



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS

Civil Suit 445 of 2007

ERIC O. ODINDO.....PLAINTIFF

VERSUS

NAIROBI BANK OF KENYA LIMITED.....1ST DEFENDANT

ALICE MBINYA AMBAYO.....2ND DEFENDANT

DICKSON TUMBO T/SADIQUE ENTERPRISES.....3RD DEFENDANT

RULING

On 28th February, 2008, Okwengu J allowed the plaintiff's application for an order of injunction. She ordered the defendants, by themselves or their agents be restrained from dealing with the parcel of land known as **Kisumu/Fort Ternan/474** (*hereinafter referred to as the suit land*) in any manner adverse to the interest of the plaintiff pending the hearing and determination of the suit. At the material part of her ruling, Okwengu J (*at page 16*) held as follows:

“Secondly, the redemption notice purported to have been served, which was exhibited as ARB 8(a) to the affidavit of A.R. Busisa, was clearly defective as it was in respect of Kisumu/Fort Ternan/48/474 which was not the same as the suit property. The allegation that the redemption notice was not properly served is therefore not without substance. Similarly, the advertisement in the Kenya Times Newspaper for the auction sale [annexture ARB-8(a) and DMT-2] was also in respect of Kisumu/Fort Ternan/48/474. The valuation report also annexed as DMT-3 to the affidavit of Dickson M. Tumbo was for yet a different property – Kisumu/Fort Ternan/68/474 Nyando District. The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of power of sale by the chargee, non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction sale (Civil Application No. NBI 165 of 2005 Ngaya Traders Limited vs. Savings & Loan (K) Ltd). Nevertheless, in this case, allegations of fraud have been made in the plaint. Consideration of the circumstances surrounding the sale will therefore be necessary. Moreover, the plaintiff maintained that no auction sale actually took place as advertised. An examination of the exhibits particularly annexture E.O 8, AMO-3 and ARB-12 reveal inconsistencies regarding the alleged payments. This taken together with the use of a valuation report in respect of a different property, the service of a redemption notice bearing a different property and the advertisement of the sale also bearing a different property are all

*matters of concern. It would be for the trial court to consider and determine whether the defendant exercised his powers in a fraudulent way. For the purposes of this application, given **Section 77** of the **Registered Land Act** which imposes an obligation on the chargee to act in good faith when exercising its statutory power of sale, the evidence placed before this court is sufficient to raise a red flag regarding the possibility of the rights of the estate of the deceased having been infringed.”*

The 2nd defendant was aggrieved by the said decision of the court. By a notice of motion dated 11th March, 2008 made pursuant to the provisions of **Sections 3, 3A, 63(e)** and **80** of the **Civil Procedure Act** and **Order XXXIX Rule 4**, and **Order XLIV Rules 1(1)** of the **Civil Procedure Rules**, the 2nd defendant sought an order to review, vary or set aside the said ruling of Okwengu J delivered on 28th February, 2008. The grounds in support of the application are stated on the face of the application. The 2nd defendant contends that she had since learnt that the affidavit which the plaintiff swore in support of the application for injunction was a deliberately advanced falsehoods which influence the court into ruling favour of the plaintiff. She stated that the plaintiff had deliberately lied and misled the court with intention of gaining sympathy from the court. She stated that she had been greatly prejudiced by the decision of the court. She contended that since there was a mistake and/or error apparent on the face of the record, it would be in the interest of justice for the said ruling and order to be reviewed, varied or set aside. The application is supported by the annexed affidavit of Alice Mbinya Ombayo, the 2nd defendant. She further swore a supplementary affidavit in support of her application on 14th April, 2008.

