



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC CRIMINAL APPLICATION NO. 21 OF 2018

JULIUS MURIITHI KIBANYA.....APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT KERUGOYA.....1ST RESPONDENT

LUCY RUGURU CHEGE.....2ND RESPONDENT

SAMUEL KARIITHI T/A GIANT AUCTIONEERS.....3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

The applicant moved this court vide a notice of motion brought under **Section 3** of the **High Court Vacation and Practice and Procedures Rules** under **Article 50** of the **Kenya Constitution**, under **Section 356(1) & (2)** of the **Criminal Procedure Code Cap 75 Laws of Kenya**. The substantive prayer is that an injunction order be issued against the 3rd respondent Samuel Kariithi T/A Giant Auctioneers from selling Land Parcel No. Inoi/Kariko/2585 by public auction pending the hearing and determination of this application:-

The application is premised on the grounds that;

- a. The applicant never offered his parcel of land INOI/KARIKO/2585 as security in Kerugoya Criminal Case No. 341/2016 in favor of the accused.*
- b. That the land parcel was consequently ordered to be sold by way of public auction without his knowledge and without following the laid down procedure due to the mistake of strangers*
- c. That the applicant is still in occupation of the above mentioned land which forms his matrimonial home*
- d. That the 1st respondent issued orders on 29.05.2018 the land parcel INOI/KARIKO/2585 be sold by public auction and the 3rd respondent has already set a date for the public auction*
- e. That it is in the best interest of justice that the parcel be preserved pending the hearing of this application.*

STATEMENT OF FACTS

i. The application was supported by the affidavit of the applicant sworn on 16/8/2018. He avers that he never stood surety for the accused person in *Kerugoya Criminal Case No. 341/2016*, Lucy Ruguru Chege the 2nd Respondent. He denies depositing his title deed for parcel *INOI/KARIKO/2585* in the court as security.

ii. He also avers that on 14.05.2016 he was illegally arrested and accused of standing surety for the 2nd respondent and failed to produce her in court. He avers that he was jailed without being heard.

iii. He depones that the 2nd respondent was a stranger to him, and that he learnt his land was up for sale when prospective buyers came to view it. He claimed that upon perusing the court file he came upon the order dated 29.05.2016, that the court condemned him unheard against the rules of natural justice. He claims that the auctioneer failed to serve him personally with the notice.

The Court ordered that the status quo be maintained pending directions by this court.

iv. The 1st respondent through the replying affidavit of Hon. Yusuf Barasa Mukhula dated 19.10.2018 averred that he presided over *Kerugoya Criminal Case No. 341/2016* Chief Magistrates Court. He averred that the applicant appeared before Hon. Juliet Kassam on 7.6.2016 where he agreed to deposit his title for land parcel *INOI/KARIKO/2585* as security.

He also averred that on the 12.9.2017 the accused failed to attend court, and warrants of arrest were issued against her. That on 26.9.17 the applicant showed up in court and introduced himself as the surety and informed the court the accused was unwell. Warrants of arrest against her were lifted. That on 24.10.2017 the state counsel made an application for warrants of arrest and summons to issue to the surety.

That on 7/12/2017 warrants of arrest were taken out against the surety and that he was arrested and arraigned in court on 14.5.2018, He informed court that he was not the surety and had no objection to the sale of the land.

v. That before the land was sold the court requested the DCI to investigate the real owner of the property, who wrote back to the court confirming the applicant as the rightful owner. That the applicant appeared before the chief magistrate court on 13.7.2018 seeking to set aside the orders.

vi. The applicant through his submission dated 28.06.2019 submitted that the principles for injunctive relief are set out in *Giella vs Cassman Brown & Co. Ltd 1973 EA 358*. He submitted that the 3rd respondent did not accord him proper notice, and that the rules of natural justice were not followed by the court before the orders for sale of the land were issued.

vii. He submitted that he lives on the land with his family and they depend on it for their livelihood, and that he would be rendered destitute, he claimed he would suffer irreparable loss that cannot be compensated by damages.

viii. He further submitted that the court should take the course with the lower injustice and that the balance of convenience tilts in his favor. He submitted that he still has possession of his original title deed and if he stood surety it would have been in possession of the court. He alleged fake documents were used in the matter.

ix. The attorney general in their submissions dated 15.11.2018 submitted for the 1st and 4th and 5th respondents that the application was filed in the wrong form and was vexatious, incompetent and an abuse of the court process. The application sought an injunction at the preliminary stage but no final orders. He prayed for its dismissal.

3. ISSUES

i. Whether the miscellaneous application dated 6.8.2018 is competent?

ii. Whether the miscellaneous application dated 6.8.2018 has merit?

4. ANALYSIS.

i. Whether the miscellaneous application dated 6.8.2018 is competent?

The application seeks a temporary injunctive relief; it does not seek final orders. The question is whether this renders it fatally defective and incompetent. An evaluation of the supporting affidavit and plaintiff's submissions brings out issues or allegations of fraud in recognizance, that his title deed was fraudulently used to stand surety for accused person. By inference the applicant is seeking to stop the sale of his land and ascertain he was not the surety. As he alleges fake documents were used as he is still in possession of his title documents.

In this case the applicant filed the application in person, noting he had no counsel to represent him, and taking note of the provisions of the Constitution in Article 159, in the interests of justice the application cannot be deemed vexatious or incompetent.

ii. Whether the miscellaneous application dated 6.8.2018 has merit?

The High Court has supervisory jurisdiction over subordinate courts the provisions of Article 165(7). The Criminal Procedure code section 364 provide the Revision powers of the High Court, the same can be applied to alter/reverse an order in the interests of justice.

The applicant is alleged to have stood surety for Lucy Ruguru Chege in *Kerugoya Criminal Case No. 341/2016* with his land parcel *INOI/KARIKO/2585*. He denied this and submitted that his title was fraudulently used. In the court proceedings on 7/6/2016, Julius Mureithi was present in court and deposited his title deed.

The court record shows the applicant appeared on several occasions before the court, he neither requested to be discharged as surety or raised the issue of fraud as regards his property being used as recognizance for the accused person.

I find that due process was followed by the magistrate, he gave he applicant the opportunity to show cause on 14.5.2018. He claimed that he had no money and stated that if the land is sold it can be sold, he chose to deny he was he surety. As section 134(1) *Criminal Procedure Code* provides that if the surety fails to pay the penalty or to show cause why it should not be paid. sub section (2) for warrants of attachment may issue. The same procedure was referenced in *George Amata Ongawa v Republic [2010] eKLR* and *Isaac Mwetish Chematia v Republic [2019] eKLR*

The applicant has also failed to prove fraud, it seems he did not understand the implications of acting as one's surety and he presumed that the court would be unable to effect the attachment. The applicant herein was accorded a fair trial, due process was followed, his application for an injunction therefore is not merited.

1. The application is supported by the affidavit of the applicant sworn on 16/8/2018. He avers that he never stood surety for the accused person in Kerugoya Chief Magistrate's Court Criminal Case No.341/2016, Lucy Ruguru Chege the 2nd respondent. He denies that he deposited his title deed for Land Parcel No. inoi/Kariko/2585 in the court as security. He further avers that on 14th May 2016 he was illegally arrested and accused of standing surety for the 2nd respondent and failed to produce her in court. He avers that he was jailed without being given an opportunity to be heard. He contends that the 2nd respondent is a stranger to him and that he learnt that his land was up for sale when prospective buyers came to view it. He claims that upon perusing the court file he came across an order dated 29th May 2016 which was issued by the court without giving him an opportunity to be heard. That this was against the rules of natural justice. He further claims that the auctioneer failed to serve him personally with the notice.

2. The court issued an interim order and directed that the status quo be maintained pending further directions by this court.

3. The 1st respondent, filed a replying affidavit through Hon. Yusuf Barasa Mukhula sworn on 19th October 2018. He depones that he was the presiding magistrate in Kerugoya Chief Magistrate's Criminal Case No.341/2016 and that the applicant appeared before Hon. Juliet Kassam on 7th June 2016 where he agreed to deposit his title deed for land Parcel No. Inoi/Kariko/2585 as security. He further depones that the accused failed to attend court and warrants of arrest was issued against her. That on 26th September 2017 the applicant showed up in court and introduced himself as the surety then informed the court that the accused was unwell. The warrants of arrests against her were lifted. Later on 24th October 2017 when the accused failed to turn up in court, the State Counsel applied for warrant of arrest against her and summons to the surety. That the warrants of arrest were taken out against the surety and he was arrested and arraigned in court on 14th May 2018. He informed the court that he was not the surety and had no objection to the sale of the land. He further depones that before the land was sold the court requested the DCI the real owner of the property. The DCI investigated and in a letter dated 22nd May 2018 signed by John Mutisya for D.C.I.O Kirinyaga addressed to Executive Officer Kerugoya Law Courts, he confirmed that the applicant was the rightful owner, that is Julius Muriithi Kibanya ID. No.115995281. Thereafter the applicant appeared in court seeking to set aside the orders but the magistrate advised him to file the application in the High Court.

4. The applicant filed submissions dated 28th June 2019 and contends that the principles for granting injunctive orders are set out in the case of Griella -v- Cassman Brown & Co Ltd (1973) E.A 358. That the 3rd respondent did not accord him proper notice and that the rules of natural justice were not followed by the court before the orders of sale of the land were issued. That the parcel of land in dispute is family land where he lives with his family and they depend on it for their livelihood and he would be rendered destitute and suffer irreparable loss that cannot be compensated by an award of damages. He submits that the court should take the course with the lower injustice, he relies on Films Rover International 1986 3 ALL E.R 772. He submits that the balance of convenience tilts in his favour. He submits that he still has possession of his original title deed and if at all he had stood surety, it would have been deposited in court. In this regard he submits that fake documents could have been used.

5. The Attorney General (5th Respondent) filed submissions on behalf of 1, 4 & 5 respondents. He submits that the application ought to be dismissed as it is brought under the wrong provision of the law, is vexatious incompetent and is an abuse of the court process. That the application seeks an injunction pending the hearing and determination of the application but does not say what will happen after that. They further submit that the applicant has denied that he stood surety for the accused and that he has his original title deed. That the D.C.I has confirmed that the land belongs to the applicant.

