



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 22 OF 2017

RAPID COMMUNICATIONS LIMITED.....1ST PLAINTIFF

ALBRIGHT HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION AS

LIQUIDATOR OR DUBAI BANK KENYA LIMITED....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

AND

BANK OF AFRICA LIMITED.....1ST INTERESTED PARTY

S. GICHUKI WAIGWA, ADVOCATE.....2ND INTERESTED PARTY

SULTAN PALACE DEVELOPMENT.....3RD INTERESTED PARTY

RULING

[1] In its Ruling dated **22 December 2017**, the Court granted the following orders following an application by the two Plaintiffs herein:

[a] That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued to stop and restrain the 1st Defendants herein whether acting by itself or through their agents, the 2nd Defendant, **M/s Garam Investments Auctioneers** or other servants or anybody acting on its instructions from selling the 2nd Plaintiffs' property **Title Number LR No. 209/11609/7** situated in **Kileleshwa**(hereinafter "**the Suit Property**").

[b] That as all the parties, including the Interested Parties, are in agreement as to the 1st Defendant' right to the sum of **Kshs. 25,000,000/=** that is now lying in an escrow account in the joint names of Counsel for the Plaintiffs, the 1st Defendant and the 3rd Interested Party, there is no reason why the same should not be paid out forthwith to the 1st Defendant.

[c] Costs of the application be in the cause.

[2] The Court declined the prayer for the discharge of **Title No. LR 209/11609/7** situated in **Kileleshwa** in the name of the 2nd Plaintiff upon receipt of bank guarantee by the 1st Plaintiff and/or its servants and agents, for the reason that it is a substantive prayer in the Plaint, in respect of which there still exists a dispute; particularly the 1st Defendant's right of consolidation. The Court proceeded to invite submissions, if any, as to why the funds in the Escrow Account should not be released to the 1st Defendant. It turned out that strong and divergent positions were taken by Learned Counsel for the Plaintiffs, the 1st Defendant and the 3rd Interested Party as to how those funds should be treated.

[3] **Mr. Odera** for the 3rd Interested Party, was of the posturing that the funds in the Escrow Account were paid by the 3rd Interested Party on behalf of the Plaintiffs on the foundation of a Sale Agreement by which the Plaintiffs sold the Suit Property along with other pieces of property to the 3rd Interested Party; and that the 3rd Interested Party only came to the rescue of the Plaintiffs on condition that the Suit Property would be discharged upon the payment of the outstanding amount of **Kshs. 25,895,094.40** for which the 1st Defendant was poised to exercise its Statutory Power of Sale. **Mr. Githui**, Counsel for the Plaintiffs expressed his support for the position taken by **Mr. Odera**, and urged that the 1st Defendant be required to discharge the Suit Property in exchange for the subject funds. His contention was that the relationship between the Plaintiffs and the 1st Defendant is limited to the payment of the **Kshs. 25,000,000/=** and no more. **Mr. Waigwa**, the 2nd Interested Party also threw his lot with the 3rd Interested Party and argued that the subject funds were paid by the 3rd Interested Party on behalf of the Plaintiffs on the understanding that the Suit Property would consequently be discharged.

[4] On the opposite side of the spectrum was the 1st Defendant, whose Counsel, **Mr. Katiku**, propounded the argument that the positions now being advanced by the Plaintiffs and the 3rd Interested Party have already been canvassed extensively by the parties and were addressed by the Court in the Ruling dated **22 December 2017**; and therefore that the Court is *functus officio*, there being no application for review of that decision. It was further the argument of **Mr. Katiku** that when the order for the deposit of **Kshs. 25,000,000/=** was made, the Interested Parties had not been enjoined to this suit; and therefore that the Court was not, at that point in time, concerned as to where the funds would come from.

[5] The record shows that this is a suit that was filed by the Plaintiffs against the Defendants for a Permanent Injunction to restrain the Defendants from disposing of the Suit Property; and for an Order compelling the 1st Defendant to discharge the title thereto. The Plaintiffs also prayed for costs and interest thereon. Simultaneously, the Plaintiffs filed an application, under Certificate of Urgency, for Temporary Injunction pending the hearing and determination of the application and the suit itself. Consequently, and based on the admission that the sum for which the Suit Property was put up for sale by public auction was indeed owing and due to the 1st Defendant, vide a letter dated **22 December 2016**, which letter was exhibited as **Annexure "AH 4"** to the Supporting Affidavit, the Court issued an order in the following terms:

"Having considered the Notice of Motion dated 18 January 2017 and the affidavit filed in support thereof, it is hereby ordered that Prayer (2) of the Plaintiffs' Notice of Motion ... be granted on condition that the undisputed amount, agreed at Kshs. 25 million, be deposited in a joint interest earning account in the names of Counsel for the Plaintiffs and the Defendants within 7 days from the date hereof. The matter is stood over to 30 January 2017 to confirm compliance and for further orders."

[6] It is indeed the case that when that order was made, it was not manifest that the Plaintiffs had already sold the Suit Property to the 3rd Interested Party; and therefore the interests of the 3rd Interested Party could not have been envisaged by the order. Accordingly, whereas it may be true, as asserted by **Mr. Githui**, **Mr. Waigwa** and **Mr. Odera** that it was the understanding between the concerned parties that the Suit Property would be discharged upon the deposit being made, to the extent that the 3rd Party was not a party when the order of **23 January 2017**, those would be parties' own out of court arrangements which can only be brought on board by an appropriate consent order. So far, there is no such consent order.

[7] Secondly, there would be no basis for the 3rd Party insisting on the discharge of the title to the suit property, the Court having taken a decision that, since the prayer for discharge was a substantive prayer in the Plaintiffs' suit, it would have to await the hearing of the substantive suit. Accordingly, that order remains unless and until set aside on review or appeal. I would agree with **Mr. Katiku** that in that regard, the Court is indeed *functus officio*.

[8] In the result, the orders that commend themselves to the Court, further to the orders issued on **22 December 2017**, are that the funds in the Escrow Account be so held pending the hearing and determination of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH APRIL, 2018

OLGA SEWE

JUDGE