



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E121 OF 2018

BETWEEN

OKSANA INVESTMENTS SUPPLIES LIMITED.....PLAINTIFF

AND

ALICE WANJIRU WAMWEA.....DEFENDANT

RULING

Introduction

1. The plaintiff, Oksana Investments Supplies Limited, has moved the court by the plaint dated 17th October 2018 for orders of vacant possession of LR 209/11395 (IR 53103) (“the suit property”) against the defendant, Alice Wanjiru Wamwea, together with rent arrears from 28th March 2018, the date of auction of the property as well as interest at bank rates.

2. In summary, the plaintiff’s case is that on 28th March 2018, it purchased the suit property from Faulu Micro-Finance Bank Limited at a public auction and is now it registered proprietor. The suit property comprises a seven story commercial cum residential development which has tenants in occupation. The defendant, who was the previous registered owner, resides on and continues to be in possession of the suit property hence the present suit.

The Application

3. The application for determination is the defendant’s Notice of Motion dated 17th October 2019 in which she seeks the following orders:

a. Spent

b. THAT pending hearing and determination of this Motion there be a stay of execution and further execution of the Orders issued on 17th October 2019 in regard to the 2 motions by the Plaintiff dated October 11th 2019 and October 15th 2019 until further Court Orders.

c. THAT the exparte Orders herein entered on October 17th 2019:

i. Dismissing the Defendant’s Motion dated 12th July 2019

ii. Allowing the 2 Motions by the Plaintiff dated October 11th 2019 and October 15th 2019 be vacated, set aside and all subsequent processing arising thereon in enforcement thereof be forthwith vacated entirely set aside

d. THAT upon the grant of Order 3 above, the Defendant be granted leave to file Replying Affidavit to the 2 Motions by the Plaintiff dated October 11th 2019 and October 15th 2019

e. THAT the Defendant's Motions dated 12th July 2019 be heard first in time and on priority.

f. THAT costs of this Motion be awarded to the Defendant/Applicant in any event.

4. The grounds of the application are set out on the face of the motion and the defendant's affidavit sworn on 17th October 2019. In summary, she deposes that on 17th October 2019, her application was coming up for hearing and not the plaintiff's two applications dated 11th October 2019 and 15th October 2019. That those two applications were served on 16th October 2019 hence there was no time to file responses hence her rights under **Articles 25 (c) and 48** of the Constitution on fair trial were violated. That under **Order 12 rule 2(c)** of the **Civil Procedure Rules**, the court was obliged to adjourn the hearing of the two applications to accord her time to respond.

5. Her case is that her application was wrongly dismissed for want of prosecution yet she was present in court on the material day and her advocate though present had stepped out to attend to another matter before another court and had requested someone to hold his brief in order to get time allocation for her application. That instead of allocating time, the court proceeded to call out the matter and dismissed the application.

6. The defendant opposed the application through the grounds of opposition dated 29th October 2019 and the replying affidavit of its director, Paul Mwangi Njuki, sworn on 29th October 2019. He states that the application has no merit, is an afterthought, the prayers sought are moot and the application intends to delay expeditious prosecution of the suit. He further states that the appropriate forum is the Court of Appeal because of the grounds upon which the application was founded were dismissed. He further deposed that defendant's counsel conduct of leaving the court room to talk to the clerk of Muigai J., three matters before the present suit was called out proves his disrespect for the court. That the advocate instructed to hold his brief is assumed to have had full instructions and that when the matter was called out at 12.30pm after being placed aside, neither the Defendant nor her Advocate, or the Advocate instructed to hold brief were present in court. That the court proceeded to hear the plaintiff and gave its ruling based on facts and evidence placed before it.

Three Previous Applications

7. In order to determine the defendant's application, it is necessary to understand the nature of the application dismissed on 17th October 2019 and the two applications referred to and the record of proceedings.

