



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

CIVIL CASE NO. 325 OF 1989

DIOCESE OF KISII - KENYA E. AFRICA PLAINTIFF

VERSUS

KEBIRIGO PARISH CONSUMER CO-OPERATIVE SOCIETY DEFENDANT

RULING

1. The court of appeal pursuant to a judgment delivered on 4th October 2013 in Civil Appeal No. 45 of 2010 (Kisumu) arising from a ruling in this case by **Wambiliyangah, J.** dated 19th March 2001 allowed the appeal and set aside the ruling by **Wambiliyangah, J.** whereby he had refused to set aside the sale of land parcel known as **West Mugirango/Bonyamatuta/1051** and the order permitting the executive officer of the court to execute transfer documents relating to the said parcel of land. The sale of the subject parcel of land was pursuant to an execution of a decree issued in the suit. The court of appeal in setting aside the ruling held that the decree that resulted in the sale of the said property was irregular as it did not comply with the law.
2. The sale that resulted in the transfer of the said property to the respondent having been set aside by the appellate court, the appellant who was the defendant and still is in the suit before this court and the owner of the property before the impugned sale filed the present application, the subject of this ruling dated 15th October 2014 and amended on 1st February 2015 under Sections 91 and 98 of the Civil Procedure Act, Cap 21 Laws of Kenya and seeks inter alia the following orders:-

1. **That this honourable court be pleased to issue orders restituting the defendant to its former position.**
2. **That the land registrar Nyamira County Land Registry do rectify the register by cancelling the name of the plaintiff and reinstate the name of the defendant in the register.**
3. **That the plaintiff be directed to pay damages set out as follows:-**
 - i. **Loss of income of rent for 85 months at a monthly rent of kshs. 15,000/= from the month of January 2009 to the month of December 2015 amounting to kshs. 1,275,000/=.**
 - ii. **Mesne profits.**

3. The plaintiff filed grounds of opposition to the defendant's application dated 10th August 2015 on 24th February 2016 and inter alia sets out the following grounds:-

1. **That the application is incompetent as the application that was reversed by the Court of Appeal had sought setting aside of the sale and the order requiring the executive officer of the court to execute the registrable documents for LR No. West Mugirango/Bonyamatuta/1057. The said reversal did not set aside the judgment upon which the orders were given.**
2. **That the application is premature and an abuse of the process of the court as the judgment**

against the defendant in the sum of kshs. 251,474.80 still stand.

3. That the application is frivolous as the defendant/applicant has not indicated how it will pay the sum admitted in the defence.
4. That since the process by which the judgment in favour of the plaintiff has been faulted by the Court of Appeal, the route of court to take is to set aside the judgment and hear the plaintiff's application for judgment on admission.
5. The defendant has not indicated how it will pay the sum admitted in exchange for the parcel of land which principal sum and interest is now in the region of kshs. 1,023,120.00.
6. That the property should be in the plaintiff's name as security for the sum the defendant has admitted pending the settlement of the said sum by the defendant.
7. That the application has no merit.
8. That there has been inordinate delay in making the application which delay is in excusable.
9. That the application is a ploy to blur the proceedings and prevent the plaintiff from proceeding with recovery of the sum the defendant admitted.

4. The court record shows that the firm of Masore Nyang'au & Company Advocates for the plaintiff on 29th July 2015 filed the notice of motion application dated 25th March 2014 where they sought the following orders:-

1. That the firm of Masore Nyang'au & Co. Advocates be granted leave to represent the plaintiff in the instant case in place of the firm of Kerosi Ondieki & Co. Advocates.
2. That the judgment entered in this case against the defendant be set aside.
3. That further to the setting aside of the judgment against the defendant, the court do enter judgment in favour of the plaintiff in the sum of kshs. 251,474.80 with interest at 12% per annum from the date filing of the suit.
4. That the plaintiff be awarded the costs of this application.

5. On 30th July 2015 Hon. Justice Okong'o partially dealt with plaintiff's application when he allowed the firm of Mosore Nyang'au & Company Advocates leave to come on record for the plaintiff in place of the firm of Kerosi Ondieki & Company Advocates. On 1st October 2015 when the matter was listed before me and attention was drawn to me of the pendency of the two applications by the plaintiff and the defendant respectively, I gave directions that the two applications be heard together and gave liberty to the parties to exchange written submissions. On 30th November 2015 the defendant applied and was granted leave to amend the Notice of Motion dated 15th October 2014. The defendant filed its submissions on 30th November but the plaintiff despite being afforded the opportunity to do so did not file any submissions and the court on 31st March 2016 reserved its ruling.

6. As per the court record the defendant did not file any response to the plaintiff's application dated 25th March 2014 filed on 29th July 2015. The defendant appears to have been subsumed by the desire to have its application dated 15th October 2014 as amended heard. The submissions filed by the defendant on 30th November 2015 make no reference to the application by the plaintiff.

7. The foregoing is the state of the record and pleadings post the judgment in the appeal. The application by the defendant/applicant as I understand it is that since its property known as **West Mugirango/Bomanyatuta/1051** was attached and sold to the plaintiff pursuant to the execution of a decree that the Court of Appeal has held to have been irregular, the effect was that the decree was annulled and the sale stood rescinded and/or set aside. It is unfortunate the appellate court was not clear and explicit in its orders following its allowing of the appeal. The court of appeal in its judgment inter alia stated thus:-

“The decree on which the respondent relied to assert rights to the judgment it had obtained was clearly irregular and should not have been allowed to stand. It was not signed by an officer of the court and there is no date on it to show when it was made contrary to legal requirements.

The respondent, who was the owner of the irregular decree, participated in the auction

without leave of the court. It did not pay the requisite deposit as required. These were matters that should have been considered by the learned judge, the which consideration should have led to a different result.

We think we have said enough to show that the judge in exercise of his discretion on the application before him ignored fundamental issues and irregularities and this led to injustice to the applicant. We are entitled in the premises to correct those irregularities and wrongs and we do so by setting aside the ruling delivered on 19th March 2001. The appeal is allowed, the ruling delivered on 19th March, 2001 is hereby set aside. The appellant will have costs of the appeal and costs of the suit.”

8. The gist of the Court of Appeal judgment is that there was not in place a valid and regular decree which could be executed and consequently the execution by attachment and sale of the defendant/applicant's property was irregular and as the court of appeal stated these irregularities which had resulted in injustice to the applicant had to be corrected. Effectively therefore, the Court of Appeal set aside the decree and the resultant sale of the applicant's property. From a reading of the Court of Appeal judgment, the judgment entered against the defendant/applicant was not set aside and it was only the decree and the sale which were set aside. The ruling of 19th March 2001 by Hon. Justice Wambilyangah which was the subject of appeal did not deal with setting aside of the judgment. Hence the judgment against the defendant still stands.
9. The sale and transfer of the defendant's property to the plaintiff was however as a consequence of the judgment of the Court of Appeal set aside. The defendant in the instant application predicates its application for restitution under Section 91 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides:-

91(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining many years after the premises had been transferred to the plaintiff any restitution or other relief which could be obtained by an application under subsection (1).”

10. The defendant/applicant avers in the further supporting affidavit that they lost rent income from the premises in the sum of kshs. 15,000/= per month from January 2009 and makes a claim for payment of that sum cumulative upto January 2016. It is unclear when the defendant ceased to receive rent from the tenant and in what circumstances since the receipts annexures AJNA-2 (a) and (b) show the defendant was receiving rent in the year 2007. The defendant states the plaintiff started receiving rent from the tenant in January 2009 though no evidence is furnished. The transfer to the plaintiff had been way back in 1997 and it is not evident how the issue of the rent continued to be handled since the defendant admits to have been receiving rent for many years after the premises had been transferred to the plaintiff.
11. While I am persuaded that an order of restitution restoring the property to the name of the defendant is merited, I am not satisfied that an order for the refund of rent paid to the plaintiff would be merited as it has not been proved the plaintiff has been paid the rent as alleged. In the circumstances of this case, I am however satisfied the defendant's property was wrongfully sold and transferred to the plaintiff pursuant to a defective decree. The defendant no doubt was denied the use of the premises and may infact have lost rent income. I will award the defendant damages by way of compensation for loss of user of kshs. 300,000/= and mesne profits of kshs. 300,000/= altogether aggregating the sum kshs. 600,000/=.
12. Turning to the application by the plaintiff dated 25th March 2014 seeking interalia that the judgment against the defendant be set aside as per prayer 2 and yet again to be re-entered as

prayed under prayer 3 of the Notice of motion it is unclear what the basis of this application. I have reviewed this application and the affidavit sworn in support and clearly no basis is laid to set aside the judgment. The Court of Appeal in its judgment did not fault the entry of judgment but faulted the decree and the execution process. I find this application to have no merit and accordingly dismiss the same but as the defendant did not respond to the same I make no order for costs.

13. The final result is that I find the application for restitution by the defendant merited and I grant the same on the following terms:-

1. **That the land registrar Nyamira, be and is hereby directed to cancel the registration of the plaintiff herein as the owner of land parcel West Mugirango/Bonyamatuta/1051 and to restore the name of Kebirigo Parish Consumer Co-operative Society Ltd, the defendant herein on the register.**
2. **The defendant is awarded damages of kshs. 300,000/= on account of compensation for loss of user.**
3. **The defendant is awarded mesne profits in the sum of kshs. 300,000/=.**
4. **Interest on (ii) and (iii) above at court rates from date of this ruling until payment is made in full.**
5. **Costs of the application to the defendant.**

Ruling dated, signed and delivered at Kisii this 20th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....for the plaintiff

.....for the defendant

.....Court assistant

J. M. MUTUNGI

JUDGE