



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

Coram: D. K. Kemei - J

**CIVIL SUIT NO. 25 OF 2019**

**SHENG SHUANG QUARRY LIMITED.....PLAINTIFF**

**VERSUS**

**NCBA BANK KENYA PLC**

**(FORMERLY NATIONAL INDUSTRIAL & CREDIT BANK LTD.....DEFENDANT**

**RULING**

1. The defendant filed this application dated 5.6.2020 by way of notice of motion under sections 1A,1B and 3A of the Civil Procedure Act, Cap 21 laws of Kenya, and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

*a) Spent*

*b) Spent*

*c) The honorable court be pleased to order that the status quo order issued in its ruling/order of 30<sup>th</sup> September 2019 did not restrict the Defendant's further exercise of its statutory rights under the Land Act, No. 6 of 2012 and the Movable Property Security Rights Act, 2017 including the commencement and/ or continuation of any enforcement process by the Defendant against the plaintiff in accordance with the law.*

*d) The costs of the application be provided for.*

2. The application is further supported by the affidavit of Stephen Atinya. The grounds of the application as disclosed in the chamber summons are summarized as follows:

*i) The plaintiff filed an application dated 29.8.2019 seeking among other things, a temporary injunction to restrain the defendant from exercising its power of sale over the charged land and that the court through its ruling dismissed the application but however ordered that the status quo relating to the suit property be maintained pending the hearing and determination of the main suit.*

*ii) According to the defendant, the status quo is not defined in any part of the ruling/order or in the pleadings filed by the parties;*

*iii) Further that the defendant understood that it was at liberty to commence and or continue the exercise of its contractual rights as related to the plaintiff's movable properties because the court noted that the enforcement against the plaintiff's moveable property was not in issue before it as the same was governed by the Movable Property Security Act, 2017(sic).*

*iv) That the court held in its ruling that the plaintiff had failed to substantiate its allegations of a sale as no notice of sale was issued under Section 96(2) of the Land Act No. 6 of 2012.*

*v) It was lamented that the plaintiff remained in default under the various banking facilities that were issued to it by the defendant and that the defendant intended to further exercise its contractual rights as governed by law but however the defendant was of the view that the ruling would not prevent it from exercising its rights under the Land Act No. 6 of 2012.*

**vi) The defendant was of the view that the status quo orders did not prevent it from continuation of any enforcement process against the plaintiff's properties; whether movable or immovable in accordance with the law hence sought that the ruling/ order of the court be clarified so as to avert the risk of acting in contempt of the court orders.**

3. The grounds of the application are further contained in the affidavit of Stephen Atenya the legal manager of the defendant, deponed on 5.6.2020. In addition to the grounds contained in the chamber summons, he deponed that the plaintiff shall suffer no prejudice if the orders sought are granted as it was in the interest of justice that the orders sought be granted.

4. In reply David Muigai Ng'anga, indicated as the only surviving shareholder of the plaintiff who deposed vide affidavit dated 15.6.2020 that the application was an attempt to circumvent the order of the court. It pointed out that the plaintiff herein was served with summons in Milimani Civil Case E 407 of 2019 in which an appearance was entered culminating in the parties exchanging their drafts of agreed issues. It was deponed that the matter was listed for pretrial hearing on 6.5.2020 but did not proceed in light of the vicissitudes of the Covid-19 menace. It was deponed that the application was an attempt to vary and or stretch the application of the court orders of 30<sup>th</sup> September, 2019 and or to extinguish the status quo order and further that the prayers sought were at cross purpose with the grounds relied upon. It was deponed that there was no ambiguity in the court order. The deponed pointed out that the defendant did not inform the court of the existence of Nairobi Commercial Court suit E407 of 2019 as well as the defence filed by the plaintiff herein. It was deponed that no reason had been given to warrant variation of the status quo order that was given on 30.9.2019.

