



**Hirani v Chiriwacho & another (Civil Suit 136 of 2014)
[2023] KEHC 2314 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 136 OF 2014
DKN MAGARE, J
MARCH 3, 2023**

BETWEEN

MAVJI KARSAN HIRANI PLAINTIFF

AND

MWANALIMA MWINYIKAI CHIRIWACHO 1ST DEFENDANT

SALIM ALI NYAWA 2ND DEFENDANT

RULING

1. This matter is before me for an application dated June 10, 2021. The application seeks for a vesting order for the parcel of land bought at a court sanctioned public auction. It is an opposed application. Ordinarily this should just be a run of the mill application, which can be dealt with administratively. From the history of this case, that is not desirable or even possible. It is a hot case, as seen from the date of the application.
2. I am inclined to allow the application as it will be apparent shortly.
3. A Chinese saying which is in chapter 64 Dao De Jing, says that a journey of a thousand miles starts with one step (#####) In this file, the parties have travelled over 10,000 Km to reach this one step. Probably the Chinese were wrong. Maybe not. Parties have ensnared each other with applications and counter Application. This matter was determined without viva voce evidence in 2015. It has been active since.
4. This case must have been in the mind of the author of Ecclesiastes 5:12, when wrote that ‘The sleep of a labouring man is sweet, whether he eats little or much: but the abundance of the rich will not suffer him to sleep.’ I cannot fathom how these parties still fight what was clearly a process expected by them.



5. Holy writs have tried to deal with these issues, but we are here. I am reminded of a verse from the Holy Quran [9: 119]. Qarai

“O you who have faith! Be wary of Allah, and be with the Truthful.”

6. Where else do we turn to, to remedy these matters. The pain of having over 9 years of litigation, is what I know the Plaintiff must be feeling. I digress.

Background to the Application

7. This case started as a claim where the plaintiff filed suit against the defendants claiming a lawful sum of Ksh 12,090,700/= being money had and received by the defendants as proceeds of sale of land parcel No Kwale Galu/Kinondo/351.

8. The plaintiff requested for judgment for a sum of Ksh 12,090,700/= in default of appearance and defence. Before entry of judgment, a defence and counterclaim was filed on January 14, 2015.

9. On April 1, 2015, the plaintiff filed an Application seeking the following prayers as against the defendants: -

a. A prohibition/ inhibition over Kwale/Diani/S.S/414 pending execution.

b. Striking out of defence and counterclaim

10. The applicant gave an undertaking for damages as regards the Application for a prohibition/inhibition. On June 25, 2015, Hon. Lady Justice Mary Kasango allowed the Application, and: -

a. Struck out the defence and counterclaim.

b. Entered judgment as prayed in the plaint for Ksh 12, 090, 700 costs and interest on the application dated March 19, 2015 and the suit.

c. Issued a prohibition/inhibition in respect of Kwale/Diani/S.S/414 pending execution of the Plaintiff's judgment.

11. A decree was extracted with the terms to include the monetary claims and the injunction. This was followed with assessment of costs at Ksh 664,466 pursuant to the bill of costs dated September 21, 2015.

12. Execution process, which hopefully will terminate today, commenced on June 22, 2016, some 9 months after assessment of costs.

13. As expected, on April 4, 2016, the Defendants filed application dated March 29, 2016 seeking to set aside summary judgment. Hon Justice PJO Otieno dismissed the application in limine with costs. He indicated in paragraphs 19 and 20, that the court found that that said application was an abuse of the court process meant to obstruct the cause of justice and as such lacked bona fides.

14. The respondent intimated they wished to appeal by filing a notice of appeal but it fell on the wayside by effluxion of time.

15. On March 7, 2017, a proposed settlement note settling the terms of the sale was filed in court. The sale was to take place on November 30, 2017. In a bid to forestall settlement of terms of the sale, the 1st respondent made an application for stay of the sale pending hearing of Mombasa ELC 212 of 2015.



