



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 45 OF 2010

BETWEEN

KEBIRIGO PARISH CONSUMER CO-OPERATIVE

SOCIETY..... APPELLANT

AND

DIOCESE OF KISII KENYA, E. AFRICARESPONDENT

(Appeal from a Ruling of the High Court of Kenya at

Kisii, (Wambiliyangah, J) dated 19th March 2001

in

HCCC NO. 325 OF 1989)

JUDGEMENT OF THE COURT

By a Plaintiff filed at the High Court of Kenya, Kisii, on 14th December, 1989 the plaintiff “**Diocese of Kisii, Kenya E. Africa**” sued the defendant Kebirigo Parish Consumer Co-operative Society for Kshs. 251,474/80 in respect of money advanced by the plaintiff to the defendant. The defendant was served and filed a Statement of Defence through its Advocate in which the defendant admitted the debt, denied refusal to pay and pleaded for time to arrange payment. It is not clear from the record how judgement was thereafter applied for or entered but at any rate judgement was entered and a decree drawn. For reasons that will become clear later in this judgement we reproduce the said decree:-

“IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 325 OF 1989

DIOCESE OF KISII (K) E.A.PLAINTIFF

VERSUS

KEBIRIGO PARISH CONSUMER)

&CO-OPSOCIETY LTD).....DEFENDANT

CLAIM: SHS. 251,474.80

This case coming on this day for final disposal before honourable Justice V. V. Patel Esq., in the presence of S. S. Balongo Esq., Advocate for the plaintiff and defendant absent, it is ordered and decreed that sh. 294,782/= be paid by the defendant to the plaintiff on account of cost of this suit with interest thereon at the rate of 12% p.a. from this date to the date of realization.

GIVEN under my hand and Seal of this court this

day of1990

a). Principal sum ofsh. 251,474.80

b). Cost taxed atsh. 23,190.00

c). Interest at 12% p.a. from

14-12-89 to 10-9-90.....sh. 20,118.20

Total 294,782.00

DEPUTY REGISTRAR”

KISII COURT

Apart from the language of the text of the document which on the face of it is not clear or drawn in the ordinarily acceptable form the document is not signed or dated but is certified by the Deputy Registrar of the court.

An application for execution of decree followed; it was heard and the court allowed the plaintiff to attach the defendants parcel of land known as **West Mugirango/Bonyamatuta/1051**. A public auction took place where the plaintiff was the highest bidder. A multiplicity of applications then followed: the plaintiff praying for leave to be registered as new owner of the property; the defendant praying for setting aside of the decree; setting aside of the sale; rectification of the register at the Ministry of Lands amongst other applications.

In the application from which Ruling the appeal herein was preferred the appellant Kebirigo Parish Consumer Co-operative Society prayed inter alia for setting aside of the sale of the said parcel of land and setting aside of the order permitting the Executive Officer of the court to execute transfer documents relating to the said parcel of land.

The application was heard by Wambiliyanga, J (as he then was) who in the Ruling dated 19th March, 2001 dismissed the application for the principal reason that the appellant was guilty of delay because the application was filed about 8 years after judgement had been entered in favour of the respondent.

This is a first appeal and we are mandated to look at the whole matter afresh and reach our own conclusions based on the evidence on record after evaluating how the judge below treated the same. The judge did in the event exercise a discretion and as has been stated in various decisions on the issue this court should not interfere with the exercise of discretion by a judge unless it is shown that he has misdirected himself in some matter and in the result reached a wrong decision or unless it is manifest

from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice - See Mbogo & Another v Shah [1968] EA 93 and Mwanasokoni v Kenya Bus Service Limited (Mombasa) (Civil Appeal No. 35 of 1985) (ur).

In the Memorandum of Appeal the appellant has raised 5 grounds of appeal - that the judge erred in not holding that the execution process was irregular, that the judge erred in not holding that transfer of the said parcel of land was irregular because there was an order staying execution; that the judge erred in holding that the appellant was guilty of laches; that the judge did not apply the law properly and that the judge misapprehended the issues before him and acted upon wrong principles.

