



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 467 OF 2008**

**IN THE MATTER OF: AN APPLICATION BY MASTO HOLDINGS LIMITED FOR LEAVE  
TO APPLY FOR JUDICIAL REVIEW ORDERS OR MANDAMUS**

**AND**

**IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP 281)**

**AND**

**IN THE MATTER OF: THE PRINCIPAL REGISTRAR OF TITLES**

**BETWEEN**

**MASTO HOLDINGS**

**LIMITED.....APPLICANT**

**VERSUS**

**THE PRINCIPAL REGISTRAR OF**

**TITLES.....RESPONDENT**

**JUDITH WANJIRU NJENGA.....INTERESTED**

**PARTY/APPLICANT**

**RULING**

The application by the interested party dated 24<sup>th</sup> February, 2011 seeks the following orders:

- “1. For reasons to be recorded, the application be certified urgent in the first instance.**
- 2. For reasons to be recorded, service hereby is dispensed with in the first instance.**
- 3. Judith Wanjiku Njenga, the applicant, herein be joined in these proceedings as an interested party forthwith.**
- 4. Pending hearing hereof the orders of the honourable court, (Justice P. Kihara Kariuki) dated 5<sup>th</sup> February 2009 emanating from Miscellaneous Application 467 of 2008 compelling the Principal Registrar of Titles, Nairobi to complete the registration of the transfer of L.R. No. 209/522/2 lodged in the land titles registry for registration on 19<sup>th</sup> March 2006 and issue a provisional certificate of titles be vacated, varied and/or set aside upon such terms as are just.**
- 5. The status quo herein, as regards the suit property, be maintained.**
- 6. The Provisional Certificate of title issued pursuant to the orders of this honourable court be revoked.**
- 7. This order be served and do bind the Principal Registrar of Titles and be noted on the respective land registry.**
- 8. Costs of this application be provided for”.**

The application was supported by an affidavit sworn by the applicant who is the wife of **Andrew Washington Njenga**, (deceased) and the personal representative of the estate of the said deceased. The interested party stated that her deceased husband was the registered proprietor of a property known as **LR No. 209/522/2, IR No. 3254**, hereinafter referred to as **“the suit property”**. The deceased died on 28<sup>th</sup> July, 2005. On 19<sup>th</sup> March, 2006 the ex parte applicant, Masto Holdings Ltd, purported to lodge a transfer of the suit property but the Registrar declined to register the same.

The interested party further deposed that on 31<sup>st</sup> July, 2008 the ex parte applicant maliciously and mischievously sought an order of mandamus vide Miscellaneous Application No. 467 of 2008 to compel the Registrar of Titles to register a transfer by a chargee in its favour and also issue a provisional title for the suit property. The application was not served upon the interested party. The orders sought were granted on 5<sup>th</sup> February, 2009. The interested party contended that the process used by the ex parte applicant to register the suit property in its name was flawed since her late husband was the registered owner of the same as at the time of filing the application.

On 21<sup>st</sup> February, 2011 the ex parte applicant, acting on the orders issued by the court on 5<sup>th</sup> February, 2009, placed a notice at the gate to the suit property where the interested party and her family reside and threatened to demolish the property.

The interested party alleged that the file in respect of the suit property has been missing at the lands registry and was therefore unable to register the transfer of the suit property into her name even after confirmation of the Grant of representation.

On 13<sup>th</sup> May, 2008 the interested party applied for a provisional title and the application was processed and advertised in the Kenya Gazette issue dated 15<sup>th</sup> October, 2008. However, no provisional title was issued to her and on 27<sup>th</sup> January, 2011 a stranger dropped a copy of the title at the suit property. That is when she realized that the property had been transferred to the ex parte applicant.

On 15<sup>th</sup> February, 2011 the ex parte applicant wrote a letter to the Chief Land Registrar seeking an explanation as to how the transfer had been effected.

In view of the foregoing, the interested party moved to court and filed this application. She stated that the suit property is her only matrimonial home and stands to suffer irreparable loss and damage if she is evicted.