The application is opposed. The plaintiff swore a replying affidavit in opposition to the application. In the said affidavit, he denied swearing falsehoods in support of his application for the order of injunction. He deponed that he had correctly sworn to the fact that the suit land was his ancestral home. He denied the assertion by the 2nd defendant that there existed no house on the suit land. He reiterated that the 2nd defendant had demolished the structures that were on the suit land and had even gone ahead to plough over the graves of the plaintiff's deceased sisters. He deponed that the court was correct when it ruled that the chronology of events that occurred during the advertisement and the subsequent purported sale of the suit property to the 2nd defendant was tainted with fraud and irregularities in which the 2nd defendant was an active participant. He urged the court not to interfere with the earlier decision granting him injunction pending the hearing and determination of the main suit.

At the hearing of the application, I heard the submissions made by Mr. Osoro on behalf of the 2nd defendant and by Mr. Ojuro on behalf of the plaintiff. Mr. Osoro submitted that the facts placed before the court by the 2nd defendant in the present application clearly made a case for this court to review the ruling delivered by the court on 28th February, 2008. He submitted that a new and important matter of evidence had arisen which made the review of the said ruling imperative. He submitted that the plaintiff misled the court into believing that the suit land was the ancestral home of his relatives. The actual position was that neither the plaintiff nor his relatives were occupying the suit land, he said. He submitted that the death certificate of the deceased (George Ishmael Odindo) and the letter from the chief which were annexed to the 2nd defendant's application, confirmed that the plaintiff and the deceased hailed from Bondo District and not from Fort Ternan. He submitted that the area chief had confirmed that none of the relatives of the plaintiff were buried in the suit land. He reiterated that when the valuation was done, there was no one residing on the suit land. Mr. Osoro referred to photographs of the suit land which were annexed to the 2nd defendant's affidavit and which according to him confirmed that there was no one residing on the suit land. He submitted that it was the argument regarding the occupation of the suit land that contributed to the court arriving at the decision that it did. He urged this court to consider the material placed before it and reach a determination that the plaintiff was not candid to the court and therefore the present application should be allowed with costs.

Mr. Ojuro for the plaintiff opposed the application. He submitted that the 2nd defendant had not placed any material before this court that would enable this court order a review of the ruling delivered on 28th February, 2008. He submitted that the complaints raised by the 2nd defendant did not fall within the ambit of grounds which the court can order review under **Order XLIV Rule 1** of the **Civil Procedure Rules**. He submitted that there were no new facts had been placed before the court to enable it review its

decision. He explained that the facts which were being raised by the 2nd defendant in the present application were facts which were within the knowledge of the 2nd defendant at the time the application was argued. He reiterated that the issues raised in the present application were *res judicata*. He further submitted that the court was *functus officio*. He maintained that the 2nd defendant was seeking an opportunity to reargue the application. He submitted that the court had correctly reached the decision that taking into account all circumstances of the case, the 1st defendant had wrongly and unlawfully exercised its statutory power of sale when it purported to sell the suit property to the 2nd defendant. He submitted that the issue of whether an ancestral home had been established on the suit land under the Luo Customary law, was an issue which could only be established during full trial. He submitted that the 2nd defendant was not deserving of any order of this court since the 2nd defendant had refused to comply with the order of the court. He reiterated that this court was being asked to sit on appeal on a matter it had already rendered a decision. He maintained that the 2nd defendant had failed to establish a case to enable this court grant her the order of review sought. He urged the court to dismiss the application with costs.

I have carefully considered the rival arguments made before me by counsel for the 2nd defendant and by counsel for the plaintiff. It was the 2nd defendant's submission that she had discovered new and important material which was not within her knowledge at the time the application for injunction was argued. She submitted that if the court were to look at the evidence she has now placed before the court, the court would reach a conclusion that the facts which the plaintiff deponed in support of his application for injunction were false and were deliberately presented to the court to mislead the court into reaching the determination that it did. In particular, the 2nd defendant argued that the plaintiff gave false information to the court that the suit land was the ancestral home of the plaintiff and the family of the deceased.