8. The defendant's application that was dismissed on 17th October 2019 is dated 12th July 2019 which sought the consolidation of the present suit together with **HCCC No. 86 of 2016 (Alice Wanjiru Wamwea v Faulu Microfinance Bank Limited and Antique Auctions)**. In that case, the defendant sought consolidation on grounds that the suit concerned the suit property and the same subject matter with the difference that she sued Faula Microfinance Bank Limited as the 1st Defendant, Antique Auctions as the 2nd Defendant and sought to enjoin the plaintiff herein as the 3rd Defendant and NIC Bank as the 4th Defendant.

9. In the application dated 11th October 2019, the plaintiff sought an order that, "*This Honourable Court be pleased to summon ALICE WANJIRU WAMWEA the Defendant herein to show cause why she should not be held liable for contempt of court.*" The Plaintiff alleged that the Defendant had continuously interfered with execution of the orders of Court issued on 24th July 2019 by denying the team of auditors and property manager appointed by the applicant to enter the suit property.

10. In the application dated 15th October 2019, the plaintiff sought an order that, "*The O.C.S. Jonsaga Police Station is hereby ordered to supervise the Audit of the rental income over L.R. No. 209/11395 (I.R. 53103) by the firm of Githaiga & Associates and the management of the suit property by the firm of Green Plots Properties*" and "*That the O.C.S. Jonsaga Police Station do ensure peace and tranquility prevails on the suit property pending the hearing and determination of the suit.*" The ground of the application was that Kasango J., had delivered a ruling on 24th July 2019, ordering an audit of rental income from the suit property be carried out and a property manager be hired and the defendant be restrained from collecting rent from the suit property until further orders of the court. The plaintiff alleged that the defendant was interfering with management of the suit property by locking up the property and interfering with its management.

11. When the plaintiff's applications dated 11th October 2019 and 15th October 2019 were filed, the Court fixed them for mention on 17th October 2019 and directed that they be served on the defendant. Both applications were indeed served, a fact conceded by the defendant.

The Proceedings

12. The record shows that on 17th October 2019 three counsels were present; Mr. Murango, Ms Mwendwa and Mr. Mpala for the plaintiff, Mr. Githumbi holding brief for H. Kinyanjui for the defendant and Mr. Onsare for the defendant in **HCCC No. 86 of 2016**. The court noted that the defendant in **HCCC No. 86 of 2016** needed to file a response to the application dated 12th July 2019 granted them seven days within which to do so. The record further shows that later that day at 12.30pm, Mr. Githumbi holding brief for Mr. Kinyanjui walked out of court without leave and the court directed that the matter to proceed. Parties addressed court on the merits on the application. Court gave its ruling and dismissed the application with costs to the plaintiff and defendant in **HCCC No. 86 of 2016** for two reasons; non-attendance of the defendant and because the court found that it had no merit.

13. Mr. Murango argued the plaintiff's application dated 15th October 2019 and the court noting that the same was coming up for directions directed that it be heard the same day. The court allowed the application as prayed and further directed that case management conference be done before the Deputy Registrar.

14. The defendant filed another application dated 18th October 2019 seeking recusal of Kasango J., which application was allowed on 24th October 2019 whereby Kasango J., recused herself and directed that the file be placed before me.

15. On 8th November 2019, I directed that in order to give directions the Deputy Registrar avail the court file for **HCCC No. 86 of 2016** to familiarize myself with the matter.

16. After studying the matter, I came to the conclusion that the interlocutory applications were caused by the fact that both parties wanted to control and manage the property. In order to ensure that the matter moves forward, on 19th November 2019, I issued directions where I directed *inter alia* that both parties were in contempt of the court's orders of 5th March 2019 directing the parties to open a joint bank account for purposes of depositing rental income from the suit property. I further proposed to appoint a receiver manager under **Order 41** of the **Civil Procedure Rules, 2010** and directed that the parties furnish the court with names of receiver/managers for consideration.

