



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 439 OF 1985

MANSO ENTERPRISES LTD.....APPELLANT

VERSUS

KENYA COMMERCIAL BANK LTD & ANOTHER.....RESPONDENT

JUDGMENT

May 19, 1989, **Githinji J** delivered the following Judgment.

This is an appeal from the Ruling/Order of the Deputy Registrar dated 26/4/88 settling the terms of sale of the appellant's plot No 2605 situated in Malindi Town.

The appellant is the second defendant in the suit. The first defendant is Kenya Commercial Bank Ltd. Undated *ex-parte* judgment in default of entering appearance was entered against the appellant for shs 101,076/55 with costs and interest. The plaintiff in the suit filed an application for execution of decree by attachment and sale of the applicant's said plot.

On 2/12/86, a prohibitory order was issued. The application for settling terms of proclamation of sale was fixed for hearing on 14/4/88. During the hearing of the application, the appellant's advocate objected to the application on several grounds namely, that the extract of title had not been attached, the property was charged to the second defendant, that there were two pending suits in the High Court Nairobi between the appellant and the first defendant, that there was no current Valuation Report of the plot and that the financial liability of the appellant had not been inquired.

The Deputy Registrar adjourned ruling to 26/4/88 and on 26/4/88 he read the ruling dismissing the appellant's objections. The ruling was read in the absence of the appellant's advocate. After dismissing the ruling, the Deputy Registrar ordered that the terms of sale are those stated in the terms of sale (filed on 23/9/87). The appellant's advocate appeared shortly after the ruling was read and applied for leave to appeal which leave was granted.

There are five grounds of appeal as follows:-

1. The learned Deputy Registrar erred in law and on the facts in settling the terms of sale without the Abstract of Title.
2. The learned Deputy Registrar erred in law and in fact in settling the terms of sale in the absence of the first defendant.

3. The learned Deputy Registrar erred in law and in fact in settling the terms of sale when proceeding in Nairobi HCCC. 2037/86 and 566/86 between the defendants were subjudice.

4. The learned Deputy Registrar erred in law and in fact in the absence of current market value, valuation of the property from stating a reasonable reserve price.

5. The Deputy Registrar erred in law and in fact in settling terms of sale without inquiring and/or inquiring into the financial liability of the second defendant to the first defendant under the statutory charge registered by the first defendant against the second defendant's property.

The appellant prays that the plaintiff's application for settling terms of sale be set aside, be dismissed and / or varied.

Mr H Jiwaji, the appellant's advocate adopted the submissions he made before the Deputy Registrar. According to him, it was imperative for the Deputy Registrar to ask for details of the property which were lacking, the details of the charge, valuation of the property and fix a reserve price. He contends that the property is valued at Shs 800,000/- and is leased to Kenya Posts & Telecommunications Corporation at a monthly rent of shs 7,500/- which appellant was receiving as rent. He contended further that the appellant has raised the decretal sum which he has deposited with his advocate.

Mr Kassim Shah also adopted the submissions he made before Deputy Registrar and added that, there is no legal requirement that extract of title be produced, that Deputy Registrar fix a reserve price; that a valuation report be produced and that the interest of first defendant (Chargee) were covered by terms of sale; that the suits pending in Nairobi did not concern the plaintiff, that the valuation given by appellant is not reliable and that the auctioneer was given a reserve price of shs 450,000/-.

What is the appeal all about? On receipt of the plaintiff's application for attachment and sale of the appellant's plot the Deputy Registrar made the following order on 2/12/86.

"1. Let prohibitory order be issued in respect of the properties mentioned in the application.

2. Terms of sale of the properties to be settled and notice of settlement of terms of sale to be issued on application."

A prohibitory order (Form Civil 22) was issued on the same day. That prohibitory order as provided in Order XXI rule 49 (1) of Civil Procedure Rules had the effect of attaching the appellant's plot.