5. The court was addressed in oral submissions conducted via skype. The applicant's counsel submitted that in order not to be in contempt of the orders of court, then the relief sought in the instant application would be necessary. Learned counsel submitted that clarification was required on two issues; firstly whether the defendant could exercise its rights under the Land Act and secondly whether the defendants could realize securities in relation to the movable and immovable properties which are not the subject of the suit.

6. Learned counsel for the respondent in opposition to the application was twofold; Firstly, that the application is an afterthought; Secondly, that the defendant was acting in abuse of court process having already filed Milimani Case E407 of 2019 that is pending between the parties and that the correct move ought to have been for the defendant to file a counterclaim in the instant case. It was submitted that the status quo did not have several meanings but only one meaning.

7. In rejoinder, learned counsel for the applicant submitted that the suit E407 of 2019 related to other securities offered by the directors of the plaintiff. It was submitted that the plaintiff sought an injunction in respect of the Mavoko Property and had not annexed evidence of the movable properties.

8. I have carefully considered the defendant's application as well as the plaintiff's reply together with the affidavit evidence and the documents attached. I have also considered the oral submissions of counsel.

9. Before proceeding to resolution of the issues for determination, I shall give a brief background to the instant application and the ruling that was delivered on 30.9.2019.

10. The plaintiff made an application dated 29.8.2019 and filed on an even date seeking the following reliefs;

**a) Spent**

**b) Spent**

**c) Pending the hearing and determination of the suit or until further orders a temporary injunction restraining the Respondent/Defendant by themselves, its servants, agents and or employees, or otherwise howsoever from exercising its power of sale over the plaintiff/applicants property known as LR NO 28617 (I.R 129519) Mavoko situate at Machakos County as per notification contained in the letter dated 14.8.2019;**

**d) That the Honorable court order the Defendant/Respondent to withdraw from the possession of the plaintiff/applicants property known as LR NO 28617 (I.R 129519) Mavoko situate at Machakos County;**

**e) That costs of the application be provided for.**

11. The court made the following observations and findings that I shall reproduce verbatim.

***"I agree with the submissions that an application to court in respect of remedies sought by a mortgagor or mortgagee is brought under the legal regime of the Land Act, 2012. I also agree that a specific law was enacted to deal with the remedies of movable properties secured and for the power of court and the parties in respect of chattels as stipulated in the preamble to the Movable Property Security Rights Act.***

12. I also noted that ***"for the copy of the agreements have not been provided hence I am of the view that during trial, whether or not the entry was within the law shall be determined during trial. I am cognizant of the right to independent action envisaged under the Movable Properties Securities Rights Act 2017*** (emphasis added).

13. It was my finding that ***"I reserve my determination in respect of prayer 4 to the main suit"***.

14. I pointed out that ***"I have not seen the said notice of sale therefore it would be putting the cart before the horse to decide that there is***

*imminent danger of the suit property being sold.’’*

15. It was my finding that **“In answer to prayer 3...I find that in respect of the mortgaged suit property, (emphasis added) there are no serious questions to be tried hence the prima facie case test fails. Nevertheless, there are serious questions to be tried as to the legality of the actions of the Respondent in entry of the suit property that I had earlier indicated would need to be interrogated at trial because the court does not have a copy of the hire purchase agreement and unfortunately, the injunction relates to the suit property and not the chattels that were secured under the hire purchase agreement mentioned by the applicant.**

16. The court in examining **“extent to which the determination of the application at an interlocutory stage will amount to a final determination of the rights and obligations of the parties”** found that **... in order to improve the chances of the court being able to do justice after a determination of the merits at the trial I order that the status quo in the suit property be maintained until the final disposal of the suit.**

17. It was my conclusion that **“the Applicant’s application partially succeeds in the terms indicated in 28 above and the rest of the application fails and lacks merit”**.

18. It is against this background that the issue for determination is whether the court may grant the orders sought.

19. For the avoidance of doubt, what is left of the rest of the application as intimated in my conclusion is prayer 4 that is indicated in paragraph 13 above where the finding was reserved for the main suit.

