REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 878 OF 1984

NATIONWIDE FINANCE CO. LTD. ……..PLAINTIFF/APPLICANT

VERSUS

MICHAEL KIPUSI…….....……DEFENDANT/RESPONDENT

RULING

The Plaintiff's Notice of Motion dated 14th July, 2004 and filed on 15th July, 2004 was brought under Order XLIV, rule 1 of the Civil Procedure Rules. The substantive prayers outstanding are two:

(a) that, this Court's ruling delivered on 9th July, 2004 be reviewed;

(b) that, the costs of this application be provided for.

Grounds in support of the application are stated as follows:

(i) there is an error or mistake apparent on the face of the record;

(ii) there is no prohibitory order registered in favour of Housing Finance Company of Kenya Limited who were not parties in this suit;

(iii) the charge in favour of Housing Finance of Kenya Limited was not a subject of this suit;

(iv) no prayer was made to discharge the charge in favour of Housing Finance Company of Kenya Ltd;

(v) the Plaintiff/decree-holder herein is Nationwide Finance Co. Ltd who have a prohibitory order registered against the judgement debtor's property, Ngong/Ngong/10484.

The application is further supported by the affidavit of **Esther Mukenyi Ndosi** sworn on 15th July, 2004. The content of the affidavit is as follows:

(a) that, the deponent, who is an advocate with M/s. Hamilton Harrison & Mathews, the firm of advocates with the conduct of the instant matter on behalf of the Plaintiffs, believes there is an error on the face of the record, in the judgement of the Court delivered on 9th July, 2004;

(b) the Plaintiff had filed suit against **Michael Kipusi** on 20th Mach, 1984; and judgement was entered in favour of the Plaintiff and against the Defendant, on 22nd March, 1991;

(c) in execution of the judgement, the Plaintiff had applied for a prohibitory order to be issued against the judgement debtor's immovable property; and the prohibitory order was issued on 10th December, 1996 against Ngong/Ngong 10482, 10483 and 10484;

(d) “the Plaintiff only has a prohibitory order against the said property and the Defendant did [not?] execute any charge in favour of the Plaintiff over the property”;

(e) the prohibitory order was fixed on the property Ngong/Ngong 10482, 10483 and 10484 on 30th April, 1999; no objection was ever raised by the Defendant or the objector until the property was advertised for sale; (f) at the time of obtaining the prohibitory order there was already a first charge in favour of “Housing Finance Corporation [Company?] of Kenya” registered against the properties. A title search on the property was carried out on 27th September, 2001 and there were no encumbrances registered against the property apart from the charge to Housing Finance Corporation [Company?] of Kenya and the “prohibitory order obtained in High Court 878 of 1994 [sic]”;

(g) the terms and conditions of sale in respect of Ngong/Ngong 10484 were settled on 5th June, 2002 in favour of the Plaintiff; the property was to be sold subject to the charge in favour of Housing Finance Corporation [Company?] of Kenya;

(h) Housing Finance Corporation [Company?] of Kenya and the Plaintiff are different entities;

(i) the Plaintiff has a regular prohibitory order under Order XXI rule 49 of the Civil Procedure Rules against the property and intends to realise the property to recover the judgement in its favour subject to the first charge by the Housing Finance Corporation [?] of Kenya;

(j) the Plaintiff did not know there was a sale of the subject property until the objector’s application dated 12th November, 2002 was filed.

The objector responded to the instant application by filing grounds of opposition on 20th July, 2004. The specific points of law raised are as follows:

(a) that, the application is incompetent, misconceived, and does not lie;

(b) that, the Plaintiff lacks locus standi to object to the Court’s order on behalf of Housing Finance Company of Kenya Ltd;

(c) that, there is no basis for the application for review of the Court’s orders.

A replying affidavit was also sworn by the objector, dated and filed on 21st July, 2004. He deposes as follows:

(i) that, the charge against the head title No. Ngong/Ngong/3223 of which parcel No. Ngong/Ngong/10484 is a sub-divisional portion was partially discharged by release of the objector’s parcel No. Ngong/Ngong/10484;

(ii) that, in terms of the agreement between the Late Michael Kipusi, the chargor of the head title and M/s. Housing Finance Company of Kenya Ltd the chargee thereof, and following payment by the objector to the said chargee of sums agreed between all the three parties aforementioned, M/s. D.M. Kimbui & Co. who were the objector’s advocates, drew up a deed for partial discharge of L.R. No. Ngong/Ngong/10484 from the charge registered in favour of Housing Finance Company of Kenya Ltd, against the head title, Ngong/Ngong/3223;

(iii) that, the said deed of partial discharge was duly executed by M/s. Housing Finance Company of Kenya Ltd and retained by M/s. D.M. Kimbui & Co. Advocates, for registration with the rest of the documents requisite for the transfer of title to L.R. No. Ngong/Ngong/10484 (the deponent has duly annexed to his affidavit the certificate of partial discharge);

(iv) that, neither M/s. Housing Finance Company of Kenya Ltd, nor the estate of the late Michael Kipusi the Defendant, has legitimate claim to ownership, possession or use of land parcel No.

Ngong/Ngong/10484, and the continued existence of a charge over the objector's land is purely historical but has no equitable significance.

The said replying affidavit was filed in compliance with orders which I made on 21st July, 2004. The relevant order thus reads:

> "Leave granted to the objector to file and serve a replying affidavit within two days from the date hereof.
>
> "Leave granted to the Plaintiff to file any further affidavit if need be, and to serve within four days from the date hereof."

The Plaintiff, however, did not file a further affidavit in response to the objector's replying affidavit.