In compliance with the second order made by Deputy Registrar on 2/12/87, a notice in Form Civil 27D was given to the appellant that whereas the "decree holder" has applied for sale of immovable property ... (underlining mine) the date of settling terms of the Proclamation of Sale had been fixed as 14/4/88. That notice which is in prescribed form is in compliance with Order XXI rule 61(2) of the Civil Procedure Rules and as can be seen from the underlined words, at that stage, the order to sell the appellant's plot had not yet been made. Order XXI rule 61(1) reads:-

"Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause a Public Notice and advertisement of the intended sale to be given in such a manner as the court may direct."

Order XXI rule 61(3) starts with the following words:-

"Every application for an order for sale under this rule shall be accompanied by"

That means that the order for sale of immovable property is made by the court under Order XXI rule 61 of the Civil Procedure Rules. That interpretation is supported by Notification of Sale (Form Civil 28D) issued after the settling of the terms of proclamation (Notification) of sale which notice is in compliance with Order XXI rule 61(1). That notice which is also in prescribed form reads in part:-

“Notice is hereby given that, under Rule 61 of Order XXI of Civil Procedure (Revised) Rules 1948, an order has been passed by this court for sale of attached property mentioned in the annexed schedule.....”

The only reasonable construction of Order XXI rule 61(1), 61(2) and 61(3) of the Civil Procedure Rules read together with the prescribed Forms Civil 27D and Civil 28D is that the order settling the terms of Proclamation (Notification) of Sale in effect operates as order to sell the immovable property. The appellant’s appeal is therefore in effect an appeal against the validity of the order to sell his plot which had already been attached on the grounds that the conditions in the grounds of appeal were not fulfilled before the order was made.

The Deputy Registrar made the order appealed from in exercise of jurisdiction conferred by Order XLVII rule 3 of Civil Procedure Rules. Under that rule, formal orders for attachment and sale of property may be made by the Registrar

“but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a Judge. Such objections shall be taken by motion on notice.”

In *Mandavia v Rattan Singh*, [1968] EA 146, the former Court of Appeal for Eastern Africa considered the powers of Deputy Registrar under Order XLVIII rule 3. In that case, the Court of Appeal was dealing with an appeal from the High Court which dismissed an application under Order XXI rule 79 to set aside the sale of Judgment Debtor’s properties on grounds of irregularities and fraud in the conduct and publishing of the sale. One of the grounds of appeal was that the Deputy Registrar acted without jurisdiction in ordering the sale of properties under Order XXI rule 59 and in the subsequent proceedings he conducted. The Deputy Registrar had settled the Notification of Sale in the presence of respective advocates. The terms and conditions of sale were settled by consent. Later the judgment debtor complained that the advertisement had misdescribed the number of buildings on the plots and that particulars of huge monthly incomes and large areas had been suppressed. The Deputy Registrar directed the advocate for Judgment debtor to provide further particulars to be inserted in a fresh advertisement but those particulars were never supplied and sale took place.

In the leading judgment of the Court Duffs, JA, stated at page 152 I:-

“The intention of this rule is to allow the Registrar to conduct necessary proceedings and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. I am, therefore, of the opinion that the expression ‘formal orders for attachment and sale of property’ include not only the actual orders for the attachment and sale but any other consequential orders which are necessary to effect this purpose, and this includes an order made under rule 61.”

As regards the meaning of the words “proceedings thereunder” in Order XLVIII rule 3, Spry, JA in the same appeal said:-

“To my mind, it must refer to rule 1 which empowers the Registrar to do ministerial acts and I think that the acts of the Registrar that are complained of, the settling of the conditions of sale and so on, as long as they were non-controversial, could properly be described as ministerial. Either party could, under rule 3 have required those proceedings to be taken by a Judge but in fact no objection by the advocate then appearing for Mr Mandavia (appellant).”

In the *Mandavia’s* case (supra) the validity of the original order of sale of the appellant’s properties was not made the subject of the appeal and it had not been attacked in the High Court. Duffus, JA however, at page 151 D-E, expressed the opinion that the “words formal orders for attachment and sale of property” would empower the Registrar to order a sale in a case like this where the order is made by consent and without objection” It is clear from *Mandavia’s* case that the Deputy Registrar has jurisdiction to make

formal orders for attachment and sale of property provided that the proceedings before him are not contested and are non-controversial.

Once objection is taken to the proceedings, then as provided in Order XLVIII rule 3 of Civil Procedure Rules, “all further proceedings shall be before a Judge”. When the advocates appeared before the Deputy Registrar on 14/4/88 to settle the terms of Notification of Sale, Mr H Jiwaji for the appellant informed the court that he had “some objections to making orders as to terms of sale of the properties attached therein”. Mr Chohan for Ddecree holder then informed the Deputy Registrar that he had not been notified of the proposed objections to terms of sale. Thereafter Mr H Jiwaji addressed the Deputy Registrar as to the objections. Mr Chohan then replied. The Deputy Registrar then reserved the ruling and on 26/4/88, read the ruling. In the ruling, he considered the objections raised and found them to have no merit and dismissed the objection and proceeded to settle terms of Notification of Sale.

In effect, the Deputy Registrar allowed the objection to be taken orally though Order XLVIII rule 3 requires that the objections should be taken by a notice of motion. I think that, once Mr Jiwaji informed the Deputy Registrar that he had objections to the proceedings, the Deputy Registrar should have asked him to file the objections formally by notice of motion and upon the filing of the notice of motion, the Deputy Registrar should have directed that all further proceedings be before a Judge.

Alternatively, as there was no formal objection, the Deputy Registrar should have refused to entertain the objection and proceed to settle the Notification of Sale. But once the Deputy Registrar, proceeded to entertain the oral objection, he by inference waived the requirement that objection be taken by Notice of Motion and validated the objection. From then on, as the matters became controversial, all further proceedings should have been before a Judge and the Deputy Registrar ceased to have jurisdiction to decide on the merits of the application. The order of sale having been made without jurisdiction, is a nullity and the subsequent sale is also a nullity.

That subsequent sale was conducted after this court had made an order staying the sale on 8/7/88. The appellant’s letter dated 11/7/88 and the auctioneer’s letter dated also on 11/7/88, show that the appellant communicated to the auctioneer that the sale had been stayed but as the order was not served, the auctioneer did not stop the sale “just because of your message through telephone”.

Mr Jiwaji asks that the sale be set aside under section 3A of the Civil Procedure Act. The sale has not been confirmed and is not yet absolute.

In an earlier application, the appellant had prayed among other things that sale be set aside pending the hearing of this application and I expressed an opinion in the ruling dated 15/11/88 that once the property is sold by public auction the sale can only be set aside on appropriate application either under Order XXI rule 78 or 79 of Civil Procedure Rules. But this appeal concerns the validity of the order of sale and as the property had not been sold when the appeal was filed, an application to set aside sale under Order XXI rule 79 could not have been filed. In any case, the question whether the court had jurisdiction to sell the property or whether the sale is a nullity or whether the sale is bad because it was held after it had been stayed is outside the scope of Order XXI rule 79 and where the sale is a nullity it can be set aside even without an application, in the inherent jurisdiction of the court – see commentary 18 and 20 to Indian Order 21 rule 90 (equivalent to Kenya Order XXI rule 79) at page 1184 *Mulla’s Code of Civil Procedure* 13th Ed Vol II.

The Civil Procedure Rules have no provisions for setting aside sale in peculiar circumstances of this appeal but just like in a case where a judgment is obtained irregularly and not in accordance with law and practice laid down in the Civil Procedure Rules, the order of sale would be set aside *ex debito justitiae* under section 3A of the Civil Procedure Act – see *Magon v Ottoman Bank* [1968] EA 156.

If I am wrong that the order of sale was a nullity for lack of jurisdiction, I will proceed to consider the appeal on its merit. Order XXI rule 61(3) provides that every application for sale shall be accompanied by a statement signed either by the decree holder or his advocate containing, so far as they are known or can be ascertained the following matters:

- (a) the property to be sold,
- (b) any incumbrance to which the property is liable.
- (c) The amount for recovery of which the sale is ordered, and
- (d) Every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property.

Under Order XXI rule (2) the public notice should specify as fairly and accurately the particulars in (a) – (d) above. The Terms of Sale filed on 23/9/87 by decree holders’ advocates qualifies as a statement required under Order XXI rule 61(3) only that, that statement is not signed. I do not think that lack of signature is a material irregularity. Order XXI rule 61(4) gives the Deputy Registrar power to summon any witness and require him to produce any documents for purpose of ascertaining the matters to be put in the public notice. As it is clear from *Mandavia v Rattan Singh* (supra), in Kenya the dominant instrument is the public notice as in India it is the proclamation and the advertisement is merely an additional mode of publicity. It would appear from Rule 61 that it is the duty of the decree holder or his advocate to provide particulars specified in rule 61(2) (a) – (d) but the court has a duty to ascertain those matters and see that they are fairly specific and accurate. The public notice (Notification of Sale) is intended to guide the would be bidders and to ensure that the property will fetch a fair price at the public auction. Taking the first ground of appeal, the Deputy Registrar held that the Deputy Registrar did not ask for extract of title when he ordered that prohibitory order to issue. Although the Deputy Registrar who made prohibitory order did not require the decree holder to produce a certified extract of title, the Deputy Registrar settling the terms of notification of sale may call for it to ascertain the matters to be specified in the public notice. As rule 10 Order XXI shows, the extract of title may specify persons possessing any interest in land, the revenue of the plot or the person liable to pay revenue for the land.

The extract of title is the best guide to ascertaining the encumbrance to which the property is liable. If the extract of title was produced as required by the appellant, better particulars such as the rates and the amount for which the plot was charged which are material particulars, could have been discovered and be inserted in the notification of sale to guide any bidder and ensure a fair bid at the auction. The encumbrance as described in the statement lacked material particulars. Grounds No 3 and 5 are related to Ground No 1.

Mr Jiwaji stated that the first defendant was required to give the particulars of balance of loan. The Deputy Registrar had power to summon the first defendant to provide the particulars of the balance of the loan unpaid. The balance of unpaid loan is a material particular as it has a bearing on the bidding price. If the property is heavily mortgaged the bidding price could be low and vice versa. Without those particulars, it cannot be said that the encumbrance was fairly specified.

As regards ground No 4, it is true that the rules do not provide that the Decree Holder state the value of the property. However, rule 61(2) (d) provides that everything material for the purchaser to know in order to judge the nature of the property should be stated.

Commentary 3 to Indian Order 21 rule 66(e) (similar to Kenya rule 61(2)(d) in *Mulla’s Code of Civil Procedure* 13th Edn. Vol. II page 1130, shows that value of property is a very material fact for the purchaser to know. The same commentary however indicates that there had been divergent decisions in the Indian courts as to who should provide valuation and as to whether value should be inserted in the proclamation of sale until some amendments were made to the rule. Those amendments relieved the court the burden of assessing the value of the property and left it to the Decree Holder and Judgment Debtor to state the value.

There has not been similar amendments to Kenya rules which amendments, I think, are long overdue in view of the persistent public outcry that valuable properties are sold for peanuts at public auctions. As the rules do not give any guidance and in the absence of similar amendment to our rules, I think it should be left to the purchaser to judge the value. But where as in this appeal the judgment debtor requires value to

be put on the Notification of Sale in his own interest the Deputy Registrar should ask him to state the value and if decree holder disputes the value, he should also be asked to state the value and in case of divergence, the court should fix a fair reserve price. I think that in the present case where the Judgment debtor needs to protect his interest and where valuable property is to be sold for disproportionately small debt, the Deputy Registrar should have asked the Judgment debtor to provide a valuation and fix a fair reserve price which reserve price was not put.

Mr Jiwaji says that the property is income producing and is leased to Kenya Posts & Telecommunications at a monthly rent for shs 7,500/-. A payment voucher has been produced to verify this. That the property is improved and producing a monthly income of shs 7,500/- is a material particular which should have been provided under rule 61(2) (d). The lease to Kenya Posts & Telecommunications is also an encumbrance and details of the lease should have been provided.

Ground No 3 has no merit as the appellant does not allege that the first defendant was acting fraudulently through the decree holder to defeat the orders of execution in the Nairobi case or to irregularly enforce the security.

According to commentary No 7 to Indian Order 21 rule 90 (similar to Kenya Order XXI rule 79) at page 1173 of *Mulla's Code of Civil Procedure* 13th Edn. Vol II, material irregularity in publishing sale include omission to determine value of the property, failure to specify the revenue assessed on the property or amount of income derived from it, failure to state the incumbrances and failure to state improvement of the property.

Those irregularities would entitle the court, on an application under Order XXI rule 79, to set aside the sale if the applicant has sustained substantial injury by reason of such irregularities.

The Notification of Sale given by the Deputy Registrar on 27/4/88 only states the amount to be recovered but does not state the property to be sold, the incumbrances, or any other material details falling under rule 61 (2) (d). The schedule to the notification of sale where those details should have been inserted is in fact left blank.

So, there was not only the failure to state material particulars I have shown above relating to the encumbrances and the property in general but also a total omission in the notification of sale to state the property to be sold and the encumbrances. The Notification of Sale which is the dominant public notice did not comply with rule 61(2) of Order XXI. The appeal has therefore merit and as Civil Procedure Rules do not provide for an eventuality peculiar to this appeal, the order of sale should be set aside under section 3A of Civil Procedure Rules.

Mr Jiwaji informed the court that the appellant has now deposited the decretal sum with him. Although I am allowing the appeal, it is just that the appellant pays the decretal sum already deposited with his advocate to decree holder's advocates. The sale has been conducted and status quo should be restored. There is a return filed by the auctioneer dated 9/7/88 showing that the property was sold at shs 453,000/- and that down payment of shs 113,250/- was made. Out of the sum the auctioneer retained shs 8,950/- as his charges and sent a draft for shs 104,300/- to court. It is not known if the balance of purchase price was paid. The application for execution indicates that the proceeds of sale were to be deposited in an account at Kenya Finance Corporation. The terms of sale indicate that it is the surplus of proceeds of sale which was to be deposited in the account.

The court file does not indicate that any money has been deposited in court. If the decretal sum was deposited in a bank account, then it should have been earning interest and the purchaser does not stand to lose anything other than the shs 8,950/- retained as auctioneer's charges. As the appellant owed the decretal sum at the time of sale and appeal has been allowed on technical grounds, the appellant should refund the shs 8,950/- to decree holders' advocates so that the purchaser will get back the full purchase price with interest if any.

As regards the costs of this appeal, it is the decree holder to blame for failing to ensure that all details as

would comply with rule 61(2) were provided and should pay the costs of the appeal.

I allow the appeal for reasons stated above with costs to the appellant and make the following additional orders:-

1. The appellant to pay to the decree holders' advocates the decretal sum deposited with appellant's advocates plus shs 8,950/- auctioneer's charges within 10 days, after which the Prohibitory Order be raised. In default the Prohibitory Order to remain and decree holder be at liberty to fix the settling notification of sale afresh.

2. The decree holders' advocates to refund the whole of the purchaser price with interest if any to the purchaser within 21 days. If any money has been deposited in court to be paid to the decree holders' advocates for refund to the purchaser.

Dated and delivered at NMombasa this 19th day of May , 1989

E.M GITHINJI

JUDGE