



Mogi v Diamond Trust Bank Kenya Ltd & 2 others (Commercial Civil Case E941 of 2021) [2022] KEHC 19 (KLR) (Commercial and Tax) (18 January 2022) (Ruling)

Neutral citation: [2022] KEHC 19 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E941 OF 2021**

**A MABEYA, J
JANUARY 18, 2022**

BETWEEN

CHARLES MAKORI MOGI PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LTD 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

**ALFRED THIGIRI JACOB & LYDIAH KINYA MWITHIMNU 3RD
DEFENDANT**

RULING

1. Before Court is an application dated 15/12/2021. It was brought under order 40 rules 4 and 7 of the *Civil Procedure Rules*, section 1A, 1B & 3A of the *Civil Procedure Act* and Article 50, 159(2) (a) & (d) of the *Constitution*.
2. The application sought orders that the ex-parte orders issued on 7/12/2021 be stayed pending the hearing of the application and the suit. There was also a prayer that these proceedings be stayed until the settlement of costs due to the 1st and 2nd defendant in NRB HC. MISC. APP NO. E869 of 2021 Charles Makori Mogi vs Diamond Trust Bank Kenya Ltd & 3 Others.
3. The application was supported by the affidavits of Francis Kariuki and that of Stephen Karanja. Both affidavits were sworn on 15/12/2021. It was contended that the 3rd respondents trading as Koki Timber & Allied obtained a loan of Kshs. 27,728,178/- from the 1st defendant on 29th July 2017 and offered the suit property as security. They failed to service the facility whereby the 1st defendant issued statutory notices.



4. They then entered into a sale agreement dated 30/7/2020 with the plaintiff who made a deposit of Kshs. 2,500,000/=. Completion was to be in 90 days being 4/11/2020. However, the plaintiff failed to complete the agreement within the time frame.
5. It was further contended that the plaintiff had filed an application dated 1/12/2021 and obtained ex parte orders on 7/12/2021 restraining the defendants from dealing with Elegance Gardens, Massonette No.7 erected on L.R. NO. 209/10206, South C, Nairobi County (“the suit property”) by public auction slated for 7/12/2021.
6. That by the time the said order was served on the 1st and 2nd defendant, the auction had already taken place at 11:00am hence the 3rd defendant’s equity of redemption had already been extinguished. That the orders were obtained through material-non-disclosure and misleading statements. That the plaintiff had purchased the suit property but failed to complete the transaction within 90 days from the date of the sale agreement of 30/7/2020.
7. That in NRB HC. MISC. APP NO. E869 of 2021 Charles Makori Mogi vs Diamond Trust Bank, Dalali Tradres Auctioneers, Alfred Thiringi Jacob & Lydia Kinya, the court had declined to grant interim orders. That the plaintiff and the 3rd defendants, using an alias Lydia Kobia, had attempted to restrain the 1st defendant from selling the property in NRB. HC. COMM. E086 OF 2021 Lydia Kobia t/a Togi Investments K. Ltd Vs Alfred Thiringi Jacob, Diamond Trust Bank Ltd & Dalali Traders Ltd.
8. That in that case, the court stayed the public auction scheduled for 16/2/2021 on condition that the plaintiff paid to the 1st applicant herein Kshs. 1,000,000/= before 25/2/2021. That the orders were not complied with. That the 3rd defendant had also attempted to restrain the sale in NRB CMCC No. 8716 of 2019 but the matter was struck out for lack of pecuniary jurisdiction.
9. That right to be given an opportunity was thus paramount in light of the numerous applications filed by the plaintiff and 3rd respondents.
10. The plaintiff responded vide his affidavit of 14/1/2022. He contended that the 3rd defendants had defaulted in repaying its loan to the 1st defendant. That in the premises, they entered into a private treaty with him whereby he paid Kshs. 2,500,000/= as deposit in line with the sale agreement 30/7/2020. That the plaintiff then applied for a loan facility from NCBA and other banks to enable him pay the balance of purchase price.
11. On 19/1/2021 he received a letter from the 3rd defendant’s advocate addressed to the bank, the contents of which was a turn away from the initial sale of the suit property. This caused him to stop his efforts of getting financing as he sought clarification from the 1st defendant.
12. That he then saw an advertisement dated 22/11/2021 for the sale of the suit property by public auction. He denied being a party in NRB HC. COMM. E086 OF 2021.
13. The 3rd defendant also responded to the application vide the affidavit of Lydia Kinya Mwithimbu sworn on 23/12/2021. She contended that the statutory notice for sale of the suit property was never served upon her. That no valuation was done prior to the sale, and that the 1st and 2nd defendant had not demonstrated that the 3rd defendants had been given the 3 month’s notice. That she had only filed two cases being NRB CMCC NO. 8716 OF 2019 which was struck out with costs for lack of pecuniary jurisdiction and NRB HCCC. E086 of 2021. That the facts of that case and the instant one were different.
14. That the 1st defendant had allowed the 3rd defendants to enter into a private treaty to sell the property for Kshs. 25,000,000/=. That her co-respondent who was her estranged husband moved to court to



stop the sale. That she then saw the advertisement of 7/12/2021 for the sale of the suit property by public auction.

15. That to-date the 1st defendant had not refunded the deposit of Kshs. 2,500,000/= paid by the plaintiff. That she attended the public auction which took place at 12:30pm and not 11:00am as alleged. That the auction did not follow legal procedure hence was a sham.
16. I have considered the pleadings, evidence and the parties' submissions. There are two issues for determination. The first is whether the ex parte orders ought to be set aside, and the second is whether this suit should be stayed in lieu of NRB HC. MISC. APP. NO. E869 OF 2021 Charles Makori Mogi vs Diamond Trust Bank Kenya Ltd, Dalali Traders Auctioneers, Alfred Thiringi Jacob and Lydia Kinya Mwithimbu.
17. On the first issue, the orders of 7/12/2021 were made ex-parte. Setting aside of an ex parte order is a matter of the discretion of the court. In *Esther Wamaitha Njibia & two Others vs. Safaricom Ltd [2014] Eklr*, the court observed: -

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.) It also goes without saying that the reason for failure to attend should be considered".

18. The main ground for the application was that there was material non-disclosure as to the previously filed cases involving the suit property and that there were misleading statements. The 1st and 2nd defendant referred to NRB HC. MISC. APP. NO. E865 OF 2021. The plaintiff responded and produced as annexure "CMM-010", a notice to withdraw that suit. In this regard, the non-disclosure of that matter had little or no significance in the granting of the instant ex parte order.
19. On the plaintiff's claim of being a purchaser of the suit property, the same was not a misleading statement as the sale agreement dated 30/7/2020 produced as "CMM-001" clearly indicated that the plaintiff was the purchaser of the suit property.
20. On the allegation of collusion, the same cannot be determined preliminarily. The case relied on to support this claim is NRB HC. COMM. E086 OF 2021. This cannot be sufficient proof of collusion as the plaintiff was not a party to that suit. It cannot therefore be said that the plaintiff was acting in collusion with the 3rd defendants to frustrate the 1st defendant's efforts to sell the suit property.
21. The applicants also alleged that they had not been given an opportunity to be heard. This is far from the truth. The order by the Court was as follows: -

- “ 1. THAT the application dated 1/12/2021 be responded to within 14 days.
2. THAT mention on 1st February 2022 for further directions.
3. THAT there be an injunction pending the determination of the suit Until 1/02/2022”.



22. It is evident that the Court gave the applicants the right to respond within 14 days of the order. That the interim orders were to run until 1/2/2022 when further directions were to be made. The ex parte orders were not blanket and everlasting orders. Neither did they infringe on the applicant's right to be heard. The orders were for the paramount purpose of protecting the suit property before both parties could be heard on their respective positions.
23. Discharging the interim orders would put the suit property at a risk of alienation. 3rd parties may become involved thereby distorting or complicating the matter further. This would no doubt prejudice the interests of all the parties involved in this suit. I see no injustice or hardship that will be occasioned if the order stays in place until the scheduled day, 1/2/2022.
24. Further, nothing has stopped the applicants from responding to the application and challenge the orders sought. The upshot is that the prayer to set aside or discharge the ex parte orders holds no water and is denied.
25. On the second issue of whether this suit ought to be stayed in lieu of payment of costs in NRB HC. MISC. APP. NO. E869 OF 2021 Charles Makori Mogi vs Diamond Trust Bank Kenya Ltd, Dalali Traders Auctioneers, Alfred Thiringi Jacob and Lydia Kinya Mwithimbu, I respectfully decline this prayer.
26. To begin with, the applicants did not attach any unsettled Certificate of costs or decree. That is the pre-requisite to an order of stay of proceedings under Order 25 of the Civil Procedure Rules.
27. The upshot is that I find the application dated 1/12/2021 to be without merit and I dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