The ex parte applicant filed a replying affidavit that was sworn by **Paul Mungai Kamau**. He stated, *inter alia*, that the application is an abuse of the court process in that the applicant had not only deliberately concealed material facts but also wilfully made misrepresentations to this court. In particular:

**(a) The applicant did not disclose the existence of High Court Civil Suit No. 1095 of 2002 which was instituted by her late husband to restrain the Co-operative Merchant Bank Limited from exercising its statutory power of sale over the suit property.**

**(b) The applicant's late husband had charged the suit property to the said bank (now Co-operative Bank Limited) vide a charge dated 13<sup>th</sup> June, 2001 to secure a facility of Kshs.10 Million. The said chargor defaulted in servicing the facility prompting the chargee to exercise its statutory power of sale. In a bid to restrain the chargee from exercising its statutory power of sale over the suit property the deceased filed HCCC No. 1095 of 2002 against the chargee.**

**(c) On 21<sup>st</sup> November, 2002 the court dismissed the application.**

**(d) The applicant's late husband did not appeal or seek to review that ruling. The said ruling is binding on the interested party.**

Subsequent to the said ruling the suit property was sold by public auction and the ex parte applicant purchased the same. On 14<sup>th</sup> November, 2004 the bank executed a transfer in its favour.

The ex parte applicant further stated that by the time the deceased died the suit property had been sold and transferred and that explains why the interested party did not include the suit property as part of her husband's estate at the time of obtaining the confirmed Grant on 20<sup>th</sup> November, 2006. The deponent added that the interested party has no interest in the suit property and should not therefore be enjoined in these proceedings.

With regard to the date of registration of the transfer, Mr. Kamau stated that it was presented for registration on Friday the 24<sup>th</sup> March 2006 and not Sunday 19<sup>th</sup> March 2006 as alleged by the interested party. He further stated that the orders granted by the court in favour of the ex parte applicant on 5<sup>th</sup> February, 2009 were properly sought and obtained. There was no need to serve the interested party with the application as she was not a party directly affected by the proceedings.

The ex parte applicant further stated that on 27<sup>th</sup> January, 2011 when the interested party was asked to

vacate the suit property she requested for some time until 14<sup>th</sup> February, 2011 to enable her make arrangements to acquire alternative accommodation. Her request was granted in good faith but instead of moving out the interested party moved to court and filed a separate suit, **HCCC No. 46 of 2011**, seeking similar orders as those in the present application. The court did not grant any interlocutory orders and as a result the interested party filed the present application. That suit is still pending in court, the ex parte applicant added.

The interested party filed a further affidavit on 6<sup>th</sup> April, 2011 but the same raises more or less the same issues as those summarized hereinabove. The parties through their respective advocates filed their submissions which I have carefully perused.

The first issue for determination is whether the interested party has any lawful interest in the suit property and which ought to be protected. It is not in dispute that vide a charge dated 13<sup>th</sup> June, 2001 the deceased charged the suit property to the Co-operative Merchant Bank Limited (now the Co-operative Bank Limited) to secure a financial facility. The deceased was unable to repay the said loan. As a result, the bank exercised its statutory power of sale over the suit property and the same was sold to the respondent at a public auction held on 10<sup>th</sup> February, 2004. By then the interested party's husband was still alive. He died nearly a year thereafter.

It is trite law that upon the fall of the hammer at an auction the rights of a chargor over the property are extinguished. In **HABIB ZURICH FINANCE (K) LIMITED vs LEE G. MUTHOGA & ANOTHER**, **Civil Appeal No. 144 of 1991**, the Court of Appeal reaffirmed that position when it agreed with the judgment of the superior court that:

**“.....in 1985 Section 60 of the Transfer of Property Act was amended so that the equity of redemption was lost on the fall of the hammer at the auction sale, unless the chargee wished to set aside the sale for non-payment of the purchase price.”**

**Section 69(b) of the Indian Transfer of Property Act (1882) states as follows:**

**“Where a transfer is made in exercise of the mortgagee's power of sale, the title of the purchaser shall not be impeachable on the ground:**

- (a) that no case has arisen to authorize the sale; or**
- (b) due notice was not given; or**
- (c) that the power was otherwise improperly or irregularly exercised and a purchaser is not, either before or on transfer concerned to see or inquire whether a case has arisen to authorize sale ..... but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power”.**

At the time of instituting these proceedings in July 2008 the sale of the suit property had taken place and the transfer had been executed in favour of the ex parte applicant way back in 2004. The deceased lost his equitable right of redemption upon conclusion of the sale of the suit property. Since the interested party is claiming her title from the deceased she has no lawful interest over the suit property.

The second issue for determination is whether the interested party was entitled to service of the ex parte applicant's application seeking orders to compel the Registrar of Titles to issue a title to it. As at July 2008 when the ex parte applicant filed these judicial review proceedings the sale of the suit property had been completed way back in 2004. What was remaining was registration of the transfer in favour of the ex

parte applicant. The interested party was not a party directly affected by the orders sought and was not therefore entitled to service of the application seeking an order for mandamus against the respondent. Even if the interested party was still in occupation of the suit property her occupation was not lawful and did not entitle her to service of the said application. I say so because the deceased's proprietary interest over the suit property had lawfully been terminated.

