



REPUBLIC OF KENYA



**Duckworth v Duckworth & 2 others (Commercial Civil Case 485 of 2017)
[2021] KEHC 52 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 52 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 485 OF 2017
DAS MAJANJA, J
SEPTEMBER 23, 2021**

BETWEEN

JULIET KIRSTEN PERNILE DUCKWORTH PLAINTIFF

AND

MICHAEL JOHN STANHOPE DUCKWORTH 1ST DEFENDANT

GEOHUT LIMITED 2ND DEFENDANT

I&M BANK LIMITED 3RD DEFENDANT

RULING

1. In the Notice of Motion dated 8th July 2021, the Plaintiff seeks, in the main, an order restraining the Defendants from transferring or in any way dealing or interfering with the Plaintiff's quiet possession of LR No. NGONG/NGONG/37632 situated in Kajiado County ("the suit property"). The application is supported by the Dianah Mureithi Gichuru, the Plaintiff's advocate, sworn on 8th July 2021. It is opposed by the 3rd Defendant ("the Bank"), through the affidavit of its Senior Manager, Legal Department, Andrew Muchina, sworn on 19th August 2021.
2. The facts leading to the Plaintiff's application are a matter of the court record. The Plaintiff moved the court for an injunction by the application dated 4th December 2017 restraining the Defendants from selling the suit property by private treaty or public auction pending the hearing and determination of the suit. The basis of the claim was that pursuant to a Trust Deed dated 23rd September 2020, she was a beneficial owner of a share in the 2nd Defendant which was, at the material time, the owner to the suit property. Also at that time, the suit property had been charged to the 3rd Defendant ("the Bank") to secure an overdraft facility for another company, Geogrid East Africa Limited. She complained that the suit property was charged to the Bank fraudulently and without her knowledge. The application



was heard interparties by Sewe J., who by a ruling dated 28th September 2018 granted the injunction in the Plaintiff's favour pending the hearing and determination of the suit.

3. By an application dated 7th February 2019, the Bank moved to seek enlargement of time within which to lodge an appeal against the ruling delivered by Sewe J. In the same application it sought an order that the filing of the appeal out of time do operate as a stay of further proceedings pending the hearing and determination of the contemplated appeal. Odero J., by a ruling dated 19th November 2019, allowed the application by enlarging the time for filing the appeal and ordered that the enlargement of time and leave to file the appeal operate as a stay of further proceedings until hearing and determination of the contemplated appeal.
4. According to the Plaintiff's advocate's deposition, the Plaintiff received a demand from the Chief of Ongata Rongai Location, where the suit property is located, requesting her to vacate the suit property on the ground that it had been sold to a third party by the Bank. The Plaintiff's advocate responded to the Chief by the letter dated 8th July 2021 informing him of the existence of the injunction restraining the Defendants from the selling or otherwise dealing with the suit property and the pending appeal in the Court of Appeal by the Bank. Needless to state, the continued threat of interference with the Plaintiff's quiet possession of the suit premises precipitated the filing of the present application.
5. In response to the application, the Bank contended that under Order 40 rule 6 of the Civil Procedure Rules, the injunction issued by Sewe J., had lapsed by operation of law after one year on 28th September 2019 whereupon it proceeded to advertise the suit property for sale in the Daily Nation on 10th August 2021. It deponed that the suit property was sold to one Idah Gatwiri Marangu by public auction on 25th August 2021 and the same transferred to her as evidenced by the title in her name and that she is currently in possession of the suit property.
6. Counsel for the Plaintiff and 3rd Defendant filed written submissions in support of their respective positions. The issue for determination is whether the court should issue an injunction in the circumstances. The thrust of the Plaintiff's case is that the Bank abused the court by surreptitiously obtaining a stay of proceedings and thereafter without recourse to the court, proceeding to sell the suit property. It is the Plaintiff's case that the Bank has deliberately exploited the order of stay in its favour, abused judicial process through deliberate misrepresentation and by continuous irregular and fraudulent conduct calculated to steal-a-match on the Court and the Plaintiff.
7. On its part, the Bank contends that it was entitled to dispose of the suit property since Order 40 Rule 6 of the Civil Procedure Rules expressly provides that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise. That since the interlocutory injunction was granted by an order of the Court on 28th September 2018, then it rightly follows that the injunctive orders lapsed automatically by operation of the law on 28th September 2019. As the Plaintiff never sought any extension of the injunctive orders as required by Order 40 Rule 6 of the Civil Procedure Rules, therefore there was no injunction in force at the time of the sale.
8. The Plaintiff impugns the Bank's actions and cites the decision in *Republic v National Assembly & another ex-parte Coalition for Reform and Democracy(CORD)* where the court noted that, "parties who have invited the Court to adjudicate on a matter which they are disputing over, ought not to create a situation whereby the decision to be made by the Court would be of no use." In its view, the Bank could not rely on Order 40 rule 6 as this provision was intended for indolent persons and in this case it could not proceed with the matter as the Bank has applied for stay of execution.



9. The plaintiff further argues she was not indolent. In her view, the stay issued froze the proceedings and neither party could take an action. It cites *Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, where the court stated that an order of stay, “denotes that no party nor interested individual or entity is to take action until the Court has given the green light.” In the circumstances and due to the stay, the Plaintiff could not take any action.
10. The Bank supports its position by citing several decisions among the Court of Appeal decision in *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another* where the court held that a plain reading of Order 40 Rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse.
11. Although the parties have raised attractive arguments, it is not necessary to make any finding at this stage because the injunction is not only directed at the Bank but affects a third party who is not party to the suit. Even if I were to hold that the sale was irregular and allow the application for the reasons stated by the Plaintiff, such finding would be made in the absence of the third party who is not a party to this suit and who has now acquired an interest in the suit property whether lawfully or unlawfully.
12. The person who purchased the property at an auction has a right to be heard before any adverse order is made against her. This position was clearly explained by the Court of Appeal in *Pasbito Holdings Limited & Another vs Paul Ndungu & 2 Others* where it was noted that:

The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of “audi alteram partem”, which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

“It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.

There is an unpronounceable Latin maxim which in simple English means: “He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right”.

The learned Judge quite erroneously in our view said: “However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”. With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents’ case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief”.

13. It is thus clear that this court cannot grant the injunction sought by the Plaintiff in the absence of the purchaser. It is on this ground that I dismiss the application.
14. I find however find that there is considerable merit in reviewing the order dated 19th November 2021 for several reasons. Although the Bank’s appeal is pending, the substratum of the appeal is now lost by the sale of the suit property. Since the Bank is the author of the circumstances that led to the sale of the suit property, it cannot benefit from a situation where the Plaintiff’s right to prosecute the suit



is frozen. I therefore discharge the stay and allow the Plaintiff to prosecute the suit including seeking relief from the Bank as she deems fit.

15. For the reasons I have set out above, I allow the Plaintiffs' Notice of Motion dated 8th July 2021 only on terms that the stay of proceedings issued on 19th November 2019 be and is hereby discharged. I decline to grant the injunction sought by the Plaintiff in respect of the suit property. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Lusi instructed by CM Advocates LLP for the Plaintiff

Ms Muhia instructed by Wamae and Allen Advocates for the 3rd Defendant.

