



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 47 OF 2018

VEKSONS LIMITED..... PLAINTIFF

VERSUS

MAESTROVILLE ESTATES (K) LTD.....1ST DEFENDANT

CONSOLIDATED BANK OF KENYA.....2ND DEFENDANT

RINGA PROPERTIES LIMITED.....3RD DEFENDANT

RULING

1. Vekson Limited (*the Plaintiff*) was contracted by Ringa Properties Limited (*3rd Defendant*) to construct and develop for the 3rd defendant apartments on *LR. No. 1870/iV 206* in Westlands Nairobi (*the property*). The *2nd Defendant* consolidated Bank Limited was the financier of that project. The plaintiff by its plaint pleaded that it was the term of agreement between it and the 3rd defendant that the plaintiff would source and provide all the building materials which would be used in the project.

2. The plaintiff pleaded that it commenced the project and as at *May 2015*, had done 80% of that work. The plaintiff pleaded that the project stalled when the *2nd and 3rd defendants* failed to make payment on the issued certificates for the amount of *Ksh 147,213,716.00*. That later the plaintiff, 2nd and 3rd defendants reached a return to work formular.

3. That despite that return to work formular *Mastroville Estates (K) Ltd*, the *1st defendant* together with the 2nd and 3rd defendant forcibly entered into the property on *27th March 2017*. In so doing the plaintiff and its workers were ejected from the property. The plaintiff pleaded in its plaint that it was later to learn that the property had been sold to the 1st defendant by the 2nd defendant in exercise of its statutory rights.

4. The plaintiff by its further affidavit dated *3rd April 2018*, attached a list of items of property that were left on the property when it was ejected. The value of that property was *ksh 9, 302,242*. Further that the defendants had failed despite several demands to release those items of property to the plaintiff. The plaintiff in its *affidavit* dated *31st January, 2018*, stated that it is apprehensive that the defendants would dispose, destroy, utilize or vandalize its items of property that were left when it was ejected.

5. The 2nd defendant by the affidavit of its recovery's officer dated *7th February 2018*, deponed that it exercised its statutory power of sale of the property and successfully auctioned that property to the highest bidder who was the 1st defendant. That following successful auction of the property the same was transferred on *16th March 2017* to the *1st defendant*. The deponent denied that the 2nd defendant was in any way involved in the events that led to the plaintiff's ejection from the property since it extinguished its claim of the property when it exercised its statutory power of sale. It was also denied that the 2nd defendant is a party to the contract between the plaintiff and the 3rd defendant.

6. *George Kiongera* a director of the 1st defendant confirmed that the 1st defendant was the highest bidder in the auction and had purchased the property on *26th January, 2017*. He further deponed that the 2nd defendant purchased '*as it is basis*' and having bought the property which was under construction it should be deemed, that apart from the tools of trade, the construction materials on the property were part of the sale. Further, that since the plaintiff had taken no steps to ascertain its rights it was guilty of laches.

7. What is for consideration is the plaintiff's interlocutory application by way of *Notice of Motion* dated *31st January, 2018*. The application seeks prayers:

i. For an order granting the plaintiff immediate access to the property to retrieve, collect and remove all unused building material lying on the property.

ii. ***That in the alternative the court do issue an order directing the 1st and 2nd defendants to jointly and severally deposit ksh 9,302,242.00 in a joint account of the counsels of the parties in this action.***

8. I have considered the affidavit evidence and the submissions filed by the plaintiff and the 2nd defendant. In my view, parties in presenting their affidavit evidence and submissions erred in arguing as though what the court is called upon to do is to make final determination of the issues before it. What the plaintiff seeks is protection of his alleged items of property that were left on the property. But the plaintiff also erred in the seeking release of the items of the property before this court determines ownership of the same.

9. The courts have power to order protection of right to property. This was well stated in the book Kerr on injunctions 6th edition by P.A. Paterson as follows:

“the jurisdiction of the high court of justice by injunction is not confined to the protection of equitable rights, but extends to the protection of legal rights to property from damage pending litigation. The protection of legal rights to property from irreparable or at least from serious damage, pending the trial of the legal right was part of the original and proper office of the court of chancery. In exercising the jurisdiction the court does not pretend to determine legal rights to property.”

10. From the above excerpt it becomes clear that this court at this stage cannot determine legal rights to the alleged items of property left when the plaintiff was ejected. It follows that the plaintiff’s prayer for release of those items of property is misplaced. Such an order is akin to attaching before judgment which is not exercised lightly. See the case of ***Court of Appeal Kuria Kanyoko T/A Amingo bar and restaurant vs Francis Nderu and others [1988] 2 Kar 126***. What however is very telling is that the 1st defendant by its replying affidavit concedes that the plaintiff’s tools of trade were left on the property when the plaintiff was ejected. It is for that reason that I form the view that the plaintiff is entitled to orders of protection of the items of property that were left when it was ejected.

11. Accordingly I grant the following orders:

a. ***An injunction is hereby issued to restrain the 1st defendant from disposing, alienating or in any other way parting with possession of the properties itemized in the plaintiff’s list annexed to the affidavit of Hirji Premji Valji dated 3rd April 2018 ,marked as HPV5.***

b. ***The injunction issued in (a) above shall subsist upto 31st December 2018, before that date, the plaintiff shall ensure this case is set down for hearing.***

c. ***costs of the Notice of Motion dated 31st January, 2018 shall be in the cause.***

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant