



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J. MOHAMMED & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 236 of 2011

BETWEEN

NINA MWEU t/a SASSMA FARM.....APPELLANT

AND

MUUS KENYA LIMITED.....RESPONDENT

UATHIMO LIMITED.....INTERESTED PARTY

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (George Dulu J.)
delivered on 14th July 2011*

in

HCCA No. 735 of 2006

JUDGMENT OF THE COURT

1. The Respondent, **MUUS KENYA LIMITED**, by way of a plaint filed a liquidated claim against the appellant for the sum of Kshs.408,701.50 before the Chief Magistrate's Court at Nairobi in **CMCC No. EJ. 232 of 2001**. By consent dated 27th April 2001, the parties agreed that judgment be entered for the respondent against the appellant as prayed for in the plaint and the appellant liquidates the decretal sum in monthly installments of Kshs.20,000/= subject to review upwards.
2. Upon the appellant defaulting in liquidating the decretal sum as per the consent order, they moved the Chief Magistrate's court and applied for the sale of immovable property owned by the appellant being No. **Land Reference No. Nairobi/Block/72/706** (the suit property). The property was sold by public auction on 17th November 2005 for Kshs.3,100,000/= to the interested party in this suit, **UATHIMO LIMITED** who was the highest bidder.
3. Subsequent to the sale by public auction, the respondent deposited in court the sum of Kshs.2,227,216.90 being the balance of proceeds from the sale, the appellant was requested to take the balance from the court. The appellant declined to take the balance and filed a Notice of Motion dated 5th May 2006 at the Chief Magistrate's Court seeking orders to set aside the sale of Nairobi Block/72/706 to the interested party. The Resident Magistrate (Hon. J. M. Were) in a ruling dated 29th September 2006

dismissed the application. In dismissing the application, the Hon. Resident Magistrate expressed as follows:

“The sale can only be set aside if in addition to the applicant showing that the sale was tempered with fraud or irregularity, also shows that she has suffered or will suffer substantial loss or injury due to irregularity... The applicant had from 2001 been aware of the possible consequences of the default in paying the outstanding sums and the advocate for the plaintiff in her letter of 4th October 2004 was explicit about this. The property was advertised on 3th November 2005 in the Daily Nation a news paper I consider to have wide circulation and the sale slated for 17th November 2005 – fourteen days from the date of advertisement. No evidence has also been shown as to what action the applicant took in the intervening period to forestall the sale of the property. The house is said to have been valued at Kshs. 3million. The house was sold for Ksh. 3.1 million and the balance after deducting the plaintiff’s entitlement and costs of the auction is lying in court for the applicant’s collection. I do not see prejudice in substantial loss to be suffered by the applicant. This application is therefore unwanted (sic). The same fails and is dismissed with costs to the respondent.”

4. Dissatisfied with the ruling delivered by the Resident Magistrate, the appellant filed appeal in the High Court which was dismissed in the impugned judgment dated 14th July 2011. This judgment is the subject of the instant appeal. In dismissing the appeal, the learned judge cited **Order 21 Rule 79** of the Civil Procedure Act stated:

“It is clear from the above rule that, for a fraud or irregularity to entitle a party to setting aside a sale, that irregularity or fraud must be material., It is not every irregularity or fraud of a minor nature that will result in setting aside of the sale. Secondly, an applicant who asks for the setting aside of the sale has to prove on the facts to the satisfaction of the court, that he or she has sustained substantial injury as a result of such irregularity or fraud. The appellant herein has just complained of irregularity or fraud. She has not demonstrated the materiality of that fraud or irregularity.

She did not place before the magistrate’s court facts that would show that she had suffered substantial loss or prejudice as a result of that irregularity or fraud. The fact that prices of real property assets have been rising rapidly is not a material prejudice or loss on the appellant, that in 2005 or 2006 when the property was sold, the subject property was worth more that it was sold for. The sale could only be done on the basis of valuation of properties at that time. She cannot use the value of the property today as the basis for claiming material loss or prejudice. .. In my view, the appellant did not prove to the magistrate that she had suffered substantial loss...The result is that this appeal will be dismissed.”

5. Aggrieved by the High Court judgment, the appellant filed this appeal citing numerous grounds of appeal that can be compressed as follows:

“(i)The learned judge erred in law when he failed to discharge his duty as a first appellate court and subject the evidence and material before the subordinate court to a fresh and exhaustive scrutiny and evaluation and draw his own independent conclusions.

(ii) The learned judge erred in law in failing to subject the evidence to scrutiny to find that the alleged service of the notice to show cause and all services allegedly affected by Cosmas Osawa in connection with the execution proceedings were false and therefore the sale of Nairobi Block 72/706 was fraudulent or irregular; that the learned judge erred in not finding that the appellant was not served by the process server.

(iii) The learned judge erred in law in failing to find that the sale and transfer of the suit property to the interested party was without notice and based on a false affidavit of service and this amounted to material irregularity and or fraud on the basis upon which the sale should have been

set aside.

(iv) *The learned judge erred in law in failing to find that the appellant had suffered substantial loss.*”

6. At the hearing of this appeal, learned counsel Mr. Onesmus Githinji appeared for the appellant while learned counsel Mr. Otieno Omuga appeared for the respondent and learned counsel Mrs. Cheruiyot acted for the interested party.