The application came up for hearing after several adjournments, on 21st October, 2004 when ***Mr. Ogunde*** represented the Plaintiff/Applicant while ***Mr. Wamalwa*** represented the objector.

Mr. Ogunde submitted that the ruling of 9th July, 2004 had contained a misapprehension of the pertinent facts and in consequence the Plaintiff/Applicant suffered prejudice. He cited page 19 where a summary of the Plaintiff's line of argument is set out. The relevant paragraph, the burden of which is that the Plaintiff's case was founded on a logical construction of legal documents overwhelmingly , reads in part as follows:

> ***"The Plaintiff's case was studiously kept at the level of legal technicality. It runs as follows: the Defendan t had charged his land, title No. Ngong/Ngong/3223 to the Plaintiff and the registered holder of this charge later became Housing Finance Company of Kenya Ltd…"***

It is now being suggested, in the light of the clearer content of the supporting affidavit of Esther Mukenyi Ndosi, clarity which unfortunately had been missing in the earlier application by the Plaintiff, that because Housing Finance had in reality been the holder of the said charge from the very beginning, there must be a factual inexactitude w hich prejudiced the Plaintiff when the Court's ruling was delivered on 9 th July, 2004 .

I do not, with respect, agree. The fact on page 19, now said to have been inaccurate, had no materiality in the Court's arrival at the ruling of 9 th July, 2004.

In a somewhat vague manner, with respect, counsel for the Plaintiff/Applicant went on to remark: "The orders made could have been influenced by a misapprehension of certain facts ." The facts in question, their materiality, and the manner in which a different perspective of them could have reversed the Court's decision, was not clarified.

Mr. Wamalwa for the objector disputed the bona fides of the application, which he submitted, simply did not lie. In learned counsel's view, the present application has a collateral purpose which is not formally stated in the application itself, but appears unambiguously in the certificate of urgency which was filed by the Plaintiff on 15 th July, 2005. Ms. Esther Mukenyi Ndosi, Advocate with the firm of Advocates on record for the Plaintiffs thus states in the said certificate of urgency:

> ***"The effect of the ruling is to discharge a charge in favour of Housing Finance Company Limited which is not a party to this suit."***

It is of course the case, as quite properly remarked by counsel for the objector, that counsel for the Plaintiffs have not at any stage professed to be acting for Housing Finance Company of Kenya . Accordingly the avowal now made in the certificate of urgency would clearly amount to an abuse of the process of the Court.

Since the suit belonged to the Plaintiffs, and in the hearing of applications brought under that suit by the

Plaintiffs it became necessary to make the orders of 9th July, 2004 the only way Housing Finance Company could lawfully and in correct procedure protect its interests, was by seeking to be joined in; but they could not possibly adopt a lateral procedure that involves challenging the orders of the Court through another party.

Learned counsel, Mr. Wamalwa submitted and, with respect, quite meritoriously, that the present application is an attempt to get the Court to sit as an appellate Court over its own judgement, which would be an abuse of Court process.

To buttress his argument, Mr. Wamalwa cited the Court of Appeal decision in Lakhamshi Brothers Ltd. v. Raja & Sons [1966] E.A. 313. Sir Charles Newbold , in that case, thus remarked (p.314):

> "There are the c***ircumstances in which this Court will exercise its jurisdiction and recall its judgement, that is, only in order to give e ffect to … what clearly would have been its intention had there not been an omission in relation to the particular matter.***
>
> ***"But this application…[goes] far beyond that. It asks … this Court in the same proceedings to sit in judgement on its own previous judgement. There is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation."***

Mr. Ogunde, by contrast, contended that this was not a case in which a judge was being called upon to sit in judgement over his own decision; and he excused his failure to extract a decree and to show his client's specific grievance over the Court's decision, on the basis that "this matter came under certificate of urgency; therefore the extraction procedure would create delay."

In the ruling of this Court given on 9th July, 2004 I had reviewed the complex set of facts and, on that basis, arrived at my final orders, after according both parties the fullest opportunity to be heard through their counsel on record. It is only through a systematic analysis of evidence and through an evaluation of the submissions that I arrived at the orders. One paragraph which prefaces those orders may here by set out:

> ***"I think the protracted history of this case has tended to scatter issues of merit in the mists of time, and thus counsel have sometimes been tempted to adhere to the letter of the law even at the expense of the fundamental considerations of justice and equity."***

The record shows that at the end of my ruling, Ms. Bor who had represented the Plaintiff had applied for leave to appeal and had sought orders for the preparation of certified copies of the proceedings. I on that occasion made the following orders:

> ***"(1) The Plaintiff has leave and indeed a right to appeal against my decision in this application.***
>
> ***"(2) Executive Officer to ensure the preparation of the proceedings for the use of the Plaintiff."***

I have read the application documents and the response, and I have heard counsel on both sides fully. I have seen no serious evidence, or had a submission made out of conviction, that there is any error at all on the face of the record, in the proceedings, which led to the ruling of 9th July, 2004 which could have led to an injustice to the Plaintiff/Applicant. The detailed ruling which I gave on that occasion, so far as I am able to assess, was in every respect a final ruling and the matter became res judicata. The application now brought before me, that I should review the said ruling, is in my judgement an abuse of the process of the Court.

Accordingly, I dismiss the Plaintiff's Notice of Motion of 14th July, 2004 with costs to the Objector/Respondent.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of January, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Ogunde, instructed by M/s. Hamilton Harrison & Mathews Advocates

For the Objector/Respondent: Mr. Wamalwa, instructed by M/s. F.N. Wamalwa & Co. Advocates