



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/RESPONDENT

VERSUS

ABDULKADIR SHARIFF ABDIRAHMAN DEFENDANT/APPLICANT

AND

DIDO ALI RASSO PURCHASER/RESPONDENT

R U L I N G

1. The Defendant/Judgement Debtor filed a Notice of Motion dated 10th May 2012 seeking stay of execution of consent Orders issued against him recorded in Court on 29th March 2012. The Application was brought under the provisions of **Order 12 Rule 7** of the Civil Procedure Rules, 2010 as well as of **sections 1A, 1B and 3A** of the *Civil Procedure Act*. Those consent Orders read as follows:

“By consent the Chamber Summons filed by the Purchaser/Applicant dated 30 March 2010 and filed herein on 14 April 2010 is allowed in terms of prayers 1, 2 & 3 thereof. No order as to costs. Mr. Issa may now be released from these proceedings.”

The Chamber Summons dated 30th March 2010 sought the following prayers:

- 1) **THAT** the Court issue an Order confirming the sale of the property known as **MARSABIT TOWNSHIP MUNICIPALITY GRANT IR 4742 LR NUMBER 11969/119 to the Applicant DIDO ALI RASSO.** (“the suit property”)
 2. **THAT** a Certificate of Sale do issue to the Purchaser **DIDO ALI RASSO.**
 3. **THAT** the Defendant/Judgement Debtor and/or his tenants be compelled to give vacant possession and in default to be evicted from the property **MARSABIT TOWNSHIP MUNICIPALITY GRANT IR 4742 LR NUMBER 11969/119**
 4. **THAT** this Honourable Court to make such further Orders as it deems fit.”
2. The Defendant/Judgement Debtor’s Application was supported by his Affidavit dated 10th May 2010 that the Application was grounded on the fact that at the time of recording the said consent in Court, he was not represented. He maintained that he was the proprietor of the suit property and

was consequently the party entirely affected by the Consent Order recorded in Court. He maintained that his participation was necessary to give validity to the Consent Order. The Supporting Affidavit dwelt upon the grounds as above and went on to say that the Defendant had been informed by his advocates on record, that on 22nd February 2012 the parties had appeared before Court for the hearing of a Notice of Motion dated 2nd February 2012 filed by the Interested Party. He had been informed that his advocates on record had been excused from returning before Court on 29th March 2012 as the Interested Party's said Application did not concern the Defendant/Judgement Debtor. He had further been informed by his advocates on record that his Application dated 30th March 2010 was not allocated a hearing date. Finally, he had been informed that the firm of Issa & Company, Advocates was not represented in Court on 22nd February 2012 and that it was not possible for a date for the Application dated 30th March 2010 to have been taken. In any event, the deponent maintained that his advocates on record should have been served with a hearing notice of the application dated 30th March 2010 by the firm of Issa and Company, Advocates.

3. When the Defendant/Judgement Debtor's Application dated 10th May 2012 came before Mabaya J. on 11th May 2012 under Certificate of Urgency, the learned Judge ordered a stay of execution of the said consent Orders issued against the Defendant/Judgement debtor on 29th March 2012. Thereafter the Purchaser, the said Dido Ali Rasso, filed a Replying Affidavit to the Application sworn on 25th July 2012. The deponent recorded that he had purchased the suit property at a public auction held on 26th of August 2009 and had fully paid the purchase price for the same to the auctioneer/Decree Holder's Advocates. His advocates, Issa & Company, had filed an application before this Court seeking Orders to confirm the sale of the property to the Purchaser. The Application first came for hearing on 25th May 2010 but did not proceed on that day. Finally after another false start, the application was fixed for hearing on 22nd March 2012 but was not listed but came before this Court on the 29th March 2012 when the same was allowed and a consent Order recorded confirming the sale of the suit property to the Purchaser. The deponent noted that although the Defendant/Judgement Debtor had been served on 14th May 2010, he had not filed a Replying Affidavit to the application nor Grounds of Opposition thereto and was, in the Purchaser's opinion, estopped from claiming to suffer any prejudice resulting from the sale of the suit property. Finally, Mr. Rasso noted that under the old **Order XXI Rule 81** a sale of property becomes absolute where no application to set such aside is made by the Judgement Debtor under the provisions of the old Civil Procedure Rules. No such application had been filed by the Judgement Debtor herein.
4. The Defendant/Judgement Debtor filed its submissions in relation to its Application dated 10th May 2012 on 30th July 2012. The submissions laid down the facts surrounding the application by the Purchaser dated 30th March 2010 seeking Orders for the confirmation of the sale of the suit property to him. He maintained that there was no dispute that the said application by the Purchaser was filed on 14th April 2010 and that it was not coming for hearing on 29th March 2012. The Defendant/Judgement Debtor repeated what he had detailed in his Affidavit in support of his Application to the extent that when the parties in this matter appeared before this Court on 22nd February 2012, the Defendant/Judgement Debtor's advocates on record were excused from participating in the application filed by the firm of Nyangito & Company, Advocates for Samkan Estates Ltd, dated 2nd February 2012 since the said application did not concern the Defendant/Judgement Debtor herein. That was the application which, according to the Defendant/Judgement Debtor was the hearing on 29th March 2012. He pointed out that the Purchaser's Application dated 30th March 2010 did not actually concern either Sakam Estates Ltd or the Plaintiff herein and consequently those parties had no *locus standi* as regards that application. Further, the Defendant/ Judgement Debtor maintained that the Replying Affidavit to his Application only delved into the history of the matter i.e. how the Purchaser had purchased the suit property. At no time was the Purchaser's said application either mentioned in court or given a date for hearing on 29th March 2012. The Defendant/Judgement Debtor's advocates had never been notified that the same was coming for hearing on 29th March 2012 as required by the Civil Procedure Rules. Finally, the Defendant/Judgement Debtor noted that the Replying Affidavit had not stated to the Court just what had happened at the appearance on 22nd March 2012 or whether

