



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 110 OF 2009 (O.S)

JOHN KARUGA WAHINYAPLAINTIFF/APPLICANT

VERSUS

VIOLET WANJA GATEI..... DEFENDANT/RESPONDENT

RULING

On 29th September 2010 **Hon. Justice Muchelule** delivered a ruling pursuant to an application for summary judgment by the plaintiff where he entered judgment in favour of the plaintiff as against the Defendant in the sum of Kshs.5 million with interest at court rates from 28th February 2008. A decree was extracted arising from this judgment and was issued on 25th February 2011. The plaintiff has taken out execution proceedings of the decree which have not been concluded. For her part the defendant judgment debtor has made settlement proposals of the judgment debt to the judgment creditor though no settlement has been reached. The plaintiff judgment creditor has not agreed to the payment arrangement proposed by the judgment debtor.

In the midst of the execution proceedings the two applications the subject of this ruling were filed one by the plaintiff judgment creditor and the other by the defendant judgment debtor. By a notice of motion application dated 1st November 2013 brought under Order 45 rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act the plaintiff judgment creditor seeks orders that:-

- a. That this Honourable court be pleased to review its ruling delivered on 29th September 2010.
- b. That the Defendant be restrained from selling, alienating or interfering with **L.R. NO.170/36 (O.N. 170/21/8)** pending the hearing and determination of the application.
- c. That the court be pleased to order a fresh re evaluation of **L.R.NO. 170/36 (O.N.170/21/8)**.
- d. That the court be pleased to review the judgment amount and base it on the value of the subject matter as per the valuation report.

The plaintiff basis his application on the grounds that the Defendant intends to gain from an unjust enrichment following the proposed sale of **L.R.NO.170/36** and further that he (the plaintiff) was not aware the Defendant intended to unjustly enrich herself a fact which was not within the knowledge of the plaintiff at the time the ruling was delivered.

The judgment debtor for her part by a Notice of Motion application dated 26th November 2013 seeks a stay of execution of the judgment amongst other orders. The Judgment debtor's application is brought

under Order 9 Rules 9 & 10 and Order 22 rule 22 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act. The application prays for inter alia the following orders:-

- i. That the firm of **M/S C.N. Kihara & Company Advocates** be allowed to come on record on behalf of the defendant in place of **M/S Mbaluka & Company Advocates** who hitherto acted for the defendant.
- ii. That there be a stay of execution of the judgment/decree by way of attachment of **L.R.NO.170/36 Kiambu** pending further orders of the court or on terms as may be fair and just.
- iii. That the court do give directions, or approve the terms of the professional undertaking and/or security instrument or guarantee to be furnished to secure payment of the decretal sum to the plaintiff within such period as the court may determine as to enable the Defendant to effect a sale of her property by private treaty, to a third party.

To put it simplistically the Defendant wanted to be allowed time to facilitate a sale of **L.R.NO.170/36 Kiambu** or **L.R. NO.170/85** and/or any other property and out of the proceeds of such sale to pay of the decretal sum owing to the plaintiff/judgment creditor. From the file record it is apparent that the plaintiff applicant applied for execution of the decree by way of issue of a prohibitory order against land parcel **L.R.NO.170/36) Redhill** (original NO. 170/218) Kiambu owned by the Judgment debtor vide an application for execution filed in court on 19th May 2011. A prohibitory Order was issued against the identified property and Notice of settlement of terms and conditions of sale issued. The Deputy Registrar apparently settled terms of sale of **L.R.NO.170/85** on 11th February 2013 and directed that the sale be carried out within 30 days of the date thereof. As at the time the two applications the subject of this ruling were filed the auction sale had not taken place. During the appearances before the Deputy Registrar on 11/2/2013, 2/5/2013 and 18/6/2013 the defendant judgment debtor sought to be allowed to sell **L.R.170/85** by private treaty and to utilize the proceeds of sale to pay the decretal sum to the plaintiff.

Against the foregoing background to the applications, I now turn to consider the two applications.

Application by the plaintiff Judgment Creditor dated 1st November 2013.

This application is for all intent and purposes an application for review of **Hon. Justice Muchelule's** ruling of 29th September 2010 entering judgment for the plaintiff for the sum of Kshs.5 million together with interest at court rates from 28th February 2008. Consequently for the plaintiff applicant to succeed he must satisfy the grounds upon which a decree/judgment or order may be reviewed as provided under Order 45 Rule 1 pursuant to which the application is premised

Order 45 Rule 1 provides:-

1. **(1) Any person considering himself aggrieved-**
 - a. **By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or**
 - b. **By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

In the context of the foregoing provision an applicant to succeed in an application for review is required to establish either:-

There has been a discovery of new and important matter or evidence, or

- a. There is an error apparent on the face of the record, or
- b. There is other sufficient reason to warrant a review, and
- c. The application has been brought without unreasonable delay.

The plaintiff as per the grounds in support of his application and the supporting affidavit thereof avers that the defendant is bound to be unjustly enriched when she sells a portion of the same land she had contracted to sell to the plaintiff but failed to complete the transaction. The plaintiff states that the price of land has appreciated and since the Defendant has kept him away from the money decreed to him the court should review the judgment so that the amount payable to the plaintiff is increased on a prorata basis having regard to the increase in value of the land. The plaintiff argues that he did not know that the defendant intended to unjustly enrich herself. The plaintiff further avers that at the time he entered into the agreement to purchase the Defendant's land he did not know the land was charged to Barclays Bank of Kenya which fact rendered the completion of the transaction not practical. The plaintiff blames the Defendant for not making disclosure that there was a mortgage registered against the title to the land.

The plaintiff's submission is that the Defendant's intent to unjustly enrich herself by selling the property at a much higher price than was offered to the plaintiff is a new discovery that was not within the plaintiff's knowledge at the time the judgment was entered. The plaintiff's averment that the Defendant did not disclose that the property was mortgaged to the Bank at the time they entered into the agreement for sale cannot in my view qualify as information that the plaintiff with exercise of due diligence could not have discovered. It is usual and the normal practice for intending purchasers of land to carry out official searches at the Land Registries where the land is registered and had the plaintiff and/or his Advocates carried out an official search before entering into the sale agreement, they would have discovered that the property was mortgaged. The plaintiff failed to exercise due diligence and for that he cannot blame the defendant.

The plaintiff filed suit seeking a refund of Kshs.5 million deposit that he had paid towards the purchase of the defendants property. The defendant in her response admitted liability for the deposit of Kshs.5 million paid to her following which the plaintiff filed an application for summary judgment based on the defendant's admission which application resulted in the ruling of 29th October 2010 entering judgment for the plaintiff and out of which the decree the subject of the execution proceedings was extracted.

True, the plaintiff may have been frustrated by the Defendant in his execution endeavours to recover the amount due to him as per the decree and in the meantime the property prices have escalated, but with respect I fail to see how that can be a ground to review the judgment with a view of enhancing the amount payable to the plaintiff on the basis that the property prices have increased exponentially. The plaintiff was awarded the costs of the suit and interest on the decretal sum. This is what is intended to compensate the plaintiff in case there is delay in settlement of the decree. The Defendant will be required to pay interest up to the time the payment is effected to the plaintiff.

In my view therefore the plaintiff has not shown there has been discovery of new and important matter of evidence that on exercise of due diligence could not have been available to the plaintiff. Indeed there is no discovery of any new matter.

The judgment in favour of the plaintiff was properly and validly entered on the information and material that was before the court. Property value increase cannot be a basis to review a judgment that was given on the basis of the parties pleadings before the court.

The upshot therefore is that the plaintiff has not established any ground under order 45 rule 1 upon which the court can review the judgment. I do not think the plaintiff can properly invoke Section 3A of the Civil Procedure Act to urge the court to exercise its inherent jurisdiction to find that there is sufficient reason to warrant a review for ends of justice to be met. I have noted that a valid judgment was entered and that the plaintiff was awarded interest which was infact backdated to 28th February 2008 when the parties entered into the sale agreement. This was intended to compensate the plaintiff with interest from the date he parted with his money rather than when he filed the suit. Section 3A is intended to provide a safeguard for the court to do justice whenever the circumstances merit it and is thus invoked by the court's to ensure

no miscarriage of justice is meted out to any party who is before the court. I would not in the circumstances of this case say there is any injustice being occasioned to the plaintiff as he has properly obtained judgment which he merely needs to execute. The delay in execution of the same may be a source of frustration to the plaintiff but that cannot be a reason to review the judgment. I thus hold that Section 3A cannot have any application in the circumstances of this case.

In the result I hold and find the plaintiff's application dated 1st November 2013 to be lacking in merit and I accordingly disallow the same.

Defendant/judgment debtor's application dated 26th November 2013

The Defendant's application essentially seeks a stay of execution of the decree by the plaintiff for such time as may be reasonable to enable her to arrange the sale of her property and to utilize the proceeds of sale to pay the decretal sum to the plaintiff. Apparently there has been a lot of correspondence exchanged between the parties Advocates respecting the proposal by the Defendant to be allowed to sell a part of her land to raise funds to pay the decretal sum. The Defendant has exhibited a copy of a sale agreement dated 12th August 2013 between herself and "**The Grove at Redhill Limited marked "VW2"**" in respect of **L.R.No. 170/85 Kiambu** being a part of **L.R.NO.170/36** (Redhill) where the consideration is shown to be **Kshs.25,5000,000/-**.

The Defendant contends that her intention was to sell the said portion of land to be able to pay the judgment debt but avers that the plaintiff has frustrated the efforts to proceed with the sale transaction as they have refused to offer co-operation when requested to do so. In particular the Defendant states that the plaintiff's Advocates **M/S Mereka & Co. Advocates** have refused neglected and/or declined to accept a professional undertaking from the Defendant's Advocates **M/S C.N. Kihara & Company Advocates** undertaking to pay the decretal sum inclusive of all accrued interest within 30 days of receipt of the purchase price or of the registration of the transfer in favour of the purchaser.

The plaintiff in a supplementary affidavit dated 26th May 2014 states that the Defendant has all along acted in bad faith in that she has during the pendency of this suit offered for sale the parcels of land **L.R.NO.170/84, 85** and 86 which are subdivisions out of **L.R.NO.170/36**. That the defendant has not made disclosure of these sales to the plaintiff. The plaintiff admits the defendant had made a settlement proposal that was filed in court on 17th December 2012 but avers that the proposal was not approved by the court. The plaintiff avers that although the court settled the terms of sale of the plaintiff's property by way of public auction within 30 days of 11th February 2013, the sale could not proceed due to a caveat registered against the property by a third party **Gambusi Limited** who had purchased a part of the property.

Having reviewed the application by the Defendant and the submissions by the parties it is clear that the plaintiff and the Defendant are at a stalemate. The plaintiff will find it difficult to execute the decree by way of sale of the defendant's property **L.R.NO. 170/36** which has since been subdivided to form **L.R.NOS. 170/84, 85 and 86** and more specifically because a third party purchaser has registered a caveat against the title. A sale at the auction cannot discharge such a caveat. A buyer at the auction would have to contend with and deal with the party who have lodged the caveat.

The Defendant states she wants to be permitted to sell a portion notably **L.R. NO. 170/85** to be able to pay the plaintiff the decretal sum. Such sale cannot proceed without the co-operation of the plaintiff, the defendant and the third party who has lodged the caveat against the property. It is not clear from the record whether a prohibitory order was registered against the property following the settlement of terms of sale on 11th February 2013 as none is exhibited. In case no prohibitory order was registered then there would be nothing to prevent a third party from dealing with the property.

Be it as it may be, the circumstances of this matter are such that the co-operation of all the players will be required. The plaintiff needs to be paid his money under the decree and the purchasers need to have their transactions completed. The plaintiff and the Defendant being the principal players in the matter can

unlock the deadlock by agreeing to engage. Given that the court has ruled that the plaintiff can only be entitled to be paid such amount as will be found to be due and owing under the decree it should be possible for a suitable professional undertaking to be worked out as between the plaintiff's and the Defendant's Advocates which can facilitate the finalization of this matter.

In the premises and with a view to facilitate the finalization of this matter I direct and order as follows:-

- i. That the plaintiff's Advocates and the Defendant's Advocates do work out and agree the decretal sum inclusive of accrued interest up to and including 31st August, 2015 failing agreement on the sum due the amount to be certified by the Deputy Registrar.
- ii. That the said parties advocates to agree on an acceptable professional undertaking as between themselves for the payment of the decretal sum, that will have been certified as at 31st August 2015 and such further interest as may accrue on the decretal sum up to and including the date of payment.
- iii. The parties to commit to co-operate and do whatever may be required of each of them to facilitate the completion of the sale of L.R.NO.170/85 to the purchaser identified by the Defendant which sale is to be completed on or before 30th November 2015.
- iv. The Decretal sum together with all accrued interest to be paid to the plaintiff on or before 30th November 2015 failing which the orders hereof will be vacated unless the same will have been mutually extended by the parties and or by order of the court.
- v. There will be a stay of execution of the decree until 30th November 2015.
- vi. Matter to be mentioned before the presiding Judge on 18th September 2015 to confirm compliance with orders/directions (i), (ii) and (iii) above.
- vii. The costs of the applications shall be in the cause.

Ruling dated, signed and delivered this 23RD day of JULY 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff/ Applicant

..... For the Defendant/Respondent