IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, BOSIRE & OWUOR JJ.A)
CIVIL APPLICATION NO. NAI. 35 OF 2001

BETWEEN
GEORGE GIKUBU MBUTHIA .....APPLICANTS

AND

JIMBA CREDIT CORPORATION LTD ..... IST RESPONDENT

NJERU MUGO ..... 2ND RESPONDENT

(Application for extension of time to serve a Notice & Record of Appeal from a ruling of the High Court of Kenya at Nairobi (Hewett, Commissioner of Assize) dated 22nd February, 2000

in

H.C.C.C. No.937 of 1986)
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RULING OF THE COURT

On 11th May, 2001, a single Judge of this Court, Tunoi, JA, allowed an application by George Gikubu Mbuthia, for an extension of the time within which to serve a Notice and Record of Appeal on Barclays Bank of Kenya Limited, on the ground that it was a party directly affected by Civil Appeal No.153 of 2000, and which, in the learned Judge's view had to be brought into the appeal. Jimba Credit Corporation and Peter Njeru Mugo were named in the said application as first and 2nd respondents respectively. The second respondent being dissatisfied with the said decision, has petitioned us under rule 54(1)(b) of the Court of Appeal Rules (the Rules) to reverse that decision.

The litigation between the parties has a chequered history, but we will confine ourselves to such part of that history as is material to the determination of the reference beforTeh eu sf.irst respondent as chargee of the suit premises, to wit Nairobi/Block/73/225, with the applicant as chargor, sold the property in exercise of its statutory power of sale, and by an order of the superior court in its Civil Suit No.937 of 1986, specific performance of that sale was decreed. Pursuant to that order the suit premises was later transferred to the 2nd respondent who soon thereafter charged it in favour of Barclays Bank of Kenya Limited after the applicant failed to obtain an order of stay of execution of that order both from the superior court and this Court.

The applicant is the appellant in Civil Appeal No.153 of 2000, aforesaid. He is appealing against a refusal by the superior court in its aforesaid suit, to grant him leave to amend his plaint to join Barclays Bank of Kenya Limited as a defendant. He alleged in a draft amended plaint, inter alia, that the Ist respondent improperly and irregularly exercised its right of sale of the suit premises, that the court order granting

specific performance to the 2nd respondent is a nullity and therefore incapable of passing good title to the 2nd respondent and that because of that he, the 2nd respondent could not pass any title to Barclays Bank of Kenya Limited. But for some reason the applicant did not serve a copy of the Notice of Appeal on the said Bank arguing that it was not a party directly affected by his appeal. However when the appeal came for a hearing this court expressed the view that prima facie, the Bank was a party directly affected by the appeal and should have been served with a copy of the Notice of Appeal. The appeal was therefore adjourned to enable the applicant take the necessary steps in that regard. The application from which this reference arises was thus provoked.

In granting the applicant's application the learned single Judge held, inter alia, that while he agreed with the 2nd respondent that it is against public policy to unnecessarily prolong litigation and that he was therefore right to demand that the applicant should not burden him any more with vexatious litigation, he was inclined to grant the extension of time because, first, there was an averment in the Memorandum of Appeal that the suit property was fraudulently charged to Barclays Bank, and second, that the said Bank is by reason of the provisions of rule 76(1) of the Rules a party directly affected by the appeal and which, therefore, should be served with a Notice of Appeal, and its joinder in the appeal was necessary for the purpose of effectually determining the real question in issue between the parties.

It is doubtful whether there is any outstanding issue between the applicant and the first respondent or even between him and Barclays Bank of Kenya Limited. On the basis of the facts before us there was neither an order of injunction nor of stay in situ at the time the 2nd respondent charged the suit property to Barclays Bank. Besides, as we stated earlier the dispute between the applicant and the 2nd respondent over the suit premises was decided when on 18th February, 1992, the superior court (Tank J.) ordered that the suit property be transferred to the 2nd respondent. That decision is still in situ and binds all parties concerned.

The applicant in his submissions before us urged the view that Tank J's decision and all consequential orders are a nullity. In his view, the decision being a nullity, it should be treated as such and no court order is necessary to declare it so.

In Barnard v. National Dock Labour Board, [1953]1 ALL ER. 1113 cited with approval in Choitram v. Mystery Model Hair Saloon[1972] EA. 525, Denning L.J (as he then was) rendered himself thus:

> ***"It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why, then, should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law."***

A decision of the court, whether right or wrong, or invalid, remains in force until declared to be wrong or invalid by a court of competent jurisdiction. The decision of Tank J dated 18th February, 1992, is a decision of a court of competent jurisdiction. It has not be set aside or varied. It binds the parties to it. There is no competent or any appeal pending challenging its validity or correctness. As the matter stands it is a decision in favour of the 2nd respondent, and which he acted upon to have the suit property transferred to him. The outcome of Civil Appeal 153 of 2000, one way or the other will not affect that decision.

The learned single Judge having come to the conclusion that the applicant was unnecessarily prolonging this litigation and that he was, in effect, burdening the 2nd respondent with vexatious litigation should not have proceeded to allow the application. On the material before him this was a fit matter for dismissal.

In the result we think that the learned single Judge erred in principle and we are therefore, constrained to interfere. We allow the reference, set aside the order granting the applicant an extension of time within which to serve a Notice and Record of Appeal on Barclays Bank, and substitute therefor an order dismissing the application dated 19th February, 2001 with costs. The 2nd respondent shall have the costs of the reference.

Dated and delivered at Nairobi this 12th day of October, 2001.

J.E. GICHERU
.....
JUDGE OF APPEAL

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

E. OWUOR
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR