



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 50 OF 2014

CHARLES MURIITHI KARUTHIRU.....APPELLANT

VERSUS

PAUL NTHINWA MUMBI

(suing through his donee JAMLACK GATERU.....RESPONDENT

(Being an appeal from the Ruling of Hon R.A. Oganyo (Mrs), Senior Principal Magistrate (SPM) at the Chief Magistrate's Court at Milimani in CMCC 4785 of 2008 delivered on 4th February 2014)

JUDGMENT

INTRODUCTION

1. In her Ruling of 4th February 2014, the Learned Trial Magistrate, R.A. Oganyo (Mrs) Senior Principal Magistrate (SPM), dismissed the Appellant's Notice of Motion application dated 29th October 2013 seeking a stay of the transfer and/or confirmation of sale of his property namely Plot No 19 Kayole Commercial Block (hereinafter referred to as "the Subject Property") that had been sold in a public auction on 24th October 2013 and orders that the previous payments he had made to the Respondent be credited and the difference of the monies be given to him.
2. Being aggrieved with the said Ruling, the Appellant filed his Memorandum of Appeal dated 26th February 2014 and filed on 27th February 2014. He relied on eight (8) Grounds of Appeal.
3. The Appellant's Written Submissions were dated 18th June 2018 and filed on 19th June 2018 while those of the Respondent were dated and filed on 27th June 2018.
4. When the matter came before the court on 31st October 2018, the parties requested it to render its decision based on its Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant stated that in execution of the decree that was issued against him, Jumbo Airlink Auctioneers (hereinafter referred to as "the Auctioneers") sold his subject property in a Public Auction to recover the decretal amount herein. The purchaser paid a ten (10%) per cent deposit.
6. To save his property, he moved the court under Order 22 Rule 74 of Civil Procedure Rules seeking to pay the ten (10%) per cent that was paid by the Purchaser and the outstanding balance of the decretal sum less Kshs 940,000/= paid prior to the sale by Public Auction. It was his argument that the aforesaid provision of the law gave him a window to redeem his subject property. He pointed out that he deposited the sum of Kshs 2,803,181/= into court but that the Learned Trial Magistrate ordered that the same be refunded to him when she dismissed his Notice of Motion application dated 29th October 2013. It was his contention that the said Learned Trial Magistrate misdirected herself when she denied him an opportunity to redeem his property.
7. He averred that a sale of immovable property through a public auction could only be completed once a court granted a vesting order and certified the sale as absolute under the provisions of Order 22 Rule 77 of the Civil Procedure Rules. It was therefore his argument that the Learned Trial Magistrate's determination that the sale was under the bridge was erroneous.

8. He also faulted the said Learned Trial Magistrate for having dwelt on his character because this blurred her mind from considering the application on merit under the provisions of Order 22 Rule 74 and 77 of the Civil Procedure Rules.

9. He added that despite annexing a Valuation Report of the subject property showing that its value was Kshs 15,000,000/=, the said Learned Trial Magistrate termed the same to have been hyped and contradictory without giving any reasons.

10. It was his averment that since the Respondent did not annex any other Valuation Report, his valuation remained unchallenged. He was emphatic that compared to the highest bid of kshs 2,000,000/= by the Purchaser, he ought to have been given an opportunity to redeem his subject property as he had deposited a sum of Kshs 2,803,181/=.

11. He therefore urged this court to allow his appeal.

THE RESPONDENT'S CASE

12. The Respondent's case was that he entered into a joint venture with the Appellant where they each contributed a sum of Kshs 4,000,000/=. Subsequently, the Appellant stopped communicating to him and he travelled from the United Kingdom where he stayed. Upon his arrival, he found the Appellant doing business. They then agreed that the Appellant would refund him the principal capital that had been given for the joint venture business.

13. The Appellant gave him his log book and cards for two (2) plots which he was to pay to redeem them but he did not make any payments. As a result, he filed the suit in the lower court to recover his money.

14. He stated that Objection Proceedings that had been filed by the Appellant's wife in respect of her motor vehicle were dismissed after she confirmed that she was going to repay him the monies he was owed by the Appellant herein.

