



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 942 OF 2016

OGEMBO ONDIEKI.....PLAINTIFF

VERSUS

SAMWEL BOSIRE ANGWENYI.....1ST DEFENDANT

KEROKA RIVERSIDE

SELF HELP GROUP.....2ND DEFENDANT

MARGARET NYANGAU.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Applicant filed an amended Notice of Motion dated 17th July 2020 brought pursuant to the provisions of section 44(1), Order 22 Rules 9, 10 and 48 and Order 50 Rule 15 of the Civil Procedure Rules as well as sections 1A, 1B, 3A and 63 of the Civil Procedure Act seeking the following orders:

a) Spent

b) That pending the hearing and determination of this application, the court be pleased to grant an order of prohibition prohibiting the judgment debtor, his family, legal representatives and all persons claiming under him from transferring, charging, alienating or disposing the interest over L.R NO. WEST KITUTU/BOGEKA/2997 or in any way taking any benefit from such purported transfer, sale, charge and the attachment to remain in place until the decretal sum be paid into court or to the counsel for the Plaintiff/Decree holder in full or further orders of the court.

c) That pending the hearing and determination of this application, the Land Registrar-Kisii County be directed to register an order of inhibition over L.R NO. WEST KITUTU/BOGEKA/2997 inhibiting and prohibiting the judgment debtor, his family, legal representatives and all persons from transferring, charging, alienating or disposing the interest over L.R NO. WEST KITUTU/BOGEKA/2997 in any way or taking any benefit from such purported transfer, sale or charge and such attachment to remain in place until further orders of this court.

d) That this honourable court be pleased to authorize the Decree-holder to sell parcel number L.R NO. WEST KITUTU/BOGEKA/2997 owned by the Defendant/judgment debtor through any licensed auctioneer or court bailiff through public auction or any other lawful means and the proceeds realized from the sale be used to offset the decretal sum which now stands at Kshs. 4 million, unless the judgment debtor pays the outstanding decretal sum immediately and/or upfront together with the auctioneer's charges.

e) That the Judgment debtor herein be ordered to hand over the property herein to the successful purchaser failure to which the same be forcefully evited therefrom.

f) The O.C.S Kisii Police Station to enforce limb 5 of this order.

g) The costs of this application be borne by the Respondents

h) Such further or other orders be made as the court may deem fit and expedient.

2. The application is premised on the grounds outlined on the face of the Notice of Motion the essence of which is that the judgment debtor has refused to settle the decretal sum yet he has immovable property that is L.R NO. WEST KITUTU/BOGEKA/2997, which is capable of settling the amount in full. The application is also based on the Applicant's supporting affidavit sworn on the 17th day of July 2020 in which the Applicant gives a background of this case which can be summarized as follows:

3. The Plaintiff and 1st Defendant entered into an agreement dated 25th August 2010 for the sale of L.R No. WEST KITUTU/BOGEKA/2997. After the 1st Defendant paid the purchase price in full, the Plaintiff filed this suit in court. The Plaintiff subsequently signed a tenancy agreement where he was to pay a monthly rent of Kshs. 15,000/= but he has been living in the suit premises for 9 years without making any payment. The Plaintiff further received a sum of Kshs. 300,000/= from the 1st Defendant to enable him relocate but he failed to do so. The parties opted to settle the matter through mediation and on 16th March 2017, they entered into a mediation agreement before the Assistant Deputy Commissioner whereby the Plaintiff agreed to pay the 1st Defendant the sum of Kshs. 3,000,000/=. The Plaintiff subsequently failed to honour the said agreement. On 25th April 2019, the court adopted the mediation agreement as a judgment of the court in the presence of both parties. As a result of the Plaintiff's failure to pay the decretal sum, the 1st Defendant applied for execution by way of Notice to Show Cause and on 16th July 2019 the court directed that execution proceeds. The Plaintiff then filed an application to set aside the consent order but the said application was dismissed.

