



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL CIVIL CASE 167 OF 2006

MOHAMMED KASSIM ABDULAZIZ}

MOHAMMED EBRAHIM ABDULAZIZ}

MOHAMMED IQBAL ABDULAZIZ}.....PLAINTIFFS

-VERSUS-

THE COMMISSIONER OF LANDS [being sued through]-

THE ATTORNEY-GENERAL.....1ST DEFENDANT

KILIFI MTWAPA DISTRIBUTORS LTD.....2ND DEFENDANT

BARCLAYS BANK (K) LTD.....INTERESTED PARTY/APPELLANT

RULING

The interested party moved the Court by Notice of Motion dated 20th August, 2009 and brought under Orders XLIV, rule 1(1) and L, rules 1 and 17 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The applicant's substantive prayer thus reads:

“The judgment delivered in this matter and the consequent decreebe reviewed and set aside, and an order be made that the matter be determined after the [applicant's]....claim to the property known as plot No. 5244 Section 1/MN (the suit property) is presented before the Court”.

The general grounds founding the interested party's application are as follows:

(a) *there is an error apparent on the face of the Court record;*

(b) *there is no dispute that the applicant has a chargee's interest over the suit property;*

(c) *although the Court did recognize the said chargee's interest, in its judgment of 23rd July, 2009 it determined rights over the suit property without hearing the applicant, or affording the applicant an opportunity to be heard, or even considering the effect of the applicant's apparent right as chargee over the suit property, before determining the matter;*

(d) the Court ought not to have made an order affecting the right of the applicant when the applicant was not a party to the suit and was not accorded an opportunity to urge the merits of its right over the suit property;

(e) the foregoing considerations give sufficient cause for the grant of review orders as herein sought;

(f) the application has been made promptly, and without undue delay;

(g) grant of the prayers made will serve the cause of justice.

Supporting evidence is in the form of the depositions of Ken Kiurah, the Corporate Recoveries Manager of the interested party, dated 20th August, 2009. The content of the supporting affidavit may be set out as follows:

(i) the main cause has already been concluded, and the recorded proceedings and the judgment are on file;

(ii) the concluded dispute was over ownership rights for property No. 5244 Section 1/MN;

(iii) there was an instrument of charge, dated 19th February, 1999, by virtue of which the applicant held a chargee's interest over the suit property, from 2nd defendant;

(iv) the purpose of the said charge was to secure advances made to 2nd defendant, in the sum of Kshs. 15,411,108 with interests and costs;

(v) the interested party came to learn that there had been litigation over the suit property, in the course of May, 2009, and that judgment on the question was to be delivered on 5th June, 2009;

(vi) on 19th June, 2009 the applicant's advocate wrote to 2nd defendant's advocate seeking information on the said dispute over the suit land; but there was no reply from 2nd defendant's advocates: and this necessitated applicant's advocate travelling to Mombasa to ascertain the situation;

(vii) the applicants' advocates established that judgment had been delivered in favour of the plaintiff on 23rd July, 2009 – and this information was received only on 11th August, 2009;

(viii) it is recorded in the judgment of 23rd July, 2009 at page 5, that the Court was aware the suit property had been charged to the applicant;

(ix) the deponent "verily [believes] that the Court having been aware of the applicant's interest in the suit propertyought not to have determined the matter in the absence of the applicant", and that "the determination, as was reached, is manifestly erroneous on the face of the Court record and discloses sufficient cause for the judgment to be reviewed and to be set aside".

(x) the deponent is advised by his advocates, and believes, that "the applicant's claim to the suit property is sound in law as it took the charge over the suit property bona fide for value, and without notice of any alleged defect in the title held by 2nd defendant, or any fraud or collusion on its part";

(xi) the deponent believes that "the Court ought to allow the applicant to ventilate the aforesaid point before the rights of the respective parties over the suit property are conclusively adjudicated upon".

