



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 722 OF 1994

KIPSIGIS FARM ENTERPRISES.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN NGERECHI.....1ST DEFENDANT/APPLICANT

DAVID K. KORIR.....2ND DEFENDANT/APPLICANT

DANIEL NYAMBATI NYABUTO.....INTERESTED PARTY

RULING

1. By the Notice of Motion dated 27th July 2012, brought under Section 3A of the Civil Procedure Act Cap 21, Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules, the Applicants sought, *inter alia*, the following orders-

(3) *That this Honourable Court does set aside the purported public auction conducted on 11th July 2012,*

4. *that the costs of this application be provided for,*

2. Briefly, the facts leading to this application are that on 20th December 2006, judgment was entered in favour of the Plaintiff and against the 1st Defendant (*the Applicant herein*) for the sum of Kshs. 1,296,062 together with interest at court rates and the costs of the suit. The decree-holder (*Respondent*) applied for execution by way of attachment and sale of the Applicant's immovable property known as Nakuru Municipality Block 24/1879. The same was allowed and a notification of sale was issued on 5th October 2011. On 19th December 2011, the Applicant herein filed an application seeking, *inter alia*, that the intended sale be postponed pending further orders of the court and the Auctioneers be restrained from auctioning the suit land. He also sought leave of the court to pay the decretal sum at the rate of Kshs. 18,000/= per month with effect from 5th January and thereafter on the 5th day of each subsequent month for a period of 18 months. **By consent of the parties**, the application was allowed on 19th January 2012, and the orders granted as prayed. The court further ordered that if the Applicant defaulted, then execution would proceed without further orders.

3. It was alleged by the Respondent that the Applicant defaulted in the payments and therefore it proceeded to advertise in the Standard Newspaper of 27th June 2012, the sale of the suit land to be conducted on 11th July 2012. On 10th July 2012, the Applicant filed an application seeking *inter alia* a stay of the intended auction and the attachment of the suit property be set aside. He filed another application on 11th July 2012 seeking a stay of the sale of the suit property, injunctive orders restraining the Respondent from proceeding with the sale and leave to continue making the monthly instalments. The latter application was allowed, but by the time the orders were extracted and served, the auction had

already been concluded.

4. In the present application, the Applicant seeks to set aside the said auction. His application was supported by the affidavit of Stephen Ngerechi sworn on 27th July 2012, and on the further grounds that-

(a) the 1st Applicant filed an application dated 11th July 2012 wherein he sought among other orders that the Respondent be enjoined from selling the parcel of land known as **NAKURU/MUN BLOCK 24/1879,**

(b) that by the time the 1st Defendant extracted the order the sale against which the injunctive orders had been sought had already been conducted,

(c) that the Respondent actions were unlawful as the Applicants had been making payments and therefore could not execute by way of sale,

(d) that the Respondent shall not suffer any prejudice if the sale of the suit property is set aside as the 1st Defendant will continue making payments,

(e) that it is in the interest of justice that the orders sought are granted.

5. In opposition to the Application, the decree-holder (Respondent) filed a Replying Affidavit sworn by Samuel Kibet Chepkony, the Treasurer of the Plaintiff, on 15th August 2012. It was his contention that the sale of the suit property was done pursuant to the consent order recorded in the court by which the judgment-debtor agreed to settle the decretal sum in monthly installments of Kshs. 18,000/=, that the property was sold to Daniel Nyambati Nyabuto on 11th July 2012 after the Judgment debtor had defaulted in making the monthly payments as agreed.

6. The parties canvassed the Application by way of written submissions, the Applicant's submissions were filed on 21st June 2013 and the Respondent's on 10th June 2013. With the leave of court, Daniel Nyambati Nyabuto was enjoined as an Interested Party in this suit. He did not file any papers in opposition to the application but put in written submissions on matters of law. It was his case that he had purchased the suit land on 11th July 2012 and that upon such sale the Applicant's proprietary interest over the suit land as well as his right of redemption were extinguished. Thus any remedy available to the Applicant lay in a claim for damages for breach of contract against the Plaintiff.

7. I have considered the application and affidavits sworn in support and against the same and the submissions of the parties. The issues for determination in this matter are-

- (a) whether the Respondent acted unlawfully in attaching the Applicant's land instead of pursuing other means to realise the decretal sum
 - (b) whether the Respondent acted unconstitutionally in purporting to satisfy a decree by sale of the matrimonial home, and
- c. whether the sale of the Applicant's property by way of public auction conducted on 11th July 2012 ought to be set aside

8.00 WHETHER THE RESPONDENT ACTED LAWFULLY IN ATTACHING THE SUIT PROPERTY

8.01 It was the Applicant's submission that the Respondent acted unlawfully in auctioning the Applicant's property for disobedience of a court order. Whereas the Applicant admitted that he had failed

to satisfy the decree made on 20th December 2006 and had further breached the terms of the consent recorded, on 19th January 2012, it was his contention that the Respondent could only cite the Applicant for contempt of court orders, seek judicial review orders of mandamus against the Respondent compelling him to pay the decretal sum or institute a debt recovery claim in the form of a plaint.

8.02 I agree with the Applicant that courts do not act in vain and their judgments, orders and decrees should be respected and obeyed. This principle is designed to protect the integrity of the courts and the rule of law. Thus the law provides for various mechanisms by which the court can enforce its orders against a person who is in contempt of court and ensure compliance with its pronouncements. In particular, Section 38 of the Civil Procedure Act (Cap 21) provides for mode of execution of a decree of the court against the party that fails to comply with the decree. The court has discretion on the application of a decree-holder to order execution by-

- (a) **delivery of any property specifically decreed;**
- (b) **attachment and sale, or by sale without attachment, of any property;**
- (c) **attachment of debts;**
- (d) **arrest and detention in prison of any person;**
- (e) **appointing a receiver; or**
- (f) **in such other manner as the nature of the relief granted may require:**

8.03 In the instant case, the Applicant failed to satisfy the monetary decree issued against him on 20th December 2006. It was therefore within the decree-holder's rights to apply to the court for execution of the decree by any of the modes provided under Section 38 of the Civil Procedure Act which included attachment and sale of the judgment-debtor's property. Whereas the Applicant was clearly in contempt of the court orders, the Civil Procedure Act in contemplation of such a case, provides for modes in which the court can ensure compliance with its decree. Thus, in my view, it would not have been prudent for the Applicant to apply for contempt orders whereas the law has provided for more efficacious means by which the decree-holder can put into effect the orders of the court.

8.04 In addition, the Respondent could not institute a fresh suit to recover the decretal sum whereas the court had already determined the dispute between the parties and made a final pronouncement on their rights and obligations. Such a suit could have been *res judicata* under Section 6 of the Civil Procedure Act and in particular where there is no dispute as to the amount owed. The consent made on 19th January 2012 did not create new obligations or confer new rights upon the parties over which could only be determined by a fresh suit. The consent order was only concerned with the mode of payment of the decretal sum and allowed the Applicant to settle the same in installments.

8.05 The Respondent could also not institute judicial review proceedings against the Applicant because **firstly**, the Applicant is not a public body over which this court has supervisory jurisdiction and **secondly**, he did not make any decision which could have been reviewed by this court. This was not a remedy available to the Respondent as wrongly submitted by the Applicant.

8.06 Consequently, I find and hold that the Respondent acted lawfully in attaching the Applicant's property in execution of the decree made on 20th December 2012 .

9.00 WHETHER THE RESPONDENT ACTED UNCONSTITUTIONALLY IN ATTACHING THE APPLICANT'S MATRIMONIAL HOME

9.01 It was the Applicant's contention that the sale of the matrimonial property without the consent of the other spouse is contrary to Article 45 of the Constitution and Section 79 (3) of the Land Act, that the Respondent should have explored other means of satisfying his decree that would not occasion

suffering upon his spouse and other dependants especially having regard to the other spouse's rights over the matrimonial property. It was his contention that the Respondent should have first attached the Applicant's pension and other properties other than the matrimonial home.

9.02 The constitution recognises the family as the natural and fundamental unit of society and the necessary basis of social order, and that the same shall be accorded recognition and protection of the state. It further provides that both spouses shall have equal rights at the time of, during and at the dissolution of the marriage. This is in recognition of the fact that a spouse may have acquired an interest over the matrimonial property even though she is not the registered owner thereof and her interest ought to be secured. Indeed Section 79 of the Land Act provides that where a charge is taken upon a matrimonial home, the consent of both spouses must be obtained for the transaction to be deemed valid.

9.03 Section 79 cited herein above, is intended to protect a spouse from dealings by the other involving the matrimonial home without her knowledge or consent. In the instant case, it was not disputed that the Applicant was the registered owner of the suit premises and there was no other interest that had been registered against the title. In attaching this land they were acting in pursuance of a court decree, and with the leave of the court and therefore did not require the consent of the Applicant as the owner of the land. In my view, if the Applicant's spouse had any overriding interest over the suit land which ought to have been recognized she should have presented her case to enable the court make a determination on her rights. The court cannot presume their existence and make an adjudication on the Applicant's spouse where she is not a party to this suit.

9.04 Consequently, I find and hold that there is no law that bars a decree-holder from attaching a matrimonial home in execution of a decree and further he need not obtain the consent of a spouse where such interest has not been registered or declared by the court.

10.00 WHETHER THE AUCTION CONDUCTED ON 11TH JULY OUGHT TO BE SET ASIDE

10.01 For the sale of the suit property to be set aside, it must be established that the same was tainted with illegality or procedural impropriety. It was the Applicant's case that he had complied with the terms of the consent order and paid the instalments, albeit, two or three days late. That the Respondent nevertheless advertised the suit land for sale, rejected the instalment for the month of June and proceeded to auction the same to the Interested Party.

10.02 The evidence before me shows that in fact the Applicant has been in breach of the terms of the consent. He has made several late payments after the due date and did not make any payment at all in the month of April while in June he paid on 28th June 2012 a day after the suit land been advertised for sale. In adopting the consent of the parties on 19th January 2012, the court had further directed that should the Applicant default in making any payments as per the consent, then execution shall proceed without further orders. The Respondent therefore acted lawfully in proceeding to advertise the suit land for sale on 27th June 2012 when the Applicant defaulted in paying the installment on 5th June 2012, when the same became due and payable and further in rejecting the purported payment by the Applicant.

10.03 It was however contended by the Applicant that when the auction was conducted on 11th July 2012, the court had already issued orders staying and restraining the sale of the suit premises and granted an order allowing the Applicant to continue making monthly payments. These orders were granted ex-parte and the suit land had already been sold by the time the orders were extracted and served upon by the Respondent. A party cannot be held to be in contempt of orders whose existence was not within his knowledge. Without establishing that the Respondent had knowledge of the orders at the time when the auction was conducted, the court cannot find his actions to have been unlawful and on this ground, set aside the sale. Section 58 (b) of the Sale of Goods Act, Cap 31 provides that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer. Consequently the sale had been concluded at the time of service and the orders issued had been overtaken by the events.

10.04 In any event, it is my view that the Applicant herein has demonstrated bad faith and no

intention to satisfy the decree herein. Since the judgment was made on 20th December 2006, he made no steps to pay the same and only moved the court on 19th December 2011, seeking stay of the sale of the suit land which was to be conducted the following day and further made a proposal to pay the decretal sum in monthly installments of Kshs. 18,000/=. He defaulted in his payments and only attempted to pay on a day after the suit land had been advertised for sale. He then remained indolent until the morning of the intended sale when he sought stay of the same and injunctive orders against the Respondent. His conduct amounts to a gross abuse of the court process and as a result, the Applicant has suffered great injustice by being denied the fruits of his judgment since the year 2006. In addition, setting aside the said auction would occasion prejudice upon the Interested Party who entered into the agreement to purchase the same in good faith and further paid a deposit of Kshs. 450,000/= to secure his interest.

10.05 In the end I find that the sale of the suit land in execution of the decretal sum of Kshs 1, 296,064/= awarded to the Respondent herein was proper and lawful. I also find that the Applicant has not demonstrated any cause to warrant the setting aside of the auction conducted on 11th July 2012 by which his land known as L.R No. NAKURU MUNICIPALITY BLOCK 24/1879 was sold to the interested party. For these reasons I dismiss the application dated 27th July 2012 in its entirety with costs to the Defendants and the Interested Party.

11. It is so ordered.

Dated, signed and delivered at Nakuru this 28th day of February 2014

M. J. ANYARA EMUKULE

JUDGE