



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

Civil Suit 1933 of 1999

WILLIAM SAPURO KIMANA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

NAFTALI WAIGA GITHINJI2ND DEFENDANT

R U L I N G

The plaintiff on instituting this suit filed an injunction application seeking to restrain the defendant from selling, in exercise its statutory power of sale the plaintiffs property namely L.R. No. KAJIADO/MAAILU/409.

After inter partes hearing of the plaintiff's injunction application this court issued an injunction on 24th February 2000 in the following terms: -

“ A temporary injunction be and is hereby issued, restraining the defendant by themselves, their servants, agents and/or otherwise from selling, alienating, dealing in, or with, or otherwise interfering with the plaintiff's property known as L.R. NO. KAJIADO/MAILU/409, until the suit filed herewith is heard and determined.”

Soon thereafter the 1st defendant advertised the plaintiff's property for sale and to that the plaintiff reacted by filing an application of committal of the 1st defendant's directors/officers. Hon Justice Khamoni by his ruling of 19th February 2001 found that the first defendant were in contempt of the injunction order issued by Justice Mulwa as aforesated.

The 1st defendant, thereafter by its application dated 27th August 2001 sought orders to discharge the injunction granted by Justice Mulwa. When that application came up for hearing on 21st February 2002, all the parties were represented. The order issued by Justice Mbaluto on that day was for the discharge of the injunction of Justice Mulwa.

Following the discharge of that injunction the 1st defendant advertised the plaintiff's property for sale to be on 19th July 2005. The plaintiff therefore filed his application dated 14th July 2005, which is the subject of the present ruling.

The plaintiff's said application seeks orders to stay sale of his property, and an order to stay or set aside the orders issued by Justice Mbaluto, which order discharge the injunction issued by Justice Mulwa.

Plaintiff's learned counsel Mr Gachoka argued in support of that application and said that the orders of Justice Mbaluto were made suo moto because the Judge did not record the arguments of counsel. That the judge after recording the counsels presence proceeded to record the orders granted. That accordingly the court proceedings do not record the stand of any of the advocates attending before the judge. That there was no record of the arguments in support of the ruling given by Justice Mbaluto. That accordingly Justice Mbaluto's ruling failed to meet Order XX Rule 4, 5 and 7, in that the ruling did not contain a concise statement of the case, the points for determination the decision thereon and the reason for such decision. Counsel therefore argued that the order issued by Justice Mbaluto was a nullity and or contains an error apparent on the face of the record. Plaintiff in support of this argument relied on the following cases: -

- PROVINCIAL INSURANCE COMPANY EAST AFRICA LTD – V – MORDEKAI MWANGI NANDWA CIVIL APPEAL NO. 179 OF 1995.

The court of appeal stated in that case:

“It is trite law that a court should only decide issues on the record.

- HC MISC N. 413 OF 2003 KENYA BUS SERVICES LTD AND OTHERS - V – ATTORNEY GENERAL AND OTHERS

In this case an order of stay of proceedings of various matters that the plaintiff was facing in various courts was issued ex parte until determination of the suit. On an application by the parties affected by that order, the ex parte orders were set aside and court stated:

“.....failure to give reasons for such a novel orderconstitutes extreme arbitrarinessan order without reason must be a nullity.....”

- CIVIL APPEAL NO. 59 OF 1993 OMEGA ENTERPRISES (KENYA) LTD – AND – KENYA TOURING DEVELOPMENT CORPORATION AND OTHERS.

In this case the High Court had issued an ex parte injunction without giving reason as required by O. 39, R. 3. The court of appeal had the following to say:

“Clearly the hearing of an application for injunction ex parte can only be legitimate where the court is satisfied that the object of granting the injunction would be defeated by delay and that satisfaction must be manifested by recorded reasons of the court.”

Plaintiff counsel further submitted that the orders issued by Justice Khamoni were still subsisting and therefore the 1st defendant's attempt to sell the plaintiff's property was unlawful.

Plaintiff's counsel further argued that he plaintiff disagreed with his then counsel Mr Kinyanjui and that even at one time, namely on 14th November 2001, the plaintiff attended court before Justice Mwera and informed the said judge that he needed time to appoint another Advocate. That on 12th March 2002 the plaintiff instructed the firm of Muthaura Kiome & Mwarania advocates to act for him instead of the firm of J. Harrison Kinyanjui Advocates. That accordingly Mr Kinyanjui had no instructions from the plaintiff on the application filed by 1st defendant to discharge the injunction.

The plaintiffs further argument is that the 1st defendant has not served him with the statutory notice before sale and because of that failure he and his extended family that occupies the charged property stand to suffer irreparably if the sale proceeds.

The 1st defendant opposed the plaintiff's application. Firstly the 1st defendant argued that the plaintiff had failed to show any factual or legal basis to warrant an order of injunction. The 1st defendant by its replying affidavit exhibited the statutory notice it alleged was served on the plaintiff dated 24th February 2003. The 1st defendant also annexed Kenya Posts and telecommunication certificate of posting which indicated that a letter addressed to the plaintiff was sent to him on 25th February 2003. The plaintiff in his further affidavit denied receipt of that notice.

The 1st defendant also annexed the auctioneers notice sent to the plaintiff and the certificate of posting of postal corporation of Kenya. Here is also a certificate prepared by the auctioneer under section 15 (c) of the Auctioneers Rules 1997 which states that the notification was pasted on prominent part of the property on 18th May 2005.

