



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA NO.735 OF 2006

NINA MWETU T/A SASSMA FARM..... APPELLANT

VERSUS

MUUS KENYA LIMITED.....1ST RESPONDENT

UATHIMO LIMITED..... INTERESTED PARTY/2ND RESPONDENT

JUDGMENT

On 29th September 2006 the Resident Magistrate J.M.Were delivered a ruling. In that ruling, the learned magistrate dismissed an application dated 5th May 2006 in which the appellant herein had sought that an order issued on 14th August 2003 ordering the sale of Nairobi/Block 72/706 and all the subsequent and consequential orders, be set aside and the registration of the interested party as the lessee of the said property be cancelled.

Following the ruling of learned magistrate, the appellant filed this present appeal through a memorandum of appeal filed on 27th October 2006. The grounds of appeal are as follows ?

1. The learned magistrate erred in law and in fact in failing to find and hold that the sale of plot No.LR Nairobi/Block 72/706 was irregular and/or fraudulent.
2. The learned magistrate erred in law and in fact in failing to find and hold that the appellant had not been served with a document and notices allegedly served on her as per the requirements of Order 21 of the Civil Procedure Rules.
3. The learned magistrate erred in law and in fact in failing to find and hold that the property that was advertised for sale and eventually sold to the interested party is a different property from the one formally occupied and actually owned by the appellant.
4. The learned magistrate erred in law in finding and holding that the advertisement in the newspaper constituted proper service.
5. By the above errors the magistrate misapplied his mind thereby arriving at a wrong decision and wrong interpretations of the provisions of the Civil Procedure Rules.

In support of the grounds of the memorandum of appeal, the appellant's counsel M/s Onesmus Githinji & Co. Advocates, filed written submissions on 23rd November 2010. In the submissions, counsel gave a background to the matter. Counsel submitted that the respondent applied for execution by way of attachment and sale of Nairobi/Block 72/706 which was registered in the appellant's name. That

application for execution was made on 5th July 2001. It culminated in the sale of the subject property to the interested party herein for Kshs.3,100,000/=

It was contended that by the time the appellant learnt of the sale, the property had already been transferred to the interested party who was now trying to take possession thereof from the tenant who was in occupation. The appellant consequently filed the application dated 5th May 2006. It was further contended that the main issue raised in that application was that the appellant was not served with notice prior to the sale of the property. The process server, one Cosmas Osawa, swore a false affidavit. Counsel emphasized that the appellant was cross-examined on the contents of her affidavit in support of the application. The appellant was very firm that the description of the property where the process server claimed to have served the notice to show cause on the appellant, could not be the place where she was served. The appellant was not occupying a corner plot behind Uhuru Gardens Post Office as described by the process server. She was also not rearing chicken where she was living.

Counsel relied on the definition of fraud in Blacks Law Dictionary, and stated that what the process server stated in the affidavit amounted to fraud. The process server intended to deceive the court that he served the appellant with the necessary court process which culminated in the sale and transfer of the appellant's property to the interested party.

Counsel contended that even the description of the valuation of the property appeared to be misleading. In view of the anomalies, the learned magistrate was in error when he failed to address himself to the fact that the house where the process server allegedly served the appellant was not House No. 67. The description given was false.

It was contended that though the process server filed a supplementary affidavit, he did not attempt to explain the apparent falsehoods. The appellant was also not cross-examined on this crucial aspect of the evidence.

Counsel contended that it was wrong for the learned magistrate to conclude that the appellant did not give any basis for an allegation of fraudulent activity by either the plaintiff or the interested party. It was also wrong for the magistrate to conclude that the notice given in the Daily Nation newspaper amounted to service on the appellant.

Reliance was placed on a case of **Remco Ltd –vs- Mistry Jadva Parbat & Co. Ltd [2002] EA 227** wherein Ringera J, as he then was, stated that if there was no proper or any service of summon to enter appearance the resulting judgment was an irregularity and the court must set it aside as a matter of right. It was submitted that the same reasoning should apply in this case for the failure to serve the notice to show cause.

Counsel also emphasized that the learned magistrate was wrong in holding that the property was advertised in the Daily Nation newspaper which had wide circulation, and that the appellant should have taken action to forestall the sale. Counsel contended that the property described in the advertisement was house No. 62 and not 67. More importantly, counsel thought the court should have asked itself what the main purpose of the sale was. This was because in law an auctioneer had an obligation to obtain the best price possible. A notice such as the advertisement made in the Daily Nation herein was meant to be addressed to prospective purchasers and not the owner of the property. Therefore in this particular case, the appellant as owner was not aware of the advertisement.

