



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO 2 OF 2020

KAUSHIK PANCHAMATIA.....1ST PLAINTIFF

SUNRISE HAULIERS LIMITED.....2ND PLAINTIFF

RISHI HAULIERS LIMITED.....3RD PLAINTIFF

DUNGA WHOLESALERS LIMITED.....4TH PLAINTIFF

VERSUS

PRIME BANK LIMITED.....1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS.....2ND DEFENDANT

AND

DISTRICT LANDS REGISTRAR

KISUMU EAST DISTRICT.....1ST INTENDED INTERESTED PARTY

PASAKA VENTURES LIMITED.....2ND INTENDED INTERESTED PARTY

MAHESHKUMAR G. S. PATEL.....3RD INTENDED INTERESTED PARTY

HIRANI HARJI KARSAM.....4TH INTENDED INTERESTED PARTY

RULING

1. In their Notice of Motion dated 30th October 2020 and filed on 3rd November 2020, the Plaintiffs sought several orders. In the first prayer, they an order for review of the Ruling and Order issued by the Hon Justice T.W. Cherere on 1st October 2020. They also sought the reinstatement and extension of the order of temporary injunction that was issued by Hon W. M. Musyoka on 19th September 2020 restraining the Defendants, their servants, representatives and/or agents from taking possession and/or transferring the suit premises title number Kisumu/Municipality/Block/12/310 and

Kisumu/Municipality/Block/6/63 (hereinafter referred to as the “subject premises”) that were sold by way of public auction on 17th July 2020 and 7th August 2020 respectively pending hearing and determination of the application dated 19th August 2020.

2. In the second prayer, they sought that in the alternative, this court do make such other interlocutory orders that it may deem just and expedient to preserve the subject premises pending the hearing and determination of the said application dated 19th August 2020.

3. The third prayer was for the enjoining of the 1st, 2nd, 3rd and 4th Intended Interested parties as parties to this suit and amendment of the Plaint dated 3rd June 2020.

4. On 29th October 2020, the 1st Plaintiff swore an Affidavit in support of the application on behalf of the 2nd, 3rd and 4th Plaintiffs herein.

On 25th November 2020, he filed a Further Affidavit that he swore on 23rd November 2020.

5. They stated that the subject premises were owned by the 1st and 4th Plaintiffs. They asserted that their application dated 3rd June 2020 seeking to restrain the Defendants from conducting the intended sale of the subject premises by way of public auction was dismissed on 24th June 2020. They added that the Court of Appeal declined to grant an injunction as a result of which the Defendants sold the subject premises by way of Public Auction.

6. It was their case that after the said sale, they discovered that the Defendant sold the said subject premises at prices that were way below the market value and forced sale values which was in contravention of Section 97 of the Land Act, 2012 and Rule 16 and 15 of the Auctioneers Rules. They pointed out that it was for that reason that they filed the Notice of Motion application dated 19th August 2020.

7. They contended further that following the Ruling of 1st October 2020 which lifted the temporary injunction that had been issued by Musyoka J, they had been exposed to harsh consequences of forced eviction from their homes by the 2nd, 3rd and 4th Intended Interested parties. They added that on 26th October 2020, the 1st Defendant demanded from them arrears of USD 50, 538.99 and USD 115,700.92 for the subject premises which sums continued to accrue interest.

8. The Plaintiffs asserted that the aforementioned events constituted new evidence which could not have been produced at the time of filing the Notice of Motion application dated 19th August 2020 and hence there was adequate reason to review the order of 1st October 2020. They averred that it was necessary to enjoin the 1st, 2nd, 3rd and 4th Intended Interested Parties to the suit herein as the orders sought in the present application would have an effect on them. They added that in the event of a joinder, the court ought to grant them leave to amend their Plaint to include the said Intended Interested Parties and facts relating to them.

9. They urged this court to grant them the orders that they had sought as there was a likelihood of the Defendants and the 1st, 2nd, 3rd and 4th Intended Interested Parties transferring the subject premises and evicting them from the said subject premises thereby causing them irreparable injury.

10. In opposition to the Plaintiffs' application, the Defendants filed Grounds of Opposition dated 10th December 2020. On 27th January 2021, George Mathui, a Legal Officer at Prime Bank Limited swore a Replying Affidavit on behalf of the Defendants herein. They termed the Plaintiffs' present application frivolous, misconceived, vexatious and a gross abuse of the court process as they had approached this court of equity with unclean hands. They added that the said application was replete of material non-disclosure and the *interim* orders given by this court on 19th September 2020, which were ultimately discharged, were therefore obtained by gross and material misrepresentation.

11. They averred the Plaintiffs' assertions regarding the valuation of the subject premises had exhaustively been determined by the High Court and Court of Appeal and consequently, the matters that had been raised herein were *res judicata* and could not thus be brought up as an issue for determination before this court.

12. They further averred that the 1st Defendant's statutory power of sale had accrued, the public auction proceeded in strict adherence of the law as sanctioned by this court and that the 1st Defendant had already received the full purchase price following the successful sale of the subject premises to the different purchasers. They further asserted that in that regard the 1st Defendant released the Completion Documents and duly executed Transfer Chargee Documents over the subject premises to the Purchasers and the Plaintiffs' application was therefore a mere afterthought.

13. They thus urged this court to uphold the dignity of the court process and justice by upholding the Ruling of this court delivered on 1st October 2020 and dismiss the present application.

14. The 2nd intended interested party opposed the Plaintiffs' application through a Replying Affidavit sworn on 9th February 2021 by Titus Ondoro, a Director of the 2nd Intended Interested Party who deposed that the 2nd Intended Interested Party lawfully purchased Kisumu/Municipality/Block 12/310 at a public auction that was held on 17th July 2020.

15. The 3rd and 4th intended interested parties opposed the Plaintiffs' application through a Replying Affidavit sworn on 26th January 2021 by Maheshkumar Gordhanbhai Shanabhai Patel who deposed on behalf of 4th interested party that they also lawfully purchased Kisumu/Municipality/Block 6/63 at a public auction that was conducted on 7th July 2020.

16. In their Supplementary Affidavit that was sworn by the 1st Plaintiff on behalf of the Plaintiffs on 9th February 2021 and filed on 11th March 2021, the Plaintiffs objected to the firm of M/S L.G Menezes Advocates from acting in this matter as they had previously acted for them. They were emphatic the subject premises were grossly undervalued to divest the 1st and 4th Plaintiffs of their ownership. The Plaintiffs blamed the 1st Defendant for gross material non-disclosure of its statements and urged this court to order it to furnish the same.

17. The Plaintiffs herein filed their Written Submissions dated 9th February 2021 on 11th March 2021. The Defendants filed their Written Submissions dated 24th February 2021 on 2nd March 2021. The 3rd and 4th Intended Interested parties filed their Written Submissions dated 28th February 2021 on 1st March 2021. The 2nd Intended Interested Party indicated to court on 11th March 2021 that it did not file any Written Submissions and would rely entirely on its filed affidavit. The Ruling herein is therefore based on the said Written Submissions and Affidavit evidence.

LEGAL ANALYSIS

18. Having considered the Notice of Motion, Replying Affidavits, Supplementary Affidavit and rival Submissions by parties, this court addressed its mind to the issue of whether or not the present application was *res judicata* as it had the potential of terminating the application without considering the merits or otherwise of the same.

19. Neither the Plaintiffs nor the Intended Interested Parties submitted on the issue of *res judicata* and review. On the other hand, the Defendants referred this court to the provisions of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) and several cases amongst them the case of **Makori & 2 Others vs Independent Electoral & Boundary Commission (IEBC) & 3 Others [2012] 3 KLR**.

20. In her Ruling of 1st October 2020, Cherere J declined to extend interim orders that had been granted by Musyoka J on 19th September 2020 on the ground that had the Plaintiffs disclosed to him that the Court of Appeal had declined to stay her orders, he would not have granted the said temporary injunction.

21. Section 7 of the Civil Procedure Act provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

22. The question of granting of an injunction in respect of the subject premises had been litigated by the Plaintiff and the Defendants herein. As this court would have to consider if the Plaintiffs had met the criteria of being granted an injunction, which had already been considered by Cherere J and granting Prayer Nos (2) and (3) of the present application would amount to reinstating the very same orders that Cherere J declined to grant and which orders were confirmed by the Court of Appeal, the said prayers were thus *res judicata*.

23. Further, this court considered the Written submissions and case law by the Defendants and the 3rd and 4th Defendants on when a court can grant an order for review and agreed with them that the Plaintiffs had not satisfied this court that they were entitled to a review of the order of 1st October 2020 by Cherere J. The conditions to be met before an applicant can be granted an order for review had not been met therein.

24. Order 45 (1) (a) and (b) of the Civil Procedure Rules, 2010 stipulates that:-

“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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

25. In **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** the Court held that:

“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.”

26. Having considered the facts of the Plaintiffs' case against the position of the law, it was clear to this court that the Plaintiffs did not demonstrate that there was discovery of new evidence, that there was an error apparent on the record or that there was other sufficient cause for the grant of review orders. In fact, the review only relates to a ruling and not to other facts that would not have affected the way the court could have decided on the issue that had been placed before it.

27. The fact that the properties were sold at an undervalue was not a ground for review. The Plaintiffs were at liberty to pursue other remedies with a view to rectifying such under valuation.

28. This court noted that despite praying that the 1st, 2nd, 3rd and 4th Intended Interested Parties be enjoined to this suit, the Plaintiff did not submit on the same. The Defendants and the 3rd and 4th Intended Interested Parties did not also submit on this issue. However, the 2nd Intended Interested Party opposed being enjoined as a party to this suit on the ground that the issue of valuation and notices that were issued did not concern a purchaser of a property at an auction.

29. Under Order 1 Rule 10 (2) of the Civil Procedure Rules, in appropriate cases, the court can order the joinder of a party at any stage of the proceedings. The joinder should not delay a suit or materially affect the rights of the parties. Such joinder assist the court in determining the matters in controversy between the parties. The court must also keep at the back of its mind that no party should be denied an opportunity to present its case in the best way it knows how.

30. With the properties having moved to the Intended Interested Parties and there being no orders of injunction having been granted, their being enjoined herein would be to unnecessarily drag them into a dispute that was between the Plaintiffs and the Defendants herein. The Intended Interested Parties were bonafide purchasers of properties for value and their participation in this matter would merely serve to blur and confuse the issues for adjudication in the suit and further cause them to incur costs which this court was not sure the Plaintiffs had ability to reimburse.

31. Having held that the said Intended Interested Parties are not necessary parties in these proceedings, it follows that the Plaintiffs' prayer to amend the Plaint to enjoin them was unsustainable and could not be granted. In any event, the claim against the said Intended Interested Parties was not discernible to the court.

32. The court considered the Plaintiffs' Written Submissions and case law regarding the disqualification of the firm of M/S L.G. Menezes Advocates and found and held that as the court had already declined to enjoin the Intended 3rd and 4th Interested Parties herein as parties to the suit, the issue of the said firm of advocates being disqualified from not acting in this matter thus became moot. The court did not therefore deem it necessary to analyse the respective parties submissions in this regard.

DISPOSITION

33. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated 30th October 2020 and filed on 3rd November 2020 was not merited and the same be and is hereby dismissed with costs to the 1st Defendant herein and the Intended Interested Parties. The Intended Interested Parties must comply with the law before taking possession of the premises. The interim orders be and are hereby discharged.

34. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **28th** day of **June** 2021

J. KAMAU

JUDGE