



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO 192 OF 2004

GEORGE OMOLLO OGOMA.....PLAINTIFF

-VERSUS-

EAGLE MILLERS LIMITED.....DEFENDANT

AND

MUNDE TRUST LIMITED.....OBJECTOR

RULING

In or about 29th September, 2008, *George Omollo Ogoma* hereinafter referred to as “*the decree holder*” took out execution proceedings against *Eagle Millers Ltd*, hereinafter referred to as the “*judgment debtor*” to recover the decretal sum of *Kshs. 8,313,669/60*. On the said date, *G. Oduor*, the Deputy Registrar of this *Court* ordered for the warrants to issue. On 28th January, 2009 *Mr. Okoth*, learned counsel for the decree holder successfully applied for the issuance of a prohibitory order against land reverence 1432/541, Homa-bay municipality hereinafter referred to as “*the suit premises*”. The warrants of attachment and sale were subsequently issued to *Pave Auctioneers*. The said auctioneers proceeded to give notice to the judgment debtors requiring it to settle the decretal sum failing which they would put up for sale by public auction the suit premises.

Though *Messers Ogola Okello & Co. Advocates, MundeTrust Limited*, hereinafter referred to as

“the Objector” entered the fray. It filed a Notice of Objection under *Order XXI rule 53 of the Civil Procedure rules*. Pursuant to the said objection the court as required by law directed the decree holder within 15 days from the date of service of the Notice to Intimate to the court in writing whether he proposed to proceed with the attachment. On 18th August, 2009 the decree holder duly intimated his intention to proceed with the execution of the decree pursuant to *order XXIV rule 55 of the Civil Procedure rules*.

On 4th September, 2009 the objector took out a chamber summons application seeking that it be ordered that the suit premises do belong to the objector and therefore not capable of attachment. The grounds in support of the application were that the suit premises belonged to the objector arising from a purchaser’s interest and not the judgment debtor. That the objector was never a party to the suit and therefore execution should not be levied against it.

In support of the application one, *Job Okuna Oyugi* a director of the Objector swore an affidavit. In the main he deponed that he only came to learn about the intended sale of the suit premises when the same was advertised on the 24th July, 2009 in the East African Standard. The objector’s claim was based on a purchaser’s interest having purchased the same from the judgment debtor pursuant to a sale agreement dated 6th June, 1990 between the objector and the judgment debtor. Though the purchase price had been paid to the judgment debtor the transfer could not be effected as a dispute arose between the judgment debtor and the objector which is still pending before the High Court of Kenya at Nairobi as “*HCCC.NO.3481 of 1991 (O.S)*.” The judgment debtor was not a shareholder of the objector and had no proprietary interest or right over the suit premises any longer.

In the response to the application, the decree holder swore a replying affidavit. In pertinent paragraphs he deponed that the objector and judgment debtor were related. Though they were different companies, both were nonetheless controlled by the late *Hezekiah Nelson Oyugi*’s family as directors. That the incorporation of the various companies and institution of suits between the said companies is an abuse of the process of court and is done for the sole purpose of evading the settlement of

decrees against the members of Oyugi family. The alleged sale agreement dated 6th June, 1990 had been challenged in *HCCC NO. 3481(O.S.)* and hence the suit premises were still registered in the name of the judgment debtor. He further deponed that no proper application had been made under *Order XXIV rule 56 and 57 of the Civil Procedure*.

The matter was thereafter listed for hearing before me on 16th February, 2010. That morning, *Mr. Okoth*, filed a Notice of Preliminary Objection to the effect that the objection proceedings were defective, incompetent and an abuse of the court process in that the Notice filed on 12th August, 2009 was defective as it flouted the provisions of *order XXI rule 53 of the Civil Procedure rules*, the objection proceedings were filed out of time and not served upon all interested parties and finally that the objection did not disclose any proof of interest, either legal or equitable.

Based on the preliminary objection aforesaid *Mr. Odhiambo* sought and was granted time and leave of court to file a supplementary affidavit to deal with the issues raised in the preliminary objection. Similar leave was extended to the counsel for the decree holder too.

Pursuant to the leave aforesaid, parties filed their respective supplementary affidavits. On the part of the objector, it deponed that the objector and judgment debtor were separate entities despite having directors who are no doubt relatives. That the objector had instructed

Messers Oraro and Rachier advocates to pay various financiers whom the judgment debtor owed money to facilitate the transfer of the company's assets including the land the judgment debtor stands on to the objector. To date the transfer of title has never been effected and

the same is still being held by one *William Olare Omodho*. As such the objector did not have a title to its name but only has interest in law as a purchaser having paid colossal sums of money to the judgment debtor pursuant to the sale agreement.

On the part of the decree – holder, the supplementary affidavit was sworn by *George Share Okoth*

learned counsel. He deponed that the decree holder was on the night of 3rd February, 2010 shot dead by suspected armed robbers at his residence in Homa-Bay. However the said death did not affect these proceedings pursuant to the *provisions of order XXIII rule II of the Civil Procedure rules*. That he had made efforts albeit unsuccessfully to conduct an official search with regard to the suit premises but the file was said to be missing from the Land Registry. Having failed to obtain the search aforesaid, he had gone to

the Town Clerk's offices at Homa-Bay who checked his records with regard to the suit premises and confirmed that they were still registered in the name of the judgment debtor. He therefore verily believed that the suit premises were still registered in the name of the judgment debtor in the official records which have been deliberately concealed to prevent the truth being known.