Counsel contended that even if the advertisement in the Daily Nation had described the property correctly, the advertisement would only be lawful if requisite notices had been served on the owner of the property. Reliance was placed on Order 21 rule 79 of the Civil Procedure Rules which provides as follows:-

“Where any immovable property has been sold in execution of a decree, the decree holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the grounds of irregularity or fraud unless upon the facts proved the court is satisfied that the appellant has sustained substantial injury by reason of such irregularity or fraud.”

It was contended that the appellant was a person affected by the sale. The appellant sustained substantial injury by reason of irregularity or fraud. The property was sold for a decretal sum of Ksh.408,701.50/= with costs and interest. It was contended that the value of the property which was sold on 17th November 2005 for Ksh.3,100,000/=, must have tripled by now. The portion of the sale price which was deposited in court was not enough for the appellant to purchase another similar house.

It was also contended that the auctioneer breached rule 15 of the Auctioneers’ Rules 1997. It was contended that under rule 15(d) the owner of the property was required to be given not less than 45 days within which to redeem the property.

The appellant also filed a reply to the 1st respondent’s submissions on 8th March 2011. It was contended that where an auctioneer had acted unlawfully and there was no strict compliance with the law, the sale should be set aside. Counsel sought to distinguish the case of **Kiplagat Arap Bartegan –vs- J.G, Mwangi**, relied on by the 1st respondent. Counsel also tried to distinguish the case of **Timothy Ongucha Omato –v-s National Bank of Kenya** relied upon by first respondent because in that case the auction was conducted after all procedures established by law had been followed. Counsel also sought to distinguish the case of **Muliro –vs- Ochieng** relied on by the 1st respondent .

Counsel contended that rule 81 (1) of Order 21 of the Civil Procedure rules was not applicable herein as the appellant had not made an application under rule 78, 79 or 80 of the Civil Procedure rules. The sale of the property could therefore not have become absolute.

The appeal is opposed. The 1st respondent filed written submissions through their counsel Otieno Omuga & Ouma Advocates on 7th December 2010. The background to the matter was given.

It was contended that this matter arose from a case in the magistrate’s court for recovery of Kshs.408,701.50/= in a plaint dated 28th March 2001. The appellant or his advocate signed a consent judgment to pay installments of Kshs.20,000/= per month for three months to be reviewed upwards. However she defaulted and the 1st respondent sought prohibitory orders against title No. Nairobi/Block 72/706. The 1st respondent subsequently moved to court, with notice to the appellant, for settlement and subsequently auctioneers were instructed to advertise the property for sale by public auction. The sale was conducted on 17th November 2005 and the 2nd respondent (interested party) emerged the highest bidder for Kshs.3,100,000/= . The 2nd respondent subsequently lodged a vesting order in the Lands Office for registration leading to the issuance of a certificate of lease dated 16th February 2006 in his favour.

It was contended that in an application dated 5th May 2006, the appellant sought an order inter alia to set aside the court order made on 14th August 2003 by which the court authorized the 1st respondent to sell the property, and for annulment of the registration of the property in the name of the interested party/2nd respondent. The main argument in that application was irregularity or fraud in the advertisement and sale of the property, just like in this appeal.

Counsel argued that even if there was an irregularity, the court has discretion to ignore an irregularity which does not cause prejudice to any party. Reliance was placed on the case of **Kiplangat Arap Bartegan –vs- J.G. Mwangi t/a Forefront Agencies – Nairobi High Court Civil Case 2556 of 1996** wherein Visram J, as he then was, held that the court had leeway to ignore an irregularity if it is satisfied that no prejudice has been caused thereby. It was contended that the decision of the subordinate court was based on good legal reasoning.

Counsel further submitted on the rules under which the Notice of Motion determined by the learned

magistrate was brought. Counsel in particular highlighted rule 79 of Order 21 which provided that the court would only set aside a sale on grounds of irregularity, if that irregularity was material and if satisfied that the applicant had suffered substantial injury as a result of the irregularity or fraud. It was contended that the appellant had not shown, in the application before the subordinate court, what substantial injury she had suffered arising from irregularities. In any event, the property was advertised in the newspaper on 3rd November 2005. The house was valued at Kshs.3million and it was sold at Kshs.3.1 million. The learned magistrate considered all this and found that no substantial prejudice or loss had been suffered by the appellant since part of the amount collected through the auction was deposited in court for the appellant to collect.

The 1st respondent also relied on several other cases. The case of **Timothy Ongucha Omato –vs- National Bank of Kenya Ltd – Nakuru HCCC No. 353 of 1994** was relied upon. In that case, Kimaru J, found that the applicant had not proved that he had suffered substantial injury by reason of irregularity or fraud.

Reliance was also placed on the case of **Mandavia –vs-Rattan Singh [1968] EA 146** in which the court found that an applicant had not proved that he had suffered substantial injury. In addition the case of **Masinde Muliro –vs- Dickson Ochieng [1987] KLR 547** was relied upon.

It was contended that the allegation of the appellant that she had suffered substantial loss had not been supported by any evidence.

On the allegation of fraud, it was submitted that the appellant did not seek to cross-examine the valuer on the alleged wrong valuation report, nor did she apply to cross-examine the process server on the alleged false affidavits. Therefore, the subordinate court was correct in finding that the appellant did not lay a basis for fraudulent activities either by the 1st respondent or the interested party.

The interested party (2nd respondent) relied on the submissions of the 1st respondent.

On the hearing date, Miss Kamau appeared for the appellant, Mr. Mogere for the 1st respondent and M/s Tugei for the interested party (2nd respondent). They relied on the written submissions filed.

This is an appeal against the decision of the subordinate court in a ruling delivered on 29th September 2006. The main thrust of the appeal is that there was non compliance with procedures for sale of the subject plot or property, and that there was fraud or falsehood in the affidavits sworn by the process server.

The sale of the property LR Nairobi/Block 72/706 by public auction has already taken place. It was done in 2005. There is no dispute about that. There is no dispute also that the property belonged to the appellant. There is no dispute that it was sold pursuant to a default in settlement by the appellant over a consent judgment entered against the appellant. There is also no dispute that the property was sold for Kshs.3,100,000/= and that part of the money was deposited in court in favour of the appellant.

The appellant claimed before the learned magistrate that there was an irregularity in the way the auction was conducted in that the appellant was not served with a notice to show cause. She also complained that the process server swore to falsehoods that he served the notice to show cause on the appellant. It was contended that the advertisement in the Daily Nation newspaper could not be a substitute for the personal service over a notice to show cause on the appellant.

I have considered the appeal. I have perused the proceedings in the Notice of Motion dated 5th May 2006. I agree with the 1st respondent's argument that the appellant herein did not cross-examine the process server or the valuer. It was the appellant herein who was cross-examined on the contents of her affidavit. If the appellant wanted to prove the truth or otherwise of the service by the process server, it would be prudent for her or her counsel to have cross-examined the process server. That would have brought out the allegations that were being raised by the appellant on the truthfulness of the contents of

the affidavit sworn by the process server. In the absence of such cross-examination, in my view the learned magistrate was correct in making a finding that irregularity or fraud was not proved.

Even if there was irregularity in the service of the notice to show cause, the provisions of Order 21 rule 79 are clear that the court may set aside a sale only when there is material irregularity or fraud and also where an applicant has sustained substantial injury by reason of the same. Order 21 rule 79 provides as follows:-

“79 Where any immovable property has been sold in execution of a decree, the decree holder, or any person whose interest are affected by the sale, may apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. Provided that no sale shall be set aside on the grounds of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”

It is clear from the above rule that, for a fraud or irregularity to entitle a party to setting aside a sale, that irregularity or fraud must be material. It is not every irregularity or fraud of a minor nature that will result in setting aside of the sale. Secondly, an applicant who asks for the setting aside of the sale has to prove, on the facts to the satisfaction of the court, that he or she has sustained substantial injury as a result of such irregularity of fraud.

The appellant herein has just complained of irregularity or fraud. She has not stated the materiality of that fraud or irregularity. She did not place before the magistrates’ court facts that would show that she had suffered substantial loss or prejudice as a result of that irregularity or fraud.

The fact that prices of real property assets have been rising rapidly is not a material prejudice or loss on the appellant. The appellant has not stated even in this appeal, that in 2005 or 2006, when the property was sold, the subject property was worth much more than it was sold for. The sale could only be done on the basis of valuation of properties as at that time. She cannot use the value of the property today as the basis for claiming material loss or prejudice. I fully agree with what was stated by Kimaru J in the case of **Timothy Ongucha Omato –vs- National Bank of Kenya Ltd.** (supra) when the judge stated –

“In the circumstances of this case I do hold that the applicant has not proved to the satisfaction of this court that he suffered substantial injury by reason of such irregularity or fraud. The allegation that the public auction was advertised in the wrong newspaper or that the venue of the public auction had been changed constitutes grounds for the applicant to file a suit for damages for irregular sale and does not constitute grounds to set aside the valid sale.”

In my view the appellant herein did not prove to the magistrate that she had suffered substantial loss. The learned magistrate was therefore correct in arriving at the conclusion that he arrived at. The result therefore is that this appeal will be dismissed.

Consequently, I dismiss the appeal. I award costs of the appeal to only the 1st respondent, as the interested party or 2nd respondent adopted the submissions of the 1st respondent.

Dated and delivered at Nairobi this 14th day of July 2011.

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GEORGE DULU
JUDGE

In the presence of:-

Mr. Musyoka for Appellant

Mr. Bargoret holding brief for Mr. Amuga for 1st Respondent

Mr.Bargoret for Interested Party/2nd Respondent
C Muendo – court clerk