



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO. 20 OF 2019

AMINA HERSI MOGHE.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK.....DEFENDANT

RULING

This ruling is in respect of 2 applications dated 6/12/2019 and 15/1/2020 by the plaintiff and the defendant respectively. The plaintiff seeks;

1. Spent.

2. **THAT** pending the hearing *inter partes* a temporary order of stay of sale be issued restraining the defendant whether by itself, agents, servants or auctioneers from auctioning, selling, purporting to sell or in any other manner interfering with parcels No. BUNGOMA/TOWNSHIP/2, BUNGOMA/MUNICIPALITY/547 and BUNGOMA/MUNICIPALITY/548.

3. **THAT** pending the hearing and final determination of the application, a permanent order of stay of sale be issued restraining the defendant whether by itself, its agents, servants and/or auctioneers from auctioning, selling, purporting to sell or in any other manner interfering with the plaintiff's parcels of land No. BUNGOMA/TOWNSHIP/2, BUNGOMA/MUNICIPALITY/547 and BUNGOMA/MUNICIPALITY/548

The file was placed before the Judge in chambers on the 6th December, 2019 where he gave orders in terms of prayer 2.

On the 15th January, 2020, the defendant filed its application seeking;

1. That this Honourable Court be pleased to direct that this application be heard in priority to the Plaintiff's Notice of Motion application dated 6th December, 2019.

2. That pending the hearing and determination of this Notice of Motion and the Notice of Motion dated 6th December, 2019, this Honourable Court be pleased to discharge the orders issued on 9th December, 2019 as against the Defendant.

3. That the Plaintiff's suit be struck out as against the Defendant for being scandalous, vexatious, frivolous and an abuse of the court process.

4. That in the alternative, this court be pleased to discharge the order issued on 9th December, 2019 as against the defendant.

5. That costs of this application be borne by the plaintiff.

In the latter application, the grounds for seeking the orders sought *inter alia* are that; the suit properties were already subject of **Nairobi HCCC No. 176/2018 Amina Hersi Moghe & 2 others vs Diamond trust Bank (K)Ltd & Another**. That the matter had reached the court of appeal under Civil Appeal No. 333 of 2018 whereby the plaintiff's had been granted 60 days to file an appeal with a rider that the orders would automatically lapse on the 60th day if no appeal had been filed.

That the plaintiffs did not file the appeal and the orders therefore lapsed and the defendant herein was at liberty to proceed with the Statutory Power of sale.

As it appears, it is the defendant's action of exercising its power of sale that prompted this suit.

The application is opposed vide the plaintiff's replying affidavit dated 20th February, 2020 where she admitted the pendency of Nairobi Civil Suit No. 176 of 2018 and that the suit properties herein are the same as the suit in Nairobi.

She however depones that she approached this court as a guarantor to the borrower, that she has paid the entire loan owed the defendant and that as such, the defendant has no right to purport to auction the suit properties.

Directions were taken that both applications be disposed by way of written submissions. Both parties filed their respective submissions.

It is not in dispute that the plaintiff obtained orders *ex-parte* restraining the defendant from auctioning, selling, purporting to sell or in any manner interfering with the plaintiff's parcels of land. It is also not in dispute that there exists and pending Nairobi High Court Civil Suit No. 176/2018: *Amina Hersi Moghe, Muhamoud Kadhar Hersi & Mt. Elgon Hardware Limited Vs Diamond Trust Bank (K) Ltd & Dalali Traders Auctioneers*. This suit was litigated up to the court of appeal where the plaintiffs were given a conditional stay. From the evidence on record, they did not comply with that order.

It is common ground that the cause of action emanates from a facility advanced to an entity by the name Mt Elgon Hardware Limited where the plaintiff is a guarantor to the former. The facility was secured by way of a charge over the plaintiff's properties, the subject matter of the suit.

From the evidence on record, the main prayer sought in the Nairobi Civil Suit is an injunction restraining the defendants from attaching, transferring, alienating, advertising, selling or in any way interfering with the suit properties.

In this suit, the plaintiff seeks; a declaration that the loan of Kshs 72 Million guaranteed using the plaintiff's parcels of land No. BUNGOMA/TOWNSHIP/2, BUNGOMA/MUNICIPALITY/547 and BUNGOMA/MUNICIPALITY/548 is fully paid, a declaration that the defendant has got no power or authority to auction the plaintiff's parcels of land, a permanent injunction restraining the defendant from recovering, purporting to recover any loan or in any other manner interfering with the properties, damages and costs of the suit.

The common thread running through the two suits is the facility which the plaintiff guaranteed and the contention by the plaintiff that the loan is fully paid. There is no doubt the cause of action and the parties are the same. The subject matter is also similar.

This court is alive to the fact that an interim injunction is an equitable remedy granted by the court to preserve the subject matter of the suit. Orders granted *ex-parte* are especially granted on the basis of the material placed by the applicant before the court either orally or by way of affidavit.

The applicant in her application which bore the orders did not disclose to the court the pendency of the suit in Nairobi. She did not disclose that she had previously been granted conditional stay whose terms she did not comply with leading to their lapse.

The consequences of non-disclosure of material facts are dire. The guilty party cannot and should not be allowed to get away with orders so obtained. It goes hand in hand with the maxim that; ***he who comes to equity must come with clean hands.***

In *Aviation & Airport Services Workers Union (K) v Kenya Airport Authority & Another (2014) eKLR*, Mbaru J. held;

Thus when a party comes to Court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure, the grant of *ex-parte* orders will be taken away from the offending party.

The learned judge proceeded to hold;

Filing another suit during the pendency of a similar suit is clearly an abuse of the process of the court. It is immaterial that the claimant has taken the step to have the first suit withdrawn, the fact of filing a new suit during the pendency of the earlier suit and failing to disclose this fact to the court during the granting of *ex-parte* orders is tantamount to peddling falsehoods while under oath. This is to be discouraged and avoided by all means possible and a party so offending must pay the cost.

In the circumstances of this case, it is clear that the plaintiff failed to disclose matters that were pertinent to the suit. Particularly the fact that there is a pending suit. This court takes such non-disclosure seriously and as a consequence, the *ex parte* orders given on the 6th December, 2020 are hereby discharged.

The defendant also seeks to have the suit struck out for being scandalous, vexatious, frivolous and an abuse of the court process.

The plaintiff in her replying affidavit depones that she approached this court as a guarantor to the borrower and that she has paid the entire loan owed the defendant.

Order 2 Rule 15 deals with striking out of pleadings and provides;

“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

Madan JA in *D.T. Dobie and Company (Kenya) Ltd Vs Muchina (1982) KLR 1* while determining an application seeking to strike out a plaint for disclosing no cause of action held:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

Similarly, the court of appeal in *Blue Shield Insurance Company Ltd V Joseph Mboya Oguttu [2009] eKLR* held;

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

In *Yaya Towers Ltd V Trade Bank (in liquidation) (2000) eKLR*. The Court of Appeal held;

Where, however, the application is made under order VI rule 13 (1) (b) or (c) or (d) of the Rules or the inherent jurisdiction of the court on the ground that the claim is ‘frivolous’ or is an abuse of the process of the court (as in the present case) evidence is admissible to show that this is the case. A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.

For these reasons, I reject the defendants application dated 15.1.2020 which is hereby dismissed.

In the result, I make the following orders;

1. The orders issued on 9th December, 2019 are hereby vacated.
2. The application dated 6th December 2019 is hereby dismissed.
3. The defendant’s application dated 15.1.2020 is hereby dismissed.
4. The plaintiff to set down the suit for hearing within 60 days from the date of this ruling.
5. Each party to bear their own costs.

DATED AT BUNGOMA THIS 25TH DAY OF JUNE, 2021

S.N. RIECHI

JUDGE