



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC 261 OF 2017

(CIVIL CASE 4735 OF 1993)

THABITI FINANCE COMPANY LTD.....PLAINTIFF

-VERSUS-

CHRIS DANIEL OKELLO.....DEFENDANT

AND

MANSUKHLAL GORDHAN KATHROTIYA.....INTERESTED PARTY

RULING

1. The Interested Party /Applicant **Mr.Mansukhlal Gordhan Kathrotiya** filed application on 22nd June 2017 and sought Court orders restraining the **M/S Nyoluoyo Auctioneers** acting on behalf of the Plaintiff from repeatedly threatening to sell the Interested Party's land parcel **SUNA EAST/WASWETA 1/8046** by public auction in execution of the decree of this suit.
2. The Applicant claimed that the suit property **SUNA EAST/WASWETA 1/8046** has never been attached, either lawfully or otherwise in execution of the decree of this Court, since the Applicant is the absolute owner and exercises absolute proprietorship over the suit property as per annexed copy of Title Deed.
3. The Applicant also stated that the suit property **EAST/WASWETA 1/8046** has never been advertised for sale, by public auction, private treaty otherwise or at all and therefore the Interested Party is not bound to satisfy the decree in this suit.
4. The application was served to the Respondents and matter was scheduled for directions and written submissions were filed.
5. The Plaintiff and Defendant despite service as confirmed by affidavit of service filed on 22nd June 2019 failed to attend Court, present documents, file written submissions as agreed by consent before the Trial Court on 15th May 2018, 17th July 2018 and 17th October 2018.
6. Strangely, despite service of the application to the Plaintiff through advocates on record, I find no affidavit of service confirming service to the Defendant who is at the centre of this dispute; judgment was entered against him and decree issued, then **NTSC** was issued to him for sale of his immovable property.
7. The Applicant through Counsel proceeded *ex parte* with oral submissions based on written submissions filed on 14th May 2018.
8. The Plaintiff and/or Counsel despite service failed to appear in Court, the Defendant was not served.
9. In a nutshell, Counsel for Interested Party/Applicant submitted on 3 points;
 - a. **On 7th July 1994, the Plaintiff obtained judgment against the Defendant for Ksh 1,944,259.05/- and interest at 30% per annum.**
 - b. **The decree was issued on 26th February 1998 and the Plaintiff instructed Nyoluoyo Auctioneers to attach the suit property.**
 - c. **By 2003, the decretal amount escalated to Ksh 5million.**

d. Since the Auctioneers repeatedly threatened the Interested Party to attach the said suit property.

e. The issue is whether the Interested Party is liable to satisfy the decree?

10. Counsel relied on the following authorities;

DANIEL NGANGA KAMANDE & 2 OTHERS vs. NGUCANIRIO FARMERS COMPANY LTD 2012 eKLR;

“I perfectly agree with Respondents, that since the Applicants were not parties to the suit ,they are not affected by the judgment...”

11. STANLEY NGETHE KINYANJUI vs TONY KETTER & 5 OTHERS [2015] eKLR Court of Appeal held;

“We have no doubt that the provisions on execution, sale and stay as contained in Order 21(now Order 22) are so elaborate that they represent a complete code to address every conceivable scenario that may arise out of the process. They have in built safeguards and conditions to ensure the protection of the interests of all persons and they are couched in mandatory terms”.

12. DETERMINATION

This court has considered pleadings and submissions on record and ought to consider whether a *prima facie* case is set out inspite of the matter proceeding *ex parte* as alluded to in the following case;

13. GIDEON SITELU KONCHELLAH V JULIUS LEKAKENY OLE SUNKULI & 2 OTHERS [2018] eKLR;

“It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that *prima facie*, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter”

14. In the case of YUSUF ABDI ADAN & BLUEBIRD AVAITION LTD –versus- HUSSEIN AHMED FARAH & 2 OTHER DEFENDANTS & MOHAMMED HASSAN INTERESTED PARTY HCCC100 OF 2016;

The Trial Court noted;

“A party cannot have the locus standi to address the Court unless and until they are properly on record or a party to the suit.

The Civil Procedure Act is silent on the concept of interested party [except] in Order 41 Rule 5 [CPR 2010]

The Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, 2013 describe an interested party as;

A person or an entity that has identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.”

15. The Court record does not contain any pleadings, evidence of the Interested Party being joined by the Court either *suo moto* or on the application by the intended Interested Party as party to these proceedings under **Articles 22(1) 48 & 50(1) of COK 2010**. Therefore, the proceedings were not properly conducted before Court in the absence of formal and/or oral application to be joined to these proceedings.

16. Secondly, the Court record confirms that the Defendant was not served with the application, mention and hearing dates and did not appear in Court. It is Crucial that the Defendant participates in these proceedings so as to confirm what property he/she lodged with the Plaintiff Bank as collateral for the loan he/she was advanced; knowledge, interest or ownership of suit property **SUNA EAST/WASWETA 1/8046** and shed light on the nexus between recovery of the loan from a decree against him/her and attachment of the suit property for sale to satisfy the decree. Finally, the Interested Party’s title deed to the suit property was issued on 7th January 2014. So who owned the property before/pre 2014?

17. Thirdly, the prayers/orders sought are injunctive orders. In GIELLA vs CASSMANN BROWN 1979 E.A an injunction is granted where a suit is filed and a *prima facie* case is established. As of now; although there is a suit, in the absence of service, attendance of the Defendant and participation in these proceedings; the Applicant has not established a case to warrant granting injunctive relief. For these reasons the application filed on 22nd June 2017 is dismissed with costs.

DELIVERED, DATED & SIGNED IN OPEN COURT ON 25TH FEBRUARY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR THE PLAINTIFF

KIPKENDA & CO. ADVOCATES FOR THE DEFENDANT

MR. MUSESIA FOR THE INTERESTED PARTY