It was further submitted on behalf of the 2nd defendant that at the time the suit property was sold in the public auction, no one was in occupation of the same. The defendant further stated that no member of the family of the plaintiff was buried on the suit land. The plaintiff, naturally, is of the contrary view. It was his submission that the 2nd defendant was in actual fact seeking to re-litigate issues which were within her knowledge at the time the application was argued. The plaintiff was emphatic that no new facts that were not within the knowledge of the 2nd defendant at the time the application for injunction was argued were raised in the present application for review.

The principles to be considered by this court in determining whether or not to grant an application for review are well settled. In **National Bank of Kenya Ltd –vs- Njau [1995 – 98] 2 EA 249**, the Court of Appeal held at page 253 as follows:

“A review maybe granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

Order XLIV Rule 1 of the **Civil Procedure Rules** grants this court jurisdiction to review any decree or order on grounds of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time the decree or order was made.

In the present application, it is the 2nd defendant's case that the court erred when it reached the determination that the plaintiff had established that his family was in occupation of the suit land, which they considered to be their ancestral home and therefore injunction ought to issue to preserve the *status quo* pending the hearing and determination of the case. At the commencement of this ruling, this court quoted in extenso the relevant part of the ruling delivered by Okwengu J. which is sought to be impeached by the 2nd defendant. It is evident that the learned Judge granted the application for injunction

sought by the plaintiff after putting into consideration several factors. She found that the 1st defendant had breached the law when it purported to serve the redemption notice on a son of the deceased. She further found that a copy of the redemption notice which was exhibited in the affidavit of the defendants was defective since it referred a different parcel of land other than the suit property. She ruled that the valuation report which was relied by the auctioneer at the time the suit property was purportedly advertised and later purportedly sold in a public auction referred to a different parcel of land other than the suit property.

The learned Judge further ruled that the inconsistencies evident in the manner in which the payments were made for the purchase of the suit property pointed to the fact that the allegation made by the plaintiff that no public auction of the suit property had actually taken place could be credible. It is clear from the foregoing, that the learned Judge took into account the plaintiff's assertion that the suit property was his family's ancestral home, among other considerations, to reach her determination that the plaintiff had established a *prima facie* case to enable her reach the determination that the plaintiff was entitled to be granted an order of interlocutory injunction pending the hearing and determination of the suit. It may well be that the plaintiff embellished his assertion that the suit property was his ancestral home; however, even if this court were to reach a determination that the suit land was not actually the ancestral home of the plaintiff and the family of the deceased, it would not alter the fact that the learned Judge had in her ruling found that the defendants had committed manifold irregularities that raised questions in the manner in which the suit property was purportedly sold to the 2nd defendant by the 1st defendant in the purported exercise of its statutory power of sale as a chargee.

It is therefore clear that the new and important matter or evidence that the 2nd defendant has relied in support of her contention that this court ought to review the ruling delivered by Okwengu J. on 28th February, 2008 is not of such a magnitude or importance as to persuade this court to favourably consider her application for review. This court heard this application because Okwengu J. had ceased to have jurisdiction in this court on account of her transfer. She would have been the ideal person to hear this application for review. No matter.

In conclusion, I wish to state that there is an aspect of the submission made by the 2nd defendant that was disturbing. It appeared as if the 2nd defendant was questioning the comprehension by the court of her case when the application for injunction was argued. The 2nd defendant used choice words such as "misled", "*falsehoods which affected the decision of the court*", "*deliberate lies that misled the court*", "*lies*" with "*the intention of gaining sympathy from the court*" to describe her vehement disagreement with the decision of the court. If that was the case, then the right course of action that the 2nd defendant could have taken after the delivery of the said ruling was to appeal to the Court of Appeal. I think where an aggrieved party is questioning the exercise of discretion by a court in determining certain issues, it is only fair that such an aggrieved party seeks a second opinion from a higher court. I have said enough.

The application dated the 13th March, 2008 lacks merit and is hereby dismissed with costs.

DATED at NAIROBI this 21st day of May 2008.

L. KIMARU

JUDGE