



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 149 OF 2017

GREEN AFRICA INTERNATIONAL LIMITED.....PLAINTIFF

- VERSUS -

JAMII BORA BANK LIMITED.....DEFENDANT

RULING

1. Being considered by this Ruling in the defendant's Notice of Motion application dated 29th July 2019.

2. Some background of this matter is necessary. **GREEN AFRICA INTERNATIONAL LIMITED**, the plaintiff is a limited liability company engaged in the business of real estate. One of its developments was known as **Madiba Gardens in Nyeri**. That development was on property L.R. No. 2279/2 and 3223 (the properties). The properties were registered in the plaintiff's name. The plaintiff purchased the properties through a loan of Ksh 369 million advanced by the defendant **JAMII BORA BANK LIMITED** (the Bank). The properties were charged as security for that loan to the Bank. The plaintiff filed this suit on 6th April 2017. By this suit the plaintiff alleged the Bank engaged in unlawful acts which were a clog to the plaintiff's equitable right of redemption. The plaintiff prayed for permanent injunction to restrain the Bank from selling the properties in exercise of its statutory power of sale; injunction to stop the Bank appointing a receiver or liquidators and; for a declaration that intended auction of the property, which was fixed for 26th April 2017, was unlawful.

3. The plaintiff filed an interlocutory injunction application, simultaneously with the plaint, which was dated 6th April 2017. By this court's Ruling dated 12th May 2017, in regard to that application, this court granted Limited injunction order restraining the Bank from selling by auction the suit property until fresh statutory notices were issued by the Bank to the plaintiff.

4. The Bank did indeed issue fresh statutory notices, as ordered by the court. Parties further entered into a consent, which was adopted by this court on 7th February 2018, to the effect that:

“by consent the suit property be valued for the forced sale value proposed by M/s Lloyd Masika Valuers.”

5. By a valuation of Lloyd Masika dated 2nd June 2018 the forced sale value of the properties was stated to be Ksh 412,500,000.

6. By a further consent of the parties in this action adopted by the court on 3rd May 2018 it was consented as follows:

“IT IS HEREBY ORDERED BY CONSENT:

1. THAT leave be and is hereby given to the Defendant to begin the process of realizing/selling the property.

2. THAT the Plaintiff if indeed they have a buyer may approach the court for review of this order.

3. THAT for the avoidance of doubt, the property will only be sold at the amount stated the valuation of Lloyd Masika dated 26th February, 2018.

4. THAT mention to monitor sale is fixed for 25th July, 2018.”

7. The Bank scheduled to sell by auction the suit property on 30th May 2018. The court declined to stop that auction as sought by the plaintiff's application dated 28th May 2018. In respect to that application by this court's Ruling dated 13th June 2018 the court found that

requisite statutory notices had been served on the plaintiff and further the court was, by that Ruling, of the view that the plaintiff could not seek to stay an auction which it had consented by a consent recorded before court. The plaintiff by subsequent application dated 11th September 2018, which application was later withdrawn, conceded that the properties were sold on 30th May 2018 by the Bank in exercise of its statutory power of sale.

8. The present application under consideration, by the Bank, is dated 29th July 2019. The Bank seeks an order that this suit be struck out or be dismissed. The bank has premised that application on the ground that the plaintiff failed to serve it, the Bank, with the summons in this matter, on the ground that the properties were sold by the Bank on 30th May 2018, that the plaintiff suit for permanent injunction has no valid reasonable cause of action and, that accordingly the pendency of this suit is an abuse of the court process.

9. Both parties filed their submissions to the application while the Bank additionally filed list of authorities. I have considered all of those.

ANALYSIS AND DETERMINATION

10. The Bank's application attacks the plaintiff's suit on two fronts. The first is that the plaintiff failed to serve the Bank with the summons and since this suit was filed in April 2017 and that the summons expired as provided under Order 5 Rule 2(1) of the Civil Procedure Rules. Indeed that was the holding in the case **Barclays Bank of Kenya Limited v Patrick Njuguna Kubai (2014) eKLR** thus:

*"37. In the case of **Julius Njoroge Muira vs Harrison Kiambuthi Mburu [2011] eKLR**, Rawal J (as she then was) stated as follows:-*

*"...I shall thus without hesitation find that the Original Summons is not in existence and all the efforts to revive the same by reissuance were null and void. The Original Summons which has lost its life cannot be resurrected... I shall quote the passage by Lord Denning in the case of **Macfoy vs United African Limited (1961) 3 ALL ER 1169 at 1172***

"If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad...And every proceeding which it is founded on it is also bad and incurably bad. It will collapse." The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers."

