



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 188 OF 2018**

**PATCAB TOURS LIMITED.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**ANTIQUA AUCTIONS AGENCIES.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Patcab Tours Limited (the Plaintiff) in filing this case against Equity Bank Limited (the 1<sup>st</sup> Defendant) and Antiqua Auctions Agencies (the 2<sup>nd</sup> Defendant) sought for Orders:

a. An Order restraining the 1<sup>st</sup> Defendant/Respondent whether by itself, its agents and its servants from exercising the statutory power of sale and or dealing, interfering, alienating or disposing of all that parcel of land, Land Reference Number Nairobi/Block105/7047 which is situated at Capital Hill area, Embakasi, Nairobi County.

b. An Order suspending and or postponing the statutory power of sale for a period of one eighty days (180) or such time as the Court may determine to enable the Plaintiffs/Applicants to redeem the parcel of land, Land Reference Number/Block105/7047.

c. General damages.

d. Costs of the suit.

e. Any other or further relief that this Honourable Court may deem fit and just to grant.

2. The Plaintiff in filing its Complaint simultaneously filed the Notice of Motion dated 14<sup>th</sup> May 2018. By that application the Plaintiff sought interlocutory injunction to restrain the Defendants from auctioning the property No. Nairobi/Block 105/7047 (the subject property) in exercise of 1<sup>st</sup> Defendant's statutory power of sale.

3. That application came before Court under certificate of urgency on 15<sup>th</sup> May 2018 when the Court fixed 18<sup>th</sup> May 2018 for directions of that application. On 18<sup>th</sup> May 2018 the application was fixed for hearing on 7<sup>th</sup> June 2018. On that date the Plaintiff's Learned Counsel was absent and the matter was adjourned generally.

4. The Plaintiff's Learned Counsel fixed the application for hearing on 27<sup>th</sup> September 2018 because the subject property was again advertised for sale by public auction on 3<sup>rd</sup> August 2018. The Plaintiff, irregularly filed yet another Notice of Motion application dated 25<sup>th</sup> July 2018 yet again seeking to restrain the Defendants from selling the subject property by public auction. The Court on 26<sup>th</sup> July 2018 Ordered the application be before Court on 27<sup>th</sup> July 2018 for direction. Parties, on that date, consented to the matter being mentioned on 2<sup>nd</sup> August 2018. On 2<sup>nd</sup> of August 2018 in the absence of both Counsels for the Plaintiff and Defendants the Court adjourned the matter generally but later at 10.43am that day when only the Plaintiff's Learned Counsel appeared the Court Ordered a temporary injunction to issue restraining the 1<sup>st</sup> Defendant from selling by public auction the subject property. The application dated 25<sup>th</sup> July 2018 was fixed for interpartes hearing on 25<sup>th</sup> September 2018. On that day because the matter could not be reached it was adjourned to 12<sup>th</sup> October 2018. On that day because the Plaintiff's Learned Counsel failed to attend Court, but in the presence of the Defendants' Learned Counsel, the Notice of Motion dated 15<sup>th</sup> May 2018 was dismissed for non attendance.

5. The Plaintiff filed an application dated 30<sup>th</sup> October 2018 and curiously sought the extension of temporary injunction Orders. That application was fixed for hearing on 14<sup>th</sup> November 2018 but because the Plaintiff's Learned Counsel failed to attend Court on that day that application was dismissed for non attendance.

6. The Plaintiff filed another Notice of Motion application dated 6<sup>th</sup> November 2018 which sought to have set aside the dismissal by the Court of Notice of Motion dated 14<sup>th</sup> May 2018, which was dismissed on 25<sup>th</sup> September 2018.

7. The said Notice of Motion application dated 6<sup>th</sup> November 2018 came before me on 21<sup>st</sup> November 2018. I engaged both Learned Counsels in discussion with a view to settling this matter. Following that discussion I made the following Orders:

**“ORDER**

**IT IS HEREBY ORDERED:**

**THAT the suit is compromised in the following terms;**

- 1. THAT the Plaintiff shall pay to the Defendant Kshs. 2 million within 10 days from today.**
- 2. THAT the Plaintiff shall pay the balance owed to the Defendant within 120 days from today.**
- 3. THAT the auction sale due today be and is hereby stopped.**
- 4. THAT the Plaintiff shall pay the auctioneers charges and the costs of this suit.**

**FURTHER ORDERS:**

- 5. THAT this file may be closed.**

**GIVEN under my hand and the Seal of this honourable Court at Nairobi this 21<sup>st</sup> day of November, 2018.”**

8. Although by the Court's Orders of 21 November 2018 this matter was compromised the Plaintiff has yet again filed another application dated 13<sup>th</sup> May 2019, which application I am presently considering. By that application the Plaintiff seeks the reinstatement of this suit. That Order relies on the grounds that the Plaintiff had entered into an agreement with another person called George Kirubi whereby the Plaintiff agreed to sell and that Kirubi agreed to buy the subject property for Kshs. 4.5 million; Kirubi agreed to remit the purchase price in the Plaintiff's account at 1<sup>st</sup> Defendant bank; that however the subject property was found to have been encroached by a neighbouring property; that it also transpired that Cabinet Secretary Ministry of Land had placed a caution against transfer and or sale of land in Embakasi Ranching Company, where the subject property is situated; and that despite those obstacles Kirubi was willing and ready to proceed with the sale transaction.

9. The Defendant in opposition to the Plaintiff's application filed a Preliminary Objection in the following terms:

**“The 1<sup>st</sup> Defendant/Respondent shall raise Preliminary Objection to the Notice of Motion application dated 13<sup>th</sup> May 2019 and the entire suit herein on grounds that the suit was compromised and settled by way of the consent Court Order made in Court on the 22<sup>nd</sup> November 2018 and by which Order the entire matter was marked as closed. The said Order has not been varied, vacated or set aside and accordingly, the present application has no basis and is unsustainable in law.**

**The 1<sup>st</sup> Defendant/respondent hereby prays that the said application be struck out in limine.”**

**ANALYSIS AND DETERMINATION**

10. The Orders of 21<sup>st</sup> November 2018 that the Plaintiff seek it be set aside essentially compromised this suit. In other words those Orders settled the dispute in this matter by mutual concession. The Plaintiff by the application before me seeks to have that compromise/settlement set aside and the suit/dispute be reinstated. The Orders of the Court being sought to be set aside, by the Plaintiff, provided for settlement of the debt of the Plaintiff to the 1<sup>st</sup> Defendant. In that Order of the Court there was no condition that the payment of that debt was dependent on the Plaintiff selling, by private treaty to Kirubi, the subject property. It is therefore farfetched for the Plaintiff to seek to set aside the said Orders, which were a product of a discussion between the parties, on basis of matters that were not contemplated by either party. The Plaintiff in seeking to reinstate the suit does not seek a review or vacation of the Orders made by the Court. Even if the Plaintiff had sought to review those Orders there would be no basis to review the same. The words of Justice Mumbi Ngugi in the case **JOSEPH KIPNGETICH KORIR V LITEIN TEA FACTORY COMPANY LIMITED & 2 OTHERS [2018] eKLR** ring true to the present case – viz:

**“In my view, there is nothing in the application before me that would require the Court to exercise its discretion and make an Order of review under Order 45. An advocate properly on record exercised his authority to compromise a suit on behalf of a client. The notice of withdrawal was filed on the basis that the parties had compromised the suit. There is no error apparent on the record, nor discovery of new evidence that was not available to the parties at the time of withdrawal, nor is**

any other sufficient cause that would allow the Court to exercise its discretion in favour of the applicant shown.”

11. In my view the Plaintiff’s application dated 13<sup>th</sup> May 2019 is without merit and is dismissed. Having been dismissed the costs rightly belong and are awarded to the 1<sup>st</sup> Defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1<sup>ST</sup> DEFENDANT

..... FOR THE 2<sup>ND</sup> DEFENDANT