One of the plaintiffs, Mohammed Ebrahim Abdulaziz swore a replying affidavit dated 3rd September, 2009 and the purport of which runs as follows –

(i) he has taken his advocate's advice, and which he believes to be true, that the applicant lacks locus

standi in these proceedings, and that “the application is therefore incompetent and defective in law and should be dismissed”;

(ii) there is a pending appeal against the judgment of 23rd July, 2009 brought by 2nd defendant, and this Court lacks jurisdiction to hear and determine the review application;

(iii) the plaintiffs are in possession and are the registered leasehold proprietors of the suit land which to-date remains undeveloped;

(iv) the 2nd defendant did not have any legal or equitable interest in the suit property, and could not pass any interest in the property to the applicant or any other person at any time or at all;

(v) in the concluded suit, the plaintiffs had sought reliefs as against the defendants and had asserted their (plaintiffs’) ownership rights over the suit property, and the Court had found in favour of the plaintiffs;

(vi) consequently, neither 2nd defendant nor the applicant can assert any claim over the suit property – and thus the alleged charge is of no legal effect as against the plaintiffs;

(vii) the trial Court considered the 2nd defendant’s evidence that it had charged the suit property to secure an advance from the applicant, “but found in favour of the plaintiffs and, accordingly, there is no error apparent on the face of the record or inadvertence on the part of the trial Court to warrant [a] review of the decree”;

(viii) this application is in fact an appeal on merits, against the decision of the trial Court, “disguised as a review as it seeks not the correction of a mistake or error on the face of the record but to substitute the view and conclusion of the trial Court with another [view]”;

(ix) the deponent has taken counsel which he believes to be true, that the applicant’s purported interest in the suit property is not bona fide;

(x) the deponent restates his belief that “the Honourable Court’s decision was not erroneous or manifestly erroneous as alleged”.

In the submissions, Mr. Ogunde, learned counsel for the interested party, submitted that the proceedings, and the judgment delivered on 23rd July, 2009 carried “a manifest error on the face of the record”: because the applicant (interested party) had an interest in the suit property, and the said interest was alive, to the knowledge of the Court and of all parties, yet “a determination of rights went on in the absence of the interested party, a commercial bank which had a charge over the suit property” – yet the contending interests were canvassed “to the exclusion of the interested party”. Counsel contended that what took place in the proceedings of the Court, was a denial of the interested party’s property rights – and that such a situation was “an error on the face of the record”. Counsel said:

“My client was condemned unheard. Their charge was taken away when they did not defend. We ask the Court to review the decree and set it aside. [The interested party be] allowed to advance its interests.....”

Counsel urged: how could the matter be disposed of without the interested party being heard? He said it is being claimed that the interested party had taken a charge from somebody (2nd defendant) who had no right to the title, and so could not give a charge. He urged that this point could not be argued without the interested party being heard. Counsel urged: “The determination was of great consequence, taking away property rights without a hearing”. Counsel contended it was *wrong*, whether seen as an *appeal* question or a *review* question. Counsel stated: “[There is] no dispute; when my client took a charge, it was on the back of a title issued by the State; it took [the charge] *bona fide*”. Counsel urged that “the only way of testing *bona fides* [was] in a trial, where [his] client was a party”. He relied on s.23 of the Registered Titles Act (Cap. 281, Laws of Kenya) which provides that a certificate of title is to be held to be

conclusive evidence of proprietorship – unless fraud is shown. Counsel contended that the interested party had acquired a charge over the suit property *bona fide*, without any notice of a defect in 2nd defendant’s title in respect of the suit property – and so the main cause should not have proceeded without the interested party being given a hearing.

Learned counsel *Mr. Asige*, in his response, doubted the propriety of the application for a *review*: because Order *XLIV* had only limited scope for such a review; the review must be restricted to *errors apparent on the face of the record*. In the instant case, it was urged, a *reappraisal* of the evidence on the record was essential, as a basis for “finding the error” – and this was not the proper task of a Court seeking to review a decree. It was urged that a review as claimed, must not be an *appeal* travelling in disguise; and that the right of appeal belonged only to those parties who were involved in the suit itself. Moreover, it was urged, even a party to the main cause is not to bring in a stranger to seek a review. Counsel submitted that it was improper for the applicant to come under the garb of interested party, as this applicant was not a party to the suit: and that this raises the larger question whether the applicant does indeed have *locus standi*. Counsel urged that the applicant lacked *locus standi* to make the application – because they weren’t a party to the suit, nor had they even sought leave to be enjoined.

