REPUBLIC OF KENYA

Muyale v Mulefu

Court of Appeal, at Kisumu August 9, 1985

Hancox, Nyarangi JJA & Gachuhi Ag JA

Civil Application No NAI 41 of 1985
(Application from the High Court at Kakamega, Aganyanya J, High Court Civil Case No 13 of 1979)

August 9, 1985,Gachuhi J delivered the following Judgment.

Batholomew Muyale filed a notice of motion before this court for stay of execution against the order of the High Court (Aganyanya, J) dated April 15, 1985 dismissing his application for stay of execution. In his affidavit in support of the application, he refers to the fact that he has filed a High Court Civil Suit against Kenya Commercial Bank Ltd; in a bid to recover his land, which was sold by the bank by way of public auction.

I have had the advantage of looking at the High Court file at Kakamega being Civil Suit No 13 of 1979. It is the suit filed by Shem Nyambasi Mulefu and Elija Nandi Chikamai against the applicant for injunction, eviction and general damages. The defendant having filed his defence an order by consent was recorded on September 25, 1979 before Cotran J (as he then was) , as follows:

> ***"By Consent:***
>
> ***The defendant to leave parcel No South Kabras/Bukusu/952 within 6 months from today. Liberty to defendant to apply to set aside the case."***

Since then, the applicant has made several applications to the High Court for stay of execution and for setting aside the said order without success. He made an application to this court (Potter, JA) for leave to file appeal out of time which application was dismissed on August 29, 1980. However, the dismissal was referred to the full court (Madan, Miller and Potter, JJA) which reference was also dismissed on December 3, 1981. The matter has again started at the High Court Kakamega and again has come to this court.

By looking at these numerous applications, one might condemn the applicant as vexatious litigant which is not necessarily the case. The applicant cannot understand why he should lose his valuable land, where he stays with his two wives and 22 children some of whom have married and have no other place to go to. He does not dispute the debt and all what he has been saying is that he needs time to pay, which proposition has not been genuine as he had not taken any steps in the past to put his words into action. At one time, he came up with a claim that he should be left with two acres for his family to stay, and at another time offered his sugarcane to the respondent to repay themselves. He has now informed this court that the has given his advocate Kshs 30,000 to be paid to the respondents.

In Civil Application No NAI 33 of 1980 (KMU 10/80) between the same parties, this court (Madan,

Miller and Potter, JJA) in its ruling dated December 3, 1981, commented:

> ***"This case prompts us to question whether peasants land owners should be exposed to the harsh and irrevocable consequences of succumbing to the temptation's offered by a modern banking system. We would commend for consideration by those empowered to amend the law of this country, to suggestion that small holders of agricultural land should not be allowed to charge more than a certain proportion of their land."***

It is certain that the bank or any financial institution is ready to dish out money as loans to peasants, but the implication of such loans are not really understood or assimilated by the recipient as to what might be his obligation regarding the repayments. It is for these reasons that the applicant cannot understand why his land should be sold without a court order for failure to meet this obligation. Similarly, it has become a habit for the banks and other financiers to sell the securities for loans under their statutory powers of sale at very much below the market price.

All the past applicant's application failed on the ground that the applicant had not taken steps to challenge the said sale. He has now filed a recent suit against the Kenya Commercial Bank Ltd in Kisumu Civil Suit No 115 of 1984. The respondents herein are not parties to it. Until the time this suit was referred to in the submissions in this application, the respondents were not aware of it. The parties in this application being different from the parties in Civil Suit No 115 of 1984, any order of the court made, cannot affect them or anybody else who is not a party to it. Any judgment that may be passed in Civil Suit No 115 of 1984 would not affect the respondents in this suit and for that reason a stay cannot be granted as requested on that basis unless the respondents are parties to that suit, and application for stay be made in that suit.

But the problem of this land does not end there. Although the respondents got themselves registered as proprietors of the applicant's parcel of land and got certificate of title, the suit filed for injunction as to trespass, possession and damages relates to a different parcel of land South Kabras/Bukusu/952.It is to this parcel of land that the defendant pleaded. It is for this parcel of land that the consent order was obtained and not parcel of land South Kabras/Bukusu/852 where the applicant resides and of which the respondents are now registered as owners. I do not view this as a mere technical error or misnomer. The principles of pleading is that the subject matter of any suit must be clearly and correctly described so as to avoid any execution on wrong property. The plaintiffs filed suit describing the property as South Kabras/Bukusu/852 and is only on that property they obtained judgment. It is only on that property that they can levy execution either for trespass or possession, but cannot execute or obtain possession on parcel No South Kabras/Bukusu/852. This is a clear irregularity.

Although this was not a ground of appeal before this court, nevertheless this court has a duty to invoke its inherent jurisdiction in the matter and prevent any act that may be caused by such irregularity. In the case of Magon v Otteman Bank [1968] EA 156 Duffus JA as he then was, in a case of setting aside ex parte judgment at page 158 letter F stated:

> ***"Rule 10, by virtue of which the judgment has been set aside, does give the court a discretion to set aside the judgment upon such terms as may be just, but in a case like this where the obtaining of the judgment was irregular and not in accordance with the law and practice as laid down in our Civil Procedure Rules, the appellant is clearly entitled as of right to have the judgment set aside without any conditions being imposed. <u>This is a case in which the court, in my view, have had power to act under its inherent jurisdiction</u> if the specific provisions of Order IX rule 10 did not apply. (underlining is mine).***

On the basis of this decision, to prevent execution on the wrong property for which judgment was obtained, I would allow the application with costs, and set aside the eviction order dated April 15, 1985.

Hancox JA. Unfortunately in this case though the respondents, as a result of the sale by the bank, became the owners of, and acquired a valid title to, the land at Kabras/Bukusu/852, the initial action for eviction

was brought in respect of Kabras/Bukusu/952 and the decree reflected that situation. No application was ever made either under section 99 of the Civil Procedure Act or otherwise, to correct the error that undoubtedly existed, with the result that the consent order of September 25, 1979, was in respect of the wrong piece of land. The strictures of this court in its judgment on the reference from a single judge in the intended appeal by the applicant from a decision refusing to set aside the sale were therefore inappropriate. The inception of the errors was the incorrect description in the original plaint.

I therefore agree entirely with the judgment of Gachuhi Ag JA, which I have had the advantage of reading in draft. This was a fundamental, and not merely a technical error and the only possible course is to allow the application, set aside the eviction order granted by Aganyanya J which was in the same case as the consent order recorded by Cotran J, in 1979, leaving the respondents to pursue their remedies according to law. I would also grant the costs to the applicant.

As Nyarangi JA, also agrees these are the orders of this court. Nyarangi JA. I agree with the judgment prepared by Gachuhi Ag JA, which I have had the advantage of reading in draft.

The error in the description of the title is so fundamental that it might have resulted in different property being attached with dire consequences for the respondents. The error in the original plaint contravened the nature of pleadings which is:

> ***"the means by which the parties are enabled to state and frame the issues … The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases …" Bulley & Leake and Jacob: Precedents of Pleadings, 12th Edition, page 3.***

As a general rule, relief not founded on the pleadings will not be given: Candy v Caspar Air Charters Ltd [1956] 23 EACA 139 (CA-K) and there were no other correct particulars of the claim given with reasonable accuracy to offset the incorrect description of the land; Patel v Fleet Transport Co Ltd [1960] EA 1025 (CA-K).

I agree that the application should be allowed with costs and that the eviction order referred to by Hancox JA in his judgment should be set aside. I concur with the order proposed by Hancox JA on costs.