



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)
Civil Case 406 of 2004

GEORGE GIKUBU MBUTHIA.....PLAINTIFF
VERSUS
CONSOLIDATED BANK OF KENYA LTD.....DEFENDANT
RULING

1. The Chamber Summons dated 31st December 2009, is brought by the defendant under the provisions of Order 6 Rule 13(1) (b) and (d) and Order 21 Rule 81(3) of the Civil Procedure Rules. The Applicant is seeking for an order that the Plaintiff's suit be struck out and the same be dismissed on the grounds that the claim is frivolous, vexatious and otherwise an abuse of the court process. Secondly, the Plaintiff's suit is barred by the provisions of Order 21 Rule 81 of the Civil Procedure Rules.

2. This application is supported by the affidavit of Julius Mwaniki sworn on 31st December 2009. According to the applicant, the suit by the plaintiff seeks to set aside an order of the High Court in HCCC No. 3231 of 1985 a ruling by Visram J (as he then was) which was delivered on 29th May 2001. The plaintiff was not a party in that suit he was a purchaser of a property known as LR No. Nyandurua Karati/728 (hereinafter referred to as the suit premises). This property was being sold in execution of a decree by the Defendant who was the decree-holder. The Plaintiff was declared the highest bidder during an auction.

3. The Defendant was however dissatisfied with the auction and moved to court to set aside the sale by auction to the Plaintiff. By the ruling delivered on 29th May 2001, the sale was set aside for reasons that the auctioneer failed to comply with the mandatory requirement of the Auctioneers Rules by failing to include the reserve price which was a material irregularity. No appeal was filed against that ruling.

4. The plaintiff filed the present suit and under prayer no (b), he is seeking for an order that the contract of sale of the LR No. Nyandurua/Karati 728 be declared lawful and valid and he should also be declared the true purchaser. According to Counsel for the Defendant, the ruling by Visram J determined this issue of the sale of the suit premises to the Plaintiff and this court has no jurisdiction to entertain a prayer seeking for declaration that the orders of the same court are illegal as prayed in this suit. Under the provisions of Order 21 Rule 81 (2) and (3) it is provided that:

2. "Where such application is made and allowed and where, in the case of an application under rule 78, the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale:

Provided that no order shall be made unless notices of the application has been given to all persons affected thereby.

3. No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

5. Counsel for the defendant also made reference to a Court of Appeal decision in the case of Muliro vs. Ochieng [1987] KLR. In that case the Court of Appeal clarified that an application to set aside a sale, as provided for under Order 21 Rule 79 cannot be rescinded due to a claim that the sale was affected by fraud. Such an application can be made where there is an allegation of material irregularity or fraud in publishing or conducting the sale. It was further held in the same decision that:

“When the Registrar made the order confirming the sale, it became absolute under the Civil Procedure Rules order XXI rule 81(1) so that the applicant’s interest in the land came to an end. No suit or any civil proceedings to set aside that order could be brought by the applicant “.

The sale having been set aside, by an order of this court which was not reviewed or appealed from, the relation between the plaintiff and defendant is non-existence.

6. Counsel argued that there is no suit before the court where orders can be made. The Plaintiff’s application seeking for an order of injunction was dismissed. The Plaintiff filed Civil Appeal No. 100 of 2005 before the Court of Appeal. After that the plaintiff went back to the High Court in HCCC 3231 of 1985 where he was not a party and obtained an order of injunction on 28th October 2005 on the grounds that there was a pending appeal. The Plaintiff was not a party in that suit when he sought for orders of injunction and the sale over the suit premises was not set aside. A notice of appeal in respect of that order was also filed in the Court of Appeal. Counsel urged the court to strike the suit as an abuse of the court process and on the further grounds that it is statute barred.

7. This application was opposed by the Plaintiff who appeared in person. He relied on his replying affidavit sworn on 26th January, 2010. The Plaintiff accuses the Defendant of breaching the provisions of several statutes and of relying on an illegal order given on 29th May 2001. According to the Plaintiff, the court should not aid the defendant who has committed certain irregularities and disobeyed court orders made on 7th March, 1988 and 28th October, 2005 in HCCC 3231 of 1985. The Plaintiff contends that his suit challenges the order to set aside a sale by public auction which was held on 18th March, 1998. Since there was active prosecution HCCC 3231 of 1985 where the Plaintiff was an interested party, the plea of resjudicata is misconceived.

8. Under the provisions of the civil procedure rules under which this application is brought, a suit which does not disclose a reasonable cause of action can be dismissed. However the power to strike out pleadings is one which should be exercised in plain and obvious cases. The summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process. This procedure has nothing to do with the case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case.

(See the case of Yaya Towers Limited vs. Trade Bank Limited (in liquidation) [2000] KLR PAGE 527.

9. At a glance, the plaintiff’s suit seeks for the following orders:-

- (a) AN INJUNCTION against the defendant and its Agents restraining them from dealing in any manner with L.R. Nyandarua/Karai/728 until This suit is heard and determined or until further Orders.
- (b) A DECLARATION that the contract of sale of L.R. Nyandarua/Karati/728 is lawful and valid and the Plaintiff is the true purchaser.
- (c) A DECLARATION that the Plaintiff cannot be coerced to increase the purchase price other than the declared price after the fall of the hammer.
- (d) Specific Performance of the Contract dated 18th March 1998.
- (e) An ORDER directing the Registrar of Titles – Nyandarua District – to cancel and remove the Prohibitory Order and the Caution registered against the suit land.
- (f) An ORDER directing the Registrar of Tiles – Nyandarua District – to cancel the subsisting Title registered in the name of Michael Gerald Kimani and in its place to register the Plaintiff as the sole proprietor of the suit land.
- (g) Special damages.
- (h) Economics loss.
- (i) Costs of this suit.
- (j) Interests on (g), (h) and (I) at Court rates.
- (k) Any other or further relief the Honorable Court may deem appropriate to grant.

10. As regards the first prayer of injunction, an interlocutory prayer for injunction was dismissed by this court. As regards the second

prayer, I am in agreement with the submissions by counsel for the defendant that in view of the orders by **Visram J** made 29th May, 2001 that declared the sale of the suit premises a nullity and set it aside, this court cannot entertain that prayer and declare the plaintiff the lawful purchaser of the suit premises.

11. That issue was determined by a court of coordinate jurisdiction this court therefore lacks jurisdiction to determine the same issue. As regards prayer number (c) it follows that the sale was set aside and under the provisions of Order 21 Rule 81(3) the Plaintiff's suit cannot be entertained. This leaves the claim by the plaintiff for special damages which the plaintiff did not plead. The last issue to consider in this matter is whether the suit is statute barred. According to the same pleadings, the plaintiff's claim is based on the allegations that he entered into a contract on 18th March, 1998 when he attended an auction and was declared the highest bidder of the suit premises.

12. This suit was filed on 21st July 2004 which is after six (6) years since the cause of action arose. This suit thus offends the provisions of Section 4 of the Limitation of Actions Act which provides that a suit founded on contract may not be brought after the end of six (6) years from the date when the cause of action arose. Accordingly the suit by the plaintiff does not only fail to disclose a reasonable cause of action, but it is also statute barred.

Considering the nature of this case, I make no order as to costs each party shall bear their own costs.

RULING READ AND SIGNED ON 16TH APRIL 2010 AT NAIROBI.

M. K. KOOME
JUDGE