IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 109 OF 2010

BETWEEN

GEORGE GIKUBU MBUTHIA.....APPELLANT

AND

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Koome, J) dated 16th April 2010

in

H. C. C. C. NO. 406 OF 2004)

****

JUDGMENT OF THE COURT

The appellant, **GEORGE GIKUBU MBUTHIA** filed an appeal against the ruling of Koome, J, (as she then was) in H.C.C.C. No. 406 of 2004 delivered on 16th April, 2010.

The background to the appeal is that on 12th August, 1985 Nationwide Finance Company (hereinafter the chargee) and predecessor of the respondent herein filed H.C.C.C. No. 3231 of 1985 against Meck Industries Ltd and Michael Kimani and obtained judgment against the two defendants. In execution of the decree, the chargee caused to be auctioned property known as Nyandarua/Karati/728 owned by the 2nd defendant. The appellant attended the auction and emerged the successful bidder. However, the sale was subsequently set aside by Visram, J (as he then was) in a ruling delivered on 29th May, 2001. Thereafter the appellant filed Civil Appeal No. 165 of 2001 against the order setting aside the sale but this appeal was dismissed on 11th February, 2003.

Undeterred, by a plaint dated 20th July, 2004 the appellant filed Milimani H.C.C.C. No. 406 of 2004 against Consolidated Bank of Kenya Limited, the respondent herein, and as indicated above, the successor of the chargee. The appellant's cause of action was premised on the fact that on 18th March, 1998 he attended a public auction and became the successful bidder at Kshs.650,000/= of LR No. Nyandarua/Karati/728; that on 2nd April, 1998 the respondent filed a Notice of Motion seeking an order to set aside the sale; that on 29th May, 2001 the sale was set aside in a ruling delivered by Visram, J. In

the plaint, the appellant sought the following reliefs:

> ***"(a) AN INJUNCTION against the defendant and its agents restraining them from alienating, transferring, selling by auction or otherwise, advertising and/or dealing in any matter with L.R. Nyandarua/Karati/728 until the suit is heard and determined or until further orders.***

b. ***A DECLARATION that the contract of sale of L.R. Nyandarua/Karati/728 is lawful and valid and the plaintiff is the true purchaser.***

c. ***A DECLARATION that the plaintiff cannot be coerced to increase the purchase price other than the declared price after the fall of the hammer.***

d. ***Specific performance of the contract dated 18th March, 1998.***

e. ***An ORDER directing the Registrar of Titles – Nyandarua District – to cancel and remove the Prohibitory order and the caution registered against the suit land.***

> ***(f) An ORDER directing the Registrar of Titles – Nyandarua District – to cancel the subsisting Title registered in the name of Michael Gerald Kimani and in its place to register the plaintiff as the sole proprietor of the suit land.***

g. ***Specific damages.***

h. ***Economic loss.***

i. ***Costs of this suit.***

j. ***Interests on (g), (h), and (i) at Court rates.***

k. ***Any other or further relief the Honourable Court may deem appropriate to grant."***

The respondent filed an amended defence dated 22nd April, 2008 and averred *inter alia,* that the auction conducted on 18th March, 1998 was irregular; that the sale was set aside by the order of the court on 29th May, 2001 in H.C.C.C. NO. 3231 of 1985 and that all moneys paid by the appellant were refunded to him and that the appellant's suit was *res judicata*. Further, the respondent averred that ***"the plaintiff appealed against the order setting aside the sale"*** and that ***"His appeal was struck out whereupon the plaintiff applied for an extension of time to file the appeal but the application was dismissed."***

On close of pleadings, the respondent filed a chamber summons application dated 31st December, 2009 and sought orders that:

> ***"(i) The plaintiff's plaint be struck out and the suit dismissed.***
>
> ***(ii) The costs of this application be provided for."***

As stated above, this application came up before Koome, J who on 16th February, 2010, dismissed the appellant's suit. The appellant was dissatisfied with the outcome in Koome J's ruling, hence this appeal.

On 23rd September, 2015 when the matter came before us for hearing and with the consent of the appellant and Mrs. Kashindi for the respondent, the court directed that the appeal be disposed of by way of written submissions. The appellant filed his submissions on 1st October, 2015 whilst the respondent filed its submissions on 22nd October, 2015. On 1st December, 2015 the appeal came before us for highlighting of the submissions.

