



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2087 OF 2001

GEORGE ROMBO PLAINTIFF

VERSUS

JONES GIBSON MWANGI DEFENDANT

R U L I N G

The Defendant has filed two (2) applications against the Plaintiff. In the first application, the Defendant is seeking to set aside judgment. He is also seeking orders to vacate the eviction orders issued earlier.

By the second application, the Defendant is seeking to have expunged from the Court records all submissions made by Mr. L. Maina Irungu.

However, even before I can commence analyzing the submissions herein, I believe that the best way to approach this matter is by first, setting out herein the orders sought. I feel that the summarised version set out above may not do justice to the industry of the applicant.

The first application, dated 9th July 2003, was filed pursuant to the provisions of Sections 3 and 3A of the Civil Procedure Act. It sought the following orders from the court;

- “1. This Honourable Court may be pleased to vacate EVICTION ORDERS granted in favour of the Plaintiff/Respondent herein and set aside the judgment thereto, and order full hearing of this case inter parties.
2. This Honourable Court may be pleased to order instant status Quo of the said property, Nairobi/Block 76/810 Buru Buru Phase III Estate, as at 1st March 2001.
3. The OCS Buru Buru Police station may be ordered by this Honourable Court to ensure Order No. 2 as prayed herein is complied with to the letter
4. The costs of this Application be in the cause”.

Thereafter, the Defendant filed the application dated 6th October 2003, by which he sought the following orders;

- “1. THAT the instant Application be certified as urgent and be heard Ex part in the first instance.
2. THAT the Application dated 9th July, 2003 be also certified as very urgent and be heard

along side this instant Application Exparte.

3. THAT notwithstanding the court's Directives for a substituted mode of service, this Honouable Court be phased to nullify each and every plea by counsel was unprocedural, and must irregular and told lies in his cond8ct herein and did it without filing NOTICE OF APPOINTMENT OF an advocate to handle and conduct this matte and for a further ground that the same L. Maina Irungu is not currently legally in practice.

4. THAT the costs hereto be in the cause".

In support of the application the Defendant swore affidavits to which he annexed documentary evidence. By an affidavit sworn on 9th July 2003, the Defendant asserts that he redeemed the suit property, by paying the loan. He has annexed a letter from Housing Finance Company of Kenya Limited (HFCK), dated 1st March 2001, as Proof that he redeemed the suit property. The said letter which is addressed to the Defendant reads as follows;

"We kindly request you to come for your refund cheque of excess money after redemption of your mortgage account"

. It is contended by the Defendant that redemption can only mean that he paid off the debt, to reclaim the free title from HFCK. He also says that upon perusal of the court file he noted that the Plaintiff herein did not adduce any evidence to prove that he had paid the purchase price of Kshs 1,700,000/=.

It is also contended that the Defendant was never served with the Plaint and Summons in this case.

I have perused the court file, and ascertained that the Plaintiff did apply for leave to effect substituted service. On 22nd April 2002 Hon. Hayanga J. gave orders, granting leave to the Plaintiff to serve the Defendant through an advertisement in an issue of the "Daily Nation" newspaper. A further perusal of the court records reveals that on 4th June 2002, the Plaintiff filed an Affidavit of Service, showing that service had been effected through an advertisement in the "Sunday Nation" newspaper dated 18th May 2002. It is therefore clear to this court that although the Defendant was not served personally with the Pleadings in this case, there was nonetheless proper service, pursuant to the orders of this court, granting leave to the Plaintiff to effect substituted service.

The fact of service does appear to be acknowledged by the Defendant's affidavit sworn on 6th October 2003. I therefore hold that the allegation of non-service of pleadings is without merit.

Meanwhile, I note that the word "redemption" is said to have the following meaning, in "The Penguin Dictionary of English Synonyms and Antonyms;"

"Recovery, reclamation, repossession, ransom, salvation, deliverance. Rehabilitation, Absolution, Expiation, Atonement, Reparation, Compensation".

A look at "Oxford Advanced Learner's Dictionary, reveals the following helpful meaning, amongst others;

" Reclaim something from someday or something is to get something back from somebody by paying them back the money they lent one in exchange".

My understanding of the letter from HFCK to the Defendant would thus imply that the Defendant was entitled to recover or reclaim the title of the property which he had charged to HFCK, to secure the loan he had borrowed. In order to become entitled to the said recovery or reclamation, the Defendant may be deemed to have paid the loan.

Section 72 of the Registered Land Act stipulates that the chargee can exercise his right of redemption by paying the money secured by the charge. Therefore, the meanings set out in the two

dictionaries cited above are in consonance with the provisions of Section 72, insofar as redemption connotes recognition that the loan had been paid. It would therefore appear that the Defendant could be entitled to complain that following the redemption of his mortgage account, he was deprived of his property. However, it must be borne in mind that the Defendant has, in paragraph 10 of his affidavit sworn on 9th July 2003, said that there is a

“payment receipt in the name of the Respondent/Plaintiff herein GEORGE ROMBO, in two parts viz

(a) Receipt for Kshs 500,000/=

(b) And a further receipt for Ksh 1,200,000/=

These are both substantially missing and they are essential as a proof of proper payment of Purchase Price of the said property. L.R. NRB/BLOCK/76/810 BURUBURU PHASE III, as claimed by the said GEORGE ROMBO”

That deposition by the Defendant is a clear recognition that the Plaintiff did assert that he is the person who paid Kshs 1,700,000/= to HFCK. Of course, it is also true that by the same token, the Defendant is asserting that the Plaintiff’s receipts for the 2 payments totaling the sum of Kshs 1,700,000/= are missing.

But the real important aspect in all this is that whilst the Defendant is complaining about the missing receipts to prove that the Plaintiff paid the amount in issue, he too has not adduced evidence to prove that the money was paid by him. I hold that if the Defendant had paid the said sum, the easiest thing for him to do, would have been to adduce receipts, to prove that fact. One cannot prove that he made payment by casting some doubt on the assertion that someone else made the payment.

A further scrutiny of the Defendant’s affidavits reveals that the Defendant does not actually depone positively that it is he who made payment of the sum of Kshs 1,700,000/-. In paragraph 4 of his affidavit sworn on 9th July 2003, the Defendant says that

“over the years since, the mortgage Account was serviced towards acquisition of the said Property L.R. NRB/BLOCK/76/ 810 BURUBURU PHASE III”

Thus the mortgage account may have been serviced by the Defendant and/or some other person (s). Of course, there would nothing wrong if some other person (s) assisted the Defendant to service the account.

But perhaps the most significant factor in this case is that the Defendant does not purport to challenge the auction that was conducted by HFCK. If his account had been regularly serviced, until it was redeemed, the Defendant ought to have challenged the auction sale. He has not done so. I believe that that entitles me to presume that the sale at which the plaintiff bought the suit property was regular. 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 for eviction of the Plaintiff. It would therefore follow that there is no grounds upon which the court can order the property to revert to the status quo that was prevailing prior to 1st March 2001. The application dated 9th July 2003 is thus dismissed with costs.

There is now the application dated 6th October 2003. By that application, the Defendant is seeking the nullification of each and every plea by Mr. L. Maina Irungu Advocate. It is contended that the whole case herein started badly and corruptly. The Defendant says that it is now public knowledge that lawyers

have been stealing property through the courts, and that that is what happened in this case. In an endeavour to illustrate the alleged corruption in this case, the Defendant asserts that the Plaintiff's lawyer, Mr. L. Maina Irungu was acting in this case when he knew that the Plaintiff had not bought the suit property. It is further contended that the Judiciary was compromised in the case. To support these contentions the Defendant says that;

- (i) No Notice of Appointment was filed in court, nor was a copy thereof served upon him.
- (ii) No Complaint was filed in court or served on the Defendant.
- (iii) No summons to Enter Appearance was filed in court.
- (iv) The case was heard, and Judgment entered on 4th June 2002, whereas the Notice indicated it should have been heard on 5th June 2002.
- (v) Cheques adduced in evidence by the Plaintiff were substituted. This proved that the case file was easily manipulated to undermine the course of justice.
- (vi) The advocates who had corruptly handled the case have abandoned it, giving way to another firm of advocates who have come to cover up the fraud.

I will address each of the grounds in turn. First is the allegation that no Notice of Appointment of Advocate was filed in court. A perusal of the court records shows that the proceedings in this case were instituted by the Plaintiff, through the firm of L. Maina Irungu & Co. Advocates. The said advocates were perfectly entitled to act for the Plaintiff provided that they had been duly instructed by the Plaintiff. As far as I can see, the Defendant does not appear to be challenging the fact that the Plaintiff did instruct M/s L. Maina Irungu & Co. But he asserts that the said lawyers ought to have filed a Notice of Appointment of Advocates.

It is to be noted that Order III rule 8 stipulates that

“where a party, after having sued or defendant in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of appointment, and the provisions of this Order relating to a notice of charge shall apply to a notice of appointment of an advocate with the necessary amendments”.

In effect, the need to file a Notice of Appointment of advocate only arises wherein the party had previously acted for himself, and then decides to engage an advocate. In this case, the firm of L. Maina Irungu had started acting for the Plaintiff from inception. I therefore hold that there was no need for them to file a Notice of Appointment of Advocate.

The next complaint is that no Complaint was filed in this suit, and that now as served on the Defendant. I have already addressed the issue of service of the pleadings. The defendant was properly served, pursuant to the orders of this court which granted leave to the Plaintiff to effect substituted service. And as regards the absence of a Complaint, I note that the proceedings were commenced by way of an Originating Summons filed in court on 3rd December 2001. By virtue of the provisions of Order XXXVI of the Civil Procedure Rules, an Originating Summons is a legitimate mode of commencing proceedings in certain circumstances. The proceedings were therefore instituted through a recognized mechanism. The absence of a Complaint is thus of absolutely no consequence in this matter. The complaint is thus totally without any legal foundation.