In support of the applicant, *Mr. Odhiambo* orally submitted that the application was filed out of time by one day. The delay was however not deliberate but inadvertent and asked the court to exercise its discretion and entertain the application on its merit in the interest of justice. In support of this submission counsel relied on the case of *Central Bank of Kenya .V. Uhuru Highway Development Ltd & Anor C.A.NO.75 of 1998 (UR)*. On the merits of the application; counsel reiterated that the objector's interest in the suit premises arose from a purchaser's interest. The objector and judgment debtor had entered into a sale agreement for the purchase of the suit premises for a consideration of Kshs. 24,000,000/= which was paid. However before

the transaction could be concluded, *Hezekiah Nelson Oyugi* passed on and the judgment debtor thereafter purported to rescind the agreement on the grounds that it had been coerced into entering into the same . The objector thereafter filed *Nairobi HCCC NO.3481 of 1991 (O.S)* to compel the judgment debtor to effect the transfer which suit was still pending hearing. That was the basis of the objection.

As for the decree holder, *Mr.Okoth* submitted that the agreement of sale did not show that the transaction was completed and in any event the two sale agreements were in conflict as to the purchase price. Notice of objection did not comply with the requirements of *Order XXI rule 53(2) of the Civil Procedure rules* as it did not state the nature of the objector's claim and was also not served on the judgment debtor as required. The application was in any event filed out of time. The objector had so far

not applied for extension of time and therefore the issue of discretion does not arise. Without the objector proving ownership, no legal or equitable interest exists in favour of the objector.

As for the authority cited, it was counsel's view that the same was irrelevant and in any event distinguishable.

The decision whether to allow the application or not will turn on my take on the late filing of the substantive application by the objector i.e the application dated 1 st September, 2009 and filed in court on 4th September, 2009.

Order XXI rule 56 of the Civil procedure rules provides interlia:-

“Should the attaching creditor, in pursuance of a notice issued under rule 54 intimate to the court and the objector that he proposes to proceed with the attachment, the objector shall take proceedings to establish his claim within 10 days of service upon him of such intimation.”

It is noteworthy that the rule is couched in mandatory terms. It is conceded by both the objector as well as the decree holder that the objector did not take proceedings to establish its claim within 10 days as stipulated. Indeed it commenced those proceedings a day later. Both the objector and decree holder concede to that fact. No explanation for the delay much as it was only for a day has however been given by the

objector. Instead the objector was content with saying that the delay though for one day was not inordinate. That is all fine. However delay is delay and it matters not that it is for a single. It behoves a party in delay to at least offer an explanation that led to the delay if it expects the court to exercise discretion in its favour. A discretion cannot be exercise in a vacuum. There must be material, documentary, verbal, oral or otherwise to assist the court in determining whether the delay even if is for a day is reasonable, acceptable and whether the court in the circumstances ought to exercise its unlimited, inherent and unfettered discretion as to overlook such delay its mission to do justice to all the parties who appear before it. In the circumstances of this case though, there has been absolutely no attempt to explain away the one day delay. The court is therefore left with nothing upon which it can exercise or base its discretion in favour of the objector.

In the case of the central bank of Kenya (supra) the court of appeal correctly observed “.....the documents were there and he was bound to look at them. In the case of *Gibbings .V. Strong (1984) ChD 66* the

court of appeal in England held that on a motion for judgment for want of defence, if a defence has been put in, though irregularly, the court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done.....” However in my view this authority does not advance the case for the objector further than where it is now. It is clearly irrelevant and distinguishable. In the instant case, the issue of delay has been raised by the decree holder before this court at the earliest possible opportunity. The objector was bound to react to it satisfactorily. It has not done so. That was not the scenario obtaining in the authority cited. The issue of grounds of opposition and replying affidavit having been filed on behalf of Central Bank albeit late was never raised before the trial judge. It was only raised in the court of appeal. Again though the instant application was filed out of time, the objector had a remedy. It could have moved the court by an appropriate application for extension of time. It did not do so. Accordingly the issue of discretion does not arise as correctly observed by *Mr. Okoth*. This situation did not obtain in the Central Bank of Kenya case as well.

I am only too aware of the recent amendments to *section A of the Civil procedure Act* which directs courts to observe the overriding objective of the *Civil Procedure Act* and the rules made there

under which is to facilitate the just, expeditious proportionate and affordable resolution of the civil proceedings. In doing so we are called upon to interpret any of the provisions so as to give effect to the overriding objective as specified herein above. In other words courts should give effect to the overriding objective so as to serve the wider interest of justice by overlooking the technicalities of procedure. I would have agreed to go that route if the objector had at least given an explanation for the delay and if it had no other remedy. In this case and as already stated, the objector offered no explanation for the delay. In any event it had a remedy of applying for extension of time which it did not take up.

That being my view of the matter, I rule that the application is incompetent and bad in law. Accordingly it is dismissed with costs to the decree holder.

Dated, signed and delivered at Kisii this 4th March, 2009.

ASIKE-MAKHANDIA

JUDGE