17. On 20th November 2019, I appointed joint receiver managers; George Ndegwa T/A Greenplots Properties and AMC Realtors Limited. I further directed *inter alia* that the receiver managers take over management of the suit property on 2nd January 2020 and ensure that the tenants pay rent by the 5th day of every subsequent month into the joint account to be opened by the parties pursuant to the orders of the court of 5th March 2019. I also directed that the receiver/managers to conduct an audit of the rent due and provide a report to the court on that day. A joint report is on record filed on 17th January 2020 by the receiver/ managers.

Determination

18. I now turn to the substance of the defendant's application dated 17th November 2019. This application is in substance an application to set aside the orders that were made on 17th November 2019, dismissing the defendant's application for consolidation and allowing the plaintiff's application for committal of the defendant. The court has discretion to set aside a judgment or order under **Order 12 rule 7** of the **Civil Procedure Rules** and the inherent power of the court. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In this respect I would adopt the statement of principal in **Shah v Mbogo & Another [1967] EA 116**, it was held that:

The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

19. In an application such as that presented by the defendant, the court of law should consider the facts before and after the default, the conduct of the parties, whether there are reasonable grounds to reinstate after considering the prejudice that the respondent would suffer if reinstatement was granted against the prejudice the applicant will suffer reinstatement is not granted.

20. The date taken of 17th October 2019 for hearing the defendant's application dated 12th July 2019 was taken by consent of the parties when they appeared before court on 22nd July 2019. The Plaintiff subsequently served the Defendant's counsel with its two applications. Thus the defendant's counsel was aware that on 17th October 2019 there were three applications coming up before court.

21. It is not contested that Mr. Kinyanjui instructed counsel to hold his brief. However, being fully aware of the seriousness of the applications, Mr. Kinyanjui failed to return to court to relieve Mr. Githumbi, who also left court without leave of the court.

22. At this stage I would point out that both applications filed by the plaintiff whose aim was to secure management of the suit property and collection of rent have now been settled by the directions I gave on 19th December 2019 and confirmed by a report of the receiver/managers.

23. The only issue then is whether I should set aside the order declining to consolidate the suit. I agree with counsel for the plaintiff that Kasango J., determined that the application lacked merit when she dismissed it. At the hearing of the application, Mr. Onsare submitted as follows:

The prayers of HCC 86 of 2017(sic) sought to stop the sale. The sale was finalized. Title also passed to the Plaintiff in E121 of 2018. That is the position of Faulu Microfinance Bank that HCC 86 of 2017 is spent. So prayer of consolidation is in futility and waste of court's time.

24. The defendant in her application dated 12th July 2019 annexed a copy of the Plaintiff in **HCCC 86 of 2016** wherein she sought for the following prayers:

a. A permanent injunction be issued against the 1st and 2nd Defendant whether by themselves, their agent and servants from selling, dealing, interfering, alienating or disposing all that piece of land known as L.R. No. 209/11395 from auctioning the Plaintiffs property until determination.

b. The 1st Defendant be compelled to issue the Plaintiff all the monthly financial statements indicating the outstanding debt.

c. The 1st Defendant be compelled to issue the Plaintiff with the valuation report on the charged property L.R. No. 209/11395 and state the reserve price to be used by the 2nd Defendant.

d. The costs of the suit.

e. Interest on d above

f. Any such other or further relief as this Honourable Court may deem appropriate.

25. It therefore follows that indeed, the Defendant's prayers were spent and her only remedy lay in damages as against Faulu MicroFinance Bank Limited, to consolidate the two suits would only serve to "muddy the waters" which would not serve the interests of justice. Further, the defendant filed her suit in 2016, she had all the opportunity to pursue the same with alacrity in order to obtain her relief. The plaintiff filed his suit in 2018, he had been diligent in prosecuting the matter. He should not be saddled with the defendant's tardiness and claims against third parties. It is not in the interests of justice to reinstate the application dated 17th October 2019.

Disposition

26. For the reasons I have set out, I dismiss the defendant's application dated 17th October 2019 with costs to the defendant.

DATED and DELIVERED at NAIROBI this 25th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Murango instructed by Murimi Murango and Associates Advocates for the plaintiff.

Mr Lubeto instructed by J. Harrison Kinyanjui and Company Advocates for the defendant.