4. The Plaintiff/ Judgment debtor has resisted the application through the Grounds of Opposition dated 14th July 2020 in which he states that he is not the registered proprietor of the land known as WEST KITUTU/BOGEKA/2997. He further states that he has filed an application for leave to appeal out of time vide Kisumu CA Civil Application No. 74 of 2020 and that if this application is granted, his appeal will be rendered nugatory.

5. The application was canvassed by way of written submissions and even though both parties were granted adequate time to file their submissions, only the Applicant filed his submissions.

ISSUES, ANALYSIS AND DETERMINATION.

6. The singular issue for determination is whether the prohibitory order should be granted.

Order 22 Rule 48(1) of the Civil Procedure Rules, which stipulates that:-

“Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”

7. A Prohibitory order is an order obtained from the Court prohibiting a Judgment debtor from effecting any dealings in relation to his or her landed properties or interest in land held by him or her. Where judgment is obtained for the payment of money, in the event that a judgment debtor refuses or neglects to comply with the judgment made by the Court, the judgment creditor can proceed to obtain a Prohibitory Order, where the properties of the judgment debtor involves land. After obtaining the order, the judgment creditor can proceed to obtain the order to auction the piece of land to recover the same. However, it may not be justified to obtain a Prohibitory order where the land is charged to a bank or financial institution for a credit facility.

8. In considering whether to grant the order of prohibition, the Court must have regard to the provisions of Section 38 of the Civil Procedure Act, states that:-

(1) Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree -

(a) by delivery of any property specifically decreed;

(b) by attachment and sale, or by sale without attachment, of any property;

(2) An application made under this section shall—

(a) specify the land to which it relates;

(b) specify the disposition alleged to be prejudicial;

(c) be served on—

i. the person who has made the disposition;

ii. the person in whose favour the disposition has been made;

iii. any other person involved in the disposition from whom compensation is sought.

9. In furtherance of the above provisions, Section 44 (1) of the Act provides that:-

“property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.

10. In the instant suit, it has been submitted that even though the suit property is registered in the name of the 3rd Defendant who purchased the same from the 1st Defendant, the property still belongs to the Plaintiff in so far as he reneged on the contract and opted to refund the sum of Kshs. 3 million as per the court decree. It has been contended that the property belongs to the Plaintiff as the 3rd Defendant was refunded the sum of 3.5 million which he had hitherto paid to the 1st Defendant as consideration. It is the 1st Defendant’s contention that the property is therefore available for execution.

11. It is not in dispute that L.R No. WEST KITUTU/BOGEKA/2997 is registered in the name of the 3rd Defendant. It is also not in dispute that the Plaintiff opted to retain the suit property and agreed to refund the Defendants the amount they had paid. The Plaintiff having failed to honour the consent cannot now turn around and claim that the suit property does not belong to him. The 3rd Defendant in whose name the land is registered has since been refunded the purchase price of Kshs. 3,500,000 by the 1st Defendant. Technically therefore, the property has reverted to the Plaintiff/judgment debtor. I am therefore constrained to agree with counsel for the Applicant that the Plaintiff has a beneficial interest in the same and thus has disposing power which he may exercise for his benefit as envisaged by section 44 (1) of the Civil Procedure Act. In the premises it is my finding that the said property is available for execution.

12. The argument by counsel for the Plaintiff that the Plaintiff has filed an application in the Court of Appeal for leave to appeal out of time does not amount to a stay of execution. The provisions of Order 42 Rule 6 of the Civil Procedure Rules are very clear that:

6.(1) “No appeal or second appeal shall operate as a stay execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such order or decree, and whether the application for such stay shall be granted or refused, by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as it may deem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

13. It is telling that the Plaintiff opted not apply for stay of execution in this court and instead filed the Appeal in the Court of Appeal. Furthermore, he has failed to serve the said application upon the Applicant. Clearly, the Plaintiff is intent on postponing the day of reckoning by purporting to file an appeal against a consent order and this court will not allow him to abuse the court process.

14. In the premises of the foregoing, I find merit in the application and I grant it in terms of prayers 2, 3, 4, 5 and 6 of the Notice of Motion.

The costs of this application shall be borne by the Plaintiff.

Dated, signed and delivered at Kisii this 25th day of November 2020.

J.M ONYANGO

JUDGE