



LUKE NJIRU KAGEREKI PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEV. CO-OP.....DEFENDANT

RULING

This is the Notice of Motion dated 26th November 2008 by the Defendant/Applicant. It is brought under 0XLIV R1(1) and 4(1) Civil Procedure Rules and section 3A Civil Procedure Act. It seeks the following orders;

1. *That the orders made on 11/6/2008, and issued by this Honourable Court on 16/7/2008 be reviewed, varied and/or set aside.*
2. *That there be a stay of execution of the orders made on 11/6/2008 and issued on 16/7/2008.*
3. *Costs of this application be provided for.*

It's supported by the facts on the face of the application and the supporting affidavit of Collins Mulwa an advocate and a legal officer with the Defendant/Applicant.

In his affidavit he states that the Plaintiff/Respondent charged his land parcel No.Kagaari/Weru/1544 as a guarantor to a loan advanced by the Defendant/Applicant to one Bernard Njiru Runyenjes. And the said Bernard Njiru defaulted in payment. The Plaintiff was served with a 45 days Redemption Notice and the Notification of Sale and Advert (CM III, IV and V). The property was then sold on 23/5/2008 and the same was registered on 9/7/2008. The orders of 11/6/2008 were made after the sale and further more the Defendant/Applicant had not been served with the application.

In his replying affidavit the Plaintiff/Respondent opposes the application saying no Statutory Notice was given to him over the sale and no Demand Notice was given to him. And that there are two dates which were given as the dates of sale i.e. 16/5/2008 and 23/5/2008.

M/s Wairimu for the 1st Defendant/Applicant filed submissions giving the sequence of events. She says the 1st Defendant exercised its statutory powers of sale and sold the property on 23/5/2008. The Respondent filed Nairobi HCCC No.246 of 2008. They were not served with any papers concerning Nairobi HCCC NO. 246/08. He further says that when the stay Orders were issued on 11/6/2008 the property had already been disposed off. The 3rd party was never notified. And that the Defendant/Applicant has never been issued with summons in this suit.

Mr. Kathungu for 3rd party supported the submissions by the 1st Defendant.

Mr. Karuti in his submissions states that there is an application dated 22/5/2008 which the 1st Defendant is countermanding with another application dated 19/11/2008.

I have read through the affidavits and submissions filed herein by the parties and their Counsels. The following are the undisputed facts;

- *This matter was initially filed as ELC Civil Case No.246 of 2005 High Court Nairobi on 23/5/2008.*
- *The same was transferred to Embu on 23/5/2008 by Justice Osiemo. No orders were given then.*
- *On 30/5/2008 the matter was before Justice Khaminwa who directed the matter to be heard on 11/6/2008. No orders given.*
- *On 11/6/2008 the matter was heard ex parte after the Hon. Judge was satisfied that the Defendant had been served. It is this Order of 11/6/2008 that the Defendant/Applicant wants reviewed or set aside.*
- *It is also not in dispute that the sale complained of was carried out on 23/5/2008. Whatever the case, its clear that by the time the Hon. Judge granted the temporary injunction the sale had already taken place. The successful bidder of the property was the interested party herein. He even has title to the property.*

The Applicant has come before me under XLIV R1(1) and 4(1) (old Civil Procedure Rules) now Order 45 R(1)(a) Civil Procedure Rules seeking that the orders of 23/5/2008 be reviewed, varied and/or set aside. Order 45 rule 1(1)(a) Civil Procedure Rules only deals with Review. However in the process of review orders/decrees may end up being varied and/or set aside. The grounds for Review are;

1. *Discovery of new and important matter 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 order was made.*
2. *Mistake or error apparent on the face of the record.*
3. *Or for any other sufficient reason.*

There is no discovery of any new evidence which has been brought to my attention. On 11/6/2008 when this matter came before the Hon. Justice Khaminwa she went through the supporting affidavit and annexures. She saw that the sale was slated for 23/5/2008. She went ahead and granted the Orders sought. All material was before her and she was satisfied that the Defendant/Applicant had been served. Would the presence of the Defendant/Applicant have changed anything anyway?

The application dated 22/5/2008 sought two main orders viz;

- 1) *That temporary injunction be issued restraining the Defendant/Respondent itself, its agents and/or their servants from selling, disposing or in any other manner dealing with land parcel No.KAGAARI/WERU/1544 belonging to the Plaintiff/Applicant pending the hearing and determination of this suit.*
- 2) *That the purported sale of the Plaintiff's land parcel No.KAGAARI/WERU/1544 be declared illegal null and void.*

And by her Ruling on 11/6/2008 Hon. Justice Khaminwa granted the Orders sought. My observation is as follows;

- 1) *The sale that the Plaintiff/Respondent wanted stopped had already taken place and there was actually nothing to stop. The said order was therefore incapable of execution/implementation. It was therefore an order issued in vain.*
- 2) *The second order declaring the sale null and void was a final order and was actually prayed for in*

the plaint.

In issuing it my sister Judge actually determined this suit. In being asked to Review this Order I am being asked by the Defendant/Applicant to determine whether this decision was right or wrong. I say so because there is no new evidence that has been laid before this Court concerning this matter. There is equally no error on record as far as this secondOrder is concerned. Dealing with it would now mean delving into the arena of determining its correctness or otherwise. It can only be challenged in the Court of Appeal. Defendant/Applicant is accordingly advised.

I therefore find that the application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT EMBU THIS 25TH DAY OF SEPTEMBER 2012.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Kathungu for 3rd party

Mr. Okwaro for Karuti for Plaintiff

Njue C/c