Mr. Asige focused his submissions on the content of order *XLIV* (i) of the Civil Procedure Rules; the relevant provisions run as follows:

“(1) *Any person considering himself aggrieved –*

(a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is hereby allowed,*

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”

From the foregoing provision of the law, *Mr. Asige* submitted that not any party can come before the Court, seeking a review of judgment or decree; some connection to the suit must be shown: there must be a nexus to the suit. It was urged that if the trial Court had been of the view that the interested party was indeed a necessary party, then, by virtue of Order I, rule 10 the Court would have made an appropriate order; and in the alternative, 2nd defendant would have applied for joinder of the applicant herein, as a necessary party: that such an application was not made, it was urged, bespoke lack of *bona fides* on the part of the applicant. Even though the trial Court was aware that 2nd defendant had charged the suit property, it had not been of the opinion that the chargee was a necessary party.

Counsel urged that the application lacked merits, because the dispute in the main cause was not about *chargee’s interest*, but it was about *proprietorship* – and in this, the role of the applicant herein was peripheral. Counsel urged that the applicant was not in any way prejudiced by the proceedings and the judgment: for he had contractual chargee’s remedies against 2nd defendant – and this was a commercial interest, as opposed to a proprietary interest.

Mr. Asige submitted that the purpose of a review was not to rehear a matter, and to give a different conclusion by the review Court – and the review Court could not usurp the jurisdiction of the appellate Court; and that what was before the Court was an attempted appeal, raised as a package between the chargor and the interested party.

Learned counsel relied on a Court of Appeal decision, *Nyamogo & Nyamogo Advocates V. Kogo* [2001] E.A. 170 (CAK), in which the essence of a proper review matter had been underlined (pp. 174-75):

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

Learned counsel, *Mr. Magolo* for 2nd defendant submitted that his client too had a title document for the suit property – and that such document was recognized by the Lands Office, and that the suit land had been charged in favour of the applicant herein. Learned counsel supported the applicant’s case, contending that “though the chargee was known, they have not been made parties to the suit”.

After the Court invited learned counsel *Mr. Ogunde* to focus his submission on the distinction being drawn between the applicant’s “commercial interest” in the suit land, and the plaintiffs’ proprietary interest in the same, he urged that a charge was an interest in *land*, and it was not registered against the land title for nothing, it was a proprietary interest and not a mere contract. In counsel’s words: “chargee’s interest is an interest in land; it is a proprietary interest, registered under the Registered Titles Act, and having consequences for the suit”.

The authority of *Nyamogo & Nyamogo Advocates V. Kogo* is the clear foundation from which this matter must be decided. Is one seeing a stark error of law marked on the face of the record, beckoning out for correction, and this error is certainly causing prejudice to the applicant? And is the applicant, under the applicable procedure, rightly before this Court invoking its review jurisdiction?

It is not apparent to me that either question must be answered in the affirmative. The question whether or not the applicant ought to have been made a party, at the trial of the main cause, is a controversial question which is not to be resolved on technicalities; a suitable application ought to have been made before the trial Court, to be canvassed appropriately, and to be the basis of a judicial ruling; it is a question in respect of which it must be assumed, given the facts in the depositions, the trial Court took a deliberate position – so to contest that position, would be an *appeal* question. The 2nd defendant who now supports the applicant’s case, is to be reasonably expected to have called on the interested party at the right time, to put in an application for joinder; and failing this, it is to be concluded there is no *bona fide* request by the “interested party” for a hearing at this stage.

It is apparent from the facts, that the first colour of proprietorship over the suit land lies with the *plaintiffs* herein, and the main cause related precisely to that question. Over the said suit land, what the applicant directly claims is *chargee’s interest*; and there are options for realizing the same; and consequently, there is no way, in my opinion, in which the applicant becomes a necessary party which the trial Court had an obligation to hear: consequently, the applicant’s case is a controversial one which cannot be perceived as resting on the principle of error-on-the-face-of-the-record.

I am in agreement with learned counsel, *Mr. Asige* that the applicant has attempted to bring before this Court an appeal passing off as a review: *Mr. Ogunde*, learned counsel for the applicant urged that a denial of the applicant’s rights had been committed, “whether seen as an appeal question or a review question”. This *review* forum is not the *locus* for solving such a substantive claim of rights.

It is clear to me that the Notice of Motion of 20th August, 2009 must be, and is hereby, dismissed. The applicant shall pay the plaintiffs’ costs for the application. Other parties shall bear their own costs.

Orders accordingly

DATED and DELIVERED at MOMBASA this 15th day of October, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Applicant: *Mr. Ogunde*

For Plaintiffs/Respondents: *Mr. Asige*

For 2nd Defendant: *Mr. Magolo*