6. I have considered the application, the averments and the submissions. The issues which arises for determination are whether the court should issue an injunction. The applicant is seeking a temporary injunction. The application is brought under **Article 50** of the **Constitution**. The Article deals with fair trial It has many sub-articles. The applicant has not quoted any of the sub-articles. The application is also stated to be brought under **Section 356 (1) & (2) of the Criminal Procedure Code** and all the other enabling provisions. The Section deals with stay of execution pending the entering of an appeal. This provision is not relevant as the applicant has not been convicted. The application has raised matters touching on fraud and misrepresentation as his title deed was used to stand surety for an accused while he claims to be in possession of his original title deed. The law now leans on doing substantive justice other than determining matters on technicalities of procedure. **Article 159(2) (d)** of the **Constitution** provides:-

“ In exercising judicial authority, the courts and tribunals shall be guided by the following principles- justice shall be administered without undue regard to procedural technicalities.”

7. Procedural technicalities are matters which may lead the court to strike out pleadings without determining the dispute. Undue regard to procedural technicalities means that the court should address the matters in dispute without undue reliance on the rules of procedure which will impede the just hearing and determination of the matter in dispute. In this case the applicant is seeking to stop the sale of his land and for the court to ascertain who indeed stood surety for the accused. It is in the interest of justice that the application be heard on merit.

8. The High Court has supervisory jurisdiction over sub-ordinate courts. This is provided under **Article 165 (6)** of the **Constitution** which state:-

“ The High Court has supervisory jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.”

This jurisdiction is restated in the **Criminal Procedure Code** (Cap 75 Laws of Kenya) which at **Section 362** gives the High Court the powers of revision over sub-ordinate courts While exercising these powers, the court has power to call for the record of any criminal

proceedings of a sub-ordinate court for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed as to the regularity of the proceedings. While exercising this jurisdiction, the court may alter, reverse or set aside.

9. In this application the dispute is on forfeiture of recognizance. It is alleged that the applicant stood surety for Lucy Ruguru Chege who was the accused person in Criminal Case No. 341/2016. The applicant has denied this and contends that he is in possession of the title deed. The accused jumped bail and therefore the court had to proceed as provided under **Section 131 of the Criminal Procedure Code**. It provides:-

Section 131 (1) to (5)

“ (1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.

(3) A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.

(4) If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment for a term not exceeding six months.

(5) The court may remit a portion of the penalty mentioned and enforce payment in part only.”

Under the section, the court is required to record proof that the recognizance has been forfeited. The court will then call upon the person to pay the penalty or show cause why it should not be paid. If the surety does not show cause it will order the recognizance to be forfeited to the State and proceed to issue a warrant of attachment and sale. If the penalty is not paid the surety may be sent to jail for a period not exceeding six months. The court has discretion to remit a portion of the penalty mentioned and enforce payment in part only.

I have perused the record and it shows that after the accused jumped bail, the court ordered that a warrant of arrest be issued against the surety. Thereafter the surety appeared before court and said he is not the surety. He told the court that he had his title deed at home. The court directed the D.C.I.O to investigate who the owner of the title deed was. It turned out that the applicant was the owner. The proceedings show that the trial magistrate followed the right procedure laid down under **Section 131 of the Criminal Procedure Code**. The applicant appeared in court on several occasions before the court and neither requested to be discharged as surety or raised the issue of fraud as regards his property being used as recognizance for the accused person.

In this case, the trial magistrate followed the due process the applicant was given an opportunity to pay the penalty or show cause why the security should not be forfeited. All he said is that he had no money and stated that if the land is sold it can be sold, he denied that he was the surety.

10. The need for persons to sign a recognizance and deposit a surety in court assists in the administration of justice. The surety is supposed to ensure that the accused person turns up for his trial. The accused enjoys his right to be released pending trial. Breach by the surety to produce the accused in court affects the administration of justice and unless good cause is shown the surety ought to be ordered to pay the penalty. If he fails to pay or show good cause the warrants of attachment will issue. See **George Amata Ongaura –v- Republic [2010] eKLR** and **Isaac Mwetish Chematia -v- Republic [2019] eKLR**

11. The surety appeared in court on 26th September 2017 and informed the court that the accused is unwell. The surety failed to appear in court during the next hearing and warrant of arrest was issued. The applicant appeared in court and his allegation that there was fraud is a mere allegation. He was accorded a fair trial and due process was followed. I find that the application for injunction lacks merits. The accused is still at large. The applicant failed to produce her in court.

I order that:-

1. The applicant to pay the penalty of Kshs.300,000/- within 14 days from the date hereof.
2. If the penalty is not paid warrant of attachment and sale of the security, that is Land Parcel No.Inoi/Kariko/2585 be executed by the 3rd respondent.

The matter shall be mentioned before the trial magistrate after 14 days.

Dated, signed and delivered at Chuka this 27th day of May 2021.

L.W. GITARI

JUDGE