1st defendant's learned counsel Mrs Odour faulted the plaintiff's prayer for review of Justice Mbaluto's orders on the basis that the application for review was brought after undue delay. Further that the plaintiff was represented at that hearing by his counsel who was on record namely Mr Kinyanjui. On the claim that because the proceedings did not reflect the argument before Justice Mbaluto, and therefore the order that the judge made was a nullity, 1st defendant counsel responded by saying that counsels are not responsible for entries made in the file.

In support of 1st defendant's contention that the plaintiff's application for review must fail for the inordinate delay 1st defendant relied on the case; KENFREIGHT (E.A.) LIMITED – V – STAR EAST AFRICA CO. LIMITED (2002) 2. KLR 783. In this case a period of three month delay in filing an application for review was found to be inordinate.

The plaintiff by his application seeks two prayers. The first is an injunction to stop the sale of his property by the 1st defendant in exercise of the 1st defendant statutory power of sale. Secondly the plaintiff seeks the review or setting aside of the order issued on 21st February 2002 when the injunction was discharged.

In regard to the first prayer the plaintiff seeks to rely on his allegation of non-service of statutory notice on him by the 1st defendant. The 1st defendant exhibited the notice served together with the certificate of posting. In response to this the plaintiff made a bare allegation that, that service was not effected. The burden of proof of service was squarely upon the plaintiff see S.107 Evidence Act. The plaintiff ought to have proved by inquiring at the post office to disprove such postage. The plaintiff chose not to, hence then that argument must fail and also is his quest for an injunction on that ground.

The plaintiff was heard to argue that the order issued by justice Khamoni was still subsisting and consequently that 1st defendant was barred from selling the charged property. If that indeed is the position the plaintiff does not need this course to so articulate it. It would then be open to the plaintiff to seek contempt proceedings against the 1st defendant for disobedience of such order. This court's response to such argument is that Justice Khamoni confirmed by his ruling that an injunction issued by Justice Mulwa was in place when the 1st defendant sought to sell the plaintiff's property. But then by the order issued by Justice Mbaluto on 21st February 2002 the injunction Justice Mulwa was discharged. In those circumstances this court's finding is that there is no order in the ruling of Justice Khamoni of 19th February 2001 which stops the sale of the plaintiff's property by the 1st defendant in exercise of its statutory power of sale.

The plaintiff's prayer for review of the order made by Justice Mbaluto is based on two grounds. Firstly that the advocate who appeared for the plaintiff did not, as at the date of hearing of the application to discharge the injunction, have instructions to act for the plaintiff. The plaintiff alleged that there was misunderstanding between him and his said advocate at the time the said application came up for hearing. Secondly the plaintiff alleged that the proceedings of the 21st February 2002, before Justice Mbaluto did not reflect any argument by counsel and consequently the said judge acted suo moto.

In regard to the first argument, it ought to be noted that Mr Kinyanjui was on record for the plaintiff up and until 12th March 2002 when another firm of advocates filed a notice of charge of advocates. That being the case when the application for discharge of injunction came up on 21st February 2002 the plaintiff was rightly represented by Mr Kinyanjui who was on record. If the said advocate exceeded his instructions or was negligent in any way it is open to the plaintiff to pursue a claim against him. But the plaintiff cannot obtain from this court an order for review on the basis that his then advocate exceeded or acted contrary to instructions. Indeed the 1st defendant's counsel put it very well when she said that Mr Kinyanjui was the plaintiff's '**mouth piece**' at that hearing. This argument by the plaintiff is rejected.

The second argument presented by the plaintiff is that the judge failed to record reasons for his order discharging the injunction. The plaintiff relied on the requirement found in order 39 Rule 3 (1), which states:

“Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application exparte.”

It is clear from the above that the order requires the court, which issued exparte injunction to given reasons thereof. That was not the situation with the application presented before justice Mbaluto. The application was neither exparte nor was it seeking an injunction. The application was seeking the discharge of an interlocutory injunction.

The plaintiff did also argue that the judge was required by the provisions of Order XX Rule 4, 5 and 7 to state reason for his decision. These rules require a judgment to contain concise statement of the case, points for determination the decision and the reason for the decision, reason for the decision on each issue framed in the case and finally that a judgment do bear a date of delivery.

I have perused the Civil Procedure Act and rules and I have failed to find provisions relating to a ruling and what form such rulings should take. The provisions of Order 20 clearly relate to a judgement. A judgment is delivered after the hearing of a case. Indeed section 25 of the Civil Procedure Act provides: -

“A court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.”

A ruling is a product of an interlocutory hearing although its effect could be final determination of the case.

Having so defined what a ruling is I am of the view that a ruling ought also to contain concise statement of the issues raised by the application with reasons for the decision reached. The fact that the ruling of 21st February 2002, which discharged the injunction, did not contain concise statement of the issues raised or the reason for the decision reached is not sufficient to move this court to review it. The plaintiff ought to have appealed against that ruling and not have sought a review. Order 44 provides that a review ought to be brought where there is discovery of new and important matter, where evidence has been obtained which could not with the exercise of due diligence be obtained or could not be produced due to mistake or errors, or because there is an error apparent on the face of the record. The plaintiff has not satisfied any of these requirements. The plaintiff as quite rightly stated by the 1st defendant, failed to file the application for review within a reasonable time as required by O 44 Rule 1 (1) (b).

The court's finding is that the plaintiff has failed to bring any material to jolt the court to review the order of 21st February 2002.

The courts order is that the plaintiff's application dated 14th July 2005 is dismissed with costs to the 1st defendant.

MARY KASANGO

JUDGE

Dated and delivered this 3rd day of May 2006.

MARY KASANGO

JUDGE