



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Environment & Land Case 464 of 2007**

**GEORGE ROMBO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JONES GIBSON MWANGI..... DEFENDANT/APPLICANT**

**RULING**

By notice of motion dated 01.07.05 stated to be brought under Order L rule 1 of the Civil Procedure Rules plus sections 3A and 20 of the Civil Procedure Act, Cap.21, the defendant/applicant applied for the following orders:-

1. That this honourable court be pleased to make declarations that the plaintiff/respondent is in court contempt for having defied seven court orders entered by this honourable court against him in the previous application dated 29.11.04, on the dates: 17.01.05, 04.02.05 and 29.03.05 and for filing or causing bogus Banker's Cheque dated 18.10.2000 to be exhibited in the instant Civil Suit No.2087 of 2001 marked 'GR4' and annexed to the affidavit of George Rombo the plaintiff/respondent herein sworn on 03.12.01. (See Exhibit marked 'JGM1')
2. That this honourable court be pleased to make instant restoration orders of the suit property L.R. NRB/BLOCK/76/810 BURU BURU PHASE III to the defendant/applicant herein, and to have the eviction orders dated 18.11.02 and all transactions on the said property reversed and every other orders nullified.
3. That this honourable court be pleased to enter compensation and vindication orders in favour of the defendant/applicant accordingly.
4. That this honourable court be pleased to have O.C.S. Buru Buru Police Station ensure a safe and instant repossession and occupation of the suit property.
5. That the costs of this application be provided for.

The grounds upon which the application is based are:-

- i. That the plaintiff/respondent is in contempt of court orders and in particular the order of 04.02.05 by Hon. Mr Justice Ransley.
- ii. That further the said plaintiff/respondent defied a further order by Hon. Mr Justice

Kubo of 17.03.05 ordering the plaintiff/respondent to comply with Hon. Mr Justice Ransley's order of 04.02.05.

iii. That the plaintiff's/respondent's failure to comply indicates and proves that the same said suit property is illegally and unlawfully in the hands of the said plaintiff/respondent herein and the same is a trespasser.

iv. That the contempt of the court orders by the plaintiff/respondent has put the dignity and authority of this honourable court to ridicule.

The application is supported by the defendant's/applicant's affidavit sworn on 01.07.05.

At the hearing of the application, the plaintiff/respondent was represented by learned counsel, Mr N. Kamau while the defendant/applicant appeared in person.

The defendant/applicant informed the court at the outset that prayer 1 had been overtaken by events because of the death of the plaintiff/respondent, George Rombo on 11.11.06.

It was the defendant's/applicant's case that someone under the name of George Rombo came to court without the defendant's/applicant's knowledge, conducted HCCC No.2087 of 2001 which became the present Environment and Land Case No.464 of 2007 and obtained eviction orders against the defendant/applicant herein. The defendant/applicant proceeded to tell this court that he found an eviction order pinned on his door, which caused him to come to court to seek vacation of the eviction orders. He said that on 10.07.03 he was granted leave to pursue his interests in this matter. Defendant/applicant said there is no truth in what the plaintiff/respondent told the court. Defendant/applicant added that George Rombo had an advocate called L. Maina

of L. Maina Irungu & Co. Advocates who ceased acting for Rombo upon learning that the defendant/applicant had come to court.

Defendant/applicant relied on his supporting affidavit sworn on 01.07.05. He pointed out that the plaintiff's/respondent's advocate, Mr N. Kamau did not take part in the deal regarding purchase of the suit property; that the suit property is a redeemed property whose redemption has not been contested by anybody anywhere. In the latter regard, defendant/applicant referred the court to annexure 'JGM3' to his supporting affidavit. That annexure is a photocopy of letter of 01.03.01 addressed to him by J.M. Wambua, Customer Service Officer, Housing Finance Co. of Kenya Ltd (HFCK) regarding Mortgage Account No.91079 relating to the suit property herein and asking the defendant/applicant to go for his refund cheque of excess money after redemption of his mortgage account.

Defendant/applicant pointed out that on 04.02.04 the court ordered the plaintiff/respondent to file receipts supporting his Banker's Cheques for Kshs.500,000/= and for Kshs.1.2 million but that the plaintiff/respondent never filed any receipts as ordered. In the defendant's/applicant's submission, the plaintiff's/respondent's failure to produce requisite receipts proves that he was not a purchaser of the suit property and that the said property was fraudulently obtained by him. Defendant/applicant said that there was conspiracy between the plaintiff/respondent and some senior staff of HFCK, adding that the plaintiff had no official records with HFCK's official accountable books.

