



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO 1 OF 2021

(FORMERLY PETITION NO E017 OF 2021 FILED

AT THE ENVIROMENT AND LAND COURT AT KISUMU)

IN THE MATTER OF: ARTICLE 10(2)((b), (c),22, 40,

43, 47AND 258 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE LAND REGISTRATION ACT 2021

IN THE MATTER OF: THE AGRICULTURAL FINANCE

CORPORATION ACT 1969(AS REVISED 2019)

IN THE MATTER OF: VIOLATION OF THE FAIR ADMINISTRATION ACT

IN THE MATTER OF: THE AUCTIONEERS ACT

BETWEEN

SAMUEL OKWAMA ODERA.....PETITIONER

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST RESPONDENT

PAUL OKETCH T/A PAMBO INVESTMENTS.....2ND RESPONDENT

OSANGO FARMERS CO-OPERATIVE SOCIETY.....3RD RESPONDENT

RULING

1. On 29th June 2021, the Petitioner herein filed a Petition dated 25th June 2021 that was supported by his Affidavit. This Affidavit was not dated. The court addressed the consequences of such omission hereinbelow.

2. In the said Petition, the Petitioner sought the following orders:-

- a. An order of Certiorari to issue quashing the Certificate of Title held by the 3rd Respondent;
- b. An order for mandamus to the District Land Registrar Ministry of Land to revoke the 3rd Respondent's Land Title;
- c. An order for mandamus to the District Land Registrar Ministry of Land to cause the restoration and registration of title in favour of the Petitioner;
- d. A declaration that the Respondent's actions had infringed his constitutional and statutory rights;

e. An order for accounts for the proceeds of the auction;

f. General, exemplary and aggravated damages under Article 23(3) (e) of the Constitution of Kenya, 2010;

g. An order do issue that costs of this Petition be borne by the Respondents; and

h. Any other order that the Court may deem fit to grant.

3. In his Notice of Motion application dated 25th June 2021 and also filed on 29th June 2021, the Petitioner sought orders against the 3rd Respondent herein, his agents and/or his representatives that they be restrained from taking possession, evicting or issuing eviction notices, selling or putting up for sale, leasing, or any other way interfering with his occupation and possession of all that parcel of land known as Kisumu/ Sidho West/3830 (hereinafter referred to as the “subject property”). He also sought an order that the Court be pleased to grant orders maintaining the status quo as at August 2011 on the subject property. The said application was also supported by an Affidavit that was unsworn.

4. On 27th July 2021, Ombwayo J transferred the matter herein to this High Court of Kenya Kisumu as this was essentially a commercial matter revolving around a Charge. He also directed the parties to file Written Submissions.

5. When this matter came up for mention on 7th December 2021, the Respondent did not attend court. The court also alerted the Petitioner of the Respondent’s Notice of Preliminary Objection and he indicated that he had not been served with the same. He asked this court to determine the Petition as it would be untidy to file Written Submissions in respect of the said Preliminary Objection.

6. In the said Preliminary Objection, the Respondent averred that **Winam PMCC No 255 of 2011** and **Winam ELC No 30 of 2018 (formerly Kisumu ELC No 132 of 2015)** relating to the same subject property had been heard and determined. It also objected to the jurisdiction of this court.

7. This court rejected the Petitioner’s prayer for an order of status quo to be granted on the ground that Ombwayo J had not granted the said orders despite the matter having been brought under a certificate of urgency. He had also requested for time to transform the Petition into a suit. However, as the date of 7th December 2021 was taken by the Respondents herein and directions appeared on filing Written Submissions were given in respect of the aforesaid Notice of Motion application dated 25th June 2021 and filed on 29th June 2021.

8. As the Petitioner was the one who only filed Written Submissions, this court reserved its Ruling of the aforesaid application. Notably, the said Written Submissions were dated 19th October 2021 and filed on 2nd December 2021.

LEGAL ANALYSIS

9. Right at the outset, this court looked at the repercussions of unsworn affidavits. Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) provides as follows:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

10. As was pointed out hereinabove, the Affidavit in support of both the Petition and Notice of Motion application were undated rendering both of them defective and incompetent. Section 5 of the Oaths and Statutory Declarations Act is couched in mandatory terms and hence, the omission to file a duly dated Supporting Affidavit could not save the application as it had no legs to stand on, all the facts being therein and lent to the same being dismissed.

11. Be that as it may, this court could not make a similar finding in respect of the Petition as the same had not come up for hearing and the Petitioner still had the option of regularising the same before it could be heard.

12. Turning to the aforesaid Notice of Motion application, this court nonetheless opted to consider the merits or otherwise of the application bearing in mind the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities for expediency purposes and for effective use of judicial resources.

13. Indeed, Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya) stipulates as follows:-

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

14. Further, Section 1B (1) of the Civil Procedure Act states that:-

For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

a. the just determination of the proceedings;

b. the efficient disposal of the business of the Court;

c. the efficient use of the available judicial and administrative resources;

d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

e. the use of suitable technology.

15. This court looked at the Petitioner's pleadings and found the same to be very confusing. Whereas the Kisumu High Court does not have distinct divisions such as those found in Milimani Law Courts, a court cannot split itself into all these divisions when hearing a particular matter that has all prayers touching on each division. A party must decide in which division it wants to file its case for the court hearing the case to transform itself to the court that should ideally hear and determine that matter. In other words, a judge in High Court Kisumu can hear criminal, civil, constitutional and judicial review provided that they are filed in the correct registries. On the other hand, a judge in a division at Milimani Law Courts can only hear matter that have been filed in that division.

16. Notably, although the Petitioner had sought injunctive orders in his aforesaid application, he had sought judicial review orders of certiorari and mandamus in his Petition. He had also sought orders that should ideally be heard in the Environment and Land Court. These prayers cannot be heard by a single court but ought to have been lodged, heard and determined by different courts.

17. As the Petitioner's orders in the application did not have any nexus with the orders that he had sought in the Petition, the application as drafted did not correspond to the orders that this court would have granted, it also found and held that the application was incompetent and defective.

18. Indeed, it is trite law that injunctive orders in an application must mirror the orders in the substantive suit. This very court had occasion to deal with the issue of relevance of prayers in an application vis-à-vis the reliefs in a plaint in the case of **Shirin Jiwa vs Ismailia Co-operative Society Limited [2015] eKLR** in which stated as follows:-

“...It was evident that although the Plaintiff had argued that her application was in line with the prayers that she had sought in her Plaint, the orders sought in the application herein had no relation to the reliefs sought in the Plaintiff. The prayers were distinct. It is irrespective that the matters at issue arose out of the same transactions as had been contended by the Plaintiff for the reason that they purported to create a totally new cause of action. They had no relationship whatsoever with the subject matter of the suit as had been rightly pointed out by the Defendant...the court did not see the nexus of that prayer to the reliefs that the Plaintiff had sought in her Plaint.”

19. It is for that reason that although this court noted the Petitioner's submissions that its application had met the threshold of being granted conservatory order did not hold any water for the reason that the orders therein did not mirror the orders he had sought in the Petition. Unless amended, the application and the Petition were not homogenous. The case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & Others [2014] eKLR** that the Petitioner relied upon that set out the test of when conservatory orders ought to be granted could not assist him.

20. On the question whether the sale was done properly, this court noted the Petitioner's submissions that the Chargee did not issue a forty (40) days' notice contrary to the provisions of Section 96(2) of the Land Act. In this regard, he relied on the case of **Yusuf Abdi Ali vs Family Bank Limited [2015] eKLR**.

21. To support his argument that the 1st Respondent blatantly refused to carry out a valuation as provided in Section 97(2) of the Land Act, he placed reliance on the case of **Palmy Company Limited vs Consolidated Bank Ltd [2014] eKLR** where the court therein held that a sale that had breached Section 97(2) of the Land Act could be set aside under Section 97(3)(b) of the Land Act.

22. He also relied on Rule 15 of the Auctioneers' Rules that require auctioneers to issue a forty five (45) days' notice before selling property that is being sold pursuant to a statutory power of sale. It was his submission that the 2nd Respondent did not issue him with this forty five (45) days' notice which demonstrated that the statutory power of sale was not done properly.

23. Unfortunately, this was information that was contained in an affidavit that had offended the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act as had been stated hereinabove. Consequently, this court could not consider an undated affidavit.

24. The court restrained itself from analysing the submissions in respect of Article 40 (1) of the Constitution of Kenya as there was danger in this court delving into the merits of the Petition which was yet to be heard.

25. Having considered the Petitioner's Written Submissions, this court came to the firm conclusion that his aforesaid application could not be saved even after invoking Article 159(2)(d) of the Constitution on the issues of the undated Supporting Affidavit and the mirroring of the orders due to a lack of nexus between the orders that had been sought in the application herein and the orders that had been sought in the main Petition. Indeed, this latter omission was not a technical issue but rather it was a substantive issue that went into the root of the said application.

DISPOSITION

26. For the foregoing reasons, the upshot of this Court's decision was that the Petitioner's Notice of Motion application dated 25th June 2021

and filed on 29th June 2021 was not merited and the same be and is hereby dismissed.

27. Cost of the application to be in the cause.

28. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY 2022

J. KAMAU

JUDGE