7. Counsel for the appellant cited **Order 21 Rule 79** which provides as follows:

“Where any immovable property has been sold in execution of a decree, the decree holder or any person whose interest are affected by the sale, may apply to the court to set aside the sale on the ground of 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.”

8. He reiterated the grounds in the Memorandum of Appeal emphasizing that the appellant was neither served with the notice to show cause nor the entry of judgment before the trial court; that the process server Mr. Cosmas Osawa indicated that he went to House No. 62 while the appellant resides in House No. 67; that this evidence was ignored by the learned judge when re-evaluating the evidence on record; that the sale of the suit property was irregular to the extent that there was no attempt made to attach and sell the appellant’s movable property before resorting to attachment and sale of her immovable property; that there was material irregularity and fraud in the sale of the suit property since the appellant was neither informed of the sale nor given an opportunity to redeem the property and repay the decretal sum and that **Rule 15** of the Auctioneers Rules was not followed and the process server swore a false affidavit. Counsel urged this Court to note that if the sale is not set aside, the appellant will forever lose her investment in the suit property and that if the appellant had been properly served, she would have redeemed the property. Counsel referred this Court to Black’s Law Dictionary definition of “fraud” to emphasize that the sale by public auction was fraudulent.

9. The respondent in opposing the appeal urged this Court to find that the conditions for setting aside a sale by public auction under **Rule 79** of **Order 21** were not been fulfilled; that **Rule 79** requires a party to show substantial loss and in the instant case, the appellant failed to demonstrate any substantial loss; that the sale price realized at the public auction was above the valuation price; that the valuation report gave a value of Kshs.3 million while the sale price was Kshs.3.1million; that the appellant did not conduct her own independent valuation of the suit property and thus there is no basis to assert that the property was sold a low value; that no substantial loss or prejudice has been suffered by the appellant and that fraud or irregularity were never established.

10. Counsel for the respondent submitted that the instant appeal was filed without leave of the High Court; that an appeal under **Order 21 Rule 79** now **Order 22 Rule 75** is not among the orders exempted from seeking leave. For the respondent, it was further submitted that this is a second appeal that must be confined to points of law; that the appellant has simply canvassed issues of fact and no point of law has been identified or addressed in the appellant’s submissions; this Court was urged to note that there is no requirement in law that a decree holder must first attach and realize movable property before attaching and selling immovable property; that the valuation report relied upon by the respondent has never been challenged in court and that the liability of the appellant to the respondent has never been denied and judgment was entered by consent.

11. Counsel for the interested party associated herself with and adopted the submissions by counsel for the respondent. She submitted that the conditions to be fulfilled under **Order 21 Rule 79** were not met by the appellant; that neither the respondent nor the interested party has prejudiced the appellant because the balance of the amount realized from the sale by public auction is lying in court awaiting the appellant’s collection.

12. In a brief reply counsel for the appellant urged this Court to find that the affidavits by the process sever was false and this was a material irregularity underpinning the sale by public auction.

13. We have considered the grounds of appeal and the able submissions by counsel in the matter. This is a second appeal which must be confined to points of law. (See **Kitivo -v- Kitivo (2008) KLR 119**). **Section 72** of the Civil Procedure Act stipulates that:-

“Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely: -

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

14. In this appeal, the appellant reiterated submissions made before the trial court and the High Court. Before us, the submissions focused on facts already determined by the two courts below. Allegations of improper, irregular or lack of service and allegations of false affidavit and fraud are all factual issues that have been considered and determined by the two courts below. The issue whether the appellant suffered substantial loss is also a question of fact that has been determined by the two courts below which have held that no substantial loss was proved. Issues relating to the value of the property, sold and the valuation report are facts that have been considered and a determination made by the two courts below. The facts in support of the conditions to be fulfilled to set aside a sale under **Order 21 Rule 79** (now order 22 Rule 75) of the **Civil Procedure Act** and Rules were properly considered and determined by the two courts below.

15. In **Karingo -v- R, (1982) KLR 214**, it was held that a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless it is shown that the findings are not based on evidence. (See **Chemagong vs. Republic, (1984) KLR 213** at page and **Reuben Karari s/o Karanja vs. Republic 17 EACA146**). In **Sanitam Services (EA) Ltd. -v- Rentokil (2006) 2 KLR 70**, this Court stated that it would not lightly differ with the trial court’s finding of fact unless the conclusion is based on no evidence or misapprehension or on application of the wrong principles. We see no reason to interfere with the concurrent findings of fact by the two courts below.

16. In the instant appeal, no point of law has been raised and canvassed by the appellant. It has not been satisfactorily demonstrated to us that the decision arrived at by the learned judge is contrary to law or to some usage having the force of law. It has also not been demonstrated that the decision by the court failed to determine some material issue of law or usage having the force of law; the appellant has also not shown that there has been a substantial error or defect in the procedure provided by law which produced error or defect in the judgment of the High Court.

17. For the foregoing reasons, we find no merit in the appeal which we hereby dismiss with costs to the respondent. We award no costs to the interested party who merely adopted the respondent’s submissions.

Dated and delivered at Nairobi this 31st day of July, 2015.

G.B.M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR