



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 3521 of 1994

ANN MUTHONI PERTET..... PLAINTIFF

-VERSUS-

PATRICK CAMPBELL MUNYUIRA..... DEFENDANT

RULING

The applicant herein seeks the court's orders to review its decision made on July 17, 2003 or, in the alternative, requests the court to make such orders as are necessary pursuant to the plaintiff's application dated May 31, 2001 and in particular that the said application be deemed allowed in its entirety. The application also seeks an order that the costs thereof be provided for.

The application is based on the grounds that the facts subsequent to the court's decision of July 17, 2003 warrant the orders sought by the applicant herein, which orders are necessary for the ends of justice and to prevent an abuse of the process of the court. It is a further ground that the plaintiff/applicant has suffered

and continues to suffer great harm and loss and shall suffer irreparable harm unless the orders sought herein are granted. The last ground is that there is an error on the face of the record. The application is further supported by the annexed affidavit of ANTHONYM. KHAMALA, Advocate, who has the conduct of this matter on behalf of the applicant. In that affidavit, Mr. Khamala summarises the history of matter between the parties and concludes by stating that the current status quo is such that the only way of enforcing the orders of the court made on December 22, 2000 is by granting the orders sought by the plaintiff in the application dated May 31, 2001.

The application is opposed and the respondent's grounds of opposition were filed in court on February 24, 2004. The grounds are that the motion is totally misconceived and an abuse of this court's process, and that there is no order on record capable of being reviewed under O.XLIV rule 1 of the Civil Procedure Rules.

It is also the defendant's case that the plaintiff's application dated 31st May, 2001 was heard and determined on merit and therefore prayer 3 of the Notice of Motion is res judicata for all intents and purposes. The defendant/respondent further contends

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that the applicant has not come to court with clean hands and has not legally complied with the court orders of 17th July, 2003. The alleged compliance with the orders of this court deponed in paragraphs 3 and 5 are a nullity ab initio, the process having been obtained ex parte throughout. The defendant finally states

that the supporting affidavit is incurably defective and does not comply with the mandatory provisions of O.XVIII rule 1 (3) and the court procedure rules and that it should be struck out.

While canvassing the application orally before the court, Mr. Khamala for the applicant referred to the court's order of July 17, 2003 to the effect that a copy of the decree dated July 22nd 2002 be served on the defendant's/respondent's advocates within 10 days from July 17, 2003. He submitted that the defendant was duly and properly served. Mr. Khamala then requested the court to make a decision in terms of the plaintiff's application dated May 30, 2001 in which the plaintiff sought to implement the decision of Ransley, Commissioner of Assize as he then was. He then referred the court to MAWJI v. ARUSHA GENERAL STORE [1970] E.A. 137, and also to RAWAL v. MOMBASA HARDWARE LTD. [1968] E.A. 392 in addition to

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Mulla's Code of Civil Procedure, 16th Edition, Vol-1 page 1322 on the "inherent power of the court: their nature and objects."

Mr. Khamala also submitted that the defendant stands in contempt of court since he was served by substituted service and disobeyed court orders. He should, therefore, purge that contempt before he can be heard. And referring to the grounds of opposition, Mr. Khamala said that subsequent facts to a ruling can compel a party to go back to court and have a decision revisited. He submitted that res judicata does not apply in such circumstances. He asked the court to allow the application.

In opposing the application on behalf of the defendant/respondent, Mr. Njuguna referred to the order of July 17, 2003 for a copy of the decree to be served within 10 days and said that that direction was not complied with. The advocates on record were not served, and instead the applicant came back to court ex parte seeking an extension of time to serve by way of substituted service, and now alleges that the orders were disobeyed. Mr. Njuguna then stated that he had no instructions on that service, and he could not say whether the defendant was served or not. He also

argued that the orders were illegal and therefore there was no contempt.

Mr. Njuguna further argued that in his address, the applicant's counsel had not stated why he wants the decision reviewed; that there was no error on the face of the record, and that there was no new evidence. He therefore submitted that the applicant's counsel has not brought himself within O.XLIV. Counsel further argued that there was nothing to review. Furthermore, Mr. Njuguna contended, the court was functus officio since it had already delivered its ruling, and the issues in the application of May 31, 2001 were therefore res judicata. He also maintained that since the court did not grant the orders in that application, the court is deemed to have refused them. The alternative to prayer 3 is a non starter as s.89 of the Civil Procedure Act requires that rules of procedure be followed to the letter. He finally submitted that the application dated May 31, 2001 cannot be revisited as it is res judicata. He thereupon referred the court to UHURU HIGHWAY DEVELOPMENT LTD. v. CENTRAL BANK OF KENYA & 2 ORS authority for the proposition that the principles of res judicata apply to interlocutory applications as well. He then

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submitted that s.3A can only be invoked in the absence of any other remedy, and that it can't be invoked in this application. He therefore urged the court to dismiss the application.

In a brief reply, Mr. Khamala submitted that with regard to the extraction of the order for review, nothing stands in the way of the court taking steps to give effect to its decisions especially when dealing with a party who is not complying with orders. The ex parte orders were not illegal, nor is res judicata applicable

as the court merely gave the defendants a chance to obey the court orders. He urged the court to do justice and allow the application.