The appellant reiterated his written submissions and contended that he bought the suit property in an

auction ordered by the Court. He attended the auction and paid 25% of the sale price. The balance of the purchase price was paid vide his personal cheque in favour of Hamilton Harrison & Mathews, the respondent's counsel. It was the appellant's contention that he entered into a contract with the court and not the respondent. He also challenged the *locus standi* of the respondent on the basis that it could not act on behalf of the chargee on the basis that:

> ***"… although Consolidated Bank of Kenya Ltd acquired Nationwide Finance Company Ltd on 21st February, 1990, it was not until 15th February, 2002 when the then Minister for Finance issued a vesting order in compliance with Section 3 (1) of the Consolidated Bank Act 1991 so that any instructions given by Consolidated Bank Ltd before 15th July, 2002 are null and void"*** and that ***"The instructions issued by Consolidated Bank of Kenya Ltd dated 1st April, 1998 directed to Hamilton Harrison & Mathews Advocates to file proceedings to annul the public sale of Nyandarua/Karati/728 which had already taken place on 18th March, 1998 is null and void for lack of …"***

In response, the respondent submitted that the Consolidated Bank of Kenya Act was enacted in 1991 ***"to make provision for the transfer of the assets and liabilities relating to the businesses of subsidiaries of the Consolidated Bank of Kenya (the respondent herein), and for connected purposes"*** and that the charge, which had filed H.C.C.C No. 3231 of 1995, was one of the subsidiaries taken over by the respondent. Subsequently, the respondent obtained judgment that was executed by way of sale in an auction on 18th March, 1998, which auction was attended by the appellant who made a bid to buy the property, the subject of the auction.

We have considered the rival submissions. Firstly, as to the contention that the respondent had no *locus standi* and could not take up the litigation on behalf of the chargee, we find that the undertakings and the banking business of the chargee was vested in the respondent vide Legal Notice No. 130 dated 15th July, 2002. This had been preceded by the enactment of the Consolidated Bank of Kenya Act, 1991 which provided for the take over of the businesses of the chargee. The business of the chargee included any pending suits. Accordingly we find that nothing turns on this assertion and for the appellant to allege that the respondent herein is a busy body is without any basis.

However, be that as it may, the gist of the appellant's complaint is that Koome, J erred when she struck out H.C.C.C No. 406 of 2004, following an application dated 31st December, 2009. From the record, it is not disputed that the appellant took part in the auction held on 18th March, 1998. It is also not disputed that he paid a 25% deposit towards the purchase price. However, this sale was subsequently set aside by Visram, J on 21st May, 2001 in H.C.C.C. No. 3231 of 1985. In her ruling dismissing the appellant's suit, the subject of this appeal, Koome, J rightly held that she could not disturb the findings of a fellow judge with concurrent jurisdiction. The sale had been set aside in terms of O.21 rule 81(3) of the Civil Procedure Rules for material irregularities. O. 21 rule 81(3) provides that:

> ***"Where any immovable property has been sold in execution of a decree, the decree-holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:***
>
> ***Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."***

It was therefore within Viram J's mandate to set aside the sale.

Having set aside the sale, it was not open to the appellant to file another suit namely, H.C.C.C. No. 406 of 2004. By filing H.C.C.C. No. 406 of 2004 the appellant sought to litigate afresh in matters that were determined in HCCC No. 3231 of 1985. This clearly offends the provisions of 0.7of the Civil Procedure Rules which provides that:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

In dismissing the appellant's suit Koome, J stated as follows:

> ***"That issue was determined by a court of coordinate jurisdiction this court therefore lacks jurisdiction to determine the same issue. As regards prayer number (c) it follows that the sale was set aside and under the provisions of Order 21 Rule 81(3) the plaintiff's suit cannot be entertained."***

We are in agreement with the learned judge's findings that the sale having been set aside in H.C.C.C. No. 3231 of 1985, it was not open to the appellant to institute H.C.C.C. No. 406 of 2004 and to re-litigate on the matter. The appellant's suit was *res judicata* besides being frivolous and vexatious.

In **Time Magazine International Limited & 2 others vs Rotich & Another, [2000] KLR 544,** Onyango Otieno, J (as he then was) had occasion to consider the words ***"frivolous"*** and citing **Bullen & Leake, Precedents of Pleadings (12th edition)**, at page 145, wherein it is stated:

> ***"A pleading or action is frivolous when it is without substance, groundless or fanciful and it is vexatious when it lacks bonafides and it is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense."***

In view of what we have explained above, we find that the suit, the subject of this appeal was frivolous and vexatious.

It is therefore our finding that the appellant is abusing the court process and that the learned judge of the High Court did not err in striking out the appellant's suit for being scandalous, vexatious and frivolous. We could have done the same. The upshot of the above is that we find no merit in this appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of February, 2016.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR