



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Constitutional Petition 302 of 2011

TOWHIDA AWO SHARIFF 1ST PETITIONER

ISHA AWO SHARIFF 2ND PETITIONER

MEHUBA

GELAN KELIL (administrators of the estate of

Awo Sheriff Mohamed (deceased)3RD PETITIONER

VERSUS

THE REGISTRAR OF TITLES1ST RESPONDENT

THE HON ATTORNEY GENERAL..... 2ND RESPONDENT

ABDULKADIR SHARIFF ABDIRAHIM 3RD RESPONDENT

ECO BANK KENYA LIMITED.....4th RESPONDENT

SASA GENERAL INVESTMENT LTD 5TH RESPONDENT

RULING

1.The petitioners have brought this petition alleging violation of their fundamental rights under the Constitution. They have also filed simultaneously with the petition a Chamber Summons application expressed to be brought under Articles 22 and 23 of the Constitution. The application seeks, among others, orders restraining the respondents and in particular the 3rd and 4th respondents from advertising

for sale, selling, transferring, charging or dealing with the property title number **I.R 15855 L.R. No. 37/262/3** (hereafter ‘the suit property’) pending the hearing and determination of the application inter partes.

2. The 4th respondent opposes the petition and has raised preliminary objections dated 15th December 2011 to the application and petition as follows:

1. The Petitioners have not disclosed any ground to merit the granting of the orders sought in the application.

2. The Petitioners have no proprietary interest in ALL THAT PROPERTY KNOWN as L.R. Number 37/262/3 that are capable of being enforced by this Honourable Court.

3. This Honourable Court has no jurisdiction to determine the issues, if any, in the Petition filed herein:

(i) The remedies sought relate to decisions made by public officers which decisions can be challenged before in appropriate proceedings before a competent court.

(ii) The issues raised are all in respect and arise out of execution of a Decree issued in HCCC 329 of 2003 and this Court is not an execution Court within the meaning of Section 34 of the Civil Procedure Act Chapter 21 Laws of Kenya.

(iii) This Court is not an appellate court with respect to decisions made by the High Court Commercial & Admiralty Division.

4. The 4th Respondent rights in respect of the subject property are those of the charge and are sanctioned by the provisions of the Registered Land Act. Chapter 300, Law of Kenya and the orders sought herein would unlawfully bar the exercise of an envisaged right of sale in respect of the said property by a party not privy to a contract reserving such right.

3. The 4th respondents preliminary points of law, which were supported by the 1st, 3rd and 5th respondents (who had also raised similar objections on points of law), were argued before me on the 21st and 27th of March 2012.

The Facts

4. The petitioners are administrators of the estate of the plaintiff/deGREE holder in **Milimani High Court Civil Case No. 329 of 2003, Awo Shariff Mohamed –v- Abdulkadir Shariff Abdirahim**, the 3rd respondent in this petition. The plaintiff/deGREE holder died intestate on or about 30th July 2009.

5. The petitioners’ case is that the deceased was in that case awarded, on the 16th of February 2006, US\$ 200,000 and Kshs. 800,000.00 together with costs and interest at 12% per annum from the 5th day of June 2003 as against the 3rd respondent.

6. Various proceedings were taken by the parties in Milimani HCCC No. 329 of 2003 but the one relevant to the present petition is the application by the judgment –creditor for execution against the 3rd respondent’s property, the suit property. The petitioners aver that a prohibitory order was issued against the title to the property on 22nd September 2008.

7. The petitioners allege that the prohibitory order was duly presented to the 1st respondent at the Lands Office and a memorial thereof entered as No 24 on the 24th day of September 2008.

8. The petitioners allege that the 3rd respondent, with the assistance of the 1st and 4th respondent sought to

defeat the process of registration of the prohibitory order by securing his debts and those of the 5th respondent by having a charge fraudulently registered against the title in favour of the 4th respondent.

9. The petitioners further allege that the 3rd respondent in tandem with the 1st, 4th and 5th respondents have mounted a series of objection applications in **HCCC No. 329 of 2003** which have all been dismissed. There are still two other applications currently pending before the High Court in that matter.

10. The petitioners have brought this petition against the respondents alleging violation of due process and of the petitioners' constitutional right to property as guaranteed under Article 40 of the Constitution. At paragraph 3 of the supporting affidavit, the petitioners aver that:

'...actions and omissions of the Respondents collectively and individually by design infringe due process in Milimani HCCC No. 329 of 2003 and your Petitioners fundamental constitutional rights to property and to protection by due process and the rule of Law....'

The Submissions

11. The respondents contend that this court has no jurisdiction to entertain this petition and the application for conservatory orders. Mr. Luseno for the 4th respondent argued that the petitioners had not disclosed the rights under Article 22 which they were alleging had been violated or threatened. He submitted that the petitioners are not the registered owners of the suit property; that the 3rd respondent is the registered owner of the property.

12. According to the 4th respondent, what the petitioners have is a decree for a sum of money issued in High Court Civil Case No. 329 of 2003. The decree does not relate to immovable property.

13. Mr. Luseno submitted that in executions of that decree, processes were taken against the suit property with a view to attaching it. All the issues about execution were considered and a decision made by Justice Harvelock on the 21st November 2011, 15 days before the filing of this petition.

14. He referred the court to Section 34 of the Civil Procedure Act and submitted that the issue relating to the execution of the decree was a matter to be determined by the executing court. There was already a decision of the court on the issue of execution, a decision that was made after the court heard the matters that this court is being asked to investigate. It is that court which has power to deal with the issue under section 34 of the Civil Procedure Act.

15. To the extent, therefore, that any right the petitioners seek to raise relates to an execution process, the 4th respondent submitted that this court had no jurisdiction. Further, there being no property interest accruing to the petitioners, there are no rights capable of being infringed, violated or threatened.

16. Mr. Luseno argued further that if this court heard the substantive issues raised by this petition, it will be constituting itself an appellate court. He urged the court not to do that and to dismiss the application and the petition as they are an abuse of the court process.

17. The 1st and 2nd respondents through their Counsel, Mr. Moimbo, took a position similar to that of the 4th respondent. Mr. Moimbo argued that the petition is bad in law and an abuse of the court process since, under section 34 of the Civil Procedure Act, the petitioners should have gone to the court issuing the decree instead of filing this petition. He referred the court to the case of **Benjoh Amalgamated Ltd -v- Kenya Commercial Bank Court of Appeal Civil Appeal No 239 of 2004** where the court noted that it had power under the Constitution to give appropriate relief to parties coming before it but that it needed to guard against abuse of process; that while the petitioners were alleging a right to property, they do not have such a right. Their seeking the court's assistance to execute a decree is therefore an abuse of the court process. He also relied on the case of **Kenya Commercial Bank Ltd – v- Director of Criminal Investigations & others Petition No 218 of 2011**.

18. Counsel also referred the court to the case of **Speaker of the National Assembly -v- Njenga Karume (2008) IKLR (EP) 425** and the case of **Alphonse Mwangemi Munga & 10 Others -v- African Safari Club Ltd Petition No 564 of 2004** for the proposition that where a procedure is provided for in law, that procedure must be followed. The petitioners had overlooked the provisions of Section 34 of the Civil Procedure Code; if they were alleging violation of an order of the court, there were other procedures that they could have followed instead of coming to the constitutional court.

19. Mr. Moimbo also referred the court to the case of **Harrikissoon -v- Attorney General of Trinidad and Tobago (1980) A.C. 265** and submitted that allowing applicants to go to the constitutional court where there are other procedures of dealing with a matter would amount to an abuse of the court process.

20. Mr. Onindo for the 3rd respondent supported the preliminary objections by the 4th respondent and submitted that prayer 3 of the Chamber Summons raises an issue that was determined by Justice Havelock when he found that there was no prohibitory order registered against the subject property; that for the petitioners to come to this court seeking an order in that direction is an abuse of the court process as the matter is *res judicata*.

21. Mr. Njenga for the 5th respondent also associated himself with the submissions made with regard to the jurisdiction of the court to deal with the matter. It was his submission that the petition emanates from proceedings in HCCC No. 329 of 2003. ; that the petitioners allege that certain rights have been violated and refer to certain prohibitory orders touching on the 3rd respondent. He contended, however, that in the ruling of Justice Havelock attached to the petition, the Judge found that there was no attachment in respect of the property complained of. The court was therefore being asked to sit on appeal on the matter of the prohibitory order on which Havelock J had made a specific finding.

22. Mr. Wamalwa for the petitioner opposed the preliminary objections. He submitted that the petitioners have made out several allegations against the respondents but no issues had arisen as the respondents have not replied to the averments of facts in the petition. He contended that the rules of pleadings that apply in civil proceedings also apply in constitutional matters, and that the respondents should respond and then issues of law or fact would be framed. He contended that in the absence of a reply, the petitioners are entitled to have their petition heard.

23. According to Mr. Wamalwa, the petitioners' proprietary interest under Article 40 is expressed by the prohibitory order and the provisions of Order 22 Rule 48 which requires registration of the prohibitory order against the title. The prohibitory order was received by the Registrar of Titles and given Presentation No. 2538 Entry No 24 of 24th September 2008; that his understanding of Section 27 of the Registration of Titles Act is that once the memorial has been entered against the title, it is deemed registered; that '*interest*' under Article 40 includes a registrable interest such as the prohibitory order.

24. With regard to the contention that the matter of the prohibitory order was *res judicata*, Mr. Wamalwa referred the court to the case of **Mburu Kinyua -v- Gachini Tuti (1976-80) KLR 790** and submitted that an application for execution can never become *res judicata*. He contended that a party can move from the court that issued the decree sought to be executed and file a suit in another court for the purpose of cancelling the fraudulent transaction. He also relied on the case of **Seringa Jill Birgit Gotke -v- Settlement Fund Trustee (1966) EA 472** and **Mulla on Transfer of Property, 1st Edition**. He also referred to Section 34 of the Civil Procedure Act which states that all questions arising between the parties to the suit shall be determined by the court issuing the decree and contended that the only parties to the suit are the petitioners and the 3rd respondent. None of the other parties are parties to the suit. He argued therefore that what can be litigated in the suit from which execution proceeded are matters collateral to the suit, and since the Registrar, Attorney General and Eco Bank were not parties to the suit, the matters the subject of this petition could not be litigated in that suit.

25. The petitioners therefore asked the court to dismiss the preliminary objection as it was an abuse of the court process.

Findings

26. Having heard the respective submissions of the parties, my views on the matter are as follows.

27. The respondents have argued that this matter is res judicata as the issues raised by the petitioners with regard to the prohibitory order were canvassed before and determined by Justice Havelock in his ruling dated 21st November 2011.

28. I have read the ruling of Justice Havelock, which is with regard to an application by **Samken Estates Limited** dated 17th January 2011 which sought to confirm a sale of the suit property in execution of the decree by the petitioners. I do not find anything in the said ruling that disposes of the issues pertaining to the prohibitory order. What I do find is that the court considered the application for confirmation of sale and found it unmerited for non-compliance with various rules under the Civil Procedure Act pertaining to execution. The Learned Judge observed as follows at paragraph 21:

“Having detailed my position and understanding of the various objections to the Application before me, I need to direct my attention to whether such objection or objections are fatal to the matter. I find and hold 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 or Order 21 Rule 6 as regards the Certified Copy of the Title, have not been complied with. I have also expressed my doubts as to compliance as regards to Order 21 Rules 79 – 83. Despite Article 159(2) (d) of the Constitution, such non-compliance to these mandatory rules of Civil procedure must nullify the legality of this Application. Accordingly, I dismiss the same with costs.”

29. To the extent therefore, that the respondents’ objection is that the issue of the prohibitory order, particularly with regard to its presentation for registration and the subsequent cancellation, has been heard and determined, and is therefore res judicata, I find no merit in the objection.

30. The respondents argue that this court has no jurisdiction to entertain this petition; that to do so would be to constitute itself a court of appeal over the decision of the Commercial and Admiralty Division. They argue, further, that where there is a specific procedure provided by law, that procedure must be followed; that this court is not an execution court and the proper court to hear and determine the issues raised by the petitioners is the execution court, meaning the court seized of HCCC No. 329 of 2003.

31. This is an argument that has considerable merit. The issues that the petitioners have raised relate to execution of a money decree issued by the Commercial and Admiralty Division of the High Court. This is a division of the High Court which has concurrent jurisdiction with this court. This court, therefore, has no jurisdiction to supervise or sit on appeal on its decisions. The Court of Appeal dealt exhaustively with the issue of the jurisdiction of the constitutional division of the High Court in the case of **Peter Ng’ang’a Muiruri -v- Credit Bank Ltd & 2 Others Court of Appeal Civil Appeal No. 203 of 2006** and overturned the decisions relied on by the petitioners such as **Kinyanjui -v- Attorney General (2005) 2 KLR 454**.

32. Further, the Civil Procedure Rules provide the rules and processes for determining issues arising out of the execution of a decree issued by a court. As correctly argued by Counsel for the 1st respondent, it would be improper to convert every issue into a constitutional issue and present it before the Constitutional and Human Rights Division for determination. See the decisions in the case of **Harrikissoon -v- Attorney General of Trinidad and Tobago** and **Alphonse Mwangemi Munga & Others -v- African Safari Club** (supra). Should a constitutional issue arise in a matter pending before the Commercial and Admiralty Division, a court in that division has jurisdiction, under Rule 23 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006** (The Gicheru Rules) to hear and determine the constitutional issue.

33. The 4th respondent argues that its rights in respect of the property are

“those of the Chargee and are sanctioned by the provisions of the Registered Land Act. Chapter 300, Law of Kenya and the orders sought herein would unlawfully bar the exercise of an envisaged right of sale in respect of the said property by a party not privy to a contract reserving such right.”

34. If this was the only objection to the petition by the 4th respondent, it would not be of much avail. Both Justice Koome and Justice Havelock have made rulings and observations that call into serious question the interest, if any, of the 4th respondent in the suit property and in this matter in its entirety. In her ruling dated 5th March 2010, Justice Koome, on an objection application by the 4th respondent in this petition, observed as follows:

“Moreover a Prohibitory Order was issued by this court, and the extract of title shows the entry was entered in the Lands Register but it was cancelled after which a charge by the judgment/debtor and a previous objector SASA Investment Limited as the borrower was registered.

This questions still persist and at this stage it appear obvious that the objector was aware of the existence of the decree holders claim over the suit property and was more probably than not aware of the prohibitory order. Thus the objector took part in a fraudulent transaction which was entered into with the judgment debtor, and the borrower with the intention of aiding the judgment debtor to avoid the execution of the decree herein.” (Emphasis Added)

35. On his part, Justice Havelock, at paragraph 11 of his ruling dated 21st November 2011, observed as follows with regard to the 4th respondent:

“The Replying Affidavit of IMINZA KAISHA sworn on the 21st February 2011 on behalf of the Objector raises little new. The deponent underlines the position as regards the Objector’s Charge registered on 5 November 2008 and notes that there was no prohibitory order registered against the title of the suit property. Although the Affidavit does mention the notification of this case’s order as against the Title, it details that the same was never signed by the Registrar of Titles and thus was never entered against the title. Interestingly enough, there is no mention of Koome J’s Ruling of the 5th March 2010 wherein she dismissed the proceedings filed by the Objector and found that the said Charge was irregular. As I understand it, there is no appeal filed or stay granted against my learned sister’s said Ruling so I am somewhat at a loss why the Objector sees fit to keep hanging in here, for whatever reason.” (Emphasis added)

36. Whatever the merits or otherwise of the petitioners’ case, the 4th respondent has what is patently a very shaky claim over the subject property, and it is as much in its interests as of the petitioners for the issue pertaining to the prohibitory order to be heard and determined expeditiously as any attempt by the 4th respondent to realize the alleged security over the suit property would quite properly be resisted as being based on what Justice Koome describes as a:

“fraudulent transaction which was entered into with the judgment debtor, and the borrower with the intention of aiding the judgment debtor to avoid the execution of the decree herein.”

Right to Property

37. The last and critical issue that the court needs to address is the issue of the prohibitory order and the alleged violation of the petitioners’ right to property with regard thereto.

38. The petitioners allege violation of their right to property which is protected under Article 40 of the Constitution. The basis of this right is the prohibitory order issued by the court in HCCC No. 329 of 2003. The respondents object that the petitioners have no proprietary interest in the property that can give rise to a claim under Article 40.

39. The question that arises is whether a prohibitory order issued in execution of a decree is an interest in land as protected under Article 40 of the Constitution which provides as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2)

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description.....

40. A prohibitory order is issued by a court in execution of a decree under Order 22 Rule 48 of the Civil Procedure Rules. The Rule provides as follows:

(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

41. Under Rule 49 of the Civil Procedure Rules, the prohibition issued under Rule 48 can be lifted upon payment of the amount due under the decree, or if the decree is set aside. The rule, whose marginal notes read '**Removal of attachment after satisfaction of decree**' provides that:

49. Where—

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into court, or the decree is otherwise made through the court or is certified by the court; or

(b) the decree is set aside or reversed, the attachment shall be deemed to be withdrawn....

42. Thus, a prohibitory order is a step in the execution process which is **temporary** and can be withdrawn **upon settlement of the decretal sum or setting aside or reversal of the decree**. It does not confer any interest in land in the sense that a transfer of the land would. It does not therefore, in my view, amount to '**property**' as contemplated under Article 40 of the Constitution and defined in Article 260 of the Constitution as follows:

"property" includes any vested or contingent right to, or interest in or arising from

(a) land, or permanent fixtures on, or improvements to, land;

(b) goods or personal property;

(c) intellectual property; or

(d) money, choses in action or negotiable instruments;

43. In the circumstances, the objection by the respondents that the petitioners have no proprietary interest in the suit property capable of protection under Article 40 of the Constitution has merit and is hereby upheld.

44. As noted above however, the claims of the respondents with regard to the subject property, particularly those of the 4th respondent, are doubtful in light of the ruling of Justice Koome set out above and the observations of Justice Havelock in his ruling of 21st November 2011. The petitioners appear to

have a legitimate claim with regard to the prohibitory order, but such claim does not lie in a constitutional court but within the court which issued the order.

45. While the court is not without sympathy for the frustration of the petitioners' efforts to execute the decree, it cannot enforce protection of a prohibitory order as a right to property under the Constitution as it clearly is not. The petition is therefore hereby struck out but with no order as to costs.

46. I am grateful to the parties for their exhaustive submissions and helpful authorities in this matter.

Dated Delivered and Signed at Nairobi this 8th day of June, 2012

Mumbi Ngugi

Judge