



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE NO. 98 OF 2000

SAMUEL AYIENDA MOKUAPLAINTIFF

VERSUS

TING'A TRADING COMPANY LIMITED DEFENDANT

RULING

1. This matter has had a chequered history. There have been a multiplicity of applications both before this court and the Court of Appeal. The majority of these applications have been at the instance of the plaintiff/applicant. The matter revolves around a consent order recorded by the parties advocates on 21st June 2001. The plaintiff did not honour some aspects of that consent order leading to execution of the decree by way of attachment and sale of the plaintiff's land parcel **Lietego Settlement Scheme/83**. The various applications made by the plaintiff have centered on having the said consent and the sale of the said property reviewed, varied and/or set aside.

2. The plaintiff's application dated 22nd August 2008 is the subject of this ruling. The application was brought under Order XLIV Rules 1, 2, 3 and 4 and Order XXI Rule 79 of the previous **Civil Procedure Rules** and Sections 3A, 63 (e) and 80 of the **Civil Procedure Act**, Cap 21 Laws of Kenya and sought interalia the following orders:-

(1) Spent

(2) Pending the hearing and determination of the application herein, the honourable court be pleased to grant preservative orders of status quo.

(3) The honourable court be pleased to review, set aside and/or vary the interlocutory judgment and decree entered on the counterclaim herein by the deputy registrar on the 8th January 2001, and the consent order dated 28th day of June 2001 together with all consequential orders pertaining thereto, emanating therefrom and/or arising therefrom.

(4) Consequently to prayer (3) hereinabove the honourable court be pleased to vacate, set aside and/or annul the sale and/or all the transaction arising from the sale of Lietego Settlement Scheme/83 in execution of the default/interlocutory court judgment and decree dated 8th January 2001, together with the consent order dated the 28th June 2001 and all the consequential orders flowing therefrom and revert ownership over the said parcel of land and/or to the applicant herein.

(5) Costs of the application borne by the respondent.

3. The application was supported on the grounds set out on the face of the application and on the supporting affidavit sworn on 22nd August 2008 by the plaintiff/applicant. Principally the applicant contended that there were errors apparent on the face of the record which necessitated rectification by way of review. Further the applicant averred the deputy registrar irregularly entered the interlocutory judgment on 8th January 2001 without jurisdiction and further contended that the consent dated 28th June 2001 upon which the execution was grounded was illegal and a nullity to the extent that the same was recorded on behalf of the applicant by an advocate who did not have capacity to act as an advocate he having not taken out a practising certificate for the year in question. The plaintiff/applicant further argued that the execution was carried out without the requisite notice to show cause being issued considering the decree had not been executed for over a year since being issued.

4 The defendant in opposition to the plaintiff's application filed a Notice of Preliminary Objection dated 30th September 2008 and grounds of opposition dated the same date. Interalia the defendant in the Notice of Preliminary Objection pleaded that the application is bad in law, is *res judicata* and that it is otherwise an abuse of the process of the court. By the grounds of opposition the defendant interalia asserted that the applicant took advantage of the consent order entered on 8th June, 2001 to secure his release from prison. Further the defendant states the consent order under the default clause permitted execution without having to issue a Notice to Show Cause. The defendant avers that execution has been finalized and that the plaintiff has raised similar issues as are raised in the present application through several applications filed herein and in the Court of Appeal which have either been dismissed and/or struck out. The defendant further averred an appeal preferred by the applicant to the Court of Appeal on the same issues was pending hearing.

5. On 26th October 2015 the application dated 22nd August 2008 was fixed before me for hearing. The plaintiff on the date applied for leave to amend the application dated 22nd August 2008 and leave was granted and the application refixed for hearing on 11th February 2016. On the date of hearing the plaintiff had not amended the application dated 22nd August 2008 but had instead filed a fresh application dated 23rd November 2015. By the fresh application the plaintiff/applicant sought leave to enjoin Moco Auctioneers and Omwoyo Auctioneers as interested parties in these proceedings. In support of the application the plaintiff stated that the intended interested parties are connected with the subject matter and that the pending issues can only be properly determined if the intended interested parties are enjoined in these proceedings. The plaintiff asserted that the intended interested parties did not render accounts and/or remit the proceeds of sale to the court or file returns as the law requires.

6. The court directed that the application dated 22nd August 2008 and the application dated 23rd November 2015 be heard together. The intended interested parties having been served with the application filed grounds of opposition to the application. The intended interested parties averred that the plaintiff's application was unmeritorious and was an abuse of the process of the court and further that on the basis of the acts complained of any action against them would be statute barred and further that any action against them would be separate and distinct and would not be conveniently handled with the instant suit.

