Villa Care Limited & another v Stanbic Limited (Commercial Case E265 of 2022) [2022] KEHC 12173 (KLR) (Commercial and Tax) (22 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12173 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E265 OF 2022

DAS MAJANJA, J

AUGUST 22, 2022

BETWEEN

VILLA CARE LIMITED ..... 1ST PLAINTIFF

AFRILAND LIMITED ..... 2ND PLAINTIFF

AND

STANBIC LIMITED ..... DEFENDANT

RULING

1. What is before the court is the Notice of Motion dated July 26, 2022 made, *inter alia*, under Order 45 of the *Civil Procedure Rules* and section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya). The plaintiffs seek an order that the court be pleased to review its ruling delivered on July 25, 2022 (''the Ruling''), set it aside and issue an injunction restraining the Defendant (''the Bank'') from selling or otherwise disposing Apartment Number A7, third floor in Block A erected on Land Reference Number 4857/121(I.R. 166442/1) within Brooklyn Springs Apartments, Kileleshwa area of Nairobi County (“the suit property”) in exercise of its statutory power of sale on condition that the Plaintiffs continue to pay KES. 500,000.00 to the Bank pending the hearing and determination of the suit. It also seeks an order under section 52 of the Transfer of Property Act preventing the transfer of the suit property to a third party pending active litigation of this suit.

2. The application is supported by the affidavit and supplementary affidavit of the Plaintiffs' director, Daniel Ojijo Agili, sworn on July 26, 2022 and August 10, 2022. It is opposed by the Bank through the Notice of Preliminary Objection dated August 10, 2022and the replying affidavit of Diana Karambu, its officer, sworn on August 5, 2022. The parties relied on written submissions and oral arguments by their respective advocates.

3. By way of a brief background, the 1st Plaintiff is a registered estate agent in the house management business while the 2nd Plaintiff is the registered proprietor of the suit property. It is not in dispute that the Bank advanced the 1st plaintiff facilities amounting to KES. 20,000,000.00 secured by, inter alia, a Charge dated September 12, 2014 over the suit property. The 1st plaintiff admits that it defaulted in servicing the facility due to the difficult economic environment brought about by the Covid-19 pandemic. Following the default, the Bank commenced the process of exercising its statutory power of sale by selling the suit property by public auction. It is this action that has precipitated the filing of this suit together with an application for injunction dated July 14, 2022 seeking to restrain the Bank from selling the suit property. The application was argued and dismissed by the ruling dated July 25, 2022 ("the Ruling").

4. Before I deal with the arguments, I think it is important to set out the scope of review under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* which provide as follows:

Section 80 of the *Civil Procedure Act*

80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the Civil Procedure Rules 45 Application for review of decree or order

(1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

5. The principles governing the exercise of discretion to review a decree or order are now settled and the parties have cited several decisions to support their respective positions. An applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matters which were not available despite the exercise of due diligence or for any other sufficient reason for the court to review. The Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* [1996] KLR 469 explained what constitutes an error of law apparent on the face of the record and the scope of review:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the

court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

6. The same point was emphasized in *Nyamogo & Nyamogo Advocates v Kogo* [2001] EA 170, the Court of Appeal further explained that:

> Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. ing or on points where there may conceivably be two opinions out. An error which has to be established by a long drawn process of reasonan hardly be said to be an error apparent on the face of the record. Again, if a view as adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal. [Emphasis mine]

7. On the ground of discovery of new and important matters, the Court of Appeal in *Rose Kaiza v Angelo Mpanjuiza* MSA CA Civil Appeal No. 225 of 2009 [2009] eKLR cited with approval the following passage in *Mulla on Civil Procedure* (15th Ed.) at page 2726:

> Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.

8. Further in *D J Lowe & Company Ltd v Banque Indosuez* NRB CA Civil Application No 217 of 1998 [1998] eKLR, the Court of Appeal observed that:

> Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

9. In summary, the plaintiffs' grounds for review of the order and Ruling are summarized on the face of the application which I shall now consider in light of the principles I have outlined above.

10. The plaintiffs' contend that the court made an error on the record on the legal and factual findings regarding the definition of a matrimonial home by limiting it to ownership in a limited liability company whereas the law recognizes physical occupation as a separate and independent pre-condition for protection of a matrimonial property. In the Ruling, I expressed myself as follows:

> (17) ..... The 2nd plaintiff centres its case on the fact that the suit property is matrimonial property as a basis for relief. I disagree. The suit property is owned by a limited liability company which is a separate entity from the shareholders. The shareholders of the 2nd plaintiff are Daniel Ojijo Agili and Maureen Wanjiru Wamaitha. What constitutes matrimonial property are the shares in the company and not the property of the company itself. I therefore agree with the holding in *Harroil Petroleum Holding Ltd v Consolidated Bank Ltd & another* ELD E & L No 335 of 2013 (OS) [2013] eKLR that, ''The

applicant is a corporate commercial entity. The properties herein are owned by the company and cannot therefore be said to be matrimonial property."

11. The Bank opposed this ground on the basis that the court found that the suit property does not constitute matrimonial property as it is owned by a limited liability company which is separate legal entity distinct from the shareholders. Thus, the court having ruled on this issue, the only option is for the Plaintiffs to appeal. That if this is an error, then it is not self-evident or apparent on the face of the record and it is a matter for appeal hence this ground ought to be dismissed.

12. I agree with the Bank that the reconsideration of the is matter amounts to calling upon the court to determine an appeal from its own decision. The court would have to consider the merits of the decision before coming to a conclusion either way, a matter that is the preserve of the appellate court. As the Court of Appeal states in *National Bank of Kenya v Ndung'u Njau* (Supra), it cannot be a ground for review that this court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law as the plaintiffs urge. This ground of the application is therefore rejected.

13. As regards new and important evidence, the plaintiffs' case is that in light of the stringent timelines applied by the court to file the supplementary affidavit within 24 hours of service of the replying affidavit, the 1st plaintiff was unable to quickly avail evidence to demonstrate the financial difficulty it is facing in order for the court to exercise its discretion under sections 104 and 105 of the *Land Act* to allow the plaintiffs to pay the amount due to the Bank in reasonable installments. The 1st Plaintiff further adds that it has been facing financial challenges to an extent that it has fallen short of its rental obligations to its office landlord who had distrained for rent.

14. In response to this argument, the Bank states that the facts and material sought to be adduced by the Plaintiffs were known to them at the time of filing the suit and application hence they do not constitute new material evidence that was not within their knowledge at the time of filing the suit and initial application. It further urges that the Plaintiffs presented their case and cannot be allowed to have a second bite of the cherry and that they have no one but themselves to blame for failing to adduce the documents which were well within their knowledge as evidence.

15. Sections 104 and 105 of the *Land Act* permits the court in certain circumstances to grant relief to the chargor to pay a lesser amount in installments than that agreed upon in the charge. This is what I stated in the Ruling in relation to this issue:

    (18) Even assuming that the 2nd Plaintiff is entitled to relief, the 1st Plaintiff, who is the borrower, has not provided a factual or evidential basis for the court to assess its ability to repay the facility on the terms it suggests. A party who seeks the court discretion to be allowed to pay an amount less than what it contracted must make full disclosure of its financial status to the court. It is not enough to say that due to the economic downturn it is unable to make payments and suggest a figure totally unrelated to its provable financial status.

16. The plea to pay the Bank KES. 500,000.00 per month was at the centre of the Plaintiffs' application for injunction. This means that the Plaintiffs were required to marshal all the evidence available to them to support the plea. The Plaintiffs admitted that it had been served with the statutory notice and a 45-day redemption notice on May 24, 2022scheduling the auction for July 26, 2022. The Plaintiffs therefore had sufficient time to make out a case before the court by gathering all the information available to it in the first instance. Even so, the evidence annexed to the application does not fall within new material for purposes of review. The Plaintiffs' bank statements were always available and the distress for rent which took place on or about June 14, 2022is a matter that was within the Plaintiffs' knowledge. I therefore find and hold the Plaintiffs have not proved that they have discovered new and important

matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time I delivered the Ruling.

17. The Bank, through the replying affidavit, states that the suit property was sold on July 26, 2022by public auction to the highest bidder, Jeremiah Ongeri Samba, who purchased the suit property for KES. 14,000,000.00. The Bank has annexed the Certificate of Sale dated July 26, 2022and the Memorandum of Sale dated July 26, 2022signed by the auctioneer and the purchaser to support its position. In light of this position, the plaintiffs seeks an order of lis pendens by invoking section 52 of the *India Transfer of Property Act* which was repealed by the *Land Registration Act*, 2013 to argue that where there is active prosecution of a suit relating to disputed property, then the court should preserve the subject property in order not prejudice the final determination of the suit. The Plaintiff cites the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure and another* [2015] eKLR where the Court of Appeal held that the doctrine of lis pendens is still applicable despite repeal of the India Transfer of Property Act where the right in question had accrued before the commencement of the *Land Registration Act*.

18. On the issue whether I should grant a lis pendens order, I hold that that this court had already dismissed an application for injunction. No new facts have emerged to the warrant a further injunction disguised as a lis pendens order. Further and from the evidence adduced by the Bank, the suit property has already been sold to a third party. Whether the sale is valid or irregular, the court cannot at this stage issue an adverse order against a third party who is not party to this suit (see *Pashito Holdings and another v Ndung'u and 2 others* KLR [E &L] 1, 295). In the circumstances, I decline to issue a lis pendens order.

19. For the reasons I have set out, I dismiss the application dated July 26, 2022 with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Simiyu instructed by Wafula Simiyu and Company Advocates for the Plaintiffs.

Ms Muhia instructed by Wamae and Allen Advocates for the Defendant.

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