



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.200 OF 2007

MOHAMMED SALIM SHAMSIDIN.....PLAINTIFF/RESPONDENT

VERSUS

TRISHCON CONSTRUCTION COMPANY LTD.....DEFENDANT/APPLICANT

RULING

1. The Applicant through a Notice of Motion brought pursuant to section 3 and 3A of the Civil Procedure Act dated 1st December 2017 seeks the following orders:-

a) THAT pending the hearing and determination of Civil Appeal No.28 of 2013 this Honourable court be pleased to set aside or vary the orders issued on 22nd November, 2017 by the Honourable S.A Opande, learned Deputy Registrar, to the effect that LR. No.12833/5 be advertised and subsequently sold after 45 days.

b) THAT the costs of this application be provided for.

2. The Application is premised on grounds numbers 1 – 4 on the face of the application and is supported by the affidavit of the Applicant Dhanji Velji dated 1st December 2017 as well as the supplementary affidavit dated 25th October 2018.

3. The Application is opposed. The Respondent relies on Replying affidavit dated 2nd Mach 2018 and annexures thereto.

4. At the hearing Mr. Bundotich, learned Advocate appeared for the Applicant whereas Mr. Wandwaba, learned Advocate appeared for the Respondent. Both counsel made oral submissions in support of their rival positions in this matter.

5. I have very carefully considered the application, affidavit in support as well as the Replying affidavit and rival submissions. The issues arising for consideration can be summed up as follows:-

a) Whether the Applicant's application is properly before court for hearing and determination?

b) Whether this court can set aside or vary the orders issued on 22nd November 2017 by the Honourable S.A. Opande, learned Deputy Registrar, to the effect that L.R. No.12833/5 be advertised and subsequently sold after 45 days?

A) Whether the Applicant's application is properly before court for hearing and determination?

6. The application before this court arises out of the ruling issued by S.A. Opande, Deputy Registrar in this matter on 22nd November 2017. In which the Deputy Registrar issued orders for the advertisement and subsequent sale of the defendant's property **L.R. No. 48/12833/5** in satisfaction of the decree in this matter. That order provoked the Applicant to file the present application before this court.

7. The Deputy Registrar issued the impugned order by virtue of order 49 of the Civil Procedure Rules. An aggrieved party by the decision of the Deputy Registrar is required to lodge an appeal from the decision of the Registrar to a Judge in chambers. **Order 49 Rule 7(2) and (3)** provides:-

"(2) An appeal from a decision of the registrar under the Orders referred to in subrule (1) shall be to a judge in chambers.

(3) The memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of

the registrar."

8. The aforesaid **order 49 Rule 7(2) and (3) of the Civil Procedure Rules** is in mandatory form, which requires the aggrieved party to strictly comply with the provisions of the said Rule. In the instant application, the Applicant did not file an appeal, as there is no memorandum of appeal, setting out the grounds of appeal nor was the appeal filed within 7 days of the decision as 7 days lapsed on 30th November 2017 whereas the application was filed on 1st December 2017, thus after 9 days from the date of the Ruling being 22nd November 2017.

9. **Order 50 Rule 2 of the Civil Procedure Rules** provides:-

"Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time."

10. In view of the above, the period for lodging appeal given as 7 days which is beyond 6 days under order 50 Rule 2 of Civil Procedure Rules, means 7 days were to be calculated including Sunday and any other day appointed as a public holiday. I find the Applicant filed the application after 9 days, beyond the period allowed by **order 49 Rule 7(3) of Civil Procedure Rules**. The application having been filed out of time and contrary to provisions of **order 49 Rule 7(2) and (3)** of the Civil Procedure Rules is a nullity and ought to be struck out.

B) Whether this court can set aside or vary the orders issued on 22nd November 2017 by the Honourable S.A. Opande, learned Deputy Registrar, to the effect that L.R. No.12833/5 be advertised and subsequently sold after 45 days?

11. I will now turn to deal with issue (b) in case I am faulted on my finding in (a) above. The Applicant seeks the orders issued by Deputy Registrar, be set aside or varied on the grounds that when the Deputy Registrar issued orders for advertisement and subsequent sale of the defendant's property **L.R. No.12833/5** in satisfaction of the decree in this matter; the learned Deputy Registrar lacked jurisdiction to issue the orders as there is a substituting stay order in Civil Appeal No. 28 of 2013, and a stay Application **No.NAI 86 of 2013 (LR 56/2013)** against the decree herein. It is further urged that the owner of the property is not a party to the proceedings before the court. It is further urged if the application is not heard and determined the defendant stands to suffer prejudice on account of the orders issued by the Deputy Registrar.

12. The Applicant, a director of the defendant company reiterates the contents of the order of 22nd November 2017 by the Honourable S.A. Opande, Deputy Registrar, ordering the advertisement and subsequent sale of the Defendant's property **L.R. No. 12833/5** in satisfaction of the decree in this matter, be set aside or varied, urging the property does not belong to Triscon Construction Company Limited. He further urges he is not a party to this suit. He therefore terms the Deputy Registrar's order as illegal as it would effect a party that is not sued. He further urges there are pending suits being Court of Appeal No. 28 of 2013 and a stay Application **Civil No. NAI 86 of 2013 (UR 56/2013)** which are directly connected to this matter and in which Court of Appeal granted order of stay of execution of the decree in Civil Application **No. NAI 86 of 2013 (UR 56/2013)**. It is therefore contended that the Deputy Registrar lacked jurisdiction to issue the orders in the two matters which are pending and in which orders of stay in place.

13. The court's record reveals that indeed there exist two matters as mentioned by the Applicant. In civil Appeal **No. NAI 86 of 2013 (UR 56/2013)**, the Court of Appeal granted stay of the proceeding on the following terms:-

"On condition that the arbitral award of Kshs.16,381,035/- be deposited in an interest-earning account in the joint names of the advocates for the applicant and the respondent pending hearing and determination of Civil Appeal No.28 of 2013 which has already been filed. The money shall be deposited within thirty (30) days from the date of this ruling in a financial institution mutually agreed upon by the parties. In the event of failure to comply with that condition, this application shall stand dismissed."

The Applicant did not comply with court's order.

14. The Respondent sought court's leave to execute the award and upon hearing of the application a ruling was issued by Honourable Justice E.K.O. Ogoia on 15th May 2015 granting the application.

15. The Applicant subsequently through an application dated 26th may 2015, sought stay of the execution pending the hearing and determination of the Civil Appeal **No. 28 of 2013** which application for stay was granted under the following terms:-

a) That the applicant does deposit the security as ordered for by the Court of Appeal, of Kshs.16,831,035/-;

b) The security be provided within 90 days from the date of the Ruling;

c) Costs were awarded to the Respondents.

16. The Applicant inspite of additional period to comply with the court's order for depositing the security, did not deposit any money or any security.

17. The Applicant herein proceeded to the Court of Appeal again in Civil Application **No. NAI.86 of 2013** seeking to review, vary and set aside the Order of the Court of Appeal which was delivered on 27th of September 2013. Dhanji sought, in place of depositing Kshs.16,381,035/- in a joint interest earning account, to have the titles documents in property **L.R No.12833/5 Kikuyu** in the name of

Dhanji Velji be held as a lien. This is as per the affidavit sworn by Dhanji Velji on 30th October 2013 (See **Exhibit MSS-15**).

18. The Respondent proceeded with execution by way of prohibitory order on property **L.R No. 12833/5 Kikuyu**, which prohibitory order was granted by the Deputy Registrar after the Applicant failed to establish that he had complied with the conditions of stay given in both the High Court and the Court of Appeal. The Respondent contends that after the order of prohibition was granted, they sought to have the property sold by auction in order to recover the decretal sum which order was granted on 22nd November 2017, subject of this application.

19. The Applicant has raised numerous issues in his application which I now turn to consider.

20. The Applicant Dhanji Velji contends that he is not a party to this case, however the Respondent submits he was a party to the Arbitration which gave rise to the award the subject of this suit. The court record reveal that the Applicant had filed a preliminary objection on the enjoinder of Mr. Dhanji, which was struck out. The same issue was dealt with before Justice Muga Apondi, who by his ruling delivered on 31st July 2012, dismissed the application while noting that the subject agreement had been entered into between Mohamed Salim and Dhanji Velji. The applicant has not sought court's leave to be enjoined as a party before filing the present application. That if he knew he was not a party he should have filed application to be enjoined as a party. By his own conduct including entering into an agreement for arbitration in this matter he confirmed he was a party in this matter. He is estopped by his own conduct from stating otherwise. I find the same issue was raised before court earlier on and has been determined, hence I find that the same cannot be re-litigated a fresh.

21. On the issue of stay of execution, the Applicant was granted conditional stay of execution within a limited period in Application **No.86/2013** and Civil Appeal **No. 28 of 2013** which period of compliance has since lapsed following failure of the Applicant to comply with the said orders when he failed to deposit the decretal sum. There are now no orders in force to which the Applicant can hold on. In view of the above the Deputy Registrar did not issue any orders illegally a urged by the Applicant.

22. In the Applicant's affidavit dated 30th October 2013 under paragraph 12 he deponed thus:-

"I verily believe that this Honourable Court has jurisdiction and power to vary and/or set aside the Ruling and Order dated 27th September, 2013 and thereby accept as security a lien for the Title documents in respect of L.R No 12833/5 Kikuyu, Kiambu County."

23. The above averment resulted in the Respondent seeking prohibitory order against L.R. No. 12833/5 which the applicant on his own will pray the court to accept as security on oath. This provoked the Respondent to proceed with execution by way of prohibitory order on property **L.R. No. 12833/5 Kikuyu**. The Applicant having committed him to have the property accepted as a security I find he cannot be heard to claim that it is wrong for the property to be ordered to be advertised and subsequently be sold in satisfaction of a decree in this matter.

24. The upshot is that the Applicant's application is without merit. I proceed to make the following orders:-

- a) The Applicant's application dated 1st December 2017 is incompetent, null and void hence is struck out;**
- b) In the alternative to (a) above the Applicant's application is without merit and is dismissed;**
- c) I find no justification to set aside or vary the orders issued on 22nd November 2017 by Hon. S.A. Opande, Deputy Registrar, to the effect that L.R. No. 12833/5 be advertised and subsequently sold after 45 days from 22nd November 2017.**
- d) Costs of the Application to the Respondent.**

Dated, signed and delivered at Nairobi this 31st day of January, 2019.

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J .A. MAKAU

JUDGE