



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 260 OF 2003

SHEIKH ALI TAIB PLAINTIFF

V E R S U S

GEORGE ELLAM WEKESA DEFENDANT

R U L I N G

Application dated 17.5.04 by the plaintiff seeking main order for the review of order of this court made on 13/4/04. The grounds are that the applicant/plaintiff is the holder of a decree which was duly executed by Court Bailiff by evicting therefrom the interested part Selina wife of Wekesa the defendant and her chattels.

The said eviction was set aside by the said court order made ex parte in favour of the interested party wife of defendant.

It is also submitted that the application resulting in that order was defective and incompetent. The interested party misled the court and failed to inform the court of issues covered in HCC. No. 454 of 2000 (O.S) – Selina Wekesa –v-s George. Wekesa (defendant herein) and another (the plaintiff herein). And that in that case the interested part had prosecuted an application similar to the present which was refused by the court of Mwera J and lastly that there is an order on record touching on the court granting orders being challenged.

The application is supported by the affidavit of Sheikh Ali Taib. Which states that the applicant purchased the property subject of suit by agreement dated 14/11/2002 for shs. 6.8 million and transfer was registered and a title certificate of lease issued on 25.11.02. That vacant possession was to be delivered by the defendant but he failed to do so hence this suit. Ex parte judgment was entered and executed by Court Bailiff on 5.4.2004 by removing from the suit premises all persons bound by the decree. At this stage it is to be noted that the occupants of the premises the interested party was not bound by the decree as she was not a party to this suit at that time and she was residing in the house after being deserted by her husband. And then on 13.4.04 this order reinstating the interested party into the premises was made and executed.

At the request of the applicant court filed no. 454/02 (OS) was brought before the court. The court has perused the same and it is clear the said suit was brought by the interested party as plaintiff claiming interest under the Married Women Property Act. In that case this court issued an injunction order against the husband George Wekesa (the defendant in this suit) against dealing with family property pending the hearing of that suit. The order was registered against the Mombasa property on 24th December, 2002 as B15. While the transfer in favour of applicant showed that it was registered as B19 on 25.11.2002. The genuineness of the registration is challenged on the ground that Document No. B15 should have been registered earlier in time to document B19.

Furthermore on 23/10/2002 the court issued an order joining the applicant to that suit (454/02 OS). In this suit the interested party has by Notice of Motion sought to set aside review or vary the ex parte judgment passed herein saying she intends to defend the same and it is in that situation that she applied and obtained orders reinstating her to the premises, Notice of Motion filed by interested party on 8.4.2004 was heard ex parte and orders issued which resulted in the setting and execution of decree issued by court in this case. She also sought and obtained order joining her in this suit as a party.

The application came up for hearing inter partes and I have already mentioned the facts and circumstances under which the ex parte orders were obtained.

The interested party had a claim under Married Women Property Act in HCC. of 454/2002. And that suit has not yet become determined. However an inter locutory order was issued and registered against the property on 24/12/2002? However, unknown to her, the property was purportedly sold by her husband (defendant herein) without her knowledge. She challenges the purported sale and transfer seeing that her order was registered at the lands office as B15 prior to the alleged transfer registered as B19. This is a fundamental issue in the purchase of property and has to be decided at the trial by evidence. There is also the issue whether the plaintiff in his case says he purchased without notice of the wife's interest.

In the cause of hearing the two applications, Mr. Juma Olela got sick and the interested party's case was taken over by Mr. Nyaga who submitted in reply to applicants that the review is governed under Order 44 CPC and that no circumstances warrant granting of review order.

Regarding the allegations that interested party misled the court and was chased from the court of Justice Mwera, he submitted that the interested party was not aware of this other suit between her husband and the plaintiff herein. He further submitted that Taib is not an innocent purchaser referring to the above contradictions in priority of registration of documents. If B15 was registered on 24/12/02 B19 could not have been registered on 25/11/02. He submitted that this registration was backdated to deny the interested party her rights and to side step Selina's proceedings. He submitted there was collusion.

The advocate of the defendant husband is the same advocate who was acting for the husband in suit no. 454/02 and was well aware of the interest of Selina. On 6.5.03 he wrote :-

“As indicated to you earlier our client has already disposed of the property.....”

Yet when possession was demanded he was seen in neighbourhood with the auctioneers on the material day. The defendant husband knew of the wife's interest in the property and kept mum when he was sued by the applicant and failed to disclose when he was selling the property his wife's claims on the property.

Mr. Nyaga also argued that the purported sale agreement is a sham. It was stated therein that the balance of purchase price could be paid upon handing over of vacant possession. No evidence that that has been done. The plaintiff claims full purchase price. There is discrepancy that showed the agreement is a sham and the judgment should be set aside with costs.

To all this Noor Mohammed submitted that they seek a review of an ex parte injunction not otherwise. They were not served. He asserted that they were purchasers for value although he did not mention issue of payment of purchase price.

For Mr. Mokaya, Mr. Maosa appeared and submitted that Order was ex parte and expired after 14 days after 24/12/02. However, he did not explain how their document B19 was registered backdated to 25/11/03.

I have considered all these matters argued on behalf of partes deeply concerned about their various interests in the disputed property. There are several important issues raised which have to be tested by evidence. I am satisfied that the interested party was never served or notified of this suit by the plaintiff and she ought to have been served. A look at the terms of sale paragraph 6 is worded in an unusual manner to the effect that full purchase price shall be made after registration of title and handing over

vacant possession. It was known to the purchaser that there could be impediment or was the purchaser being too cautious?

At this stage this court is not expected to make any final findings on important issues. But it is clear to me that there are important issues to be answered after receiving evidence at a trial.

On application dated 8/4/2004 I hereby set aside judgment entered exparte. I grant the interested party leave to file defence within the next 14 days from the date hereof.

On application dated 17/4/04 the same is hereby dismissed. Costs shall be in the cause, pending hearing and determination of the two suits. The interested party shall give undertaking as to damages that may be suffered by the plaintiff Taib in HCC. 260/03 the undertaking to be filed within the next 7 days from the date hereof.

Dated this 30th July, 2004.

J. KHAMINWA

JUDGE

Read on 30/7/04 in presence of Mr. Kiambya.

J. KHAMINWA

JUDGE