16. The parties now had a fourth round of the merry go round of applications before justice PJO OtiéNo He heard the application and dismissed the same and awarded the Plaintiff costs of 15,000/=, since costs had earlier been taxed. This was in order to avoid waste of judicial time going to assess costs of one application.
17. To contextualise, the background, the defendants fraudulently sold land parcel number Kwale/ Kinondo /351 to the plaintiff. She sued for refund of the said money. The property subject of this application was specifically set apart in the order of Hon Lady Justice Mary Kango pending execution of the judgment of the court.
18. The said parcel of land was not the subject matter of the suit. The subject matter was a refund of Ksh 12, 090, 700/= arising from fraudulent sale of the aforementioned property, Kwale/Galu/Kinondo /351. In other words, this was not a land case.
19. The Plaintiff, in exercise of due diligence, found land parcel No Kwale/Diani/ SS/414, which was in the name of the 2nd defendant. It was preserved to be sold in execution of the decree. The parcel had no other purpose. It was not the subject matter of the case. An affidavit filed by the plaintiff on May 24, 2017 sets out all the pertinent facts.
20. The fraudulent title deed was cancelled vide an order dated July 20, 2015 on application by the defence counsel. The surrender of the said title opened way for the settlement of terms of the sale of Kwale/ Diani/ SS/414 in execution of the decree of the court. I thought that this could have marked the end of acrimony but I am wrong. It was the beginning of the grand finale.
21. Earlier on, the auctioneers had returned warrants unexecuted as they did not find any attachable assets of the defendants. New warrants were subsequently issued. Thereafter, the auctioneers later issued 45-days' notice dated September 3, 2020. They filed the following documents in court: -
 - a. A 45-days redemption notice
 - b. Notification of sale
 - c. Letter dated September 3, 2020 addressed to the 2nd defendant, the registered owner vide P.O Box 59-80400 Ukunda.
22. The sale took place and Amarbahi Mavji K Hirani bought the said parcel of land No Kwale/Diani/ S.S/414.
23. On July 21, 2021 the plaintiff filed the current Application dated June 10, 2021, for a vesting order over land parcel No Kwale/Diani/ S.S/414 to the purchaser.
24. The application is supported by the Plaintiff's affidavit dated June 10, 2021. The applicant filed a further affidavit showing that the sale took place, the tile to 351 was surrendered and destroyed. a valuation dated February 1, 2022 from Valuconsult Ltd which valued the subject parcel at 23,500,000/ =

Defendant's Response

25. The 2nd defendant registered owner did not file any response to the application. However, the 1st defendant filed a response claiming that:
 - a. The sale was not procedural.
 - b. The warrants were wrongly obtained, after one year had passed, without notice to show cause.



- c. The suit property was sold without valuation.
 - d. The sale was void.
 - e. The 2nd defendant has been missing
 - f. The cause is related to Mombasa ELC 212 of 2015.
 - g. They posited that the address of 59-80400 Ukunda was used long ago and they were currently using their advocates address (the address is the same on the demand for rates from the Kwale County Government.
26. They thus vehemently opposed the application.

Plaintiff's Submissions

27. The Plaintiff/deed holder submitted that the sale had been completed and there is no challenge to the same. By now it is water under the bridge. I presume this was the Indian ocean waters flowing calmly under the Nyali bridge. They Plaintiff /Decree holder places reliance on the authority of *Bernard Kiprono Bett Versus Bernard Kiprono Koech* (2021) eKLR.

Defendants' Submissions

28. The defendants reiterated the content of the 1st defendant's replying affidavit. They question the validity of the 'purported' sale, noting that there was no current valuation. They are of the view that the current value is over 25,000,000/= (it appears to be a change of heart from 30 million in the Replying affidavit).
29. There is a reference to pending case in Kwale ELC 212 of 2021(formerly Mombasa ELC 212 of 2015).

Determination

30. I have set out the long history to have a permanent treatise given the chequered history of this case. This will also quickly explain the genesis and steps taken or omitted to be taken by parties. I have noted and will say this for the umpteenth time, that the only way to challenge a decision or even a sale, is to apply to have it set aside. For a court decision, it can be done though review or appeal.
31. In *Sheila Cassatt Isenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, Hon Justice E C Mwita, quoted with approval the decision of the Indian Supreme Court again stated in Re: Vinay Chandra Mishra [(1995) 2 SCC584], to the effect that: -

“The judiciary has a special and additional duty to perform, viz, to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. Dignity and authority of the court has to be respected and protected at all costs.

32. In the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR, the Court made the following observations;

“ 30. It must however be remembered that court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the



difficulties faced by the need to comply with the order. Once a court order is made in a suit the same is valid unless set aside on review or on appeal.

It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

33. There is no provision for setting aside a sale though a replying affidavit. The court is supposed to look at the merit of a matter as at the point of Application.
34. The court cannot anticipate that in future, an unknown application will be filed by an unknown person, seeking unknown orders, at unknown time, having unknown effect and defer the current application for an unknown amount of time waiting for that an unknown action.
35. If, for any reason whatsoever, any party is of the view that any of the proceedings were irregular, they needed to deal with it in the same court or any other forum of adjudication in the vertical and horizontal hierarchy of the courts. It shall never come out the mouth of a party that the order is irregular, then sit and do no more.
36. The order being enforced may indeed be irregular or even wrong. It could even be issued by a court, which the Respondent believes has no jurisdiction. However, once a court pronounces itself, there can be no re-looking into that order without an appeal or an application for review to that effect. Not contextualising the words of The privy council as pronounced by Lord Denning in *Macfoy* case can lead to pain.
37. Lord Denning M.R in had this to say on issues of a nullity in *Macfoy v United Africa Co Ltd* (1961) All ER, 11:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

38. Lord Denning was referring to an act and was not referring to court orders. court orders are valid as long as they subsist till they are set aside. Trying to ignore a court order on the believe that it is wrong, is foolhardy.
39. In the case of *Wildlife Lodges Ltd v County Council of Narok and Another* [2005] 2 EA 344 (HCK) the Court was of the considered position that: -

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A



party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course.”

40. It is therefore a duty of the person aggrieved by a decision to take active steps to forestall the effect of the order or even an action. Lawyers, should be like surgeons. They should tell their clients when the rubber has met the road. Surgeons always advise when amputation will be necessary and why.
41. It is painful but necessary to tell a client that you have reached the dead end of a tarmac road. The end of a well-trodden path and it is time to walk away. The first ruling by justice Mary Kasango, cooked the defendant’s goose. It is now well served, eaten and belched.
42. Auctioneers are officers of this court. Once the court, sends any of its officers out there to do some work, they file returns. Once returns come there are processes that must be followed to dislodge them. The court is not a sheriff entering into any fray, trying to shepherd everyone into obeying the law. That is the duty of the individuals and executive, the court’s duty is to determine rights and punish wrongs.
43. In The Supreme Court of Kenya Presidential Petition no 1 of 2017 (Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki and Lenaola, SCJJ)- [*Raila Amolo Odinga and another versus IEBC & Others*](#) (2017) eKLR, the supreme court pronounced itself on the place of the rule of law in the constitutional dispensation. They stated: -

(394) It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the [*Constitution*](#) and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the [*Constitution*](#).”
44. In the year 2000, upon being declared not to be the winner, despite overwhelming evidence to the contrary, the former presidential candidate, Al Gore gave a concession speech like no other. It is an election, which even the winner knew who won. Al Gore stated as doth:-

“Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession. I also accept my responsibility, which I will discharge unconditionally, to honour the new President-elect and do everything possible to help him bring Americans together in fulfilment of the great vision that our declaration of independence defines and that our constitution affirms and defends.”
45. What the statements above tell us is that we are not above the law hence we are governed by laws. The laws may not always be just or according to our sense of justice. But again that is why we have



hierarchical court system. Wherever one is not happy with the outcome of a case, they can move up hierarchically and have their disputes settled, one way or another.

46. I completely understand the defendants when they fight for their land. It is good for historical records and it has palliative effect. It does not solve the Newtonian effect of their act. Isaac Newton's third law of motion is to the effect that every action in nature there is an equal and opposite reaction. The defendants therefore expected the effect of their actions will lead to a domino effect as it has done.
47. There is time, when one accedes to loss, even when you don't believe on the justice of the case. Men throughout generations have caused pains to each other. Sitting and reminiscing on what ifs, cannot get back the land. It is the reflection on the moral path taken and the possibility that, had one not, in that moment of weakness collected that money, then history will be difference. Wahenga left us with a saying that majuto ni mjukuu.
48. It is not always my way or the highway. This is always an inconvenient truth. As held in *Republic v County Government of Kitui Ex Parte Fairplan Systems Limited* [2022] eKLR, Justice A K Ndun'gu stated that there is a plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged.
49. Parties must recall that courts don't discharge orders as a matter of course. courts have to be properly moved. The court has so far as I am aware, not been moved to discharge those orders.
50. There is limit to wisdom. However, there is no limit to lack of it. This means that we may have at times to rely on other people wiser than us to show us the right path. Be it as it may, I note that the painful pangs the respondents are undergoing are self-inflicted.
51. I am unable to fathom, the level of courage someone will have in sitting down, in their wisdom or otherwise, connive, encompass and scheme to sell hot air to someone and collect a cool 12,090,700/= and escape unscathed not only from the law but also from the heavens.
52. Enough said, the application dated June 10, 2021 is a simple one. The auctioneers were sent to execute orders of the court. They have confirmed that they have carried out their duty been paid and left the scene. The applicant has been left to collect land and he respondents dust of their actions and picking the tab. It is real a fair game.
53. When the court gave instructions auctioneers to sell, through a warrant for attachment and sale of immovable property, there were natural consequences that those instructions were to be carried out. Payment had been made and the process closed. It is only natural that that process be concluded.
54. In the case of *Bernard Kiprono Bett versus Bernard Kiprono Koeb* (2021) eKLR, supplied by the applicant, the court stated that without an appeal or review, a vesting order should issue. In that case, Hon Lady Justice M C Oundo J, Sstated as doth: -

“ 11. Although the respondent herein had deponed that he had not participated in the subordinate court's proceedings and had only become aware of the judgment, decree and execution by way of sale of his land title No Kericho/Chemoiben/693 when he was served with the originating summons herein, and further that he had not been served with a notice of entry of judgment, notice to show cause and a notice for the hearing of the terms of the sale, yet it is nowhere on record that he sought to have the said proceedings annulled through an appeal process and no appeal, to the best of my knowledge has been filed almost two years down the line, so as to enable the court investigate into the respondent's allegations which as of now remain mere allegations. This is



not an application for review and neither is this court sitting as an appellate court in the matter.”

55. We have allowed this drama to go on for far too long. Again that it is the beauty of our constitution, one is allowed to be heard, even if they have nothing to say.
56. I find merit in the application and allow the same with costs.
57. It is my honest and sincere hope that this journey now ends here. Proxy wars may however start soon. Resurrections outside Easter will happen. We will be waiting with the sword of justice, which is our shield and defender

Determination

58. Consequently, I make the following orders: -
 - a. An order do issue vesting all that parcel of land known as Kwale/Diani/ S.S/414 to Mrs Amarbai Mavji K Hirani of P.O Box 99091-80107 Mombasa.
 - b. Cost of the application dated June 10, 2021 of Ksh 20,000/= be borne by the 1st defendant. The same be paid within 30days from the date hereof, in default execution do issue.
 - c. The file be mentioned before the deputy registrar on a date to be fixed immediately after this ruling to confirm vesting and issuance to the applicant of the vested title.
 - d. The file is hereby closed.

Dated, issued and delivered at Mombasa, virtually 3rd Day of **March** the year of our Lord Two Thousand and Twenty-Three.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Vincent Omollo for the Plaintiff/ Applicant

No appearance for the Respondents

Andrew -court assistant

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RULING MBSA 136 OF 2014 – JUSTICE MD KIZITO

