Wafubwa v Housing Finance Company of Kenya Ltd (Civil Suit 385 of 2011) [2022] KEHC 13253 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 385 OF 2011

A MSHILA, J

SEPTEMBER 23, 2022

BETWEEN

CAPTAIN J.N. WAFUBWA .... PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LTD .... DEFENDANT

RULING

Background

1. The applicant filed the amended notice of motion dated April 16, 2020 under order 45 rule 1 of the Civil Procedure Rules and section 3 & 3A, of the *Civil Procedure Act* for the following orders;

   a. The court to stay the orders given the ruling dated February 13, 2020, given by Hon Lady Justice Nzioka until this application is determined.

   b. The court to review the ruling dated February 13, 2020, given by Hon Lady Justice G Nzioka.

   c. The court to review the judgment herein given by Hon Justice Eric Ogola and do enforce the majority decision of Civil Appeal No 253 of 2004.

   d. The court to order payment of Kshs 1, 131,470 being damages by the defendant for the illegal eviction without issuing an eviction notice.

   In the alternative

e. The court to validate the draft decree with amendments if any served and filed in this court in view of Civil Appeal No 102 of 2013 judgement

f. The costs of the application be provided for.

2. The application was supported by the sworn affidavit of Captain LN Wafubwa who stated that the plaintiff brought an application dated April 3, 2019 for determination by the court but the same application was withdrawn when the evidence for purchasing the property LR 209/10481/85 between the defendant and John Wambua Kiilu were found and filed in court.

3. The ruling and the judgment ought to be reviewed for the apparent error on record, since Hon, Lady Justice G Nzioka erred in law and fact in determining an application which had been withdrawn and overtaken by events as the evidence in a bundle dated July 17, 2019 was before her.

4. It is erroneous and an abuse of the court process for Hon Lady Justice G Nzioka since the Ksh 9, 264,963 was deposited in the court by order of Justice Ogola and a stay was granted by the Court of Appeal without the defendant seeking orders to deposit the same money in an interest earning account.

Applicant's Case

5. The applicant submitted that the issue of ownership of LR 209/10481/85 arose from Civil Appeal No 102 of 2013 upon the judgment of this court. The plaintiffs' property LR, 209/ 10481/85 was sold by public auction on November 8, 1996 where a deposit was duly paid, as a result the mortgage account was left with a credit of Ksh 20, 667.80 but the purchaser united millers failed to clear the balance. The defendant failed to take action but sold the property by private treaty again on March 20, 2009.

6. The Court of Appeal awarded the Ksh 20, 667.80 to the plaintiff but due to lack of evidence on record for the second sale by private treaty to John Wambua Kiilu, the court remained silent on the ownership of the property LR 209/10481/85.

7. It was the applicant's submission that he proved beyond any doubt that plaintiffs title was transferred unlawfully and the same should be reversed and given to the plaintiff.

8. The draft final decree should include Ksh1, 131,470/= as damages with effect from August 21, 2009 at court interest. The applicant argued that he lost a lot of money for failure to collect rent from his property and as such, the security deposited should be forfeited to the plaintiff.

Respondent's Case

9. It was the respondent's position that prayers (2) and (3) of the application reiterate the facts of the dispute as this suit was heard in full, through *viva voce* evidence, and thereafter judgment was delivered on April 26, 2012, hence a lapse of over 8 years ago since delivery of judgement. Thereafter, the defendant lodged an appeal againstthe High Court's judgment at the Court of Appeal in Civil Appeal No 102 of 2012.

10. The plaintiff filed a cross appeal at the Court of Appeal wherein he was seeking reliefs for illegal and brutal eviction, general damages and the residual balance of Ksh 3, 375,000. The Court of Appeal heard the said appeal and the cross appeal and consequently delivered its judgment on June 28, 2014 and by virtue of the said judgment that there is nothing pending before the court as relates the main issues in dispute. A period of about six (6) years have lapsed since determination of the dispute by the Court of Appeal.

11. It was the respondent's further submission that it is not in dispute that after the court delivered its judgment on April 26, 2012 the defendant deposited in court the sum of Kshs 9, 264,963 as security for stay. On June 28, 2014 the Court of Appeal determined the dispute or the appeal and immediately thereafter the funds held at the High Court ought to have been released in enforcement or compliance with the decision by the Court of Appeal.

