



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 329 OF 2003

AWO SHARRIFF MOHAMED.....PLAINTIFF

VERSUS

ABDULKADIR SHARRIFF ABDIRAHIM & ANOTHER.....DEFENDANTS

R U L I N G

1. In her Ruling dated 5th March, 2010, my learned sister Koome J. noted that since Judgement was entered herein by Kasango J. on 16 February 2006, she had come across almost a dozen applications which have been filed in this matter in regard to execution proceedings. She observed that most of these relate to objection proceedings either brought by the Judgement/Debtor or other entities related to him. What worried Koome J. is whether these objections are contrived to defeat the interest of the decree holder from realizing the fruits of his litigation, were these objections raised to scuttle the execution of the judgement which has been set aside for well over 5 years now.

2. I heartily concur with my learned sister and share her doubts as to the authenticity of the various applications on this Court's file. Having not been acquainted previously with this now alarmingly voluminous file, I have chosen to deal with the different outstanding applications one by one commencing with the oldest in time, the Notice of Motion dated 17 January 2011 brought by the interested party **SAMKAN ESTATES LIMITED**. The Application is supported by an Affidavit sworn by one **SAMUEL KAMAU NJUGUNA** on the 17 January 2011.

3. In his said Affidavit, Mr. Njuguna describes himself as a director of the interested party company authorized by the company's other directors to depone to the same. At paragraph 4 of his said Affidavit, Mr. Njuguna states that in her Ruling dated 5 March 2010 Koome J. dismissed the proceedings filed by the Objector, Eco Bank Ltd, and ruled that the Objector's Charge registered on 2 July 2008 against the Title of the suit property L.R. No. 37/262/3 was irregular. With respect to Mr. Njuguna, that is not what the learned Judge said in her ruling of 5 March 2010. She did not find that the Charge was irregular. She found that the Objector took part in a fraudulent transaction viz:

“Moreover a prohibitory order was issued by this Court, and the extract of the title shows the entry was entered into the Lands Register but it was cancelled after which a charge by the Judgement debtor and a previous objector SASA Investment Limited as the borrower was registered. These questions still persist and at this stage it appears obvious that the objector was aware of the

existence of the decree holder's claim over the suit property and 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 Judgement debtor to avoid the execution of the decree herein".

4. One would have thought that the objector Eco Bank Kenya Ltd. having been found by Koome J. to have been involved in a fraudulent transaction may have left well alone as far as this case is concerned. However, such is not the case and there is a Notice of Motion pending before this Court seeking a stay of the proceedings and execution of the Decree and an Order directing the Registrar of Titles to attend before this Court for the purpose of examination as regards the original documents at the Lands Registry in relation to the suit property. Finally, that application asks for orders to set aside the sale of the suit property while the Application before me asks that the sale of the suit property to the Interested Party be confirmed. It seems to me that depending upon what I rule as regards this Application will have a knock on effect in relation to the Objector's Notice of Motion dated 5 February 2011.

5. Before I turn to considering the current Application dated 17 January 2011 on its merits, I think that it is worth recording that apart from the Objector's (**Eco Bank Kenya Limited**) said Notice of Motion dated 5 February 2011 there are 2 other applications on the Court file that are still to be disposed of. The first is dated 12th April 2011 and is a Notice of Motion brought by the same interested party/purchasers. It seeks orders as against the judgment debtor to account for rent monies and any monies collected being mesne profits to be deposited in a joint interest earning account in the names of the interested parties advocates and the judgement debtor's advocates. I believe that such Application is somewhat dependent upon the result and finding of the current Application before me.

6. Then there is the Notice of Motion dated 12 May 2011 requesting this Court to set aside the Ruling and subsequent Order dated 18 June 2010, such application is filed by the Decree Holders as administrators of the Estate of the late **AWO SHARIFF MOHAMED** deceased. The Ruling dated 18 June 2010 was delivered, again by Koome J, and involved a property being L.R. No. 209/13688 Nairobi formerly Title No. 103/564 Civil Servants House No. 794 Nairobi West. The learned Judge allowed the Application to restrain the Decree Holder from selling, transferring, disposing etc of that property and further set aside the sale of the same to an interested party **ISAAC KAMAU KABIRA**. As that Application in no way affects the current Application before me, no doubt it will be heard in due course of time.

