



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 23 OF 2006

ATHMAN OMAR ZUBERIAPPELLANT

VERSUS

MAMSON ASOL APINDE RESPONDENT

Coram:

Mwera J.

Mlandi for Appellant

Respondent in person

JUDGEMENT

The record of appeal herein was lodged in court on 24/6/2008. The focus of the appeal is a ruling delivered on 31/1/2006 following a chamber summons dated 19/2/2004. The present appellant, Athman Omar Zuberi filed as an objector. The orders sought were to be directed against the present respondent who obtained warrants of execution in the suit SRMCC 4668/95. The objector/appellant had invoked the powers donated by the now repealed OXX1 R.22 of Civic Procedure Rules and SS. 3A, 63 of the Civil Procedure Act.

The appellant's prayers were:

- (i) that there be a stay of execution of the warrants dated 4/12/2003, and
- (ii) those warrants be set aside.

The grounds advanced were that the objector was the legal owner of a certain "house without land" standing on Plot No. 231 Sec. 1 MN, Kisauni, Maweni. He had obtained a court order on 22/5/2003 by virtue of which he took possession of the said house and was still in occupation thereof. That there was no application filed by the plaintiff/respondent to warrant issuance of the warrants dated 4/12/2003. There were no proceedings in that regard either. Nonetheless, the respondent had obtained *ex parte* orders which he was moving to enforce against the objector. And that that was illegal since the orders of 22/5/2003 in favour of the objector were still in force.

The objector/appellant swore a supporting affidavit averring that he had been served with an order dated 9/6/2003 together with a warrant to give vacant possession of the suit property. That on 7/4/2003 on behalf of the objector on a chamber summons was filed for orders that the notice of intention to proceed with execution, be struck out and eviction orders be raised.

After due hearing the orders sought in that summons were granted and the notice of motion to proceed with execution was struck out, thereby giving possession of the suit premises to the objector. Then the respondent who was the plaintiff in the suit filed a notice of motion dated 6/6/2003 to stay execution pending appeal namely the appellant taking up possession but that application was defective and had been overtaken by events. Thus there was no order to stay execution or other proceedings taken by the plaintiff/respondent. So the warrant the plaintiff/respondent was seeking to enforce did not exist and if this execution proceeds the appellant would suffer loss. Accordingly the objector/appellant sought the court orders to strike out the notice of motion dated 6/6/2003. It did not disclose a cause of action against the objector and it had never been prosecuted.

If the sequence of filing as reproduced in the record of appeal is properly followed, the plaintiff/respondent's a replying affidavit was not reproduced opposing the application that gave rise to the ruling being appealed against. However, after hearing both sides the trial magistrate wrote the ruling delivered on 31/1/2006 now under review.

The learned trial magistrate went over the arguments of both sides including an aspect of the objector having bought the suit premises after the plaintiff had obtained judgment/decree on 15/3/1996 against the owner of the house, Mwanahawa Mira Rajab (the defendant in the lower court) who the lower court further found, died on 7/8/2000. Citing O 23 Rule 4 Civil Procedure Rules (old) the learned trial magistrate found that the application dated 19/2/2004 that the objector brought long after the defendant had died (Mwanahawa), and without substituting her first was irregular. So the orders sought then, namely to stay warrant to give vacant possession to the plaintiff/respondent were refused. In essence that meant that the plaintiff would proceed to evict the appellant from the property. The objector decided to appeal and his counsel Mr. Mlandi filed the present 6-point appeal. The respondent was acting in person. The grounds were in the context that trial magistrate erred in law and fact to dismiss the application dated 19/2/2004; she considered irrelevant matters; she had not acquainted herself well with the material facts; and she did not interpret and apply well ss.3A 63 of Civil Procedure Act. And only technical issues had been considered, albeit wrongly.

At the time of hearing the appeal, the basics of this suit which both sides seemed agreed upon were that the plaintiff/respondent sued the deceased defendant (Mwanahawa) for vacant possession of the suit premises in that he had bought it but the defendant had not moved out according to their agreement. He also claimed special damages from October 1995 to the time vacant possession was given. After trial and judgment in favour of the plaintiff/respondent, a decree was extracted on 15/3/1996, that the defendant do deliver vacant possession of the property to the plaintiff/respondent. He also got costs and interest. For whatever reason, the defendant did not give vacant possession. But she sold the house to the appellant on 16/3/1996. Apparently being frustrated, the respondent started moves to get possession relying of his judgment. It does not appear how that was done, e.g. the respondent first seeking leave of the court to join the appellant. Quite likely the appellant did not seek to be joined. Any way the respondent joined him and so he appointed his present lawyers to appear for him.

Down the line on 27/9/1999 all the parties represented by counsel i.e. the defendant, the plaintiff/respondent and the objector described as the 3rd party, filed a consent in court setting aside the judgment that had been obtained *ex parte* by the respondent on 15/3/1996. The consent spoke of that agreement as being dated 13/3/1996 an aspect the court will revert to presently. However, one would expect that by setting aside the *ex parte* judgment, of whatever date described, that whole thing went back to what it was before the judgment. And so further proceedings would include preparing the suit for trial and having a trial. But then the defendant died 7/8/2000. And on 3/12/2001 the plaintiff/respondent filed an *ex parte* application and got orders to reinstate the judgment of 15/3/1996, which had been set aside by the consent of 27/9/1999. The *ex parte* judgment was reinstated and that is the basis on which the plaintiff/respondent proceeded to obtain warrants to procure vacant possession of the premises.

This is the point at which the 2 sides parted ways. The appellant told the court that the respondent who knew the defendant had died did not substitute her before further proceedings; he merely made his way obtaining the warrant of giving vacant possession against the appellant. On his part the respondent argued that he had a valid judgment and decree of 15/3/1996 which he was validly executing.

It is clear that in the light of O 23 r 4 Civil Procedure Rules with the death of a party, who is not substituted in 12 months from the date of death, the suit abates. Nothing can proceed against a dead party except by substituting him/her with his/her legal representative. The appellant admitted to the court that he did not substitute the late defendant (Mwanahawa) in order to obtain any orders against her estate which would be in the hands of her legal or personal representative. He filed the notice of motion dated 27/11/2001 without substituting the dead defendant and then went on to obtain *ex parte* orders to set aside the *ex parte* judgment of 15/3/1996. He did not involve the appellant who had been a party to that consent. Without having substituted the defendant first the filing and prosecuting the motion dated 27/11/2001 was all invalid together with the orders made on 3/12/2001. Accordingly, the warrant dated 27/1/2003 to the court bailiff directed to Mwanahawa, since deceased, to give possession, was invalid. A process could not be affected on a dead person. Similarly the respondent could not file a competent motion dated 27/3/2003, notice of intention to proceed with execution. This is a fact that the *ex parte* judgment herein had been set aside by consent on 27/9/1999. The respondent had even without substituting the deceased defendant or involving the appellant, moved *ex parte* to set aside that consent. It is no matter that the dates of the judgment are stated variously as 13th or 15th of March 1996. The court is satisfied that all sides were clear that it was the *ex parte* judgment in question which bore the date of 15/3/1996 that they are dealing with. All said and done the respondent without first substituting the defendant who died on 7/8/200, any moves he made thereafter including the warrants to get possession were invalid. On 31/1/2006 the learned trial magistrate appears to have applied the provisions to substitute a deceased party to the appellant only. Had she directed her mind to the fact that whatever the respondent was relying on had been proceeded upon after the defendant had died and again without substitution, the outcome on 31/1/2006 would have been different. The warrant for possession had been issued following proceedings instituted by the respondent, after Mwanahawa had died and had not been substituted. The warrants of 4/12/2003 are struck out. They were invalid.

In sum this appeal is allowed with costs.

Dated, signed and delivered this 27th day of March, 2012.

**J.W. MWERA
JUDGE**