12. Further, it was noted that the plaintiff is attempting to introduce a new issue at this stage, being over eight (8) years since determination of this matter by the court and about six (6) years since judgment of the Court of Appeal. The new issue relates to John Wambua Kiiiu and that the issue is overtaken by events.

13. It the respondent's submission that a party to a dispute cannot introduce a new issue nor a new party after a lapse of about six (6) years since delivery of judgment. The plaintiff is guilty of inordinate delay and that prayers (2) and (3) of the application are vexatious and they should be dismissed.

14. In the case of Civil Suit No 102 of 1995 *Vishva Builders Limited v J K Koskel*, it was held that;

> " The deciding factor is whether a party has made an election to proceed on appeal to redress his grievances. Once that election is made and it fruitifies it matters not that the appeal filed eventually turns out to be invalid. Once the process of appeal is taken the process of review is shut out".

15. Prayer (4) of the application seeks an order of damages for allegedly illegal eviction and its noteworthy that the said relief is now being sought through an application without any evidence to warrant it. It is also imperative to note that the relief for general damages for illegal eviction, as sought in the application, was expressly pleaded by the plaintiff in the plaint, as was filed herein. In that regard the court is now *functus officio* and it cannot revisit the issues which were in dispute in the main suit.

16. The respondent submitted that prayer (5) is vexatious and it ought to be dismissed. However, the court should proceed to issue the decree, in terms with the decision of the Court of Appeal, irrespective of whether the plaintiff approves it or not as there is no need for a formal application for a party to obtain the decree. Litigation must come to an end one way or the other and this is a classical case wherein a party who is not happy with the court's decision has made all attempts possible to frustrate closure of this matter and as a result there has been vexatious and unwarranted litigation for a period of about six (6) years, the application lacks in merit and it ought to be dismissed with costs.

17. On the issue of the funds held in court, the respondent argued that the ruling of February 13, 2020 considered the only pending issue before the court which relates to the sum of Kshs 9, 264,963 which was deposited in court by the defendant on December 17, 2012 as a condition for stay. The main dispute between the parties was determined by the Court of Appeal on June 28, 2014 and there is no justification why the said funds are still held in court to-date. It is the interest of justice that the funds still held in court be released in compliance with the orders or decision of the Court of Appeal. Further, retention of the funds in court is highly prejudicial to the defendant as it is not earning any interest.

Issues For Determination

18. The plaintiff herein filed the amended notice of motion dated April 16, 2020 ("the plaintiff's present application") wherein he is seeking review of the judgment delivered in this matter on April 26, 2012 and enforcement of the decision of the Court of Appeal of March 28, 2014. The application also seeks review of the orders of February 13, 2020 and an award or orders for damages. The issues raised by the applicant have already been dealt with to conclusion and the Court of Appeal's decision cannot be reviewed by this court. Therefore, the only issue for the court to determine is;

    a. Whether this court should review the orders given in the ruling dated February 13, 2020, given by Hon Lady Justice Nzioka?

Analysis

19. On February 13, 2020 the court issued the following impugned ruling which the applicant seeks to review:

    Ruling

    1. The plaintiff filed a notice of motion application dated June 4, 2019 seeking for an order of *mandamus* directed at the defendant to release the certificate of title LR No 209/1084/85 to him. In the alternative the lands registrar be directed to issue a copy thereof as the defendants are either maliciously or illegally holding the original or have lost it. Further, the defendant be ordered to pay him Kshs 75,000,000 in lieu thereof and the costs of the application be proved for.

    2. The defendant in response to the application filed a notice of preliminary objection dated April 12, 2019 on the ground that the court lacks jurisdiction to hear and determine the application as it has become *functus officio*, upon the delivery of the judgment on the merit on April 26, 2012. Further, the application is in breach of the mandatory provisions of; order 53 rule 1 of the Civil Procedure Rules 2010 which requires leave be granted before a judicial review application is filed seeking for an order of *mandamus*. The respondent also filed a replying affidavit sworn by Eunice Kamau on May 6, 2019. However, the plaintiff/applicant subsequently withdrew the subject application. As such, there is no any other application.