7. I should not depart from the introductory aspect of this Ruling without mention of Koome J's Ruling of 10 January 2011. It appears that the Applicant herein filed a previous Application dated 12 July 2010 seeking to have the sale of the suit property L.R. 37/262/3 Nairobi confirmed by court and certificates of sale be issued. Koome J by her said Ruling struck out the Supporting Affidavit to the Application sworn by **SAMUEL KAMAU NJUGUNA** and dated 12 July 2010, on the grounds that the Affidavit was sworn contrary to the provisions of the Oaths and Statutory Declarations Act. As the said Notice of Motion dated 12 July 2010 could not survive without its Supporting Affidavit, that was struck out too. However, Koome J. left the door open for the Applicant by granting leave to file a proper Affidavit hence the current Application before me.

8. It is interesting to note that the wording of the Notice of Motion currently before me is almost exactly the same as the wording utilized in the Notice of Motion dated 12 July 2010. I was pleased to note that more care has been taken with the Supporting Affidavit this time round. Even so, the Interested Party's Application brought a whole host of objections of a procedural nature and was strongly opposed by both the advocates of the Decree Holder and those of the Objector, Eco Bank (Kenya) Ltd. The Decree Holders' advocates filed Grounds of Opposition herein on 7 February 2011 plus a Replying Affidavit sworn by **ABDULKADIR SHARIFF ABDIRAHIM** dated 15 March 2011. The Objector's advocates filed a Replying Affidavit sworn by **IMINZA KAISHA** the Bank's Head of Legal dated 21st February 2011.

9. The Affidavit in support of the Application sworn by the said **SAMUEL KAMAU NJUGUNA** merely recites the history of the Interested Party's involvement with this matter since the auction sale conducted regarding the suit property on 18 December 2009. Although I am inclined to accept what Mr. Njuguna says in relation to the sale as substantially correct in relation to the conduct thereof, there are a number of complaints being voiced that the sale was irregular for a number of reasons:

(a) That there was a valid Charge registered on 5 November 2008 in favour of the objector. Details of the sale being subject to the Charge were not disclosed in the notification of sale of the property dated 30 October 2009;

(b) That there is no lawful entry on the Title for L.R. No. 37/262/3 sanctioning the sale.

(c) That the Judgement Debtor was never served with the notification of sale either before or at the time of the sale of the property. See Order 6 Civil Procedure Rules 2010.

(d) That there is doubt as to who or what entity is the bona fide purchasers of the property. Is it Samkan Estates Limited, Samkan Limited or the deponent of the Affidavit in support of the Application Samuel Kamau Njuguna himself?

(e) There is doubt about the date that the Application requests inserted in the Certificate of Sale. Is it the date of the sale 18th December, 2009 or 15 days later which was supposedly the completion date according to the conditions of sale or was it the date of payment by the Interested Party of the last instalment of the purchase price which was much later than 15 days after the 18th December, 2009.

10. These then were the complaints raised as regards the sale of the suit property to the Interested Party under the *Civil Procedure Rules*. The Judgement Debtor in his verbal submissions and as particularized in the Judgement Debtor's Replying Affidavit dated 15 March 2011 had more:

(a) The application refers to the suit property registered under the Registration of Titles Act. Such requires that a Search must be conducted and the Applicant should have attached certified copies of the Title – see Order 21 Rule 6 of the Civil Procedure Rules 2010.

(b) Attached to the Judgment Debtor's said Affidavit is exhibited a copy of the Title which shows no prohibitory orders registered against the same but does show the Objector's Charge registered on 5 November 2008 as Entry Number 24. Such charge has not been detailed in the description of the suit property and thus offends the provisions of Order 19 of the Civil Procedure Rules 2010.

(c) The Interested Party's Application is said to be brought under Section 98 of the Civil Procedure Act, *inter alia*. If so, where is the Order of the Court to the Judgment Debtor requiring him to execute a Transfer in favour of the Interested Party?

(d) Further, Order 22 Rule 79 – when did the sale become absolute so that the Court may grant the Certificate of Sale?

(e) The Application details that it is also brought under Order 22 rule 80 of the Civil Procedure Rules 2010. Such refers to the judgement Debtor being in possession of the suit property whereas it is known that a tenant occupies the same. Rule 80 cannot apply to this Application.