7. Parties filed written submissions to canvass both applications. The plaintiff/ applicant filed his submissions on 5th April 2016. The intended interested party filed their submissions on 15th March 2016. The defendant/ respondent's submissions were filed on 7th June 2016. I have reviewed the applications the subject of this ruling being the plaintiff's application dated 22nd August 2008 and the other dated 23rd November 2015. I have equally reviewed the record and the issues to determine is whether the application by the plaintiff dated 22nd August 2008 is sustainable and/or whether the same is *res judicata* as argued by the defendant. Further the court has been invited to determine whether the intended interested parties are necessary parties in these proceedings to enable the court to determine and adjudicate and settle all questions involved in the suit.

8. The application by the plaintiff dated 22nd August 2008 sought to review, set aside and/or vary the

interlocutory judgment and decree entered on 8th January 2008 and the consequential orders stemming from the consent order dated 28th June 2001. Following such review, variation or setting aside of the interlocutory judgment the plaintiff consequently sought the setting aside of the sale of his property **Lietego Settlement Scheme/83**. As relates to the plaintiff's prayer for review and setting aside the interlocutory judgment as prayed under prayer (3) of the application dated 22nd August 2008 **Musinga, J.** (as he then was) dealt with the limb of the application while ruling on the preliminary objection taken by the defendant against the application. The judge stated in his ruling delivered on 25th November 2008 thus:-

“I have considered the above submissions. It is not in dispute that an appeal has been filed to the Court of Appeal as stated by the defendant's counsel. Order XLIV Rule 1 of the Civil Procedure Rules is clear that an application for review cannot lie if an appeal has been preferred against a decree or order. The plaintiff/appellant filed a notice of withdrawal of the appeal in terms of the provisions of Rule 93 (1) of the Court of Appeal Rules but the defendant has not consented to the proposed withdrawal of the appeal. In the circumstances, the appellant has to comply with the provisions of Rule 93 (4) of the Court of Appeal Rules by applying for leave to withdraw the appeal. That has not been done. I therefore agree with Mr. Bosire that there is an appeal pending before the Court of Appeal and for that reason an application for review does not lie. The prayer for review as set out in the plaintiff's application is struck out.”

9. Prayer (3) of the application dated 22nd August 2008 having been struck out does not exist so that the court could reconsider it. To do so would precisely be to sit on appeal on **Musinga, J's** ruling. I cannot do that. There is presently therefore no such a prayer in the application today for the court to consider. Prayer (4) has couched in the application was dependent on prayer (3) being granted. The disposal of the said prayer (3) of the application must have informed the plaintiff to make the application dated 29th April 2009 vide which the plaintiff sought the following prayers:-

2. The honourable court herein be pleased to give directions consolidating the application herein with the pending Notice of Motion application dated the 22nd August 2008 and entertain the same as if it was a single application,

3. In the alternative, the court be pleased to hear and determine the instant application and the applicant's pending Notice of Motion application dated 22nd August 2008 concurrently.

4. That consequent to granting either prayer 2 or 3 hereto, the court be pleased to set aside, vary and/or vacate the interlocutory judgment and decree entered on the counterclaim herein by the deputy registrar on 8th January 2001, and the consent order dated 28th June 2001 together with all consequential orders pertaining thereto, emanating therefrom and/or arising therefrom.

5. Costs of this application be borne by the respondent.

10. **Musinga, J.** (as he then was) again heard this later application and delivered a ruling on 22nd April 2010 dismissing the application. In his ruling the learned judge held that **Wambilyangah, J.** had on 8th March 2001 declined to grant a stay of execution of the decree granted to the defendant/ respondent and further had declined to set aside the judgment in default of filing of a reply to the counter claim and further held that the judgment was entered regularly in favour of the respondent. **Musinga, J.** further in his ruling held thus:-

“On 25th November, 2008 this court struck out the applicant's prayer for review of interlocutory judgment. Prayer no. 4 in the present application that seeks to set aside and/or vacate the interlocutory judgment and decree entered on the counterclaim by the deputy registrar on 8th January, 2001 is res judicata, the same having been rejected by

Wambilyangah, J. in the aforesaid ruling. I cannot sit on appeal on the judge's findings".

As regards the impugned consent, the judge held that the terms of the consent had partially been performed and that it would be inequitable to set aside the consent order on the basis that the applicant's advocate did not have a practising certificate when he participated in the recording of the consent.

11. Not one to be satisfied, the plaintiff appealed against the ruling of **Musinga, J.** delivered on 22nd April 2010. The appellate judges in a considered judgment delivered on 14th November 2014 in which they reviewed the road the applicant had so far travelled as he mounted one application after another upheld the judge on his findings and in their concluding observations stated thus:-

"We totally agree with the learned judge. The appellant, who had been committed to civil jail for inability to pay a civil debt, was released from prison after a consent order was recorded where he was released on condition that certain conditions be met. The appellant was therefore a beneficiary of the consent order but upon being released from civil jail he instead of meeting his part of the bargain mounted a multiplicity of applications that have run a good 13 years culminating this appeal. The learned judge was right to hold that there are instances in which the interests of justice are better served by asking a litigant to pursue their advocate for negligence or misconduct rather than re-opening proceedings. Once a consent order was recorded it became a binding contract between the appellant and the respondent and the interests of justice cannot be served by re-opening the matter."

12. I am in agreement with both **Musinga, J.** and the appellate judges in their resolution of the issue of the impugned consent. The applicant cannot on one hand benefit from the consent and on the other hand challenge the same as faulty after deriving the benefit. My view is that the plaintiff/ applicant is being dishonest as the consent was faultless when it secured his release from prison but was illegal and a nullity when he failed to perform the terms that the consent required him to perform upon his release.

13. The **Supreme Court in Petition No. 36 of 2014** in the case of **National Bank of Kenya Ltd –vs- Anaj Warehousing Limited** held that the failure by an advocate to have a practising certificate does not invalidate documents drawn by such advocate and the same remain binding between the parties. The court in the judgment in the petition stated thus:-

66. The court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010 Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159 (2) (d) of the Constitution." "Justice shall be administered without undue regard to procedural technicalities."

The Supreme Court went further to state that:-

68. The facts of this case, and it's clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34 (1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons such as non advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes."

The effect of the said Supreme Court judgment was to reverse the earlier decision in the case **National Bank of Kenya Ltd –vs- Wilson Ndolo Ayah [2009] eKLR** where the Court of Appeal had held documents drawn by an advocate without a practising certificate were null and void. The Supreme Court took the position that a party ought not to be punished for the fault of the advocate and I agree with that

position. In the premises I would decline to invalidate the consent entered by the parties on 8th June 2001 and hold that the parties stand bound by the terms of the said consent. There is no doubt the parties had intended to be bound by the consent.

14. The net effect of the review and analysis that I have outlined above is that the plaintiff's application dated 22nd August 2008 is in all respects *res judicata*. The application for review of the interlocutory judgment was refused by both **Wambilyangah, J.** and **Musinga, J.** while the prayer to set aside the sale of the property by public auction and/or to annul the consent dated 8th June 2001 was dismissed by **Musinga, J.** on 22nd April 2010 and the appeal by the applicant to the Court of Appeal was equally dismissed. The applicant's application dated 22nd August 2008 is therefore unsustainable for being *res judicata* and I dismiss the same with costs to the defendant/respondent.

15. The plaintiff's application dated 23rd November 2015 seeking joinder of the intended interested parties must of necessity fail. The intended interested parties were mere agents of the court in the execution of a valid decree. The court has upheld the decree and has declined to set aside the sale carried out by the intended interested parties. Consequently there can be no basis to enjoin the intended interested parties to the proceedings. They would have no role as the court has sanctioned what they did and no issue arises out of their actions. The application lacks any basis and has no merit. The intended interested parties cannot properly be enjoined in a suit where judgment has been entered and a decree has issued as the suit has already been determined. If anything the plaintiff could only have a distinct and separate action against the auctioneers if they conducted the auction in breach of the **Auctioneers Act** and the **Rules** made thereunder, and there is no evidence of such breach. Having regard to the circumstances of the present matter any actions the applicant may have had against the proposed interested parties, if at all, would at any rate be liable to be defeated by limitation considering the acts complained about took place in 2001 and 2007 well outside the period of limitation.

16. For the above reasons I find the plaintiff's application dated 23rd November 2015 to be devoid of any merit and I accordingly order the same dismissed but I make no order for costs in regard for the joinder application and consequently each party is to bear their own costs of the application.

Ruling dated, signed and delivered at Kisii this 30th day of September, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

Ms. Moguche h/b for Mr. Bosire for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE