REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 214 OF 2018

STEPHEN KIBIEGO MELLY.....1ST PLAINTIFF

NAOMI MELLY.....2ND PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. Through the application dated 13th May 2019, the plaintiff/applicant herein seeks the following orders:

> ***1. Spent.***
>
> ***2. That pending the hearing and determination of this application this Honourable court be pleased to grant a temporary injunction restraining the defendant or any party acting on its behalf whether as a servant or agent, from selling ,attempting to sell, advertising for sale or otherwise publishing for sale, leasing of any of the following properties known as Land Reference Number 209/18362 (original Number 209/12486/45) and Apartment Number A2.3 being the premises erected on all that piece of land situate in the City of Nairobi known as Land Reference Number 1/270.***
>
> ***3. That this honourable court be pleased to enlarge the time within which the plaintiff should comply with the provision of Order 1 of the Civil Procedure Rules 2010 for a not exceeding Ten (10) days from the date of the grant of this order.***
>
> ***4. That pending the hearing and determination of this suit, this Honourable court be pleased to grant a temporary injunction restraining the defendant or any party acting on its behalf whether as a servant or agent, from selling, attempting to sell, advertising for sale or otherwise publishing for sale, leasing of any of the following properties known as Land Reference Number 209/18362(original Number 209/12486) and Apartment Number A2.3 being the premises erected on all that piece of land situate in the City of Nairobi known as Land Reference Number 1/270.***
>
> ***5. That this court be pleased to issue an order for the maintenance of the status quo prevailing so as to prevent the ends of justice from being defeated.***
>
> ***6. That the costs of this application be provided for in any event.***

2. The application is supported by the affidavit of the applicants' advocate **Henry Nganga Gathuru** sworn on 13th May 2019. The application is premised on the grounds that the defendant/respondent has instructed auctioneers to advertise the applicant's property for sale without following the legal provisions and further, that the suit property comprises of the plaintiff's matrimonial home thereby threatening the plaintiffs constitutional right to own property.

3. The applicant further states that the delay in complying with the Case Management process was due to inadvertence on the part of the applicants which should not be visited upon innocent litigants.

4. In their submissions in support of the application, **M/S Waruhiu & Gathuru Advocate's** highlighted the background of the case and the sequence of events that necessitated the filing of this application. Counsel submitted that the respondent's counsel filed its Case Management forms out of time, took a hearing date exparte and did not serve them with a hearing notice thereby leading to the Case Management being done before the Deputy Registrar in their absence.

5. Counsel attributed the delay in filing the case Management forms to an oversight/error on their part. He cited the cases of ***Belinda Murai & Others v Amos Wainaina*** [1978] LLR 2282 *and* ***Philip Keipto Chemwono & Another vs Augustine Kubende*** [1982-88] KAR 1036, in support of the argument that the mistakes of an advocate should not be visited on their clients.

6. Counsel also cited the provisions or Order 50 Rule 6 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act in advancing the argument that the court has wide powers to enlarge time for compliance with its orders.

7. It was also submitted that the court has jurisdiction to extend time in order to attain the overriding objective of doing justice to the parties as envisaged under Section 1 A of the Civil Procedure Act.

8. Counsel submitted that the application meets the threshold set for the granting of orders of injunction in view of the fact that the applicants had demonstrated that the auctioneer did not issue any notification of sale in compliance with Section 15 of the Auctioneers Act. Counsel also faulted the respondent for failing to comply with the provisions of Section 84 of the Land Act.

9. It was submitted that damages would not be adequate remedy in the event that the applicants' property was sold. For this argument, counsel relied on the decision in the case of ***Manasseh Denga v Ecobank Kenya Limited*** [2015] eKLR wherein it was held that a person's property is not a matter that can be taken casually because it deprives a party of his or her right to own property, a right enshrined in Article 40 of the Constitution.

10. Counsel further submitted that the balance of convenience tilts in favour of allowing the applicant's application and for maintaining the status quo pending the determination of the case.

The respondent's case.

11. The respondent opposed the application through a Notice of Preliminary Objection dated 27th May 2019 in which it listed the following grounds.

a. The application is so for as it seeks injunctive orders is res-judicata these issues having been determined by the consent dated 5th June 2018.

b. In the case of Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996 the Court of Appeal stated as follows:

> ***"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature….That is to say, there must be end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit."***

c. The injunctive and status quo prayers sought in the present application were also sought in the earlier application dated 16th November 2017, which was compromised by the consent dated 5th June 2018.

d. The plaintiffs' application being an attempt at a cosmetic facelift of its earlier application ought to be dismissed with costs.

e. ***The present application is an abuse of the court process and a delaying tactic. The same should be dismissed so that parties can proceed with the hearing of the main suit in the terms of the consent.***

12. The respondent also filed the replying affidavit of its legal officer, **Mr. Billy Ubindi,** dated 27th May 2019, in opposition to the application. The respondent's deponent avers that on 5th June 2018, the parties recorded a consent wherein the applicants were granted 21 days, from the date of service, to file their pleadings and case Management forms in readiness for Case Management and further, that it was a term of the said consent that the injunctive orders would lapse in the event that the applicant's did not comply with the case Management orders.

13. He avers that on 26th June 2018, the applicant sought an extension of time to file pleadings which extension the respondent conceded to and that on 3rd July 2018, the applicants were served with the respondent's complete bundle of pleadings. He states that the applicants were, in line with the consent that they recorded, therefore expected to comply in readiness for the hearing by 24th July 2018.

14. He further avers that as at 30th April 2019, the applicant had already taken 10 months to comply in readiness for Case Management but had failed to do so despite having been invited to take a date for Case Management on 27th February 2019. He states that several attempts to reach the applicants counsel for purposes of effecting service of the Case Management notice were fruitless thereby prompting the respondent's counsel to serve them by way of registered mail as shown in the certificate of posting attached to the replying affidavit.

15. He further states that the applicant has not advanced any reasons for their failure to comply with the terms of the consent order dated 5 th June 2018 for over 10 months. The respondent maintains that statutory notices were properly issued to the applicant and that there is no law requiring reissuance of such statutory notices.

16. It is the respondent's position that a matrimonial property, once charged, becomes a commodity for sale upon default in loan repayment and that the applicants sat on the interim orders by taking no steps to prosecute the case while the debt in question continued to

escalate.

17. At the hearing of the application, **M/S Wamae & Allen Advocates** for the respondent submitted that the application dated 13th May 2019 is res-judicata and is an attempt to relitigate an earlier application dated 15th November 2017 which had been disposed of by consent.

18. It was further submitted that the applicants have not demonstrated any sufficient grounds/reasons why the court should interfere with the terms of the consent recorded on 5th June 2018 as to do so would be tantamount to rewriting the agreement between the parties. For this argument, counsel relied on the decision in the case of ***Board of Trustees National Social Security Fund v Michael Mwalo*** [2015] eKLR wherein the court held that:-

> ***"A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of court."***

19. For the argument that a matrimonial property becomes a commodity for sale once it is charged, counsel cited the case of ***Christopher Mugwima Muroki v Housing Finance Company of Kenya & Another*** [2006] eKLR wherein it was held:-

> ***"The plaintiff's argument that the suit property is a matrimonial home where he resides with his family, and that its sale would result in irreparable loss, cannot stand since the plaintiff in offering the suit property as security for loan accepted that in default the property would be sold. That in deed was the finding in the Court of Appeal Case No. NAI 28 of 2005(UR 18-2005)Ratila Gova Sumaria v Fina Bank Ltd. & 2 others. In that case the Court of Appeal had this to say in regard to the argument that the suit property us a matrimonial home:-***
>
> ***"But surely, that was an eventuality contemplated by the applicant when he made a decision to offer the residential property for the commercial purpose of securing a loan."***
>
> ***All in all, I find that the plaintiff has failed to show a prima facie case with a probability of success and has similarly failed to show that damages would not compensate him. I have no doubt in regard to the two aforesaid principles of injunction and I would therefore, not consider the balance of convenience. The plaintiff's application by chamber summons filed in court on 29th June, 2006 is hereby dismissed with costs to the defendants."***

Determination

20. I have considered the application dated 13th May 2019, the respondent's response and the submissions made by the parties advocates together with the authorities that they cited. The main issues for determination are as follows:

> ***a) Whether the instant application is res-judicata .***
>
> b) ***Whether the applicant has made out a case for the granting of the orders sought in the said application.***

Res judicata

21. The doctrine of *res-judicata* is captured at Section 7 of the Civil Procedure Act as follows:

> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

22. In the case of ***Ngugi v Kinyanjui & 3 Others*** [1989] eKLR it was held:-

> ***"In law, any litigation has to come to an end. Once a decision has been reached by a competent court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. Any decision reached, if not set aside, it can only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in case of review. The law will not allow any dispute between the same parties or between those who claim through them to re-open the dispute while the judgment still remains on record."***

23. In the instant case, the respondent argued that because an earlier application dated 15th November 2017 had been compromised through a consent order recorded on 5th June 2018, the applicant is precluded from filing the instant application, which according to the respondent, amounts to relitigating the earlier application of 15th November 2017.

24. A perusal of the court filed reveals that through the application dated 15th November 2017, the applicant herein sought the following orders:-

> ***1. Spent***

2. That a temporary injunction be issued, pending the hearing and determination of the application inter- parties, restraining the defendant or any party acting on its behalf whether as a servant or agent, from selling, or attempting to sell, or advertising for sale, or otherwise publishing for sale, leasing, of any of the following properties;

a) All that piece of land situate in the City of Nairobi known as Land Reference Number 209/18362(original Number 209/12486/45)

b) All that Apartment No. A2.3 being the premises comprised in lease dated 25th November 2010 and registered in Volume N91 Folio 137/1 File 26465 and erected on all that piece of land situate in the City of Nairobi known as Land Number 1/270 (all hereinafter collectively referred to as the suit properties).

3. That the defendant be restrained, by way of an order of injunction whether by itself or any party acting on its behalf whether as servants or agents from selling or attempting to sell or advertising to sale, or otherwise publishing for sale, leasing any of the suit properties herein, namely land Reference Number 209/18362(original Number 209/12486/45) and Apartment No. A2.3 erected on land reference number 1/270 pending the hearing and determination of the suit.

4. That pending the first appearance of the parties to this suit for the hearing of this application inter-partes, a temporary injunction be issued exparte, for a period not exceeding fourteen (14) days or as may otherwise be directed by the court, restraining the defendant by itself or any party acting on its behalf whether as servant or agent from selling or attempting to sell, or advertising for sale or otherwise publishing for sale, leasing, any of the suit properties herein; Land Reference Number 209/18362(original Number 209/12486/45) and Apartment No. A2.3 erected on land reference number 1/270.

5. That the costs of this application be provided for.

25. A further perusal of the court file shows that on 5th June 2018, the parties recorded a consent compromising the application dated 15th November 2018 in the following terms:

1. "By consent injunction be and is hereby issued in terms of prayers No. 3 of the application dated 15th November 2017.

2. The defendant shall have 21 days to file and serve their pleadings in readiness for Case Management.

3. The plaintiffs shall have 21 days from the date of the service to file their pleadings in readiness for Case Management.

4. The parties shall file their Case Management forms in readiness for the Case Management Conference to be held on 25th July 2018.

5. Failing compliance by the plaintiff with the timelines aforesaid the injunctive orders shall lapse without further reference to this court."

26. I note that the consent was signed by the parties' advocates and adopted as an order of the court. The applicants did not dispute the fact that they did not comply with the 21 days deadline that they had undertaken, through the said consent order, to comply with the filing of the case Management forms. The consent order was clear on the consequences of non-compliance with the said order by the plaintiff. For avoidance of doubt, it is worth repeating that the parties agreed that the injunctive orders would lapse without any further reference to the court if the plaintiffs did not file the Case Management forms within 21 days.

27. There is no dispute that the consent order was not complied with and that the injunctive orders have since lapsed. Through the instant application, filed almost ten months after the lapse of the injunctive orders, the applicants once again, seek not only orders of injunction, but that the court enlarges the time within which the plaintiff should comply with Order 11 of the Civil Procedure Rules. In effect, the plaintiffs/applicants seek orders to review or vary the terms of the consent recorded on 15th November 2018.

28. Courts have taken the position that a consent order is akin to a contract and held that a consent judgment, just like a contract, can only be varied on grounds that would allow a contract to be vitiated. The locus classicus on this matter is the judgment by Hancox JA (*as he then was*) in the case of ***Flora Wasike v Desterio Wamboko*** [1982-1988] IKAR 625, at page 626 wherein it was held:

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

29. In ***National Bank of Kenya Ltd v James Orengo*** [2005] e KLR it was held:-

"Now, there is nothing in this case to show that such circumstances existed. There is no claim of fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hiranj's case, "a court cannot interfere with consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

I find that there were such circumstances – there was no suggestion of fraud, misrepresentation, or collusion, and as I have found, no possibility of mistake. No specific statute or provision of law was cited to show that the consent judgment was contrary

to such law, or public policy. The lower court had absolutely no jurisdiction to re-write the consent between the parties and order that interest "would be at court rates".

30. In ***Samuel Mbugua Ikumbu v Barclays Bank of Kenya Ltd*** [2015] eKLR it was held:

> "***The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts."***

31. In ***Board of Trustees National Social Security Fund v Michael Mwalo*** [2015] eKLR the Court of Appeal held:-

> ***"The judgment arose from consent of the parties to the suit. The law clearly stated . A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the police of the court."***

32. Having regard to the jurisprudence that arises from the above cited authorities, one can say that the circumstances under which a consent order can be set aside have been clearly spelt out. In the instant case, I find that the applicants have not demonstrated that there are any vitiating factors that can warrant the invalidation of the consent order that was recorded on 5th June 2018. The applicants have not indicated that there was any fraud, or collusion at the time that the consent was recorded so as to entitle the court to interfere with consent recorded by the parties. I find that the alleged failure, by the applicants' counsel, to act on the consent order in time or at all, does not fall within classification of the vitiating factors that can necessitate the review or setting aside of the consent order.

33. It is would appear that the applicants after obtaining the orders of injunction through the initial application dated 15th November 2017, literally on a silver platter, following a concession made by the respondents herein so as fast track the hearing of the main suit, sat on their laurels and did not take any steps to set the suit down for hearing. It is further clear that instead, it is the respondents who took the trouble to file the Case Management forms, so as to move the case to the next level, which is a step that should ideally have been taken by the plaintiffs as the initiators of the case.

34. In the circumstances of this case, the applicants can be said to have been sitting pretty in the comfort of having obtained the interim orders in their favour at the expense of the respondents who were keen on having the case determined.

35. Having regard to the findings that I have made in this ruling, I further find that the applicants have not made out a case for the granting of the discretionary orders sought in the instant application. Furthermore, the earlier application dated 15th November 2017, having been determined/compromised through the impugned consent, I find that the applicants are not at liberty to file another application seeking the same orders as to do so would offend the *res-judicata* doctrine that I have already discussed in this ruling.

36. In a nutshell, I find that the instant application is not merited and I therefore dismiss it with costs to the respondent. Consequently, the interim orders to maintain status quo issued on 28th May 2019 are hereby vacated.

Dated, signed and delivered in open court at Nairobi this 26th day of September 2019.

W. A. OKWANY

JUDGE

<u>In the presence of:</u>

No appearance for plaintiff

Miss Muhia for defendant/respondent

Court Clerk - Otieno