(f) As regards Order 22 Rule 81, the Objector pointed out that there is no prayer in the Application as to whom should be notified in relation to the sale so that the Court can issue the appropriate notice. The Rule requires that one must apply specifically for an order to affix a notice on the suit property as to the transfer thereof from the Judgement Debtor to the purchaser.

(g) The Application is said to be brought under Order 22 Rule 83 but again, this Rule does not apply. Nowhere has it been detailed that there is a complaint against the Judgment Debtor that he

has resisted the occupation of the suit property by the purchaser.

(h) Again the Application before Court is said to be brought under Order 22 rule 83. That rule requires that the Court orders an investigation. There is no prayer for this in the Application such being a clear abuse of the court process.

(i) Order 22 Rule 83 which this Application is also said to be brought under refers to the liberty of the Judgment Debtor. There is no indication in the Affidavit in support of the Application or anywhere else that the Judgment Debtor has been resisting execution.

(j) The person named as the Plaintiff/Decree Holder AWO SHARIFF MOHAMED is deceased and is no longer a party to this suit. The application consequently, is brought in the name of a wrong party and in the name of the wrong decree holder. It is thus contrary to Order 24 of the Civil Procedure Rules 2010.

(k) The Application includes an order for directions to the Chief Land Registrar but there is no Decree or Order of the court requiring him to do anything. Similarly Orders are sought in the Application against person who are not parties to this suit.

(l) There is currently an Appeal, as regards the judgement of Kasango J. delivered on 16 February 2006, pending before the Court of Appeal affects the suit property. The doctrine of *lis pendens* applies.

(m) The Application invokes jurisdiction under Section 126 of the Registered Land Act (Cap 300) for imposition of an inhibition but also seeks an order for transfer of the property. The suit property is registered under the Registration of Titles Act (Cap 281) to which the Registered Lands Act does not apply. This court has no jurisdiction to entertain such an application so it should be dismissed with costs.

(n) The Application's Supporting Affidavit paragraph 27 states that Koome J in Ruling delivered 10 January 2011 ordered the deponent to make a fresh application in order for the sale to be confirmed by the Court. The learned Judge did nothing of the sort, she merely granted leave to the Interested Party to file a proper affidavit.

11. The Replying Affidavit of IMINZA KAISHA sworn on the 21 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 5 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.

12. As I see it, my task is now to disseminate the various objections raised as against this Application to see if any so raised are incurable or fatal to the same. In this regard, I am acutely aware of the Applicant's submissions in reply to the Judgment Debtor's counsel's submissions that Article 159 (2) (d) of the Constitution provides that, courts should, as far as possible, overlook technical and procedural irregularities in order to arrive at a fair and judicially considered decision. Against this, I am cognizant of the Court of Appeal's direction in this regard in Galaxy Paints Company Limited – Civil Appeal No. 219 of 1998 viz:

“The Rules are designed to facilitate justice and further its ends. They are not a thing to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee. But, due to rampant inefficiency, negligence, dishonesty, lack of diligence and general disregard for professional ethics on the part of the majority of the advocates in this country, the

Rules are abhorred”.

Further, the Court of Appeal emphasized that:

“Unless the Rules, the hand maid of justice are observed, the administration of justice in this country will be eroded”.

13. **Order 22 rule 57 (2)** provides:

“(2) Such public notice shall be drawn up after notice to the decree-holder and the judgment-debtor, and shall state the time and place of sale, and specify as fairly and accurately as possible –

(a) The property to be sold;

(b) Any encumbrance to which the property is liable;

(c) The amount for the recovery of which the sale is ordered; and

(d) Every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property;

Provided that notice to the judgment-debtor may be dispensed with, or substituted service thereof ordered, for reasons to be recorded by the court”.

(2) (b) above details that the public notice shall state details of any encumbrance to which the property is liable. Certainly the notification of sale dated 30 October 2009 contains no reference to the Objector’s Charge registered on 5 November 2008. At that stage of the execution proceedings, the Charge still remained unchallenged on the Title of the suit property and there is no doubt that it should have been detailed in the Notification of Sale.

