



REPUBLIC OF KENYA



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Mwangombe v Adam; Gulam (Objector); Mwabingo (Interested Party) (Environment & Land Case 105 of 2011) [2023] KEELC 199 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 199 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 105 OF 2011
NA MATHEKA, J
JANUARY 25, 2023

BETWEEN

PETER MBOGHO MWANGOMBE PLAINTIFF

AND

ZAHARA ADAM DEFENDANT

AND

NOREEN GULAM OBJECTOR

AND

JAPHET IWIWASI MWABINGO INTERESTED PARTY

RULING

1. The application is dated May 6, 2022 and is brought under Section IA, 1B, 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. This application be certified as urgent and be heard expeditiously in the first instance.
 2. The Warrants of Attachment and Sale of the Objector's property registered as CR No 30496 and Prohibitory Orders as well as the purported auction of the said property be lifted.
 3. The costs of this application be provided for.
2. It is supported by the Supporting Affidavit sworn by Noreen Gulam and on the grounds that the Objector wishes to sell her properly registered as CR No 30496. The determination that the Court awaited from the High Court concerning the estate of Zahara Adam (the deceased Judgement Debtor) was delivered on March 31, 2022. The Plaintiff/ Decree Holder has identified 6 properties in which the deceased Defendant has ownership interest and obtained prohibitory orders over those properties. There was no auction of the suit premises belonging to the Objector and the Memorandum of Sale



presented to this Court is a false document. It is oppressive and unreasonable for the Plaintiff to proceed against the Objector after he obtained prohibitory orders against property of the deceased Judgement Debtor. That no prejudice will be caused to the Plaintiff decree holder as the prohibitory order he obtained on September 28, 2020 have secured his claim. The Plaintiff cannot enforce the Decree against both the Judgement Debtor and the Objector. That there is no judgement or Decree against the Objector.

3. The Plaintiff/Respondent stated that on the 1st August 2014, the Honourable Court entered judgment for him for a sum of Kshs 3,000,000 and Kshs 28,374/- with interest at court rates from the date of payment until payment in full. In addition, he was awarded costs which were assessed and or taxed at Kshs 341, 128/- vide a ruling delivered by the Deputy Registrar on the June 10, 2015. That following the delivery of the said judgment, the Defendant, met her unfortunate demise, prior to the compliance with the Orders of this Honourable Court. That at this point he was a holder of a valid decree which was yet to be fulfilled and or satisfied hence making it difficult for him to reap the fruits of his judgment. That being a decree holder, he was entitled to enforce the decree as per the directions of the Court and as against any properties belonging to the Defendant (deceased) in a manner that secures his interests and in line with the directions of the Court. That he instructed the firm of Elite Africa Valuers Limited to conduct a valuation of the property LR No 1956/966 (CRNo 30496) and issue a report on the market value of the property and its properties. The valuers subsequently returned a report dated 20th December 2017, giving accounts of the market value, and also attaching an official search dated September 13, 2017 conducted at the land registry marking the owner to be Zahara Adam and also pointing out that there was an encumbrance created vide a court order dated September 4, 2014. That following the report that valuation report, he instructed Work-No-Words Auctioneers to carry out the sale as per the provisions of the law, and to which the Auctioneer proceeded as instructed and later by way of public auction sold the property to The Interested Party herein who was declared the purchaser of the property known as plot No LR 1956/966.
4. That the information above is reflected in the Memorandum of Sale dated 10th April 2018 which declared the Interested Party herein as the purchaser of the property and also, contains the purchase price payable consequent to the auction. That following this he made a return by producing the certificate of sale of immovable property to court which was then stamped by the Deputy Registrar of this Honourable Court, thereby giving force of law to the process, and in turn declaring The Interested Party herein to be the new owner of the property. That the Applicant seeks to revisit this entire process which has already obtained the sanction of the law, and thus, interfering with a valid process of the court to render the same moot. That is further notable that the Applicant herein had since invoked the Jurisdiction of the Appellate Court following the decision of this Honourable Court by filing a Notice of Appeal thus rendering this Court functus officio on the Subject matter involving the property of instance. Consequently this Court is bereft of the requisite Jurisdiction to determine the application herein. That for all the foregoing reasons, he prays that the Application herein be dismissed with costs on a full indemnity basis to the Respondents.
5. This court has considered the application and the submissions therein. The suit herein was instituted vide a plaint filed by the plaintiff on April 19, 2011 and amended on April 30, 2013 seeking inter alia refund of Kshs 8,028,374/= paid to the defendant. On August 1, 2014 the court found that the defendant had admitted to having been paid Kshs 8,000,000/= by the plaintiff as part purchase price for LR No 1956/966 and ordered the defendant to pay Kshs 8,000,000/= and Kshs 28,374/= with interest at court's rate from the date of payment until payment in full. The defendant being dissatisfied with the Ruling dated August 1, 2014 filed a Notice of Appeal on August 11, 2014, while the plaintiff was issued with a decree dated August 22, 2014. The objector claims to have bought the same suit



property from the defendant for Kshs 1,500,000/= and became the registered proprietor on August 15, 2014.

6. The plaintiff was issued with Warrant of Attachment of immoveable property in execution of a decree for money on July 17, 2015, and on November 20, 2017 with Prohibitory Order as against the defendant (judgement-debtor). On April 10, 2018 the plaintiff sold the suit property to Japhet Mwasi Mwambingo through public auction. The objector opposed the sale and made an application to court to set the said sale aside. On May 8, 2019 the court set aside the sale and ordered stay of execution of the ruling delivered on April 28, 2017 pending the hearing and determination of the appeal at the Court of Appeal. Further the court in preservation of the plaintiff's interest directed the objector not to interfere in any way and/or dispose any interest in the title grant No 30496 LR 1956/966 until the appeal is heard and determined. The plaintiff being dissatisfied with the Ruling dated May 8, 2019 filed a Notice of Appeal dated May 29, 2019.
7. From the above analysis, it is clear that the objector is asking court to set aside the Warrant of Attachment of immoveable property in execution of a decree for money issued on July 17, 2015, and the Prohibitory Orders issued on November 20, 2017. The objector seeks to set aside the said warrant of attachment and prohibitory order in order to sell the suit property. The question of ownership of the suit property is still under determination and the suit property cannot be disposed until the same is determined. Further, the orders of court issued on May 8, 2019, which directed the objector not to interfere in anyway or dispose any interest in Grant No 30496 LR No 1956/966 until the appeal at the Court of Appeal is heard and determined are still inforce. The application herein does not seek to set aside, vary or lift the orders issued by court on May 8, 2019, these orders are still alive and ought to be adhered too. The averments by the objector in her affidavit in support of the application that she wants to sell the suit property, is in violation of the orders issued on May 8, 2019.
8. The court has already pronounced itself on the suit property in its ruling dated August 1, 2014 and May 8, 2019, where dissatisfied, objector has the right to appeal to the Court of Appeal where she can seek any other consequential order and can be granted on merits. Therefore, the orders sought herein are in contravention of the orders of court issued on May 8, 2019 and cannot be issued. The application herein dated May 6, 2022 is unmerited and the same is dismissed with costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

