IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 159 OF 2003

BETWEEN

GEORGE GIKUBU MBUTHIA …….....……...APPELLANT

AND

PETER NJERU MUGO ……..…....1ST RESPONDENT

GEOFFREY KARIUKI MWENDA …….…….…..... 2ND RESPONDENT

HON. THE ATTORNEY GENERAL ……..……...3RD RESPONDENT

CONSOLIDATED BANK OF KENYA ……...…..….. 4TH RESPONDENT

(An appeal from ruling and decree of the High Court of Kenya at Milimani Commercial Courts at Nairobi (Nyamu, J.) dated 20th March, 2003

in

SUCCESSION CAUSE NO. 3105 OF 2006)

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JUDGMENT OF THE COURT

This is perhaps one of the oldest appeals pending before this Court having been filed on 11th July 2003. It is an interlocutory appeal arising from the ruling of the High Court (Nyamu, J, as he then was) rendered on 20th March, 2003. The learned Judge struck out HCCC No. 1260/2002 as against all the respondents for the reasons that the suit (No. 1260/2002) was *res judicata* HCCC No. 937 of 1986 which was (and is still) pending, and secondly, that no claim was pleaded against the 3rd and 4th respondents.

Briefly, this is how this dispute arose. On 17th January, 1986, the 1st respondent participated in a public auction in which the appellant's property, LR No. Nairobi/Block 73/325 was being sold by the 4th respondent's predecessor (Jimba Credit Corporation Limited). After emerging the highest bidder and paying 25% as stake money, the 1st respondent found himself in court, where he and the rest of the

respondents have been stuck for the last 28 years.

The appellant instituted HCCC No. 937 of 1986 against the bank and the 1st respondent seeking an order of permanent injunction to restrain the former from selling the property to the latter. Simultaneously with the suit the appellant filed an application in which he sought the same relief on a temporary basis pending the determination of the suit. That application was dismissed by Schofield, J. triggering an avalanche of suits and applications. The appellant first moved to this Court to challenge the dismissal of that application by filing Civil Appeal No. 111 of 1986. At the same time, he filed Civil Application No. 83 of 1986 seeking that there be a stay of execution pending the determination of the aforesaid appeal.

An order of stay was granted on two conditions, directing him *"to file and serve the usual undertaking by noon…..,"* and to pay Kshs. 8,000/= or more to his loan account with the bank on or before 21st July 1986 and in default the application for stay would stand dismissed with costs.

In the meantime, Civil Appeal No. 111 of 1986 was heard and in a majority judgment (Platt and Masime, JJ.A) the Court found that the High Court did not properly exercise its discretion in rejecting the appellant's application for interlocutory injunction, allowed the appeal, and granted the prayer for temporary injunction on the aforesaid two conditions, Apaloo, JA (as he then was) dissenting.

Subsequent upon this judgment the 1st respondent applied to the Court under **Rules 80, 52 (c)** and **56 (2)** of the Court of Appeal Rules for the vacation or discharge of the injunction granted by Platt and Masime, JJA in Civil Appeal No. 111 of 1986 arguing that the appellant had failed to comply with the conditions upon which it was granted. In a unanimous decision (Ruling), the Court (Masime, Cockar (as he then was and Muli, JJ.A) discharged the order of injunction stating;

> **"Mr. Mbuthia signed the charge attached to his affidavit and marked GGM4. In the said charge on Title No. Nairobi/Block 73/225 the rate of interest charged on the loan is clearly stated together with when and how such interest would accrue. He duly signed the charge and cannot now be heard to say that the loan carried no interest. It is absurd to hear that the banking or financial institution like Jimba Credit would lend money on "friendly basis" without charging interest hereon. We think Mr. Mbuthia is laboring under serous misconceptions. In any event he can urge the High Court as he deems fit. We are concerned with the compliance or otherwise with the court order of 12th July, 1988. There is ample evidence to show that Mr. Mbuthia is in breach of the order and that he is in arrears in the tune of Kshs. 683,768 or thereabout . He has not kept up remittances as he was required under the order so we hold. Mr. Mbuthia too agreed that the injunction order be vacated although his ground for this is that he has paid off the loan to Jimba Credit. We do not agree.**
>
> **The result is that the applicant's application for vacating or discharging of the injunction succeeds. The injunction order dated 12th July 1988 is hereby vacated with costs to the applicant. It is so ordered."** (Emphasis ours)

Between 1st August 1991 when this order was made and 17th March 2003 when the application, the subject of this appeal was made, there have been numerous applications and, we believe, a number of suits.

By chamber summons dated 12th February, 2003, the 1st respondent applied to the High Court to have HCCC No. 1260 of 2002 as against the 1st respondent struck out for being *res judicata*, raising issues already determined previously. We reiterate that although the application sought specifically to have the suit against the 1st respondent struck out, the learned Judge was of the view that the entire suit was incompetent and ought to be struck out. The learned Judge found that:-

> **"It is therefore quite evident that the matters raised have been canvassed before and final decisions given concerning the exercise of the power of sale. The Court of Appeal has clearly ruled that the applicant's remedy if any is in damages. This is in line with**

S. 77 of the Registered Land Act which is the governing Act for RLA registered transactions. I find and hold that the suit does not lie in view of the clear provisions of S. 7 of the Civil Procedure Act…….

The filing of the subsequent suit including ignoring all past court orders made in respect of the same suit property since 1986 reveals an ugly face of vexatious litigation which the court process must frown upon at the earliest opportunity in order to enhance the credibility of the court orders and process. I feel constrained to invoke the inherent powers of this court to prevent abuse and oppressive litigation although the two defendants had not made any formal application."

Notwithstanding that this was the second time the courts (High Court and Court of Appeal) were making observation that the appellant was developing a tendency of a vexatious litigant, he was not deterred. He filed this appeal to challenge the striking out of HCCC No. 1260 of 2002 citing twenty one (21) grounds of appeal, the combined effect of which may be summarized thus;

i. That the learned Judge erred in holding that there was a properly filed chamber summons upon which to strike out the appellant's suit.

ii. That HCCC No. 1260 of 2002 was not *res judicata* but was brought to "*impeach irregular, fraudulent and illegal rulings, orders and judgments"* made in HCCC No. 937 of 1986 and previous applications.

iii. That the learned Judges (Masime, Cockar and Muli) in Civil Application No. Nai. 18 of 1991 had no jurisdiction to interfere with the decision of an earlier majority decision (Platt and Masime) in Civil Appeal No. 111 of 1986.

iv. That the learned Judge erred in determining the merit of the suit on affidavit evidence, instead of letting the trial Judge to do so after discovery, and on oral evidence tested by cross-examination.

v. That the learned Judge, like other Judges before him declared the appellant a vexatious litigant without invoking the correct provision of the law or following the laid down procedure for making that declaration.

These, in our view, are the only grounds germane to this appeal. The rest deal either with the merit of the pending suit or with orders made in other proceedings not related to the impugned ruling.

For various reasons, this interlocutory appeal has been adjourned several times between 11th July 2003 and 25th November 2014 when it was finally argued.

Before us, the appellant submitted that the majority decision of Platt and Masime, JJ.A, being a "*judgment*" was final and could not be "*overturned*" by a "*ruling*" of the same court; that Nyamu, J. (as he then was) fell into the same error by revisiting matters determined with finality by the majority decision of this Court.

Mr. Mugo, the 1st respondent argued that after the appellant's several attempts to stop the sale and transfer of the property failed and following the dismissal of Civil Appeal No. 475 of 2004, he (the 1st respondent) proceeded to sell and transfer the property to the 2nd respondent; that rulings and other decisions prior to that of Nyamu, J. of 20th March, 2003 are irrelevant in considering this appeal.

Mr. Mugambi, learned counsel for the 2nd respondent and Mr. McCourt learned counsel for the bank asked the Court to dismiss the appeal for lack of merit; that no cause of action was pleaded against the 2nd respondent who was a purchaser for value and without notice; that instead of instituting a fresh suit (No. 1260 of 2002) the appellant ought to have applied for the joinder of the 2nd respondent in the earlier suit (No. 937 of 1986); that previous decisions had dealt with the questions being raised herein; that the

appeal is an abuse of the court process, and that the appellant ought to prosecute HCCC No. 937 of 1986.

It is common ground that HCCC No. 937 of 1986 is still pending determination in the High Court. It is equally clear that the judgment rendered on 12th July 1988 by Platt and Masime, JJ.A in Civil Appeal No. 111 of 1986, was an interlocutory decision arising from a ruling of the High Court dismissing an application for injunction in HCCC No. 937 of 1986. The decision of Platt and Masime, JJ.A gave the appellant an opportunity to preserve his property while pursuing the main suit by meeting two conditions. The temporary injunction was discharged in a subsequent application (No. 18 of 1991) following the appellant's failure to fulfill the two conditions imposed by the judgment of Masime and Platt, JJ.A in Civil Appeal No. 111 of 1986.

That judgment being an interlocutory judgment was confined to the determination of the question whether Scholfield, J. properly exercised his discretion in dismissing the appellant's summons for interlocutory injunction. It did not and could not possibly determine with finality the issues pending in the main suit (HCCC No. 937 of 1986).

It is well settled that an appellate court considering an appeal arising from an interlocutory decision of the court below cannot make definitive determinations of either law or fact on the issues pending in the main dispute to avoid embarrassing the trial Court. Indeed, in this instance, the Judges in Civil Appeal No. 111 of 1986 considered only whether Schofield, J's decision was made within the well-known principles for the grant of an interlocutory injunction enunciated in **Giella Vs. Cassman Brown & Co. Ltd** [1973] EA 358.

In their Honours' view, only four (4) issues fell for determination by Schofield, J. albeit on a *prima facie* case basis apart from the other two usual considerations. The four issues identified were:-

i. Whether the suit premises was sold for such an under-value, as would entitle the court to set the sale aside and hence prevent the transfer and registration of the property in the name of the 2nd respondent.

ii. Whether the appellant could show that the bank had fraudulently exercised its statutory power of sale.

iii. Whether the bank had given the appellant notice, and

iv. The scope of equity of redemption in the circumstances of the dispute. The learned Judges then summarized their role thus:-

> **"The questions now are whether the High Court exercised its discretion properly in refusing to grant a temporary injunction before trial, and secondly whether this Court on this interlocutory appeal should interfere."**

They went on to state that although Schofield, J. had in mind the principles laid down, first in **East African Industries Vs. Trufoods Ltd** [1972] EA 420 and followed in the celebrated **Giella** (supra) the learned Judge erred in determining disputed facts at an interlocutory stage. They concluded that:-

> **"The correct approach in dealing with an application for injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties and has made final findings of fact on disputed affidavits."** Per Platt, JA.

Clearly, from these passages of the judgment no final determination was made. As a matter of fact, the Court took issue with the High Court's approach of making conclusive findings on an interlocutory application.

Bearing in mind that the suit property constituted the appellant's home and weighing the points in contention, the learned Judges reversed Schofield J's decision and proceeded to issue an injunction on terms, emphasizing that;

> **"In the event of non-compliance with either condition the injunction will be discharged, unless otherwise ordered."**

It is common ground that the appellant defaulted and with that default the injunction, by operation of the aforesaid order was automatically discharged. But out of an abundance of caution and prudence, the 1st respondent made a formal application to this Court in Civil Application No. NAI 18 of 1991, three years later for the discharge of those orders.

By filing HCCC No. 1260 of 2002 asking the High Court to declare the sale of his property null and void, on the same grounds as those raised in HCCC No. 937 of 1986, while the latter suit was still pending, the appellant was in clear abuse of the court process. As demonstrated by paragraph 52 of the plaint in HCCC No. 1260 of 2002 the appellant was alive to this fact as he declared that;

> **"52. There is no other suit pending other than HCCC No. 937 of 1986 which is yet to be fully heard between the plaintiff, Jimba Credit Corporation and the 1st defendant."**

If the only reason for bringing a fresh suit was to deal with the fact that the property had been transferred to the 2nd respondent, the appellant did not have to file a fresh suit but instead he ought to have considered joining the 2nd respondent in an already existing suit.

For the reasons stated herein, we have no doubt that the learned Judge properly directed himself in striking out the appellant's suit instituted in HCCC 1260 of 2002. The only mistake he committed was his consideration of certain aspects of the dispute that go to its merit. For instance, the learned Judge had no jurisdiction to declare that under **Section 77** of the repealed Registered Land Act:

> **"….the appellant's interest, title or other right in the suit property was extinguished as a matter of law following the sale by public auction, pursuant to the exercise of a statutory power of sale by the chargee."**

That was a serious misdirection because the jurisdiction to strike out under the former **order VI Rule 13 (a) (b) (c)** and **(d)** was restricted to whether:-

i. the pleading disclosed no reasonable cause of action or defence; or

ii. it was scandalous, frivolous or vexatious, or

iii. it would prejudice, embarrass or delay the fair trial of the action; or

iv. it was otherwise an abuse of the process of the court.

The application under consideration was brought pursuant to all the above four grounds. In terms of **Order VI Rule 13 (2)** no evidence was admissible where it was alleged that the pleading disclosed no reasonable cause of action or defence.

In considering this aspect of the application, the learned Judge, in error, went into evidence and the law drawing conclusions which could only be arrived at by the trial court.

Our finding on this question, however, does not affect the fact that the striking out of the suit was proper on the material before the learned Judge. In any case, the erroneous conclusions he made do not bind the Judge, who will ultimately hear the main suit.

Finally, contrary to the appellant's submissions, the learned Judge did not declare him a vexatious litigant. Like the Court of Appeal, (Gicheru, Tunoi, as they then were, and Akiwumi, JJ.A) in Civil Application No. NAI. 137 of 1995, the learned Judge only observed the appellant's trend and tendency of filing a multiplicity of applications which, in their opinion were vexatious.

In granting the appellant an injunction, the learned Judges in Civil Appeal No. 111 of 1986 expressed the hope that the main suit would be set down for an early hearing, considering that it involved the appellant's home. That was in July 1988.

Similar sentiments were expressed recently in a ruling delivered on 26th July 2013, in which it was noted that no less than fifteen (15) rulings have been issued by different courts in different applications. The Court reminded the appellant that, like Charles Dickens' fictional **Jandyce Vs. Jandyce** in **Bleak House** litigation has to have an end.

We reiterate that the appellant must go back to HCCC No. 937 of 1986, where the answer to the issues he has been raising in the many applications lies. In the result, we find no merit in this appeal which we accordingly dismiss with costs to the respondents.

Dated and delivered at this 13th day of February 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR