale of such land in enforcement of such charge, and the High Court may make an order directing the sale of such land subject to such conditions and with all such directions usual to the nature of such a summons as the justice of the case may require . . . .” It seems to me clear beyond question that this sub-section confers upon a rating authority an option, exercisable at its discretion, whether its decree is secured by a charge under s. 19 of the Rating Act or not, to proceed either by execution against the land or by applying to the High Court for an order for sale of the land. Even in the latter case, a special and simple procedure is laid down, quite different from the procedure by way of suit provided by the Transfer of Property Act, which to my mind indicates that a charge created by s. 19 of the Rating Act is not a charge of the nature contemplated by s. 100 of the Transfer of Property Act. For these reasons I have not been satisfied that leave to appeal against the order withdrawing these obsolete caveats should be given, and I would dismiss this application, with costs.

**Sir William Duffus P:** I agree with the ruling of Law, Ag. V.-P. and as Mustafa, J.A. also agrees the application is dismissed with costs.

**Mustafa JA:** I have read the ruling of Law, Ag. V.-P. and agree with it. I only wish to say that in my view a charge over land arising out of s. 19 of the Rating Act is a special kind of charge, and is different, in relation to its enforcement, from a charge as defined in s. 100 of the Transfer of Property Act. In terms of s. 17 (6) of the Rating Act, a rating authority has the option, when it has obtained a decree in its favour in a subordinate court, whether the decree is secured by a charge over land by virtue of s. 19 of the Rating Act or not, to proceed to execution either against the land charged or by applying to the High Court by originating summons for an order of sale of such land. Such a sale by the High Court would be in accordance with s. 17 (6) of the Rating Act and not under the provisions of the Transfer of Property (Mortgage Suits) Rules. The sale ordered by the resident magistrate was in order, not null and void as alleged by the applicants. The applicants clearly have no case, and I see no reason for granting leave to appeal.

*Application dismissed.*

For the applicants:

*SC Gautama*

For the respondents:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi)