



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO. 57 'A' OF 2004

ALFRED KWEYU..... PLAINTIFF/RESPONDENT

VERSUS

1. FRANCIS WETA OPWOKO

2. WAMBUTSI OMENO

3. CLEMENT OMITO..... DEFENDANTS/APPLICANTS

RULING

1. This is a Notice of Motion application dated 1/3/2010 premised on Section 3A of the Civil Procedure Act and all enabling provisions of the law. The application seeks some five (5) main orders as follows;
2. That the removal of the prohibitory order registered against the land comprised in Title No. South Wanga/Shikalame/946 on 12th February, 2008 and the purported transfer of Title No. South Wanga/Shikalame/946 to Joyce Obwala Kweyu on 23rd January 2009 be nullified, set aside and/or cancelled.
3. That the Title Deed issued to Joyce Obwala Kweyu on 2nd March, 2009 be cancelled.
4. That the prohibitory order registered against Title No. South Wanga/Shikalame/946 on 22nd December 2008 be reinstated at no further costs to the defendants.
5. That the sale of Title No. South Wanga/Shikalame/946 by public auction in execution of the decree for costs do proceed as per directions earlier given by the court.
6. That the defendants be at liberty to appoint another Court Bailiff to whom Warrants will be issued by the court to sell Title No. South Wanga/Shikalame/946 by public auction as per the terms of sale already settled by the court.
7. The applicants also pray that costs be borne by the respondent. The application is based on the grounds appearing on the face of the Motion and on the affidavit in support sworn by Clement Omito on 1/3/2010.
8. The applicants' case is that upon the respondent's suit being dismissed, they lodged a Bill of Costs which was taxed at Kshs.310,632/= and a certificate of Taxation issued. Payment of costs was demanded and when the respondent failed to pay a Notice to Show Cause why execution should not proceed for attachment and sale of the respondent's land title No. South Wanga/Shikalame/946 was issued. Though

served, the respondent did not show cause to the satisfaction of the court and a prohibitory order was issued by the court and duly registered against the suit property on 22/12/2008. The court went ahead to settle terms of sale and ordered that the property be sold by public auction with a reserve price of Kshs.500,000/= all this with the knowledge of the respondent.

9. The applicants assert that the property was not sold for quite some time and when the 3rd applicant visited the land registry at Kakamega on 9/12/2009 he discovered that the respondent had caused the property to be transferred to one Joyce Obwala Kweyu on 23/1/2009, after the Prohibitory order registered against the property had been mysteriously removed.

10. The applicants are of the view that this act was in contempt of court and have asked the court to rein on such conduct and allow the application.

11. The application was served on the respondent's counsel but no response was filed. A Hearing Notice for the application slated for hearing on 12/3/2015 was also served on counsel but was received under protest saying they no longer had instructions in the matter. It is important to note here that when the matter was called out for hearing on 12/3/2015, there was no representation on the part of the respondent and Mr. Musiega, counsel for the respondent did not appear or send a representative to court. The application therefore preceded exparte.

12. Mr. Amuga, counsel for the applicants, moved the application and urged the court to grant the prayers sought. He relied on the affidavit in support and the annexures to the affidavit saying that the respondent had not deemed it fit to respond to the application despite having been served in 2010.

13. I have considered this application, the grounds and affidavit in support and submissions by counsel. I have also perused the court record to acquaint myself with this matter.

14. From the record, it is true that there was an order for payment of costs of Kshs.310,632/= that were taxed in favour of the applicants. Thereafter on 17/12/2008 a prohibitory order was issued against the property in the presence of both Mr. Mukavale for the judgment Debtor and Mr. Nyikuli who was holding brief for Mr. Amuga for the Decree holder and on 11/8/2009, terms for sale of the property were settled in the presence of counsel for the parties and the court set the reserve price for the property at Kshs.550,000/= and ordered that it be sold by public auction.

15. According to a copy of the extract of title annexed to the affidavit in support of the application, the prohibitory order was registered against the title on 22/12/2008 as entry No. 3 on the register. On 11/2/2009, the prohibitory order was removed in what was said to be through a court order in Succession Cause No. 916/2007 and the property was registered in the name of Joyce Obwala Kweyu through the same Succession Cause No. 916/2007 and finally the property went into the name of the same Joyce Obwala Kweyu on 23/1/2009 with a title Deed issued in her favour on 2/3/2009. It is important to note here that the prohibitory order was removed in less than two months after it was registered against the suit property.

16. A prohibitory order having been issued by a court and registered against a property, cannot be removed except by an order of the same court in the same case in which the order was issued. That property is attached and is not available for transfer to any other person by any other means except in compliance with the directions of the court and for purposes for which the prohibitory order was issued.

17. In the present case, the Decree holder had been allowed to sell the property by public auction and terms of sale settled. A reserve price had also been placed by the court and that property was now a property of the court. The Succession Cause, if there was one, could not be used to remove a Prohibitory Order issued by a different court and no lawful entry could be registered against that property without reference to the prohibitory order.

18. The Title to the suit land was not clear and could not pass to any person let alone Joyce Obwala Kweyu. The Prohibitory Order simply put all and sundry on notice that the title to the land was inhibited

and was not available for transfer. The interest in the suit land could not be conveyed without first settling the outstanding debt which made the property encumbered.

19. Courts must stand up and discourage the practise where even with existence of court orders, Land Registrars transfer properties to third parties in what would appear to be a clear case of disobedience of such orders. When the court issued the Prohibitory Order which was eventually registered against the property, it was clear to all that that property was not available for transfer without recourse to the court that issued the order. The purported transfer of the suit property in what was said to be a Succession Cause cannot be allowed to stand.

20. The transfer also raises a curious aspect to this matter. When this matter came up for Notice to Show Cause on 17/12/2008, Mr. Mukavale who was present for the Judgment Debtor, ALFRED KWEYU, addressed the court as follows;

“The JD is in court. He was served personally on 10/12/2008 when he was burying his brother. He did not get to me until this morning. I have talked to him but I have not had time to advise him accordingly...”

21. Clearly, as at 17/12/2008 the respondent/Judgment Debtor, was alive and not dead. However, the extract of title annexed to the supporting affidavit to the Motion shows that the suit land was transferred into the name of Joyce Obwala Kweyu through what was said to be Succession Cause No. 916 of 2007. At what point then did the respondent/judgment debtor die leading to Succession proceedings on behalf of his estate?

22. What I can read from all this is mischief. The Judgment debtor wanted to defeat the Decree Holder’s claim by having the land transferred from his name to that of Joyce Obwala Kweyu, whatever the relationship between the two, to defeat the cause of justice. I respectfully agree with the words of **Madan, J.** (as he then was) in ***Mawj –vs- United States University [1976 – 80] KLR 229*** where he stated at page 251 as follows;

“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The court therefore must protect the status quo. Lord Cranworth LC said in Bellamy – vs- Sabire (IDG&G at pate 578) The law does not allow litigant parties to give to other pending the litigation rights to the property in dispute, so as to prejudice the opposite party.”

23. Considering the aspects I have alluded to in this ruling, they satisfy me that the alleged transfer was possibly obtained by fraud and collusion and were clearly aimed at stopping the applicants from attaching the property to satisfy the decree given in their favour against the respondent in this suit.

24. In the present case, the property had been a subject of attachment and a Prohibitory Order issued and the Judgment debtor/Respondent or Joyce Obwala Kweyu, had no right whatsoever by subsequent agreement or suits to transfer or take transfer of a property which had been attached. I agree with **Emukule, J.** in the case of ***China Situah International Co-operative Company –vs- Syokimau Dam Estates & 2 Others [2005] e KLR,*** when he says that “it would be improper if a successful litigant, like the plaintiff in this case, were to be forced to litigate again and again whether through fresh suits or applications” because the suit land though already attached by a Prohibitory Order, is transferred to new people in complete disregard of the court order. A court of justice will not allow anyone to be cheated out of his just deeds. The property was registered in the name of the judgment debtor as at the time it was transferred to Joyce Obwala Kweyu and the judgment debtor was then alive and not dead.

25. I am persuaded that the applicants are entitled to the orders they seek and their application dated 1/3/2010 succeeds and the following orders are hereby issued.

1. The removal of the Prohibitory Order registered against the land comprised in Title Number South Wanga/ Shikalame/ 946 on 12th February, 2008 and the purported transfer of Title Number South Wanga/Shikalame/946 to JOYCE OBWALA KWEYU on 23rd January, 2009 is hereby nullified and cancelled and the said property restored into the name of ALFRED KWEYU SHUNJI.
2. The Title Deed issued to JOYCE OBWALA KWEYU on 2nd March 2009 is also hereby cancelled.
3. The Prohibitory Order issued by the court and registered against Title No. South Wanga/Shikalame/946 on 22/12/2008 is hereby reinstated and at no further costs to the Defendants/Applicants.
4. The sale of Title Number South Wanga/Shikalame/946 by public auction in satisfaction of the decree for costs herein do proceed as per the directions earlier given by the court.
5. The Defendants will be at liberty to appoint another Court Bailiff to whom Warrants will be issued for purposes of selling by public auction the property known as Title Number South Wanga/Shikalame/946 subject to the terms and conditions of sale already settled by the court.
6. The applicants will also have costs of this application.

Dated and delivered at Kakamega this 21st day of April, 2015

E. C. MWITA

J U D G E