

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS

Civil Suit 1916 of 1995

MOSES KABITHI KAMAU.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LTD (KANGEMA).....DEFENDANT

R U L I N G

On 24th May 2007, Azangalala J, made the following order pursuant to an application which had been made by the defendant and which was dated 21st February, 2006:

“I have perused the application dated 21/2/06 and the supporting affidavit. I have also heard counsel in the application. Having done so, I am satisfied that save for the prayer for eviction, the application is merited. Accordingly I allow the application in terms of prayer 2 with costs.”

The court issued the said order in the absence of the plaintiff. The court was satisfied that the date for the hearing of the application had been taken when the plaintiff was present in court. In the application dated 21st February 2006, the defendant had sought two substantive orders, namely that the order of the court issued on 15th December, 1997 placing a restriction in the sale and transfer by the defendant of the plaintiff’s properties, **Title Nos. LOC 19/KIAWAMBOGO/768** and **LOC 19/KIAWAMBOGO/1284** (*hereinafter referred to as the suit properties*) be set aside. The defendant further sought an order of eviction of the plaintiff from the suit properties since it alleged that the defendant had exercised its statutory power of sale and successfully sold the suit properties on 23rd May, 2003 and 24th November, 2005 respectively. As is evident from the order of Azangalala J, the court did not grant the defendant’s application seeking to have the plaintiff evicted from the suit properties. The court only allowed the restrictions placed in the titles in respect of the suit properties set aside.

However, as it is apparent from the plaintiff’s application dated 29th August 2007, the defendant proceeded and had the persons who had purchased the suit properties registered as the owners thereof. Further, the plaintiff was evicted from the said suit properties. In his said application, made under the provisions of **Order IXA Rule 10** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, the plaintiff prayed for two substantive orders: he prayed that the orders issued by the court on 24th May, 2007 be stayed pending the hearing and determination of the application. The order of stay was not granted. The second prayer was for an order to set aside the *ex parte* orders which were issued by the court on the said 24th May, 2007.

In his application, the plaintiff contends that the proceedings on the said date had taken place in his absence because he was not aware of the date that the application had been fixed for hearing. At the hearing of the application, the plaintiff amplified this ground by stating that he was served by registered post in such a manner that he could only receive the hearing notice after the date scheduled for the hearing of the application had passed. He submitted that he was unaware of the date that the application had been fixed for hearing and even after the said order had been issued, he was unable to know the fate of the application because the file soon thereafter disappeared. He submitted that pursuant to the order issued by the court, the defendant, on instigation of the persons who had purchased the suit properties, evicted him from the said suit properties with the assistance of the provincial administration and the police. He urged the court to allow his application, since in his view the defendant had obtained possession of the suit properties contrary to an express order issued by the court.

In response, Mr. Ngara, counsel for the defendant, denied the assertion by the plaintiff that he had failed to attend court on account of the fact that he was unaware of the hearing date of the application. Relying on the replying affidavit that he swore on behalf of the defendant, Mr. Ngara submitted that the hearing date of the said application was taken by the consent of the parties since the plaintiff was invited when the date for hearing was fixed by the court. He submitted that the defendant had sent the hearing notice to the plaintiff by registered post as a formality and not because it was under any legal obligation to serve the plaintiff.

Mr. Ngara reiterated that the court issued the order after it was satisfied that the plaintiff was aware of the date fixed for the hearing of the application. He submitted that, after the order was extracted, the persons who had purchased the suit properties in the public auction conducted by the defendant pursuant to its statutory power of sale by chargee were registered as the owners thereof. He maintained that, once the said purchasers were registered as the owners of the suit properties, they were entitled to possession. He denied the suggestion by the plaintiff that the defendant had unlawfully obtained possession of the suit properties contrary to an earlier order issued by Ochieng J. He urged the court to dismiss the application with costs since the defendant had already obtained judgment against the plaintiff.

I have carefully considered the submissions made before me by the plaintiff and by Mr. Ngara, counsel for the defendant. I have also familiarized myself with the proceedings of the court prior to the said order issued by Azangalala J. The application before me is for setting aside of the *ex parte* order issued by Azangalala J on 24th May, 2007. The parties to the application raised many side issues which this court will not be in a position to consider at the moment. The said issues will be addressed at its appropriate time. This court has unfettered discretion to set aside any *ex parte* order (See **Patel vs. E.A. Cargo Handling Services Ltd [1975] EA 75.**)

In the present application, it is the plaintiff's application that he was unaware of the date when the application was fixed for hearing before the learned Judge. The record of the court shows that the plaintiff was present at the registry on 20th November, 2006 when the date for the hearing of the application was fixed. It was therefore incorrect for the plaintiff to state that the defendant had taken an *ex parte* date and thereafter failed to serve him with a hearing notice. The said hearing date was taken by the consent of the parties. On the hearing date, the plaintiff failed to attend court. Adverse orders were issued against him. The restriction placed by the court on 7th February, 1997 in respect of the suit properties was lifted. The persons, who purchased the suit properties from the defendant pursuant to an exercise by the defendant of its statutory power of sale, were registered as the owners thereof. However, it is apparent that the defendant obtained the eviction of the plaintiff from the suit parcels of land without a court order. As stated earlier, that is not an aspect of the case that is before me.

This court has the discretion to set aside any *ex parte* order even where it is established that the opposing party was served. In this application, having established that the date fixed for the hearing of the application was taken by consent, does the justice of the case demand that the said *ex parte* order be set aside? It is apparent that so much water has passed under the bridge since the issuance of the said order. The plaintiff is no longer the registered owner of the suit properties. He is no longer in possession of the suit properties. The order sought to be set aside only relates to the order which lifted the restriction placed by the court in respect of any dealings as regard the titles of the suit properties. Even if this court were to allow the application, it would be neigh impossible for the acts which have taken place subsequent to the lifting of the said restrictions to be reversed. Much as this court sympathizes with the plaintiff, his remedy lies elsewhere. It cannot be availed to him in view of the restricted nature of the prayers made in this application.

The application dated 29th August, 2007 is hereby dismissed but with no orders as to costs.

DATED at NAIROBI this 23rd day of MAY, 2008.

L. KIMARU

JUDGE