



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 27 OF 2019

ESTHER JEROTICH ROTICH..... 1ST APPELLANT

JOHN KIPKURUI ROTICH..... 2ND APPELLANT

VERSUS

SIDIAN BANK LIMITED.....1ST RESPONDENT

PROTUS WANGA

T/A TIMELESS DOLPHIN AUCTIONEERS..... 2ND RESPONDENT

RULING

1. The appellants moved this court by way of notice of motion application dated 30.7.2020. They are seeking for the following orders:

i. Spent

ii. That the default provision in the order of injunction made by the court on 24.7.2020 requiring the same to stand vacated in the event of non-compliance with the conditions to pay the auctioneers charges and deposit of the decretal sum in a joint interest earning account in the names of the advocates for the parties on record within 7 days be stayed and/or held in abeyance pending the hearing and determination of this application.

iii. That the court be pleased to review and vary the conditions in the order of injunction issued on the 24.7.2020 by:

a) Setting aside the order to pay the auctioneers charges as the same are normally already debited from the loan account being recovery charges and if not so debited the

auctioneer after Auction be directed to file the auctioneer's bill in court for assessment and/ or taxation.

b) Setting aside the condition to deposit the half of the decretal sum in a joint interest earning account in the names of both advocates on record within 7 days.

iv. That costs of this application be provided for.

2. The application is premised on the grounds that conditions were imposed on the order of injunction, thus there is an error apparent on the face of the record. In addition there is sufficient cause warranting a review and this application had been made without undue delay.

3. The supporting affidavit was sworn by Esther Jerotich Rotich, the 1st appellant who had the authority of the 2nd appellant. It was averred that this court delivered a ruling on 24.7.2020 in respect of an application for injunction pending an intended appeal to the Court of Appeal. The injunction was granted on condition that they paid the auctioneers charges and deposit half the decretal sum in an interest earning account in the names of both counsels at an agreed financial institution within 7 days, failure to which the orders shall stand vacated. This would result to enriching the auctioneer since it will be double payment.

4. The respondents had refused to supply them with the auctioneer charges and thus they should not be penalized for that. The auctioneers could file their bill of costs for assessment and/or taxation. There was no decretal sum in this case thus there was an error in the order issued by the court. In addition the court was asked to hold the orders in abeyance pending the hearing and determination of this application since if the injunction is vacated, the respondents would move to realize the securities and render this application null.

Replying affidavit

5. The legal officer of the 1st respondent Beverlyne Chweya swore a replying affidavit in opposition of the application dated 30.7.2020, averring that she was aware the appellants had applied for leave to appeal against the court's decision declining to grant them an injunction pending hearing of their appeal. On 24th July, 2020 a conditional injunction was granted. The injunction was to remain vacated if the conditions were not met by the appellants. The auctioneers fee was forwarded to the appellants though the same was not within the 7 days as ordered by this court, but it was received on 5.9.2020. The appellants' account was debited with incurred costs as a result of the stalled auction pursuant to section 44 of the Banking Act.

6. She had been informed by their counsel on record that the condition for payment of the auctioneers' fees had been overtaken by events and further the appellants had failed to deposit half of the loan amount in a joint account thus the order granted had been vacated. The "half the decretal amount" ordered by the court simply meant the outstanding loan, which the appellants had not made any effort to pay as ordered. This instant application was filed on 31st July, 2020 but the same was served on their advocate on record on 26th August, 2020.

7. In addition to the above, she was aware that the guarantor who was a party in the main suit from which the appeal emanates (Eld. CMCC no. 1225/2018) had filed another suit seeking for an injunction. This was a delaying tactic to frustrate the bank from realizing its security pending the hearing and determination of the suit as ordered by the court on 31.7.2019.

8. The conditions attached to the injunctive order was to balance the rights and interests of the bank and also preserve the appellants suit property. Their advocate on record had advised, which advise was reliable that it would be unfair and unjust if the court reviewed its orders of 24.7.2020 by vacating the conditions upon which the injunction was granted. It was her averment that if the condition to pay half the decretal sum/outstanding debt was vacated, then the injunction should be vacated too. The appellants request to tax the auctioneer's bill before the Deputy Registrar has been overtaken by events.

9. Further there was no apparent error on the face of the record that had stopped the appellants from depositing half of the outstanding loan debt as ordered by the court on 24.7.2020.

10. Parties agreed to canvas the application by way of written submission.

Appellant's submission.

11. It was their submission that the respondents had already conceded to the application dated 30.7.2020.

12. On the issue of the auctioneers bill, the appellants account had already been debited thus the appellants could not pay the same, thus it be allowed with costs since their act was being exploitative. The court was urged to take note that it's the respondents who had applied for leave to appeal against the decision which had issued an injunction against them, yet in their replying affidavit they are misleading the court that its the appellants who had sought to appeal.

13. The court was urged to rely on Order 45 rule 1 of the Civil Procedure Rules which gives the court power to review. Section 80 of the Civil Procedure Rules also confers the power for an aggrieved person to ask for review of judgment to the court that passed the decree or made the order.

14. It was their submission that there is an error on the face of the order since the court gave a condition for deposit of half of the decretal sum in a joint interest earning account yet there is no decretal sum in this case, making it hard for compliance with the same. The court was referred to ***Muyodi v. Industrial & Commercial Development Corporation & Anor(2006) 1EA 243***, where the Court of Appeal described an error as, ***"...an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out."***

The respondents could therefore not assert and assume that the court meant the outstanding loan debt. This is because the respondents never availed any evidence to show that there was any outstanding loan owed to them by the appellants.

15. Further, the respondents argument that the guarantor had filed another case is inapplicable in this instant application. The guarantor was not a party in this appeal.

16. Finally it was urged that the application was made without undue delay and therefore the same be allowed.

Respondents' submission.

17. It was their submission that the auctioneers charges had already been debited on the applicants account pursuant to section 44(2)(c) of the Banking Act.

18. On whether the court could set aside the conditions set on the injunctive order, it was urged that the court had balanced the bank interest and the appellants interest which was to preserve the suit property since they intended to appeal, the court had even noted that the appellants had not sought for stay order whose purpose was to preserve the subject matter. Therefore, the court cannot vacate the conditions without any alternative. In ***Aga Republic v. vice Chancellor Moi University & 3 ors Ex-parte Benjamin J.Gikenyi Magare [2018] eKLR***, where the court held, ***" at the request of a defendant or an interested party, the court can set aside permission previously granted. However, this is a very restricted power. It was never popular with judges, who required there to be a very clear-cut case before discharging the***

permission.”

19. Further, on whether the decretal sum meant the loan outstanding, the court was called upon to refer to the pleadings. The appellants has been seeking the court to stop the bank from selling the suit property which had been scheduled for auction on diverse dates whereupon the bank was exercising its statutory power to realize its security since the appellants had defaulted in loan repayment.

20. The appellants had not shown any seriousness in meeting the injunctive conditions. The instant application was prosecuted two months from the day the court gave the orders. See ***Abdul Kader Khaliq Said & 4 others v. National Bank of Kenya Ltd [2006]eklr.***

21. In addition, this instant application was made in bad faith since they had defaulted in the loan repayment. This was a delay tactic to frustrate the respondent from realizing its security.

22. Finally the court was urged to decline granting the orders being sought by the appellants.

Analysis and determination.

23. The issue that arises for determination is whether there is an error on the face of the record to warrant review by this court.

The Law

24. This court is guided by *Order 45 rule 1* of the *Civil Procedure Rules*, which provides as follows:

“Application for review of decree or order. 1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

25. In addition to the above *Section 80* of the *Civil Procedure Act* provides for review to an aggrieved party. It states as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

26. This court has jurisdiction conferred upon it via the stated provisions, in that any party aggrieved by an order or decree of the court should move the court by an application seeking for review orders without unreasonable delay.

27. The appellants allege that this court made an error on the face of the record and thus the same should be reviewed. The court on 24.7.2020 delivered a ruling in which paragraph 38 read as follows:-

“that an injunction do issue against the respondents restraining them from selling and/or transferring the land parcels known as PIONEER/NGERIA BLOCK 1[EATEC] 8956 and TARAKWA/LANGWAI BLOCK 1[BISERIA]/92 pending the hearing of the intended appeal to the court of Appeal on condition that the applicant pays auctioneers charges and deposits half the decretal amount in an agreed financial institution within 7 days hereof, failure to which the orders shall stand vacated.”

28. The appellant has a duty to demonstrate the following in an application for review.

a) there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at that time;

b) there is some mistake or error apparent on the face of the record; or

c) any other sufficient reason; and

d) that the application has been brought without unreasonable delay.

29. The appellants averred that there is an error apparent on the face of the record as there is no decretal amount. The respondents interpreted

the same to imply that the court had meant the outstanding loan debt, which was disputed by the appellants. It was the appellants' contention that the respondent cannot make an assumption for the court and expect the parties to obey the same yet there is an error which makes the orders unenforceable.

30. In the case of *Nyamogo & Nyamogo Advocates v. Kogo [2001] EA 174*, the Court of Appeal held that:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal...”

31. The subject matter in this case are two parcels of land known as *PIONEER/NGERIA BLOCK 1[EATEC] 8956 and TARAKWA/LANGWAI BLOCK 1[BISERIA]/92* which had been offered as security and the 1st respondent had intended to exercise its statutory power of sale after the land was put on advertisement.

32. The court had made the order dated 24.7.2020 upon filing of an application by the appellants seeking for an injunction against the respondents restraining them from selling and/or transferring the parcels of land. It's upon this application that the court granted a conditional injunctive order.

33. In *National Bank of Kenya Ltd v. Njau [1995-98]2EA 231(CAK)*, the Court of Appeal opined as follows in respect of applications for review:

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it.”

34. The appellants averred that they could not honor the order since the orders to be complied with had an error and only this court can review the same. The 1st respondent had assumed it was the outstanding loan that the appellants had to deposit half of it. The appellants strongly opposed this by stating that the 1st respondent throughout the proceedings did not state how much was owed to them. The appellants' in their notice of motion application dated 6.3.2019, which application had been supported by an affidavit sworn by the 1st appellant, had an annexure of a plaint dated 3.12.2018. The plaint at paragraph 5 states that the 1st plaintiff had been advanced a loan of ksh1,500,000/= being a term to clear the outstanding loan balance and interest charged at 23.5.% per annum. As collateral for the loan the above named parcels of land belonging to the 2nd appellant and one Benjamin Kiprotich Sambu were charged. This simply meant the 1st appellant had an outstanding loan with the 1st respondent.

35. The issue on the 1st respondent mentioning a suit filed by one Benjamin Kiprotich Sambu in a civil suit number 570/2020 does not arise here, the instant application being for review.

Auctioneers' fee

36. The appellants had asked the court to set aside the order to pay the auctioneer's charges. The appellants had urged that the same had been debited from the account and it would amount to double compensation. The 1st respondent in their replying affidavit dated 21.7.2020 confirmed to the court that the auctioneer's bill was sent late however at paragraph 9 of the affidavit they averred that the charges had been debited on the appellants account pursuant to *Section 44* of the *Banking Act*.

37. From the foregoing observations it is vivid that there wasn't a decretal sum in this matter and the applicant wouldn't have known the sum to deposit in a joint interest earning account. It can't be assumed that it was the sum owed to the Bank as the same is disputed by the applicant. The auctioneer's fee having been debited from the account, if paid would amount to double compensation. These amounts to errors apparent on the face of the record. As such the application has merit and is allowed.

38. The court therefore sets aside the conditions on the granted order of 24/7/2020 that; the applicant pays auctioneers charges and deposits half of the decretal amount in an agreed financial institution within 7 days hereof, failure to which the orders shall stand vacated.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 7th day of October, 2020.

In the presence of:-

Mr. Kisuya for the Applicant

Mr. Manani for the respondent absent

Ms Gladys - Court assistant