20. That leaves us with prayer 3 that sought the following relief that I shall reproduce verbatim;

**“Pending the hearing and determination of the suit or until further orders a temporary injunction restraining the Respondent/Defendant by themselves, its servants, agents and or employees, or otherwise howsoever from exercising its power of sale over the plaintiff/applicants property known as LR NO 28617 (I.R 129519) Mavoko situate at Machakos County as per notification contained in the letter dated 14.8.2019.”**

21. It was my finding that the status quo in the suit property be maintained. The finding was clear and the view of the defendant that the status quo order is not defined in any part of the order or the pleadings is a misconception.

22. Having said so, the applicant has sought for an order that:-

**“the status quo order issued in its ruling/order of 30<sup>th</sup> September 2019 did not restrict the Defendant’s further exercise of its statutory rights under the Land Act, No. 6 of 2012 and the Movable Property Security Rights Act, 2017 including the commencement and/ or continuation of any enforcement process by the Defendant against the plaintiff in accordance with the law”**

23. A quick perusal of the defendant’s pleadings in respect of the application dated 29.8.2019 and more specifically the response by the defendant was to the effect that **the notice under Section 90(1) of the Land Act is inapplicable for purposes of obtaining possession of a collateral that is governed by the Movable Property Rights Act** and further that **the movable assets were disposed of in accordance with the Movable Property Rights Act and that the respondent has never managed or controlled the applicant’s quarry business and only entered the suit property to collect its collateral as contractually entitled under the hire purchase facilities.**

24. To the extent that the applicant wants this court to make a finding on **further exercise of its statutory rights under the Land Act, No. 6 of 2012... including the commencement and/ or continuation of any enforcement process by the Defendant against the plaintiff in accordance with the law** the defendant is departing from the pleadings that at all times material to this application and ruling referred to property known as LR NO 28617 (I.R 129519) Mavoko situate at Machakos County that appeared to be the subject of the application that was dispensed with in the ruling delivered on 30.9.2019. In the case of **Captain Harry Gandy v Caspair Air Charter Ltd. (1956) 23 EACA 139**, Sir Ronald Sinclair said:

*“The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.”*

25. It appears to me that the defendant seeks to set up another claim against the plaintiff that is inconsistent with its claim as elicited from the response to the application that was the subject of the ruling of this court on 30.9.2019. Further, when the defendant makes reference to **“further exercise...”** it is being vague and in this regard defeating the rule of pleadings that they ought to be specific and set out with clarity the exact remedy being sought in order for the court to be certain of what intervention a claimant seeks and thereafter award an appropriate relief. To that extent I decline the invitation to make such a finding on **further exercise of its statutory rights under the Land Act, No. 6 of 2012... including the commencement and/ or continuation of any enforcement process by the Defendant against the plaintiff in accordance with the law.**

26. On the second limb of the prayer that seeks a finding on **the Defendant’s further exercise of its statutory rights under the Movable Property Security Rights Act, 2017 including the commencement and/ or continuation of any enforcement process by the Defendant against the plaintiff in accordance with the law**, as indicated in paragraph 12 above, I was, in the ruling delivered on 30.9.2019 **cognizant of the right to independent action envisaged under the Movable Properties Securities Rights act 2017**. I am satisfied that the finding was in clear and uncertain terms and as such the applicant in seeking a relief to the effect that they wanted clarification sought a remedy that served no useful purpose as the issue was aptly addressed in the ruling delivered on 30.9.2019. I quickly add that the envisioned independent action and issues arising from the same would be addressed in the requisite independent action itself presented before a competent forum and

not in the instant application. In any event the defendant/applicant has confirmed filing another suit namely E407 of 2019 at Milimani Commercial Courts which is yet to be determined.

27. In the premises, it is my finding that the defendant's application dated 5.6.2020 lacks merit. The same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**Dated and delivered at Machakos this 30<sup>th</sup> day of June, 2020.**

**D. K. Kemei**

**Judge**