



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 385 OF 2011

CAPTAIN J. N. WAFUBWA.....PLAINTIFF

- VERSUS -

HOUSING FINANCE CO. OF KENYA.....DEFENDANT

R U L I N G

1. This Ruling is in respect of two applications before the court. The first application is a Notice of Motion dated 25th June 2014 by the Plaintiff (herein the 1st application) while the second one is a Notice of Motion dated 7th July 2014 by the Defendant (herein the second application). Both were heard together.

2. The first application seeks orders that:-

1. ***The Honourable court be pleased to give directions and allow the amended draft decree to be the final decree of the court.***
2. ***The costs of this application be provided for.***

3. The application is premised on the grounds set out therein and is supported by affidavit of the Plaintiff sworn on 25th June 2014.

4. The application is based on the grounds that the judgment of Civil Appeal No. 102 of 2013 partially interferes lawfully with the judgment of this court since the appellant and the Respondent thereto succeeded partially in their respective appeals. The application is grounded on the fact that the said Civil Appeal (Justice Waki, Justice Musinga and Justice Gatembu) never interfered with the declaration of this court's judgment that the Plaintiff's property was unlawfully sold by private treaty in 2009, and so the Plaintiff is entitled to his property LR. 209/10481/85 Nairobi. It is based on the finding of this court as an alternative that the Plaintiff be awarded the Kshs.4.5 million which the Court of Appeal nonetheless set aside, but did not comment on the alternative finding that the suit property was unlawfully sold. As a result of the foregoing the Plaintiff's ownership of the property upon the public auction of 1996 has never been challenged either in this court, or in the Court of Appeal.

5. The application is opposed. The Respondent filed Statement of Grounds of Opposition dated 4th July 2014. The second application herein is also in response to this application. The said second application seeks the following orders by the Respondent:-

1. ***The sum of Kshs.9,264,963/- deposited by the Defendants in court on 17th December 2012 be released to the parties in terms of the orders by the court of appeal of 28th March 2014.***

2. ***In the alternative to (1) above, out of the sum of Kshs.9,264,963/- held by this Honorable Court, the sum of Kshs.20,662.80 with interest at 27.5% per annum with effect from 12th November 1996 be released to the Plaintiff and the entire balance thereof be released to the Defendant.***
3. ***This honorable court do make such other or further orders as it may deem fit under the circumstances of this case.***
4. ***There be no orders as to costs.***

6. The second application is supported by the affidavit of **Martin Machira** sworn on **7th July 2014**, and a further affidavit of **Austin Ayisi** sworn on **24th March 2015** to which is attached their proposed draft.

7. The second Applicant's case is that:-

- a. ***This honourable court delivered judgement on this matter on the 26th April 2012 in favoru of the Respondent on the following strict terms:-***
 - i. ***Kshs.20,662.80/- with interest at 27.5 % pa. with effect from November 2996 till payment in full.***
 - ii. ***Kshs.4,500,000/= with interest at kshs.27.5% p.a. with effect from 9th Feburayr 2009 till payment in full being the value of the suit premises from the date of sale; and***
 - iii. ***Costs of the suit with interest thereon at court's rates.***
- b. ***The Defendant/Applicant deposit in court the sum of kshs.9,264,963/- on 17th December 2012 as a condition of stay pending appeal.***
- c. ***The Applicant herein being aggrieved by the said decision preferred an appeal to the Court of Appeal and the judgement of the Court of Appeal was delivered on 28th March 2014 wherein the appellate court set aside the award of Kshs.4,500,000/= with interest but upheld the award of Kshs.20,66280 with interest.***
- d. ***There is nothing further pending in this cause to warrant retention of the aforesaid sum deposited in court.***
- e. ***Further delay in releasing the funds is prejudicial to the Defendant as the claim on interest is accruing and efforts to compromise the issue of release of the funds has been unfruitful.***
- f. ***The present application has merit and it's in the interests of justice that the application herein be allowed to bring closure to this matter.***

8. The two applications are therefore in opposition to each other.

9. The brief history of the application is that this court by its Judgment herein in favour of the Plaintiff ordered that

- a. ***Kshs.20,662.80/= with interests at 27.5% p.a. with effect from 12th November 1996 till payment in full.***
- b. ***Kshs.4,500,000/= with interest at 27.5% p.a. with effect from 9th February 2009 till payment in full being the value of the suit premises from date of sale.***
- c. ***Costs of the suit with interests thereon at court rates.***

10. The Defendant/Respondent appealed those orders and was partially successfully when the Court of Appeal ordered that

1. ***The Appellant's appeal and the Respondent's cross appeal partially succeeds.***
2. ***The award by the High Court in favour of the Respondent for Kshs.4,500,000.00 and interest thereon be and is hereby set aside.***
3. ***The award by the High court to the Respondent of Kshs.20,662,80 and interest thereon be and is hereby upheld.***
4. ***The appeal and cross appeal otherwise fail.***

5. Each party shall bear its own costs both in the High court and in this court.

11. I have perused the court of appeal's judgment delivered on 28th March 2014. I am bound by that Judgment even if I feel certain issues needed to have been clarified in the Judgment. I say this because the court set aside the judgment on the kshs.4,500,000/= without commenting on the fact that this court granted the said sum to the Plaintiff as compensation for the loss of his property which had been unlawfully sold by the Defendant. It seems to me that since the compensation was for the lost property, the Court of Appeal ought, as a matter of justice being seen to have been done, to have commented on their wisdom of denying the Plaintiff the compensation without commenting on the property which was unlawfully sold by the Defendant. A comment by the Court of Appeal one way or the other, clarifying the issue would have been beneficial to all the parties herein. However the Court of Appeal's decision binds this court without question. However, because there appears to be an issue which needs a higher court to clarify, it may be upon the parties either to seek a review from the same court, or an appeal to a higher court.

12. In that regard the decree that flows from the matter herein must be in terms of the Court of Appeal judgment delivered on 28th March 2014, and it is not this court to approve such a decree. That decree, once approved, binds the High Court and there will be no need to urge the Defendants (second) application herein.

13. Pursuant to the foregoing paragraphs of this Ruling, the two applications before the court are either unnecessary or pre-mature, and for avoidance of doubt both are dismissed with no order as to costs.

14. Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JUNE 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Wanyanga for the Plaintiff

Mr. Musyoka holding brief for Ayisi for the Defendant

Teresia – Court Clerk