IN THE COURT OF APPEAL

AT NAIROBI

(CORAM :LAW, POTTER JJA & KNELLER Ag JA)

CIVIL APPLICATION NO. NAI 8 OF 1983

MASINDE MULIRO …….. APPLICANT

VERSUS

DICKSON OCHIENG' ……..RESPONDENT

(In an intended appeal from an order of the High Court at Nairobi, Aganyanya J)

JUDGMENT

Kneller Ag JA Mr Raiji, for the first respondent (Mr Ochieng'), who was the decreeholder in the High Court, took a preliminary point, namely, that Mr Akhaabi's application, on behalf of the judgment debtor (Mr Muliro), for leave to appeal was incompetent and should be struck out because, although the application was accompanied by a copy of the decision against which Mr Muliro desired to appeal, there was no copy of the order of the High Court refusing to give leave to appeal, and this fell foul of rule 43 (3) of the Court of Appeal Rules. Mr Omondi, who appeared for the auctioneer, who sold Mr Muliro's farm and Mr Onalo, who appeared for the purchaser of the farm, Yuya Co-operative Society Limited supported Mr Raiji. Mr Akhaabi relied on the fact that he had accompanied his application with a photocopy of the typed copy of the learned judge's decision, against which he desired to appeal together with a copy of his ruling refusing leave to appeal, and he said this was the practice in this court.

The learned judge had refused leave to appeal on January 19, 1983 because Mr Muliro had consented to judgment being entered against him in favour of Mr Ochieng' and had not paid the decretal amount since the date of judgment, which was January 8, 1981 or settled the matter amicably.

Before that he had delivered a ruling dismissing with costs Mr Muliro's application under order XXI rule 79 of the Civil Procedure Rules and section 3(A) of the Civil Procedure Act asking the High Court to set aside the sale of Mr Muliro's farm in execution of the decree passed after judgment was entered because the matter was *res judicata* or he was *functus officio*, the court having dismissed with costs on August 13, 1982 the same application which had been brought under section 3 (A) of the Act because Order XXI rule 79 should have been specified and not section 3 (A) of the Act. The High Court had not given Mr Muliro's advocate leave to bring another application and he had dealt with the first one in full and although notice of appeal had been filed it had not been pursued, and no reasons or sufficient reasons had been given for abandoning that appeal.

The preliminary objection was well taken, the learned judge should not have dismissed the first application to have the sale set aside because Order XXI rule 79 was not invoked, he should not have held that he was *functus officio* or the matter was *res judicata* when the second application was made to him and he should not have refused leave to appeal, but because Mr Muliro's advocate did not ask for a stay of an order confirming the sale until this court had heard his application for leave to appeal, and the appeal itself, if leave were given, the sale was confirmed and the interest of Mr Muliro in the farm has come to an end so this application must be dismissed with costs. First of all, however I must set out the facts behind this application and then the law which lead to these results.

Mr Dickson Ochieng' lent Mr Masinde Muliro some money in 1977 which was not repaid.

Mr Ochieng filed suit for its return in early 1980 and obtained a consent judgment against Mr Muliro in December the same year. The terms of the judgment were that Mr Muliro should pay the decretal amount of Kshs 130,000 in equal monthly instalments of Kshs 32,500 on or before the twentieth day of each month beginning on or before December 20 1980.

Mr Muliro did not pay these instalments but in April 1981 he paid Kshs 10,000, on account as it were, to Mr Ochieng' who, weary of waiting for the balance of the decretal amount to be paid, instructed his advocates to apply for execution of the decree by attachment and sale of Mr Muliro's farm LR No 9008 Kitale. The terms of sale were settled by a deputy Registrar of the High Court on November 3, 1981 and they included one that directed that the farm should be sold at a public auction to be conducted by a court broker to be appointed by the Kitale magistrate.

He chose Jamii Auctioneers of Kenyatta Street Kitale and they claim the farm was sold to the Highest bidder, Yuya Farmers Co-operative, for Kshs 650,000 on January 26, 1982 at 10.30 am at a public auction with over fifty people present. Someone from the co-operative went with the auctioneers' accountant to a bank after the auction and paid him Kshs 162,500, which is twenty – five percent of the purchase price and the balance has since been paid together with various fees so Mr Ochieng' and Jamii auctioneers are well satisfied with everything.

Not so Mr Muliro, however for Mr Khaemba of the City Valuers of Nairobi, maintains that in March 1982 the market value of the farm, free from all encumbrances but subject to its ground lease, was worth Kshs 3,220,000 and two friends of Mr Muliro, Mr Julius Wafula and Mr Gilbert Khaemba, have sworn affidavits to say that no public auction was held on January 26, 1982 or at all and Jamii auctioneers merely told the co-operative it could have the farm for Kshs 650,000, all of which Jamii Auctioneers indignantly deny.

Mr Muliro's advocate should have applied to the High Court in Nairobi under order XXI rule 79 to set aside the sale on the ground of a material irregularity or fraud in conducting the sale and the substantial injury he sustained by reason of that irregularity or fraud and done so by a motion on notice; order XXI rule 91.

Instead, they asked for the same relief by way of summons in chambers expressed to be brought under that section 3A of the Civil Procedure Act, which Mr Ochieng's advocate submitted should be dismissed because no application should be brought under that section if there is another section or an order and rule that provides for the relief sought, whereas Mr Muliro's advocate asked for leave to amend the summons by deleting the section and substituting the order and rule.

The learned judge in a reserved ruling held that the application could not have been made under order XXI rule 79 because fraud was not alleged but, with respect, the application to set aside the sale can be made under that order and rule if there is alleged to have been a material irregularity or fraud in

publishing or conducting it and it is not restricted to a claim that it was affected by fraud.

He was right to hold that section 3A and 34 of the Act (ibid) were inappropriate, though he did so because order XXI rule 79 set out the procedure for setting aside the sale of immoveable property on the ground of irregularity or fraud having earlier found the application was not "as a whole within its ambit."

He was also correct to opine that if the defect were only one of form the court could and ought to correct it of its own motion in the interests of justice but he felt constrained by the decisions in *Ahmed Assain Murji v Shirinbhai Jadvji,* [1963] E A 217 (Z): *Ryan Investments Ltd and another v U S A* [1970] E A 675 (EA-K) and *Saldanha & others v Bhaila & Co,* [1968] EA 28 not to do so. He could have begun with *Hassan Karim & Co Ltd v Africa Import and Export Central Corporation Limited.* [1960] EA 396 (T) though it was not cited to him. Sir Ralph Windham CJ in *Murji v Jadvji* (*ibid*) held, among other things, the respondent could not invoke the inherent jurisdiction of the court under section 151 of the Indian Civil Procedure Code (which is in the same terms as section 3A of the Act) because another remedy was available to her and Dalton J followed this in *Saldanha v Bhailal* (ibid).

Law AG VP, as he then was, of the former Court of Appeal for East Africa, in *Ryan Investments v USA* (ibid) explained that although no application can be brought under section 97 of the Civil Procedure Act (now section 3A), because it does not create jurisdiction but merely makes it clear that the inherent powers of the court are not affected by the enactment of the Act, it may be called in aid and exercised to help a party who has no remedy provided by law.

These authorities do not affect the issue of whether or not Mr Muliro's advocate or the court of its own motion could amend the application so that order XXI rule 79 should head it. The learned judge did not have his attention drawn to order VI rule 12 which declares that:

"No technical objection may be raised to any pleading on the ground of any want of form"

The learned judge should have followed his inclination and allowed the amendment to be made, heard the evidence about the auction or the lack of one, together with any submissions the advocates had, and then ruled whether the sale and its conduct were irregular and whether he was satisfied that Mr Muliro had sustained substantial injury by reason of that irregularity.

Instead, as we know, he dismissed the application. He should have struck it out, not dismissed it, and made it clear that the advocates for Mr Muliro had leave to return with the application in proper form with order XXI rule 79 at the top of it.

When the application was disallowed Mr Muliro's advocates did not ask for a stay and the Senior Deputy Registrar of the High Court issued a certificate on January 24 1983 which states that Yuya Co-operative Society Limited was declared the purchaser of Mr Muliro's farm at the sale by public auction on January 26, 1982 in execution of the decree in this suit and that the sale had been confirmed by the High Court.

This is a ministerial act and the Senior Deputy Registrar may perform it under the special powers given to him by order XLVIII rule I. The practice is for the Deputy Registrar to make an order confirming the sale and certify this has been done on the application of the staff of the registry who are moved to do this by the purchaser or the auctioneer or the decree holder or judgment debtor asking one of them to take the file before him. The parties do not appear before him and are not served with any notice to do so because this is ministerial action, which arises upon the disallowance of an application under order XXI rule 78, 79 or 80 or when no application is made these rules, the parties do not need to be served and the order may be made in their absence. The practice in future should be to have the Deputy Registrar

make the order in writing in the file confirming the sale and then sign the certificate declaring that this order has been made.

When immoveable property is sold by order of the court in execution of a decree the purchaser is to deposit 25% of the purchase money to the officer or other person conducting the sale and if he does not do so the property must be re-sold forthwith: order XXI rule 73. Yuya Farmers Co-operative Society Limited did this and later paid the balance into court and on January 20 1983 the Senior Deputy Registrar made an order for the payment of this balance to the advocates for Mr Ochieng'. Mr Muliro's advocates says that the full amount of the purchase money must be retained until the delivery to the purchaser of an executed conveyance or transfer of the property unless the holder has had permission to bid for and has purchased the property: see order XXI rule 65 and 74. This is not a correct reading of these two rules which, in fact, merely said that the full amount of the purchase money must be paid when the purchaser is given the executed conveyance or transfer of the property but, of course, the full amount may be paid before the purchaser gets the conveyance or transfer of the property.

When the Senior Deputy Registrar made the order confirming the sale it became absolute so far as the interest of Mr Muliro in the farm was concerned: Order XXI rule 81 (1); and no suit to set aside that order made under that rule may be brought by Mr Muliro: Order XXI rule 81 (3): and Suit means all civil proceedings commenced in any manner prescribed: Section 2 Civil Procedure Act. The consequence is that it would be futile to give Mr Muliro leave to appeal from the refusal of the learned judge to allow him to file an application under order XXI rule 79 to set aside the sale on the ground of material irregularity in the conduct of the auction of the farm.

His advocates did not extract and have approved the order of the judge refusing the application for leave to appeal which offends against rule 43(3) of the Court of Appeal Rules, so we could have struck out this application for leave to appeal but we did not do so since rule 43(3) has not been understood to require the applicant to include a copy of the formal order of the High Court refusing to give leave to appeal and for that sufficient reason we asked Mr Muliro's advocates to argue *de bene esse* the application for leave to appeal from the decision of the High Court. If we had given that leave we would have required him to draw up the order, have it approved, filed and served within a certain number of days for the sake of proper order and compliance with our rules of court but as it is the application is refused on another ground and the need for this shrivels away.

Accordingly, I would dismiss this application with costs to be paid by Mr Muliro to the Co-operative Society, the auctioneer and Mr Ochieng'.

Law JA. I have had the advantage of reading in draft the judgment prepared by Kneller Ag JA. I agree that this application for leave to appeal against the order of Aganyanya J dismissing an application to set aside a sale under order XXI rule 79 must fail as the Registrar of High Court has issued his certificate, in due from, stating *inter alia* that the sale has been confirmed by the High Court. The matter is thus concluded. As Potter JA and Kneller Ag JA are of the same view, this application is dismissed, and there will be orders in the terms proposed by Kneller Ag JA.

Potter JA. I agree that this application must be dismissed and I agree with the order as to costs proposed by Kneller Ag JA.

Dated and Delivered at Nairobi this 7th Day of March, 1983

E.J.E. LAW

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JUDGE OF APPEAL

D.C. POTTER

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JUDGE OF APPEAL

A.A. KNELLER

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Ag JUDGE OF APPEAL