



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 329 OF 2003

AWO SHARIF MOHAMED.....PLAINTIFF

VERSUS

ABDULKADIR SHARIFF ABDIRAHMAN.....DEFENDANT

AND

DIDO ALI RASSO.....PURCHASER/RESPONDENT

R U L I N G

1. There would appear to be some confusion as regards my Ruling delivered on 21 November, 2011. At paragraph 21 of that Ruling I found and held that the mandatory provisions of **Order 22 Rule 57 (2)** as regards the Notification of Sale, of **Order 22 Rules 48 (1) and (2)** as regards the notification of the Prohibitory Order and of **Order 21 Rules 6** as regards the Certified Copy of the Title, had not been complied with. I also expressed my doubts that there had been compliance as regards the provisions of **Order 21 Rules 79 – 83**. I found that such non-compliance of these mandatory rules of Civil Procedure nullified the Application dated 17 January, 2011 by the Interested Party/Purchaser Samkan Estate Ltd., to confirm the sale of LR No. 37/262/3 (Title No. IR 15855) ("the Property"). The current Application before this court is brought by the Plaintiffs herein and seeks Orders (*inter-alia*) as follows:

“2. That Abdulkadir Shariff Abdirahim the 1st Defendant/Judgement-debtor/Chargor, M/s. Eco Bank K Ltd the Chargee/Objector and Sasa General Investments Ltd or their servants representatives or assignees be restrained by temporary injunction from discharging and or from presenting for registration or registering a Discharge of Charge entry number 24 of 5th November 2008 presentation Book Number 215 of 5th November 2008 in the Register to title number IR 15855 LR 37/262/3 at Ardhi Lands Office Nairobi or selling transferring disposing off or howsoever dealing with title number IR 15855 LR 37/262/3 in any manner prejudicial to or negating the prohibitory order made herein on 22nd September 2008 pending hearing and determination of this application interpartes.

3. That Abdilkadir Shariff Abdirahim the 1st Defendant/Judgment-debtor, Eco Bank K Ltd the Charge/Objector and Sasa General Investments Limited the Borrower/Objector and the respective servants agents representatives or assigns be restrained from discharging charge entry number 24 Presentation Book No. 215 of 5th November 2008 in the register of title

number IR 15855 LR No. 37/262/3 at Land Office Ardhi House Nairobi or selling transferring charging or howsoever disposing off or dealing with title number IR 15855 LR No. 37/262/3 in any manner prejudicial to or negating the prohibitory order issued herein on 22nd September 2008 memorial thereof entry number 24 and presentation number 2538 of 24th September 2008 against title number IR No. 15855 LR No. 37/262/3 pending and or subject to the registration of the said prohibitory Order entry number 24 in Register of Title Number 15855 and subject to further orders under the said prohibitory Order made herein on 22nd September 2008.

4. That the ruling and order made herein on 21st November 2011 be set aside or reviewed.
5. That the Purchaser's application dated 17th January 2011 be allowed in terms confirming sale of Title No. IR 15855 LR No. 37/262/3 to the Purchaser.
6. Alternatively the Purchaser and or the Plaintiffs be granted extension of time to file an application for confirmation of sale of Title No. IR 15855 LR No. 37/262/3 to the Purchaser".

2. The Plaintiffs' said Notice of Motion dated 16 March, 2012 was brought (*inter-alia*) on the following grounds:

“(a) that Eco Bank K Limited has demanded forthwith redemption by the Judgment-debtor of liabilities of the Judgment-debtor and of Sasa General Investments Ltd to Eco Bank K Limited and has recently caused to be sold certain of the Judgment-debtor's immovable properties and is in the process of selling others and that unless an order of this Honourable Court is made reinforcing prohibitory orders issued herein on 22nd September 2008 Eco Bank K Limited and or the Judgment-debtor are likely to sell charge transfer deal with title number IR 15855 LR No. 37/262/3 to the third Parties and thereby render the said prohibitory Order herein nugatory the Judgment-debtor having in the intervening period sold transferred and charged his properties and that the Plaintiffs' decree will be rendered a paper decree by disposal of LR No. 37/262/3 loss of which to the Plaintiffs will be irreparable.

(b) of an error or mistake apparent on the face of the record of the Honourable Court and of discovery of new facts not readily available at the hearing of the Purchaser's application dated 17th January 2011.