    3. However, the defendant seeks that the funds in the sum of Kshs 9,264,963 deposited in court be released, as it is not earning any interest thereto. But the plaintiff responded by stating that all he requires is his title deed. He sought for payment of Kshs 20,662.80 with interest awarded in the judgment.

    4. The defendant/respondent in response argued that the issue of title deed was settled *vide* the decision of the Court of Appeal. That it does not make sense that the plaintiff objects to the deposit of the money in an interest earning account. The money has been in court for long and it is uncertain as to when this matter will be settled. The plaintiff then responded that even if it takes five (5) years, it is ok as he is prepared to wait.

    5. The court directed the parties to file brief submissions on the subject issue detailing the background facts. I have gone through the respective submissions by both parties and I find that, from the judgment of the Court of Appeal in Civil Appeal No 102 of 2013, the decision of the High court was varied and upheld partially. The appeal and cross appeal succeeded to the extent indicated therein. It indicates that, the High Court award of Kshs 4,500,000 and interest was set aside. The award of Kshs 20,602.80 in favour of the plaintiff plus interest was upheld. Each party was to bear its own costs.

    6. There is no evidence that an appeal has been lodged against that decision. Therefore, the parties should comply with that decision as reflected in the ruling of the court dated June 12, 2015. It is also evident that when the decision of the High Court and the Court of Appeal was rendered, the issue of the release of the subject sum herein of Kshs 9,264,963 deposited in court on December 17, 2012 (as a condition for stay) was not dealt with. If indeed the purpose for which that sum was deposited has been accomplished and/or overtaken by events, then, there is no reason why the funds should be held as such. Further, the sum is not earning interest. Therefore I direct that, the defendant should pay the plaintiff all the sum of; Kshs 20,662.80, he was awarded as per the judgment of the Court of Appeal. The other money held should be deposited in an interest earning account within a period of fourteen (14) days from the date of this order.

    7. There being no formal application herein, no order to costs does not arise. However, each party is at liberty to apply.

8. Those are the orders of the court.

Dated, delivered and signed in an open court this February 13, 2020.

G L Nzioka

Judge

20. Order 45(1) of the *Civil Procedure Rules* sets out the requirements for an application for review as follows:

> " Any person considering himself aggrieved
>
> a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay".

21. Section 80 of the *Civil Procedure Act* provides as follows: -

> 80. Any person who considers himself aggrieved-
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

22. A clear reading of the above provisions shows that section 80 gives the power of review while order 45 sets out the rules. They limit review to the following grounds-

    (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

    (b) on account of some mistake or error apparent on the face of the record, or

    (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

23. The applicant's argument was that the ruling and the judgment ought to be reviewed for the apparent error on record, since Hon Lady Justice G Nzioka erred in law and fact to determine an application which had been withdrawn and overtaken by events as the evidence in a bundle dated July 17, 2019 was before her.

24. In the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 170 the court defined what constitutes an error on the face of the record, held as follows:

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal"

25. The court wishes to point out that contrary to what is alleged by the applicant that Hon, Lady Justice G Nzioka erred by determining an application which had been withdrawn; the court record shows that on July 25, 2019 the application that was withdrawn by the applicant was a notice of motion dated April 3, 2018. The application that the court then determined was a notice of motion dated June 4, 2019.

26. In light of the above, it is the court's finding that this is not a proper case for the court to grant the review sought as it does not meet the desired threshold.

Findings And Determination

27. In the light of the forgoing reasons the court makes the following findings and determinations;

    i. The application is found to be devoid of merit and is thus dismissed.

    ii. The orders issued on February 13, 2020 are maintained and the Kshs 9,264,963 deposited in court on December 17, 2012 (as a condition for stay) be put in a joint interest earning account other than the respondent's bank within fourteen (14) days of the date hereof.

    iii Parties at liberty to apply for the release of the monies.

    iv. Each party shall bear its own costs.

    Orders accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Captain for the Applicant

Odindo for Miss Muthee for the Defendant/Respondent

Lucy---------------------------Court Assistant