14. **Order 22 rule 48** as to attachment of immovable property read as follows:

“48. (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.

(2) A copy of the order shall be affixed on a conspicuous part of the property”.

In my perusal of the particulars of the Title to the suit property annexed as Exhibit “ASA1” to the Affidavit of **ABDULAKADIR SHARIFF ABDIRAHIM** dated 15 March 2011, I note that the deponent’s Application for a copy thereof is dated 10th February, 2011. I do not see any notification of the Prohibitory Order dated 22nd September, 2008 being registered as against the Title to the suit property. In fact there is no evidence that a copy of the Prohibitory Order being affixed on a conspicuous part of the property as per **Order 22 Rule 48 (2)**.

15. The said Prohibitory order dated 22nd September 2008 refers to the various properties owned by the Judgment Debtor as per the Schedule thereto, including the suit property L.R. No. 37/262/3 Nairobi. Indeed Exhibit “KK3” of the Supporting Affidavit to the Application reveals photocopies of the Title Deeds for the various properties including the suit property. But is this good enough? In my opinion, the provisions of **Order 21 Rule 6** of the *Civil Procedure Rules* have not been complied with. Such requires that a certified copy of the Title shall be produced to the Court before any Judgment is delivered in a suit where there is a prayer for such Judgement the granting of which would result in some alteration to the title of the land registered. Again, I have perused the Court file. I do not see any certified copy of the Title of the suit property thereon. It appears that this mandatory rule has not been

observed.

16. I was referred to the fact that the Notice of Motion dated 17 January 2011, the subject of this Ruling is said to have been brought under **Rules 79, 80, 81, 82 and 83** of the *Civil Procedure Rules*. I have taken cognizance of the objectors comments in relation to these Rules which I have outlined in paragraph **10 (c) 9d) (e) (f) (g) (h) and (i)** supra. I believe that the Judgement Debtor is completely correct in the comments he has made as regards to where the interested party and/or the Decree Holder has failed to detail the mandatory requirements of those Rules or provided sufficient evidence particularly as regards the Judgment Debtor being in any way unco-operative or hostile so far as the execution process herein is concerned.

17. The Judgement Debtor's counsel referred me to the fact that in his opinion, the application had been wrongly brought in the name of the deceased **AWO SHARIFF MOHAMED**. This may well be the case but I take cognizance of the provisions of **Order 24 rule 10** of the *Civil Procedure Rules 2010*, in that **Rules 3, 4 and 7** of that Order do not apply to proceedings in execution of a decree or order.

18. I am also not convinced that the Judgement Debtor's submission that the Application, which includes a prayer for direction to the Registrar of Titles, requires the Registrar to be joined as a party to the same. Part XIV of the *Registration of Titles Act (Cap 281)* gives this Court power of direction to a Registrar in terms of rectification of the register or in respect any instrument related to land. Accordingly, I see no reason why the Registrar need be joined as a party to this suit.

19. Similarly, I am not convinced in relation to the Judgement Debtor's submission that this Application be disallowed under the *Lis Pendens* doctrine in relation to the pending Appeal in the Court of Appeal as regards the judgement of Kasango J. delivered herein on 16 February 2006. It is trite law that any appeal from a Judgement of this Court does not automatically mean that the proceedings before this Court are automatically stayed. Indeed, I note on the file, that the Judgement Debtor's application that there be a stay of this Court's Order dated 23rd February, 2006 and that there be a stay of garnishee proceedings pending the filing, hearing and determination of the intended appeal, was dismissed by Ransley J. on 9th March, 2006. In my opinion, the doctrine of "*lis pendens*" does not apply hereto.

20. In the heading to the Notice of Motion dated 17 January 2011, there is a reference to the Application being made under Section 128 of the Registered Land Act. The Judgement Debtor is quite right in that the suit property is registered under The Registration of Titles Act (Cap 281) and hence the Registered Land Act's provisions do not apply. There is no provision for an "*inhibition*" under the Registration of Titles Act. However, I do take cognizance of the provisions of **Order 51 Rules 10 (1) and (2)** of the Civil Procedure Rules, 2010 which bear repetition here:

“(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

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 of **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.

DATED and DELIVERED at NAIROBI this 21st day of November, 2011.

**J. B. HAVELOCK
JUDGE**