the Purchaser's said application was allocated the hearing date of 29th March 2012.

5. The Purchaser's submissions herein were filed on 12th June 2013. It noted that his Chamber Summons dated 30th March 2010 was filed under the provisions of the old **Order XXI Rule 81 (1), 83, 84, 85 and 86** of the now repealed *Civil Procedure Rules*. The Purchaser set out the provisions of the old **Order XXI Rule 81 (1)** which detailed as follows:

“Where no application is made under rule 78, rule 79 or rule 80, or where such application is made and is allowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgement-debtor in the property sold is concerned”.

The Purchaser noted that the Defendant/Judgement Debtor had not filed any application under the above said rules and, as a result, the Court was entitled to make an Order confirming the sale of the suit property. The Purchaser submitted that the sale of the suit property was properly conducted and no application was filed to challenge the same. Further it referred the Court to **section 48** of the *Civil Procedure Act* which reads:

“Where immovable property is sold in execution of a decree and such sale has become absolute the property is deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.”

9. The Purchaser also referred the Court to the cases of Jandu v Kirpal & Anor (1975) EALR 225 as well as City Council of Nairobi v Kenneth Imbhale Civil Appeal No. 126 of 1991 (unreported) where the learned Judges of the Court of Appeal referred to its holding in Sheikh Mohamed Bashir v United Africa Company (Kenya) Ltd & Ors (1959) EA 706, with approval where it had held:

“The effect of Rule 81 (1) is that the court must make an order confirming the sale if no application is made under any of the three preceding rules or if (as is the case here) such an application is made and refused...”.

The Purchaser concluded his submissions by detailing that although the Defendant/Judgement Debtor had been served with his application to make the sale absolute on 14th May 2010, the latter had not filed any Replying Affidavit or Grounds of Opposition to the Application to date. The application had therefore been deemed unopposed and was allowed on 29th March 2012, the sale of the suit property being confirmed by this Court. The Purchaser submitted that in the absence of an application to set aside the sale of immovable property, the Defendant/Judgement Debtor's Application herein, dated 10th May 2012 was without merit.

10. I have perused this Court's record for the appearance before it on 22nd February 2012. Mr. Onindo appeared on that day holding brief for Mr. Mwenesi for the Defendant/Judgement Debtor. The Application before Court on that day was that of the Interested Party, Samken Estates Ltd dated 2nd February 2012. Both Mr. Onindo and Mr. Maunde, holding brief for Mr. Luseno for the Interested Party Eco-bank, informed the Court that either the said application did not affect their clients or that they did not oppose the same. This Court directed that so far as the said Application dated 2nd February 2012 was concerned, the Plaintiff would be given time to put together his reply thereto. The Court also noted that as far as the Defendant/Judgement Debtor and the 2nd Interested Party were concerned, as they had no interest in the said Application, they would be excused from having to file documents in reply thereto or appear for the hearing of the same. Indeed, the matter was stood over for hearing of that application to the 29th March 2012.

11. On that day, Mr. Nyangito appeared for the Interested Party Samken Estates Ltd, Mr. Wamalwa appeared for the Plaintiff and Mr. Issa appeared for the Purchaser. Mr. Issa opened the proceedings before Court by stating that he understood that the Chamber Summons which he thought was for hearing on that day was dated 20th March 2010, 2 years ago. It was for confirmation of sale and he believed that it was unopposed. Mr. Wamalwa stated that he had come with the papers ready to

deal with Mr. Issa's Application which he did not oppose. Further, Mr. Nyanguto stated that he had no objection thereto. As a result, this Court entered the Consent Order as above and detailed that Mr. Issa could be released from the proceedings. Thereafter there was some discussion as between Mr. Wamalwa and Mr. Nyanguto as regards the latter's Application dated 2nd February 2012 and the two parties were directed that as they were to refile the 2 unheard Applications before this Court on a date could be taken for the hearing of the same on a priority basis at the Registry. It does seem therefore, from the Court's record, that the Defendant/Judgement Debtor's advocates were present in Court and, in fact, had been excused from attending Court on that day. However, would their presence have made any difference as to the recording of the Consent Order or otherwise? There is no doubt that the Application for confirmation of the sale of the suit property by way of Chamber Summons dated 30th March 2010 was filed in Court on 14th April 2010. There is also no doubt that the Application was served on the Defendant/Judgement Debtor's Advocates – Messrs. S. Musalia Mwenesi on 14th May 2010. There is further, no doubt that the said Advocates neither filed a Replying Affidavit to the Application nor Grounds of Opposition thereto.

12. I have perused the finding in the cited case of **Jandu v Kirpal** (supra) in which the learned Judge **Chanan Singh** (as he then was) with reference to **section 48** of the *Civil Procedure Act* (again supra) found that:

“The scope and object of this section (corresponding to the Indian s. 65) is stated by *Chitale and Rao*, op cit.,p. 762, in these words:

‘A judicial sale, unlike a private one, is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings..... If no such proceedings are taken, or if taken are not successful, the sale will then be made absolute...’.”

Later in his Judgement, the Judge stated:

“This, in my view, is the plain meaning of the words of the section. It does not seem to have been intended to shut out claims which are otherwise valid. O. 21 r 81 (1) declares that on confirmation the sale shall, absolute ‘in so far as the interests of the judgement-debtor in the property sold was concerned’. If the judgement-debtor has no interest, none could pass.”

Such observations seem very pertinent to the Application before this Court. However, what is binding upon it, is the finding of the Court of Appeal in the **City Council of Nairobi** case (again supra) where the Court quoted from the judgement of its predecessor in the **Sheikh Mohamed Bashir** case above as follows:

“The reference in r. 81 to r.79 as well as to rule 78, shows the pattern of this legislation. Rule 78 provides for an application to set aside the sale upon payment of certain sums of money; r. 79 provides for similar application on the ground of material irregularity or fraud; r. 80 gives to the purchaser a right to make a like application on the ground that the judgement-debtor had no saleable interest in the property sold. The effect of r. 81 (1) is that the court must make an order confirming the sale if no application is made under any of the three preceding rules or if (as is the case here) such an application is made and refused..... (emphasis mine).

These rules have been taken from the Indian Code of Civil Procedure in which the corresponding r.89, r.90 and r. 92 of O. XXI respectively in same terms. The words ‘shall make an order confirming the sale’ in r. 92 (r.81 of the Supreme Court Rules) was held by the Privy Council in **Seth Nanhelal v Umrao Singh (1) (1931), 58 I. A. 50 to be mandatory”.**

13. From the above authorities, it seems quite clear to this Court that where the Defendant/Judgement Debtor fails to file an application to set aside the sale, this Court shall make an Order confirming the same. **Order 22 rule 74 Civil Procedure Rules, 2010** makes provision for an application to set aside sale on deposit of monies by any person either owning the immovable property concerned or holding an interest therein by virtue of a title acquired before such sale. **Order 22 rule 75, Civil Procedure Rules, 2010** makes provision for an application to set aside a sale on the grounds of an irregularity or fraud. **Order 22 rule 76 Civil Procedure Rules, 2010** makes provision for an application by a purchaser to set aside a sale on the ground that the judgement-debtor had no saleable interest. However, of particular note, are the provisions of **Order 22, rule 77, Civil Procedure Rules 2010** which reads as follows:

“22. 77. (1) Where no application is made under rule 74, rule 75 or rule 76, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgment-debtor in the property sold is concerned.

(2) Where such application is made and allowed and where, in the case of an application under rule 74, the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made”.

14. As said above, the Defendant/Judgement Debtor failed to file a Replying Affidavit and/or Grounds of Objection to the Purchaser’s said Application of 30th March 2010. The provisions of **Order 51, rule 14** as regards applications of that nature are clear. The same reads:

“51. 14. (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents –

- a. a notice preliminary objection: and/or;
- b. replying affidavit; and/or
- c. a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard exparte”.

15. The upshot of the above is that I find no merit in the Defendant/ Judgement Debtor’s Application dated 10th May 2012. I consider such to be a last, desperate attempt by him to try to avoid the sale of the suit property in Marsabit. Litigation of this nature must end, particularly as such in this case, has been going on for over 10 years. The said Application is dismissed with costs to the

Purchaser.

DATED and delivered at Nairobi this 20th day of November, 2013.

J. B. HAVELOCK

JUDGE