1. In the case of **Zakaria Somi Nganga vs Kenya Commercial Bank Limited & 3 Others [2008] eKLR** , Lesit J had the following to say:-

" The summons to enter appearance in this case expired 12 months from the date of issue...it was not possible to revive them. That therefore means that the Plaintiff's suit lapsed for reason of non-compliance of Order V Rule 1 of the Civil Procedure Rules..."

1. Finally, in the celebrated case of **Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others vs Charles Thaithi [1997] eKLR** which is binding on this court, the Court of Appeal held as follows:-

"Order V Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore non-compliance with the procedural aspect cause by failure to renew the summons under this rule is such a fundamental defect in the proceedings that inherent powers of the court under Section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons...the court had no power to extend the validity of summons beyond 24 months, when in fact there were no valid summons in existence...."

11. The plaintiff in opposition stated that it served the summons on the Bank on 10th April 2017 and that the Bank acknowledged that service, that acknowledgment being shown by the Bank's legal department dated receipt stamp and a signature.

12. I have examined the affidavit of service of Dickson G. Kariuki dated 10th April 2017 where by Dickson confirmed service of the summons on the Bank's legal department on that date. The Bank did not respond to that affidavit of Dickson and did not request to cross examine Dickson. It is trite that there is a presumption that the depositions of a process server are correct unless found otherwise after cross examination. This was stated in the case **Kenya Orient Insurance Limited v Cargo starts Limited & 2 others (2017) eKLR**:

"Accordingly, it must be presumed then that the Process Server's averments are indeed correct, in line with the decision of the Court of Appeal in **Shadrack arap Baiywo vs. Bodi Bach [1987] eKLR**, that:

"There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

13. That presumption, stated above, will lead me to find that the Bank's application, in respect to the first ground fails. There is evidence of service of summons on the Bank.

14. The Bank sought the striking out or dismissal of the plaintiff's suit on the ground that there is no valid or reasonable cause of action against the Bank.

15. **Justice M.J. Anyara Emukule** defined cause of action in the case **Elijah Sikona & George Pariken Narok** on behalf of **Trusted Society Human Rights Alliance v Mara Conservancy & 5 Others (2014) eKLR** thus:

“23. A cause of action is “a factual situation the existence of which entitles one person to obtain a remedy against another person-” LETANG VS. COOPER [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures.”

16. It will be recalled that the plaintiff, by this suit, seeks to permanently injunct the Bank from selling the properties and also seeks to permanently injunct the Bank from appointing Receivers in respect of the properties. Those properties were sold by the Bank in exercise of its statutory power of sale. Indeed the Bank did transfer the properties to the successful purchaser in that sale. What then remains to be determined in this suit? That question is appropriately responded to in the decision of **Joseph Okumu Simiyu v East African Building Society & Another (2005) eKLR** thus:

“Indeed going by the plaint I am left with the distinct acceptance of the argument raised on behalf of the defendants. There is no reasonable cause that has been left surviving in view of the transfer of the suit property to a third party who is not a party in this action.”

17. The properties were sold by the Bank, the purchaser of them and now the registered owner is not a party to this suit. There is in my view no cause that remains to be determined. The remedies the plaintiff seeks by this suit cannot be granted in view of the auction of the properties. On that ground the Bank's application does succeed. This plaintiff's suit will be dismissed since it has no reasonable cause of action against the Bank. The costs of the suit and the application will follow the event, as provided under section 27 of the Civil Procedure Act, that is they will be awarded to the Bank.

CONCLUSION

18. The court grants the following orders in respect to the Notice of Motion dated 29th July 2019.

- a. This suit is hereby dismissed for lack of reasonable cause of action.
- b. The costs of the suit and of the Notice of Motion dated 29th July 2019 are awarded to the defendant.

DATED, SIGNED and DELIVERED at **NAIROBI** this **29th** day of **JULY** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

ORDER

This decision is hereby virtually delivered this **29th** day of **July, 2020**.

MARY KASANGO

JUDGE