Defendant/applicant urged this court to strike off all arguments advanced by the plaintiff/respondent and his former advocates as Mr L. Maina who argued the plaintiff's/respondent's case had no practising certificate. At that juncture the court asked the defendant/applicant if he had furnished evidence to show that L. Maina came to court while not having a practising certificate. The defendant/applicant replied that he filed a letter to that effect in a previous application, that the letter is not part of the bundle of letters attached to the present application but that it is in the court file.

The final requests of the defendant/applicant were that the court does away with every consequential order issued by the court; grant him compensation for loss of use of the suit property, etc. in terms of

prayer 2; grant prayers 2, 3, 4 and 5; find that HFCK did not honour the court order of 29.03.05 by the late Kamau, J (that the plaintiff should serve HFCK's Legal Officer with orders of 17.03.05 for purposes of the said Legal Officer attending court on 15.04.03); order HFCK to make good Mortgage Account No.01/091079; order the current occupier of the suit property to cease paying rent to third parties; and grant any other relief as the court may deem fair and just.

In response, plaintiff's/respondent's counsel said he relied on the replying affidavit of the late George Ouma Rombo, who he said was the plaintiff/respondent herein, sworn on 19.07.05. Plaintiff's/respondent's counsel said that the nature of the present application requires that the court looks at the entire court record, from the filing of the suit to date and looking at all pleadings and affidavits filed by both parties. In the latter regard, he invited the court to look at the plaintiff's/respondents replying affidavit sworn on 27.11.03 and the supplementary affidavit of Maina Irungu sworn on 27.11.03 filed in reply to the defendant's notices of motion dated 09.07.03 and 06.10.03. Plaintiff's/respondent's counsel informed this court that a decree issued on 04.06.02 was executed against the defendant on 05.12.02 and that unless the said decree was set aside, the prayers sought by the defendant/applicant are incapable of being given. Plaintiff's/respondent's counsel pointed out that the defendant's notices of motion applications dated 09.07.03 and 06.10.03 sought to set aside the decree of 04.06.02 so that the matter could be heard on merit as the decree was *ex-parte* but that the applications were dismissed by Ochieng, J on 22.03.04. Plaintiff's/respondent's counsel added that the defendant filed notice of appeal on 29.03.04 against the dismissal but did not pursue his appeal. Plaintiff's/respondent's counsel termed the present application an abuse of the court process and urged that the application be dismissed.

Plaintiff's/respondent's counsel said that prayers 2, 3, 4 and 5 presuppose that the decree issued on 04.06.02 has been set aside, which is not the case.

On the issue of defendant's/applicant's allegation of fraudulent transfer of the suit property, plaintiff's/respondent's counsel pointed out that the plaintiff bought the property from HFCK at a public auction; that in causing the suit property to be sold by public auction, HFCK was exercising a chargee's statutory power of sale; and that the defendant/applicant never filed suit against the plaintiff and HFCK to challenge the sale. Plaintiff's/respondent's counsel added that the plaintiff came to court to obtain vacant possession of the property from the defendant and duly got vacant possession. Plaintiff's/respondent's counsel pointed out that the fraud the defendant alleged is a criminal matter which he should have raised with the police. It was plaintiff's/respondent's counsel's contention that the defendant ought to have filed suit against HFCK and probably the plaintiff on grounds of alleged fraud and conspiracy.

With regard to plaintiff's failure to produce receipts, plaintiff's/respondent's counsel pointed out that on 03.03.05 an order was made by Ransley, J for production of receipts; that the plaintiff discovered he was not issued with the receipts by HFCK; that plaintiff's counsel applied for HFCK's Legal Officer to appear in court over the matter and that the said Legal Officer, Mrs Janet Mwaluma appeared before Ransley, J on 15.04.05 and said she did not produce the receipts as HFCK was still looking for their file on the matter. The transaction in question took place in 2001 and the file had been taken to the archives. Plaintiff's/respondent's counsel said no receipts were subsequently produced by HFCK.