(c) that hearing of the Purchaser's application for confirmation of sale ahead of the objector's application dated 5th February 2011 without reference to the Objector's application dated 5th February 2011 and without reference to the affidavit sworn by Towhida Awo Shariff on behalf of Plaintiffs on 15th March 2011 in opposition thereto was prejudicial to the Plaintiffs and the Purchaser and rendered the outcome of the Purchaser's application dated 17th January 2011 fait accompli.

(d) that the directions made for the order of hearing pending applications in light of Provisions of Order 22 Rule 77 (1) and Order 51 Rule 14 Civil Procedure Rules prejudiced the outcome of the purchaser's application.

(e) that failure to confirm sale will occasion irreparable loss hardship and injustice to the Purchaser and to the Decree-holders.

(f) that unprecedented and overly belated Objections by the Judgment-debtor through mere affidavit in opposition citing irregularity on the basis of repealed provisions of the Civil Procedure Rules without any application therein within a reasonable time or at all were designed to delay confirmation of sale, abused process of court and occasioned a failure of justice”.

3. The said Notice of Motion dated 16 March, 2012 was supported by the affidavit of **ISHA AWO SHARIFF** who is the 2nd Plaintiff herein as one of the administrators of the estate of the late **AWO SHARIFF MOHAMED deceased**. The deponent commenced his affidavit by referring to the Notice of Motion dated 2 February 2012 filed by the Interested Party/Purchaser Samkan Estates Ltd seeking a refund of the amount of Shs. 50 million which it had paid at auction to purchase the Property. That Application remains undetermined and in my Ruling of 29 March, 2012, I directed that such Application would be heard alongside the Plaintiffs' Notice of Motion dated 16 March, 2012. Thereafter, the said affidavit related the history of this matter going as far back as the 22nd September 2008. I believe that this was an attempt, covering some 21 paragraphs of the said affidavit, to impress upon the court that there was an error or mistake apparent on the face of the record of this court and a discovery of new facts not readily available at the hearing of the Interested Party /Purchaser's Application dated 17 January 2011.

4. The first 8 paragraphs of the Replying Affidavit sworn by the first Defendant on 11 May 2012 contained details of what the deponent had been informed as regards the proceedings, by his advocates on record. The deponent then noted that his advocates had informed him that the application to review my said Ruling of 21 November 2011 had been filed by the firm of Nyangito and Company advocates on behalf of the Interested Party, Samkan Estates Ltd. Indeed it is correct that the Interested Party did make an application by way of Notice of Motion dated 2 February 2012 but not for me to review my said Ruling but to seek a declaration that the amount that the Interested Party had paid for the suit property L. R. No. 37/262/3 being Shs. 50,000,000/- be immediately refunded to the Interested Party. That Application has yet to be heard and determined. Thereafter, the deponent went on to detail 12 further paragraphs based on information that he had received from his advocates basically being a commentary on what had or had not occurred in relation to the proceedings leading up to my said Ruling. To my mind, the only pertinent observation that the deponent made to the court from information given to him by his advocates on record, was that the Plaintiff's Application herein was not a ground for Review but for Appeal. The same did not constitute or detail any new evidence or an error apparent on the face of the record.

5. To complicate matters somewhat, the Advocates for the Judgement/debtor, the Defendant herein, filed an application under certificate of urgency dated 10 May 2012. That application sought a stay of execution of the consent orders issued as against the Defendant/Judgement debtor on 29 March 2012. Those consent orders recorded by court on 29 March 2012 detailed:

“... AND UPON HEARING Counsel for interested party council plaintiff and the counsel for 3rd party,

IT IS HEREBY ORDERED BY CONSENT

1. THAT an order BN is hereby issue confirming the sale of the property known as MARSABIT TOWNSHIP MUNICIPAL GRANT IR 4742 LR NUMBER 11969/119 to the applicant DIDO ALI RASO.

2. THAT a Certificate of sale be and is hereby issued to the purchaser DIDO ALI RASSO.

3. THAT the defendant/Judgement Debtor and/or his tenants be and are hereby compelled to give vacant possession and in default to be evicted from the property MARSABIT TOWNSHIP MUNICIPALITY GRANT IR 4742 LR NUMBER 11969/119.”

6. That Application was answered by the Replying Affidavit of the said Dido Ali Rasso sworn on 25 July 2012. Further, the Defendant/Judgement Debtor filed his submissions with regard to that Application dated 10 May 2012 in court on 30 July 2012. At the *ex parte* stage in relation to that Application my learned brother Mabeya J. gave a stay of execution of the said consent orders issued on 29 March 2012 pending the hearing and determination of the Application inter-parties or until further orders of the court. The learned Judge when the file last appeared before him on 20 July 2012 gave directions as follows:

“The application was argued before me on 6/6/12 was to review the ruling of the Hon Mr.

Justice Havelock of 21/11/2011. As at that time Hon. Havelock was away and it was not known when he was to return.

Before I could write the ruling for delivery today Hon. Havelock returned and is active in the Division. Accordingly, to be faithful to the provisions of Order 45 of the C. P. Rules, it is just and fair that the application be handled by Hon. Havelock J.

Accordingly, I direct that this matter be mentioned on 25th July, 2012 before the Hon. Havelock J. for his directions.”

Consequently, when the advocates for the parties appeared before me on the 25 July 2012 I stated that I had seen no breach of **Order 45** of the *Civil Procedure Rules* as I was not on station when the Application for Review of my Ruling dated 21 of November 2011. As the parties had already submitted on that Application before my learned brother Mabeya J., I was of the opinion that he should deliver the Ruling in respect thereof. To cut a long story short, it was agreed that the proceedings before the learned Judge would be typed, checked by the parties’ advocates and thereafter the Application would be ruled upon by me.

7. Upon a review of the record, I note that the parties appeared before Mabeya J. on 6 June 2012 with Mr. Wamalwa submitting on behalf of the Plaintiff/Applicant. He referred to my said Ruling and to the fact that I had found that there was non-compliance with the notification of sale of the suit property under **Order 22 Rule 57 (2)** and **Order 22 Rule 40**. Counsel maintained that at the time that I made the Ruling those forms under Appendix D of the old *Civil Procedure Rules* were no longer in use. The only form that remained was Form 28 covering advertisements in public newspapers. To comment briefly in that regard, Mr. Wamalwa seems to forget that the sale of the suit property which I set aside had taken place when the old Civil Procedure Rules applied to the process. However, undeterred Mr. Wamalwa pressed on with a detailed resume of my said Ruling. He also referred to the Ruling of Koome J. (as she then was) delivered on 5 March 2010 making observations with regard thereto. I was not quite sure from the recorded submissions whether Mr. Wamalwa was insinuating that I had not taken into account that said Ruling when making my Ruling. I should point out that at paragraphs 1, 2, 3 and 4 of my Ruling I referred extensively to that Ruling of Lady Justice Koome, indeed quoting from the same. In winding up his submissions, Mr. Wamalwa referred this court to the authorities of **Njoroge versus Mbiti, Mburu versus Gadini Tuti and Mapis Investment** but failed to detail the citations therefore.

8. In his turn, Mr. Luseno for the Objector/Charge, Eco-Bank Kenya Ltd, submitted that **Order 22 Rule 48 (1)** dealt with the attachment of immovable property. He noted that the attachment is complete upon the registration of the prohibitory order against the title. On the title of the suit property, he noted that the entry for the prohibitory order was No. 24 and that the first 2 entries were not registered as they were not signed for. All the other entries have been signed for. He submitted that registration cannot be presumed and if the court had found that the prohibitory order was not signed, there was no attachment in respect of the suit property. Mr. Luseno maintained that all these issues were raised before me and that this court should not sit on appeal as against my Ruling. He said that all the documents had been produced in the initial application before me and were part of the record. It could not be assumed that the court had not looked at the same. He submitted an application for Review does not permit parties to really argue an application in a better or another way. He concluded that the Application before court should be read together with that of the Purchaser’s application dated 2 February 2012. He maintained that there was no confirmation of the sale because of his client’s Charge over the suit property.