15. He pointed out that subsequently, there were other Objection Proceedings that were filed in respect of the subject property on the ground that the same had already been sold to a third party, one Daniel Maina Chege for Kshs 2,000,000/=. These proceedings were also dismissed.

16. He also contended that despite the Appellant having obtained a stay on condition that he would deposit the rent from the subject property into a joint interest earning account in the names of their advocates, he did not do so. As a result, he proceeded with the auction to recover the decretal sum.

17. It was also his averment that the Appellant had lodged a Memorandum of Appeal dated 7th September 2009 which he abandoned and that since they had recorded a consent to settle the matter out of court, the present Appeal had been overtaken by events.

18. It was his submission that the Appellant had been evasive and pointed out despite the said Daniel Maina Chege having filed Objection Proceedings relating to the subject property on the ground that the same belonged to him, he was now claiming that the subject property belonged to him which was contradictory.

19. He was emphatic that the Appellant was trying to deny him his lawful judgment and thus urged this court to dismiss his Appeal.

LEGAL ANALYSIS

20. Notably, the Respondent did not address himself to the Appellant's submissions in respect of Order 22 Rule 74 of the Civil Procedure Rules.

21. Order 22 Rule 74 of Civil Procedure Rules stipulates as follows:-

1. Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court-

a. for payment to the purchaser, a sum equal to ten per cent of the purchase-money; and

b. for payment to the decree-holder, the amount specified in the public notification of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such public notification of sale have been received by the decree-holder.

2. Where a person applies under rule 75 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

3. Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the public notification of sale.

22. The aforesaid subject property was sold by public auction on 24th October 2013. The Appellant filed his Notice of Motion application seeking the setting aside of the public auction and a stay of transfer/confirmation of sale of the subject property pending the hearing and determination of the application on 29th October 2013. Although he had sought leave to deposit the sum of Kshs 2,803,181/= to cover the amount indicated in the Notification of Sale in the sum of Kshs 3,243,181/= less Kshs 940,000/= paid to the Respondent plus ten (10%) per

cent paid by the Purchaser, he deposited the same in court on 8th November 2013.

23. It was evident that by the time both parties filed their respective Written Submissions in respect of the said application, the Appellant had deposited the sum envisaged in Order 22 Rule 74 (1) (b) of the Civil Procedure Rules. This court thus wholly agreed with the Appellant that provided that the sale of the subject property had not become absolute as envisaged in Order 22 Rule 79 of Civil Procedure Rules, proper title had not passed to the Purchaser. Indeed, this court did not see such certificate in the lower court file which appeared to be a reconstructed file and it came to a firm conclusion that the sale of the subject property had not been confirmed and/or absolute.

24. Having said so, the discretion of setting aside the sale by public auction remained with the Learned Trial Magistrate. She declined to exercise her discretion in favour of the Appellant to set aside the sale by public auction on the ground that despite having been present at the auction, the Appellant did not bid. In addition, she observed that he had purported to give a Valuation Report of a property that had previously been claimed by one David Maina Chege.

25. Accordingly, having considered the Ruling of the said Learned Trial Magistrate, it was the considered view of this court that she properly exercised her discretion for the reason that from previous Objection Proceedings, it had been stated that the subject property did not belong to the Appellant, having sold the same to the said David Maina Chege for Kshs 2,000,000/=. In view of the aforesaid, this court was not persuaded that it should interfere with the Learned Trial Magistrate's discretion.

26. This court was not, however, persuaded to conclude that the Valuation of the said property was hyped or that he ought not to have redeemed his property because, although present at the Auction, he did not bid as the Learned Trial Magistrate had concluded. Ordinarily, where a property is sold at an under value, the aggrieved party can seek redress from court. As this was not the case herein, this court will say no more on it.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 26th February 2014 and filed on 27th February 2014 was not merited and the same is hereby dismissed. The Appellant shall bear the Respondent's costs of this Appeal.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of January 2019

J. KAMAU

JUDGE