On the issue of plaintiff's/respondent's previous counsel, Mr L. Maina Irungu having had no practising certificate when he filed Civil Case No.2087 of 2001 by originating summons, plaintiff's current counsel said there was no evidence that the said L. Maina Irungu had no practising certificate for 2001 or for 2002 and that the letter of 29.09.03 from the Law Society of Kenya relied on by the defendant/applicant herein for contending that L. Maina Irungu had no practising certificate related only to the year 2003.

Plaintiff's/respondent's counsel urged this court to find that the orders the defendant/applicant seeks are incapable of being granted in this particular matter and disallow the notice of motion application dated 01.07.05.

In reply, defendant/applicant said there is an order in the court file made by Aluoch, J on 21.03.07 to the effect that the lawyer for the plaintiff should obtain a limited grant *ad litem* within 30 days to continue

the suit following the plaintiff's death. Defendant/applicant pointed out that no limited grant *ad litem* was obtained and submitted that the suit had abated since the plaintiff died on 11.11.06 and no substitution had been done. Defendant/applicant contended that the current plaintiff's/respondent's lawyer has no right of audience before court. It was the defendant's/applicant's case that George Auma Rombo who swore one of the affidavits relating to this case is a different person from the plaintiff herein, George Rombo. In the latter regard, defendant/applicant referred to his further affidavit sworn on 08.03.06. I interpose here to note that annexure 'JGM 5F' to the further affidavit is a replying affidavit ascribed to George Ouma Rombo. Only the first page has been availed but not the signature page. The deponent of the incomplete replying affidavit gives his name as George Ouma Rombo and described himself as the plaintiff in HCCC No.2087 of 2001 whose parties are given in the said replying affidavit as George Rombo as plaintiff/respondent and Jones Gibson Mwangi as plaintiff/respondent.

Other matters touched on by defendant/applicant in his reply related to the notice of appeal he filed and the issue of non-production of receipts. With regard to non-pursuit of his intended appeal, defendant/applicant said the intended appeal would not have been proper because he had not been heard by the High Court. He acknowledged that he did not file the appeal itself because he considered it inadvisable to appear before the Court of Appeal prior to getting enough information regarding what happened at the High Court. On the issue of non-production of receipts, defendant/applicant said it was unheard of for one to pay as much as Kshs.1.2 million, as the plaintiff is said to have paid, without getting a receipt.

Defendant/applicant reiterated prayers 2, 3, 4 and 5 in his notice of motion application dated 01.07.05.

I have given due consideration to the application, the opposition thereto and the rival arguments of the parties.

Prayer 1 was marked by Aluoch, J as withdrawn at the defendant's/applicant's request on 06.11.06. It no longer exists, so this Ruling will concern itself only with prayers 2, 3, 4 and 5.

The defendant/applicant complained that someone under the name of George Rombo came to court without his knowledge and obtained orders against him (defendant/applicant). The court record shows that normal service of court process was attempted on the defendant/applicant herein without success. Plaintiff/respondent then sought the leave of the court to serve the defendant/applicant by substituted service through newspaper advertisement. There was no response from the defendant/applicant to the advertisement and the plaintiff obtained the orders now complained of *ex-parte*. The mode of service eventually employed was lawful, necessary and the defendant/applicant cannot now be heard to complain about it.

It was the defendant's/applicant's case that the suit property is a redeemed property. He ascribed to the term 'redemption' the meaning that he had paid the full price for the suit property. This issue was considered by Ochieng, Ag J (as he then was) who in his ruling delivered on 22.03.04 concluded, in essence, that redemption in this case could have come about through servicing of the defendant's account with the Housing Finance Company of Kenya Limited (HFCK) by the defendant himself and/or by some other person. The learned Judge noted that the sale of the property was through public auction by HFCK and that the defendant never challenged the auction. The Judge said that if the defendant's mortgage account had been regularly serviced, until it was redeemed, the defendant ought to have challenged the auction sale, which he did not do, prompting the Judge to presume the sale to have been regular. The Judge, instructively, continued:

**'If that be the case, and the proceeds of the sale were used to pay the loan, the plaintiff would have become entitled to have the suit property transferred to him, as did happen.**

**But if it is the defendant who paid the funds to redeem the suit property, his recourse would be against the HFCK for selling the suit property notwithstanding the said redemption.**

**By now it should be apparent that the defendant has not persuaded me that he is entitled to the**

**orders of eviction of the plaintiff. It would therefore follow that there is no grounds (sic) upon which the court can order the property to revert to the status quo that was prevailing prior to 1<sup>st</sup> March 2001. The application dated 9<sup>th</sup> July 2003 is thus dismissed with costs.'**

Plaintiff's/respondent's counsel informed this court that a decree issued on 04.06.02 was executed against the defendant/applicant herein on 05.12.02 and submitted that as long as the decree has not been set aside, prayers in the current application are incapable of being granted. There is really no cogent answer from the defendant/applicant to the above submission.