9. In his turn, Mr. Onindo holding brief for Mr. Mwenesi for the Defendants/Chargors submitted that where a document requires signature, it becomes valid only when it is signed. The search carried out against the title which had been exhibited to the Affidavit in support of the Notice of Motion dated 17 January 2011, clearly showed that the entry No. 24 for the prohibitory order was cancelled and not signed. The Charge therefore remained. He requested that the Application be dismissed with costs. Mr. Wamalwa in a brief reply stated that **Order 22 Rule 48 (1)** referred to registration as defined in **section 25** of the *Registration of Titles Act*. He maintained that where a memorial is made, it is deemed to be registration. He submitted that the Civil Procedure Rules will not override the Registration of Titles Act.

He notified the court that his clients had presented a Petition to this court seeking to “undo the Charge”. The matter in the Judicial Review Division was awaiting the Ruling of Ngugi J.

10. The Plaintiffs’ Application before court is brought under the provisions of **Order 40 Rule 1, Order 45 Rule 1, Order 50 Rule 6 and Order 51 Rule 1 Civil Procedure Rules** as well as under **sections 3A and 80** of the *Civil Procedure Act*. The Application being brought under **Order 51 Rule 1** of the *Civil Procedure Rules* has relevance only as regards that Order covering applications to court. From the Orders sought it is apparent that the substantive one is prayer No. 4 as to a Review of my Ruling of 21 November 2011. I say that because prayers 2 and 3 which seek injunctive or directive Orders as regards the Register of the suit property at the Lands Office were both covered in my said Ruling. All that the Application seeks to do in that regard, is re-present the entries for rectification in the Register in a different way. Consequently, in my view I am to deal with principally, as regards the Application, with the provisions of **Order 45 rule 1** as well as **section 80** of the *Civil Procedure Act*. To this end, I would adopt the reasoning of my learned brother **Kimondo J.** in the case of **Land Lords Ltd & Anor. Versus Waymax Company Ltd & 2 Ors (2012)eKLR** when he stated as follows:

“The motion is expressed to be brought under orders 45 and 52 of the Civil Procedure rules 2010. The parameters within which the court can review its decisions are well settled. The application has chosen to come for review under section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act reads as follows:

Any person who considers himself aggrieved –

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred;

or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 (1) is parimateria with section 80 and provides:

1. (1) Any person considering himself aggrieved –

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important mater or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account or some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including **Origo & another vs. Mungala [2005] 2 KLR 307, Kisya Investments Ltd vs. Attorney General and Another Civil Appeal No.**

31 of 1995 (unreported), Refrigeration Contractors Ltd vs. Lieta [2005] KLR 506, Kuria vs. Shah [1990] KLR 316 and M'Anthaka M'Mwoga vs. M'Boore [2006] e KLR”.

11. Applying the provisions of the law in relation to Review, I am not satisfied that the Plaintiffs have satisfied the test as regards **Order 45 Rule 1**. I do not consider that the Application by the Plaintiffs has been brought before court particularly timeously. As submitted by learned counsel for the Objector, I do not find that there is any new and important evidence which was not before this court at the time of the hearing of the Application that I dealt with by way of my Ruling dated 21 November 2011. Further, I do not find that there was any mistake or error on the face of the record and/or that there is any sufficient cause for me to change my said Ruling in any way. Those are the parameters set by the authorities. Further and as regards prayer 6 of the Plaintiffs' Application, I see no good reason for the Plaintiffs to be granted any extension of time to file an application for confirmation of the sale of the suit property to them. In my opinion, it is in the interest of all the parties herein that this litigation do come to an end sooner rather than later, as this case is now 10 years old.

12. The conclusion to all the above is that I dismiss the Plaintiffs' Notice of Motion dated 16 March 2012. As regards costs, as it has only been the Defendants/Chargors as well as the Objector who have been involved in this Application, they will have the costs thereof. Order accordingly. As far as I can see, that leaves 2 Applications on the Court file still to be determined being the Notice of Motion of the Purchaser/Interested party dated 2 February 2012 seeking a refund of the monies paid by it in respect of the abortive sale plus the Judgement Debtor/Applicant's Notice of Motion dated 10 May 2012 seeking to set-aside the consent orders recorded by this court on 29 March 2012 as well as praying for the Application by the said Dido Ali Rasso dated 30 March 2010 to come for hearing. Should the parties wish to pursue those Applications then they should fix a date at the Registry for the hearing of the same or file notice of withdrawal, whichever is applicable.

DATED and delivered at Nairobi this 12th day of February 2013

J. B.HAVELOCK

JUDGE