



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 105 OF 2011

PETER MBOGHO MWANGOMBE.....PLAINTIFF/RESPONDENT

VERSUS

ZAHARA ADAM..... DEFENDANT

AND

NOREEN GULAM..... OBJECTOR/APPLICANT

AND

JAPHET MWASI MWAMBINGO.....INTERESTED PARTY

RULING

1. There are three applications filed and on record. Two applications were filed by the Objector/Applicant and the 3rd applicant belongs to the plaintiff.

2. On 18th June 2018, Mr. Kinyua advocate appearing for the objector informed the court that he wishes to argue the application dated 15th May 2018 seeking orders of injunction and setting aside the sale simultaneously with the application dated 8th June 2018 which sought leave to amend the notice of motion dated 24th January 2018. Mr Mwinzi did not oppose the application seeking to amend. Consequently the 2nd application by the objector is the one filed on 18th June 2018 seeking orders of stay of execution of the ruling delivered on 28th April 2017 as well as leave to file appeal out of time. The plaintiff's application is dated 13th June 2018 seeking to set aside orders of interim stay that were issued on 6th February 2018.

3. The application dated 15th May 2018 was brought under the provisions of section 80 of Land Registration Act, Section 3A of Cap 21 and Order 51 and 40 of the Civil Procedure Rules. The objector applicant sought orders that;

1. Spent;

2. Spent;

3. That there be an injunctive order restraining the respondent by themselves agents and/or servants from dealing with L.R No. 1956/966 Title No. 30456 Voi in any manner whatsoever pending hearing and determination of notice of motion dated 24th January 2018 and 15th May 2018.

4. That this Honourable Court be pleased to grant leave to enjoin Japhet Mwasi Mwabingu as an interested party herein.

5. That this Honourable Court be pleased to cancel and nullify the purported sale by Mr. Sammy Muli Mutua t/a Work No Words Auctioneers to one Japhet Mwasi Mwanbingu and an order directing the Registrar of land Voi to cancel any registration in respect of the sale if any.

6. That costs of the application be provided for.

4. The application is premised several grounds inter alia that the court on 6th February 2018 issued a stay of execution which were

subsequently extended on 8th March 2018 until 17th May 2018. That the said sale was a nullity having been conducted in disobedience of a court order. Further that the 2nd Respondent has already taken possession of the suit property and has even chased away the caretaker of the applicant thus greatly prejudicing the applicant's interest.

5. In response, the plaintiff/respondent filed his application dated 13th June 2018 brought under Order 40 rule 7 of the Civil Procedure Rules and section 3A or 63(e) Cap 21 asking the court to vacate and or review the orders made on 6th February 2018 staying the execution of the judgment. The plaintiff argues that the orders were procured illegally and therefore undesirable to remain in force. That Mr. Omburo advocate purported to hold brief for Mr. Mwinzi advocate without instructions and wrongly agreed to the orders being mutually granted. That the alleged orders were kept in secret until 22nd May 2018 when it was served on the plaintiff.

6. Essentially what is before the court is an application seeking orders of injunction and stay of execution pending the determination of an intended appeal of time to appeal is extended to the objector (as prayed in the notice of motion dated 18th June 2018). I have raised three issues for my determination of the three sets of application;

(a) Whether the orders of 6th February 2018 should be set aside or not;

(b) Whether to extend time or not to the objector to file an appeal out of time;

(c) Whether orders of injunction and or stay of execution should issue.

7. Following the filing of the application dated 24th January 2018, by the objector, the same was fixed for hearing on 6th February 2018 on which date Ms. Wambani advocate appeared for the applicant while Mr. Omburo advocate held brief for Mr. Mwinzi for the plaintiff/Respondent. Mr Omburo proposed canvassing the application by filing of written submissions. He also had no objection to the orders of interim stay being granted. The court thus issued interim stay in terms of prayer 2 of the motion.

8. Mr. Mwinzi advocates denies issuing Mr. Omburo with any instructions to hold his brief. It is on this basis that he wants the orders vacated. The applicant opposed this move filing her replying affidavit on 28th June 2018. Ms. Noreen deposed that it was not the objector's business to find out whether Mr Omburo had instructions or not. Further that Mr. Mwinzi got to know of the events of 6th February 2018 the reason he appeared in court on 8th March 2018 and sought more time to file his submissions.

9. In contesting the facts set out in the replying affidavit of the objector, Mr. Mwinzi filed a further affidavit on 18th September 2018. He annexed to his further affidavit an affidavit sworn by Mr Dominic Tunje advocate whom he deposed that he had given instructions to hold his brief on the 6th February 2018. At paragraph 4 of Tunje's affidavit of 2nd July 2018, he stated thus;

“That when I found I won't make it to court on time, I contacted my colleague Victor Omburo advocate to hold my brief and place the file aside for me.”

At paragraph 5, Mr. Tunje continued that when he arrived in court, he found that Mr Omburo had instead of placing the file aside proceeded to mutually agreed to have the orders granted in terms of prayer 2..

10. Mr Tunje deposed that Mr. Omburo advocate did not carry out the instructions as given. I find Mr Tunje's averment to be contrary to the grounds set forth in seeking to vary the orders of 6th February 2018 in two respects. First Mr. Tunje admits calling Mr. Omburo to hold his brief and place the file aside. This is contrary to Mr. Mwinzi's averment that Mr Omburo had no instructions to appear on his behalf. It is unfortunate for him that the person he instructed also delegated the instructions. He cannot visit the consequences of such delegation to the objector who was completely unaware of such relation. The second contradiction is when counsel stated that he was unaware of the orders of 6th February 2018 until 22nd May 2018 when they were served on the plaintiff. At paragraph 5 of Mr. Tunje's affidavit, he stated that he reached court only to find that instead of placing the file aside, Mr. Omburo had allowed the orders to be granted. Whether he informed Mr. Mwinzi of this state of affairs or not is a matter between them. Since he was instructed to hold brief, it is assumed his knowledge of the issuance of the orders automatically were passed on to the plaintiff and his counsel on record.

11. If the plaintiff was unhappy with the instructions carried out on 6th February 2018, nothing stopped him from moving the court to vary the orders. The said orders were indeed extended on 8th March 2018. As pointed out by counsel for the objector the orders granted on 6th February 2018 allowing prayer 2 of the motion were to remain in force until the application was heard inter partes. Nothing changed whether they were extended on 8th March 2018 or not. In the result, I find the plaintiff's application dated 13th June 2018 to be without merit and thus dismiss it with an order for each party to meet their costs.

12. Having dismissed the plaintiff's application and having confirmed that the orders of 6th February 2018 were in force until the application dated 15th January 2018 was heard inter partes should the sale be set aside given that it took place before that application was heard inter partes? The parties agreed to argue the application of 15th January 2018 by filing of written submissions. As at 8th March 2018, the plaintiff had not filed his submissions. He informed court that he required more time because he was served with objector's submissions only on 5th March 2018. On 17th May 2018, there was no appearance for Mr. Mwinzi advocate. In essence the said motion had not been heard when the auction took place on 9th April 2018 as deposed in paragraph 10 of Mr. Mwinzi's replying affidavit sworn on 13th June 2018.

13. The plaintiff deposed that the execution process began in 2017 long before the objector filed the application dated 15th January 2018. However the plaintiff does not deny that the execution process was not complete at the time the objector came to court. The objector came in the picture after the immovable property was attached and she declared her interest over the same. The plaintiff also blamed the objector of

delaying the execution process by filing application after application. The plaintiff therefore urges the court to order the objector to deposit the entire decretal sum in court as security within 14 days of delivery of the ruling in the event the court grants the prayers sought.

14. In his submissions, the objector has submitted that the auction was advertised on the standard newspaper of 24th March 2018 and the sale set for 9th April 2018 which is a period less than 30 days set under Order 22 rule 58. Order 22 rule 58 provides thus;

“Save in the case of property of the kind described in the proviso to rule 37, no sale hereunder shall without the consent in writing of the Judgement debtor take place until after the expiration of 30 days in the case of immovable property calculated from the date of which the copy of the public notice has been affixed in the precinct of the court of the judge ordering the sale.”

15. The plaintiff on his part submits that the notice was placed in the court precincts on 6th February 2018 thus it took 55 days to the date of sale. That the 30 days provided for in Order 22 rule 58 is not from the date of the advertisement, but from the date of copy affixed in the court. He did not annex in his replying affidavit a copy of the notice that was affixed in the court notice board/precincts. Thus there is no evidence presented that Order 22 rule 58 was complied with.

16. Consequently, for the twin reasons I do find merit in the application dated 15th May 2018 seeking orders to cancel and or nullify the sale by Sammy Muli Mutua t/a Work No Words done on 9th April 2018. The said sale and any consequent registration pursuant to the sale be and is hereby set aside. The costs of the application is ordered in the cause.

17. The amended notice of motion dated 18th June 2018 is also allowed in exercise of my discretion. The Objector’s notice of appeal filed on 8th June 2018 is deemed as duly filed on time. Further I do grant a stay of execution of the ruling delivered on 28th April 2017 pending determination of the appeal to the Court of Appeal. As security to preserve the interests of the plaintiff, the objector is directed not to interfere in anyway and or dispose any interest in the title grant no 30496 L.R. No. 1956/966 until the appeal is heard and determined. Costs of this application shall abide the outcome of the appeal.

Ruling DATED & SIGNED this 8th day of May, 2019.

A. OMOLLO

JUDGE.

And delivered at Mombasa this 16th day of May 2019.

C. YANO

JUDGE.