In his submissions before me in support of his present application, the defendant/applicant also raised the issue of Advocate L. Maina Irungu having had no practising certificate. The issue formed part of prayer 3 in the same defendant's notice of motion application dated 06.10.03 which was in the undermentioned terms:

**'3. THAT notwithstanding the court's Directions for a substituted mode of service, this Honourable Court be pleased to nullify each and every plea by counsel L. Maina Irungu on the grounds that the same counsel was unprocedural, and most irregular and told lies in his conduct herein and did it without filing NOTICE OF APPOINTMENT of an advocate to handle and conduct this matter and for a further ground that the same L. Maina Irungu is not currently legally in practice.'**

It is noteworthy that the issue of Advocate L. Maina Irungu having had no practising certificate was slotted into the tail-end of the above omnibus prayer. The letter of 29.09.03 from the Law Society of Kenya upon which the defendant/applicant had previously relied on the issue of L. Maina Irungu having had no practising certificate shows that the said L. Maina Irungu did not hold a practising certificate for the year 2003. The suit herein was filed on 03.12.01 by way of originating summons by L. Maina Irungu & Co. Advocates. If there are material actions taken by Advocate L. Maina Irungu in this matter in 2003 when he had no practising certificate, those may be properly impugned. However, it would be invalid for actions by him to be impugned for other years in respect of which no evidence of lack of practising certificate was tendered. In any event, Judge Ochieng examined the defendant's aforementioned omnibus prayer and dismissed it in its entirety in his ruling delivered on 22.03.04. I am not sitting on appeal or review over the ruling of my brother Judge Ochieng who has concurrent jurisdiction as myself. If the defendant/applicant was aggrieved by Judge Ochieng's afore-said ruling, he should have appealed against it or sought its review. He did neither and must shoulder the consequences of his omission.

I agree with plaintiff's/respondent's counsel's submission that prayers 2, 3 and 4 in the defendant's/applicant's present application presuppose that the decree issued on 04.06.02 against the defendant and executed on 05.12.02 does not exist. That presupposition is false as the said order has not been set aside through due process of law. The prayers are indeed incapable of being granted.

The defendant/applicant faulted the plaintiff's/respondent's counsel for not obtaining a grant *ad litem* to continue the suit herein within 30 days as directed by Aluoch, J on 21.03.07. On account of the aforesaid omission by plaintiff's/respondent's counsel, the defendant/applicant submitted that the said counsel had no right of audience before this court. The plaintiff's/respondent's omission is no doubt reproachable. However, the defendant/applicant should note that as far as the plaintiff's case was concerned, it had ended in final orders in the plaintiff's favour. It was in the defendant's interests, if he wanted someone substituted for the plaintiff to enable the defendant effect any orders against the plaintiff's estate, for the defendant/applicant to move the court for appointment of the plaintiff's legal representative. The defendant/applicant failed to initiate such action and cannot now be heard to complain about the apparent vacuum in having a legal representative for the plaintiff.

The defendant/applicant also contended that George Rombo cited as the plaintiff herein and George Ouma Rombo who, among other things, signed some of the documents in this case are not one and the same person. This point is of academic interest only and need not take any more time of the court since it is common ground that the plaintiff herein, by whatever name called, is dead.

It was also the defendant's/applicant's contention that non-production of receipts by the

plaintiff/respondent and/or HFCK should be deemed as proof that the plaintiff never purchased the suit property. It is my considered view that this issue is adequately covered by the conclusions reached by Judge Ochieng in his ruling delivered on 22.03.04, some extracts of which have been reproduced hereinabove.

The upshot is that I find no merit in the defendant's notice of motion application dated 01.07.05 and the same is hereby dismissed.

Costs ordinarily follow the event. I note that in the present case the plaintiff/respondent is dead and no legal representative has been made known to this court. I order that each side shall bear its own respective costs.

Orders accordingly.

**Delivered at Nairobi this 19th day of June, 2008**

**B.P. KUBO**

**JUDGE**