In his written submissions, the advocate for the interested party cited the Court of Appeal decision in **JAMES NDUNGU WA WAMBU vs REPUBLIC & ANOTHER, Civil Appeal No. 85 of 1982**, where the court held as follows:

**“It is not in doubt that the interested party was never served with the said application notwithstanding the fact that she is a person directly affected both in her capacity as the administrator of the estate of the deceased registered proprietor of the land. The applicant and her children, the family of the registered owner of the late Andrew Washington Njenga, have been in occupation of the suit property and until the orders of mandamus were effected the deceased remained the registered owner of the property. Service was imperative. Non-service was fatal and on that ground alone the application must succeed.”**

The advocate for the interested party merely cited the above quoted portion of the ruling, he did not provide a copy of the entire ruling. It is not therefore possible to tell the context in which the said decision was given. That notwithstanding, it is clear to my mind that the deceased had lost his equitable right of redemption long before he died. Although he had filed a suit to challenge the chargee's right of redemption the suit was dismissed and no appeal was preferred against the decision in favour of the bank.

But even if it were to be argued that pursuant to the provisions of **Order 53 rule 3(2) and (3)** the interested party ought to have been served with the ex parte applicant's application, I do not see how the interested party would have successfully challenged the application, considering that her deceased husband had no proprietary interest in the suit property. As it is now, the ex parte applicant is the registered owner of the suit property. If the court were to hold that for the simple reason that the interested party was not served with the ex parte applicant's application in compliance with **Order 53 rule 3(2)** of the **Civil Procedure Rules** and therefore find in favour of the interested party, that would betantamount to denying the ex parte applicant its rightful entitlement to the suit property on account of a procedural technicality. Article **159(2) (d)** of the **Constitution of Kenya, 2010** requires the court to administer justice without undue regard to procedural technicalities. In matters of this nature, constitutional provisions must prevail over pedantic observance of procedural technicalities, which in my view, in the circumstances of this case, the non-observance did not occasion any prejudice to the interested party.

As regards the interested party's arguments relating to issue of the provisional title, it is important to note that at the time of making the application for mandamus the original Grant had gone missing at the lands office after the ex parte applicant presented it for registration together with the transfer. However, subsequent to the order of mandamus being issued on 5<sup>th</sup> February, 2009 the original Grant was traced and the transfer was registered. Having traced the original Grant the need to issue a provisional title was dispensed with together with the requirement for gazettelement as contended by the interested party. That being the position, the arguments raised by the interested party regarding issuance of a provisional title are not relevant.

When the interested party appeared ex parte before this court on 24<sup>th</sup> February, 2011 the court ordered that the status quo obtaining as at that day be maintained until 7<sup>th</sup> March, 2011 when the application was scheduled to be heard. That meant that she was to continue staying in the suit property until the aforesaid

date. Those orders were extended severally and remain in force todate.

However, the interested party is guilty of material non-disclosure and wilfully misled the court in her ex parte appearance. She did not disclose, *inter alia*:

**(a) That her late husband from whom she is claiming title to the suit property had filed HCCC No. 1095 of 2002 seeking injunctive relief against the bank from exercising its statutory power of sale over the suit property and that the application was dismissed on 21<sup>st</sup> November, 2002. That decision has neither been set aside nor appealed against.**

**(b) She did not disclose that on 9<sup>th</sup> February, 2011 she filed HCCC No. 46 of 2011 against the respondent, the ex parte applicant and two others seeking to nullify the sale of the suit property. She had also filed an application to restrain the parties from dealing with the suit property until determination of the suit. The court declined to grant the orders and directed that the matter be heard on 18<sup>th</sup> May, 2011. The current proceedings were instituted when the court declined to grant the orders anticipated by the interested party as aforesaid.**

**In UHURU HIGHWAY DEVELOPMENT LIMITED vs CENTRAL BANK OF KENYA & 2 OTHERS, Civil Appeal No. 140 of 1995**, the Court of Appeal held that where a party goes to court in the absence of another he assumes a heavy burden and must put before the judge all relevant materials including materials against him.

Where the court is satisfied that an applicant has obtained ex parte orders by concealing relevant material, the court is entitled to discharge those orders and refuse to consider the applicant's application any further.

Apart from the interested party's blame worthy conduct of failing to disclose material information, I also find that the orders sought are not deserved for the reasons as stated hereinabove. Consequently, the application by the interested party is dismissed with costs to the ex parte applicant. For avoidance of doubt the order of maintenance of the status quo made on 24<sup>th</sup> February, 2011 is also vacated.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – Court Clerk**

**Mrs. M. Imende for the Applicant**

**Mr. A.M. Mureithi for the Interested Party**