The appeal came for hearing before us on 26th June, 2013 when the appellant was represented by its learned counsel, Mr. G. K. Bosire. The respondent did not appear. Learned counsel for the appellant in prosecuting the appeal submitted that the decree of the High Court was irregular as it was neither dated nor signed. The same with Certificate of Costs. Counsel submitted further that the sale was irregular as the decree – holder participated in the sale and did not even pay the requisite deposit. It was also argued that the sale was void as consent of Land Control Board of the relevant area was neither sought nor obtained within time or at all.

As we have stated it is not clear how judgement was obtained after the defence that admitted the claim was filed. We have not seen any application for judgement on admission or an application to strike out the defence. What we have seen is the decree reproduced earlier in this judgement.

A “Decree” is defined thus by the Civil Procedure Act:

“Decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include-

- (a) any adjudication from which an appeal lies as an appeal from an order; or**
- (b) any order of dismissal for default:**

Provided that, for the purposes of appeal, “decree” includes judgement, and a judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgement may not have been drawn up or may not be capable of being drawn up.”

Order 21 Rules 7 and 8 Civil Procedure Rules declares that a decree shall agree with the judgement, shall contain the number of the suit, the names and descriptions of the parties, particulars of claim and shall specify the relief granted or other determination of the suit. It shall state who is to pay costs and shall bear the date on which the judgement was delivered.

The decree on record is not signed and does not show the date on which it was made at all. It does not even show the date when then the counsel for the plaintiff appeared before the judge who ordered judgement for the plaintiff resulting in the decree.

Order 22 Rule 61 Civil Procedure Rules forbids a decree – holder from bidding to purchase property in execution of a decree without the express permission of the court. We have not seen any application by the respondent for leave to participate in the auction that resulted from the decree or an appropriate order allowing the same.

Counsel for the appellant has also raised as an issue lack of consent of the land Control Board of the relevant area to sanction the sale.

Section 6 of the Land Control Act requires consent of the Land Control Board of the relevant area to be obtained within 6 months without which the transaction becomes void. Consent of the board was not obtained by the respondent at all and the sale could therefore not be sanctioned.

In Situma v Cherongo [2007] 2 KLR 84 it was held:

“By Section 8 of Land Control Act, the application for the consent of the Land Control Board was required to be made within 6 months of the making of the agreement subject to the jurisdiction of the High Court to extend the period. Upon the failure by the deceased and the respondent to make an application for the consent of the Land Control Board within six months the agreement for sale of the land became void for all purposes by virtue of Section 6 (1) of the Land Control Act.

See also William Ocharo Maangi v Joseph Onyoni Kombo (Kisumu) Civil Appeal No. 18 of 1995 (ur).

We have perused all the pleadings and material on record and have considered the issues raised by the appellant in this appeal.

The learned judge based his findings purely on the basis that the appellant was guilty of laches, the application before him coming about 8 years after judgment had been entered for the respondent. Yet a perusal of the record shows that the 2 parties to the suit before him had filed many applications since entry of judgement praying for various orders. It could not be said in the premises that the appellant had slept on its rights and the status quo be left undisturbed. The court was indeed kept so busy by the many applications and the appellant had no time to aside the judgement or stop transfer of the property to the respondent.

The decree on which the respondent relied to assert rights to the judgement it had obtained was clearly irregular and should not have been allowed to stand. It was not signed by an officer of the court and there is no date on it to show when it was made contrary to legal requirements.

The respondent, who was owner of the irregular decree, participated in the auction without leave of the court. It did not pay the requisite deposit as required. These were matters that should have been considered by the learned judge, the which consideration should have led to a different result.

We think we have said enough to show that the judge in exercise of his discretion on the application before him ignored fundamental issues and irregularities and this led to injustice to the applicant. We are entitled in the premises to correct those irregularities and wrongs and we do so by setting aside the Ruling delivered on 19th March, 2001. The appeal is allowed the Ruling delivered on 19th March, 2001 is hereby set aside. The appellant will have costs of the appeal and costs of the suit.

Dated and Delivered at Kisumu this 4th day of October 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR