



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 333 OF 2013

ST. ELIZABETH ACADEMY - KAREN LIMITED.....PLAINTIFF

- VERSUS -

NATIONAL BANK OF KENYA LIMITED.....1STDEFENDANT

GA LIFE ASSURANCE LIMITED.....2ND DEFENDANT

RULING NO.2

1. The plaintiff intended to lodge an application before the Court of Appeal to seek orders to restrain the defendants from evicting the plaintiff, or from advertising for sale, selling, disposing of or otherwise howsoever from completing the conveyance or the transfer of the suit property.
2. The plaintiff requested that the orders should remain in place, in the first instance, until this application was heard and determined.
3. Secondly, the plaintiff requested that the orders do remain in place until the Court of Appeal had determined the application which the plaintiff had lodged before that court.
4. On 20th February 2017, Mr. King'ara, the learned advocate for the plaintiff, informed the court that he had already filed an application before the Court of Appeal, in Civil Appeal No. 228 of 2016. At that time, the application was still pending before the appellate court.
5. He stated that the parcel of land which had already been sold, was a part of the land upon which the school was built.
6. He added, that if the school was to remain licenced, the parcel of land in issue had to remain a part of the school compound.
7. The property was sold by the bank through private treaty.
8. The bank is said to have discharged the charge and also to have refunded Kshs. 40 Million to the plaintiff, at the time when the sale was taking place.
9. The plaintiff therefore held the view that the bank had acted improperly. For that reason, the plaintiff had filed an appeal to challenge the decision by this court, when I rejected its application for an interlocutory injunction.

- 10.** It is the view of the plaintiff that it had not just paid off the loan, but that there had been an overpayment.
- 11.** Whilst awaiting the determination by the Court of Appeal on the pending application for an injunction pending appeal, the plaintiff asked this court to grant an interim injunction.
- 12.** In answer to the application, Mr. Odhiambo, the learned advocate for the bank, submitted that the orders sought was an abuse of the court process. He pointed out that the very same reliefs being sought before this court were also being sought at the Court of Appeal.
- 13.** Secondly, as concerns the contention that the plaintiff had overpaid the loan, the bank pointed out that that issue had already been determined by this court.
- 14.** The court records show that the High Court has already pronounced itself on the assertion of overpayment. It is therefore not open to this court to revisit that issue again.
- 15.** Secondly, the High Court has already held that compensation would be an adequate remedy. In the circumstances, the court cannot now be expected to change tune and hold that an interim injunction should issue, on the grounds that the plaintiff would otherwise suffer irreparable loss which could not be adequately compensated by an award of damages.
- 16.** Mr. Litoro, the learned advocate for the purchaser, pointed out that the plaintiff was seeking an injunction, and not an order for stay. That is correct; the plaintiff has asked for an injunction.
- 17.** In any event, if the plaintiff had sought an order for stay, the court would have joined Mr. Litoro advocate in telling it that the order for the dismissal of the plaintiff's application for an injunction cannot be executed.
- 18.** In answer to the contention that the plaintiff had planted "examinable crops" on the suit property, the bank asked the court to ignore the same, as it emanated from the advocate's submissions. In other words, there was no evidence to back the statement from the bar.
- 19.** The bank pointed out that the plaintiff had, previously said that the land was vacant. In the circumstances, the bank expressed the view that the plaintiff was simply being mischievous.
- 20.** Meanwhile, the purchaser drew the court's attention to the pictures of the suit property. The pictures show a piece of land which was vacant.
- 21.** In the event, it does appear that the bank's comment was most probably right; that the plaintiff was being mischievous.
- 22.** But nothing turns on the question whether or not the land was vacant or had "examinable crops" growing upon it.
- 23.** The purchaser further submitted that there was no reason, under Section 40 of the Land Act, for giving an order which would limit the rights of a purchaser.
- 24.** In any event, if the plaintiff really wanted to get the order for an injunction to limit the purchaser, Mr. Litoro said that the plaintiff would have to give an undertaking to the purchaser.
- 25.** When called upon to reply to the respondents' submissions, Mr. King'ara clarified that the plaintiff was only seeking orders against the purchaser.
- 26.** He conceded that the court was functus officio, in relation to the orders being sought against the bank.
- 27.** But, as against the purchaser he said that orders were needed because the purchaser was seeking to

take over possession of the parcel of land which it had purchased.

28. The plaintiff said that the purchaser's application for the eviction of the plaintiff, was still pending.
29. But the purchaser pointed out that there was no application for the eviction of the plaintiff, in this case.
30. When the plaintiff insisted that the application of 6th August 2015 was for eviction, the court perused the court records, and established that that application did not seek the plaintiff's eviction.
31. The plaintiff then submitted that whilst the purchaser claimed to be an innocent purchaser for value, that is the very claim which the plaintiff was challenging in its appeal.
32. The plaintiff expressed the view that it will, at the Court of Appeal, prove that it had suffered substantial loss.
33. At that stage, the court asked the purchaser to clear the air about the person who was in possession of the suit property.
34. The purchaser said that it was in possession. However, the purchaser also said that the plaintiff did not allow it to use the land.
35. Having given due consideration to the application, I find that on 18th August 2016, the court had already given to the plaintiff, a period of 21 days during which the plaintiff was to move the Court of Appeal for such interlocutory relief as the plaintiff deemed appropriate.
36. That order was given after the plaintiff had expressed a desire to appeal against the dismissal of its substantive application for an injunction.
37. Thereafter, the plaintiff filed its appeal, together with an application for an interim injunction pending the hearing and determination of the application which had lodged at the Court of Appeal.
38. By simultaneously asking both the High Court and the Court of Appeal to make a determination on similar applications, the plaintiff is acting irregularly. It is not right for a party to go before two or more courts, at the same time, seeking similar reliefs. An applicant must choose one forum where he will canvass his case.
39. As the plaintiff said that it had already filed an application at the Court of Appeal, I hold the considered view that when the plaintiff then filed a similar application at the High Court (whilst the matter was pending at the Court of Appeal), that constituted an abuse of the process of the court.
40. The application before the High Court ought to have been struck out. It is only by so doing that this court would have ensured that there was no possibility of the High Court and the Court of Appeal making contradictory or inconsistent determinations on the same issue, between the same parties.
41. However, even on the basis of substance, I find that the application has no merit. The plaintiff has failed to satisfy the court that there is any basis in law or in fact, for the grant of the orders sought.
42. In the result the application is dismissed, with costs to the respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of July 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mirie for King'ara for the Plaintiff

Odhambo for the 1st Defendant

Litoro for the 2nd Defendant

Collins Odhambo – Court clerk.