The facts of this matter are not in dispute. On July 17, 2003 the court ordered that service of a copy of the decree dated July 22, 2002 be served on the defendant's/respondent's advocates within 10 days, and the defendant/respondent to obey the orders within 30 days of service. For some reason which has not been clearly articulated, the plaintiff sought to serve the court order on the defendant personally instead of serving it on the defendant's advocates as directed, and the effort to effect that service went begging because the defendant could not be traced. Thereafter, the

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plaintiff/applicant applied to serve the defendant/respondent by substituted service by advertisement in the newspaper, which was granted and which was duly effected. Counsel for the respondent now argues that since the order for substituted service was granted ex parte, they were not aware of the order and they were not served, yet they were on record. He says, consequently, that he can't say that the defendant was served or not, and that he has no instructions on that service. He also said the orders were illegal.

As intimated above, it would have been sufficient for the applicants to serve the advocates for the respondent instead of taking the longer and more expensive route of serving the defendant personally. This was the root cause of the confusion in this matter. And, as the matter stands now, the defendant's advocates have not been served with the decree dated July 22, 2001. And yet, there are orders in this case that the plaintiff is entitled to specific performance of the contract for sale of the suit premises. What then, are the powers of the court?

The application herein is brought to court under O. XLIV of the Civil Procedure Rules and S.3A of the Civil Procedure Act. O. XLIV

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deals with review, while S.3A deals with the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. O. XLIV allows for review of any order or decree upon discovery of new and important matter or evidence, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. On the facts of this case, it is plain that there is no new and important matter or evidence which was not within the applicant's knowledge at the time when the order was made. Even though the applicant alleges in the grounds upon which the application is based that there was an error on the face of the record, no such error has been articulated. The grounds upon which the applicant argued her application however, point to one direction, i.e. that there is sufficient cause for the review of the orders. This is brought about by the fact that there is already judgment for the plaintiff and a court order to the effect that the sale of the suit premises be specifically performed. In my ruling of 17th July, 2003, I observed that the main issue between the parties was whether defendant/respondent has failed to obey court orders in a manner which would entitle the court to

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authorize the Deputy Registrar to step in and rescue the situation by executing the necessary documents. The judgment delivered by

Philip Ransley, Commissioner of Assize, as he then was, was very clear. The defendant was ordered, within a span of 30 days, inter alia, to produce the title deed to the property and to give vacant possession of the suit property to the plaintiff within the same period.

I did not agree with counsel for the defendant that obedience to such an order required the subsequent and additional service on the defendant of another order or decree. However, entirely in very good faith, I chose to give him an opportunity to prove his *bona fides* in this matter. I said-

"In the interests of justice, I therefore order that a copy of the decree dated 22nd July, 2002 be served on the

defendant's/applicant's advocates within 10 days of the date hereof. The

defendant/respondent to obey the orders within 30 days of service..."The only hitch here was that the advocates for the defendant

were not served. Having gone to the extent of having made an order

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for them to be served, I think it is only fair for them to be served, as

initially ordered, thereby giving them a chance to obey the order.

Section 3A of the Civil Procedure Act states-

"Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." In MAWJI -v- ARUSHA GENERAL STORE [1970] E.A. 137, and

reacting to s.95 in the Tanganyika Civil Procedure Code 1996 bearing

similar words, Sir Charles Newbold said, at page 139-

"I am satisfied that that section means that a court should not be precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in any way which will result immediately in justice between the parties and in the saving of unnecessary proceedings.... A court must have the power unless it is most clearly set out to the contrary by legislation, to give effect to its decision.."/From the foregoing, I think that the defendant's contention that

the court is *functus officio* cannot be sustained. The court has the

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power to make such orders as will lead to the plaintiff realising the fruits of the judgment entered in her favour. Until then, the court cannot be functus officio. I also do not agree with the defendant's counsel that by not granting orders sought by the application dated 31st May, 2002, the court is deemed to have refused the said order and that therefore prayer 3 of the Notice of Motion is res judicata. Far from it. The effect of the court's order was to suspend the granting of the orders prayed for in order to give the defendant an opportunity to show his bona fides in this matter by obeying the court orders of 21st December, 2001. These orders required the defendant to execute the relevant documents failing which the court would grant orders for the Deputy Registrar to do so in lieu of the defendant. Unfortunately the advocates for the defendant were not served as envisaged.

In his submission, Mr. Njuguna for the defendant/respondent said that they were never served even though they are still on record for the defendant. Clearly, it is not in the interests of justice that this matter should any longer be stagnated by technicalities which only help to waste time and escalate costs. In the circumstances of this

case, in my view, justice will only be seen to be done if and when the defendant obeys the orders of 21st December, 2001, or the plaintiff acquires the title and possession of the suit premises. In exercise of its inherent jurisdiction under S.3A of the Civil Procedure Act, therefore, the court hereby vacates its orders for substituted service and makes the following orders-

1. The orders dated 21st December, 2001 be served on the defendant's advocates within 7 days from today.
2. Should the defendant's advocates decline to accept service of the said orders for whatever reason, the orders sought in the application dated 31st May, 2002, will be deemed to have been granted and the Deputy Registrar will proceed to execute the necessary documents forthwith.
3. Upon the defendant's advocates accepting service, the defendant should obey the orders within 30 days of service. If he fails to do so within the said period, then the orders sought in the application dated 31st May, 2002 will similarly be deemed to have been granted and the Deputy Registrar will proceed to execute the necessary documents forthwith.

I think that this is the only way in which the judgment given and orders made on 21st December, 2000 can now be given effect.

Each party will bear its costs of this application.

Dated and delivered at Nairobi this..13th day of may 2004

L NJAGI

JUDGE