The next complaint was that No Summons to Enter Appearance were filed in court. It is emphasized here that when proceedings are commenced by way of Originating Summons, the provisions of Order XXXVI do set out the procedure to be followed thereafter. Those procedures do not require that there be any Summons to Enter Appearance. The requirement for Summons to Enter Appearance is spelt out by Order IV rule 3; and the same only applies to suits commenced by way of Complaint. The criticism of the case

for the lack of summons to enter appearance is thus unfounded.

Next, the Defendant complains that the hearing date was altered from 4th to 5th June 2002. However, the Plaintiff says that the case was scheduled for hearing on 4th June 2002, and was heard on the said date. I have perused the court records and noted that on 22nd April 2002, Hon. Hayanga J., ordered, *inter alia*, that the case be heard on 4th June 2002. The court records further show that the case was heard on 4th June 2002 by the Hon. Mbitio J. I therefore do not know the basis for the complaint about the purported change of the Hearing date.

The Defendant also complained that the cheques adduced in evidence were later substituted. My reading of the record of the proceedings reveals that the proceedings were very brief. The said proceedings were by way of submissions made by Mr. Irungu Advocate. He did not adduce any evidence, but placed reliance upon the Applicant's affidavit sworn on 3rd December 2001. After the said submissions, the Court gave its judgment on the same day. Having thus obtained judgment in an uncontested trial, I do not see any reason why the Plaintiff or his advocates would need to manipulate the court file by substituting evidence. But in the event that the court records have been manipulated in the manner stated by the Defendant, I believe that the proper method for addressing that complaint is through lodging a complaint with the police, so that they can investigate the matter. Such manipulation as alleged by the Defendant is criminal in nature. If ultimately proved, the said manipulations would have far reaching consequences against the perpetrators. However, until and unless the allegations are investigated by the appropriate law enforcement agency, and thereafter proved in court, this court cannot act on them. Finally, the Defendant has alleged that the Plaintiff's previous advocates acted corruptly in the manner they handled the case. He says that the advocate acted for the Plaintiff in the case when he knew that his property had not been sold. He then says that the said advocate then abandoned the case, so as to leave it to another firm of advocates, who would cover up the fraud. The court was then told that it is public knowledge that advocates are using the courts to steal properties. Theft is a criminal offence. And when the said offence is committed by a lawyer it is perceived to be even more serious as he/she is supposed to be an officer of the court, which is the custodian of legal rights. If the Defendant has any evidence that L. Maina Irungu Advocate acted in cahoots with some members of the Judiciary to steal his property, he (the Defendant) would be doing a great disservice to himself and to the whole country if he failed to pursue the matter to its logical conclusion. But this is certainly not the role of this court to act on the basis of some generalized allegations of some perceived theft. It may be fashionable for some people, such as the Defendant, to make blanket accusations directed at lawyers and the Judiciary. That mentality must be discouraged completely. It must be discouraged not because lawyers or the judiciary are angels. No. I believe that inasmuch as the lawyers and judicial officers are a part of the society within which they operate, there is every possibility that there will be those in their ranks who may succumb to temptation to seal.

But I am not prepared to accept the assertion that it is a matter of public notoriety that lawyers have been stealing property through the courts. Let us by all means identify, isolate and deal with those that may be rotten. But, for the sake of this country and its future generations, let us learn to have faith in the Judiciary, or otherwise there would be no need for the case such as this one to have been placed before me for adjudication.

But before I conclude, I note that the Defendant has alleged that Mr. I. Maina Irungu abandoned the case, so that another law firm could cover up the fraud. No evidence was led by the Defendant in respect of these serious allegations. Instead, the court records show that Ngata Kamau & Co. Advocates filed an application on 3d November 2003, seeking leave to act for the Plaintiff, in place of L. Maina Irungu & Company Advocates. That application was supported by the Plaintiff's affidavit, by which he said that he had withdrawn instructions from his previous lawyers. In effect, the said lawyers did not abandon the case; their instructing client withdrew instructions. Such a step by any party to a suit is the right of the said party. He may at any time decide to instruct such an advocate as he may feel confident will be best suited to serve his legal interests. It is therefore most unfortunate that the defendant should insinuate that the change of advocates is calculated to cover up some perceived fraud.

I find that the Defendant has failed to persuade me he is deserving of the prayers set out in his

application dated 6th October 2003. I therefore decline to nullify or expunge the pleas or submissions made by Mr. L. Maina Irungu Advocate The application dated 6th October 2003 is dismissed with costs.

DATED at Nairobi this 22nd day of March 2004.

FRED A. OCHIENG

Ag. JUDGE

Head Note

1. Setting aside a judgment.
2. Expunging legal submissions from the record.
3. Summons to Enter Appearance do not apply in proceedings by Originating Summons.
4. Redemption of charge - meaning
5. Notice of Appointment of advocate – when applicable – Order III rule 8.