



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 506 OF 2016

MALEZI PREPARATORY SCHOOLS

LIMITEDPLAINTIFF/APPLICANT

VERSUS

ECO BANK KENYA LIMITEDDEFENDANT/RESPONDENT

RULING

1. The ruling relates to a Notice of Motion Application dated 13th December, 2016 under the Provisions of section 1A, 1B, 3A 59 & 63€ of the Civil Procedure Act, Cap 21 Laws of Kenya, Orders 40, Rules 1(a) 2., 4 and 10, Order 51 Rule 1 of the Civil Procedure Rules, Section 82, 84, 90(2 & 3), 96, 97, 98, 103, 104(3), 105 and 106 of the Lands Act. Section 56, 68, 69 & 70 and 106 & 107 of the Land Registration Act.
2. The Application is supported by the grounds thereto and the Affidavit sworn by Abok J. Odera the Managing Director of the Plaintiff's Company dated 13th December, 2016.
3. The Applicant is seeking for prayers that:

*(a) The Honourable court be pleased to grant a temporary order of injunction restraining the Defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing Receivers or exercising any power conferred by Section 90(3) of the Land Act, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership or title to al that parcel of land known as Title No. **Nairobi/Block No. 72/2915** until the determination of the suit.*

*(b) An order be made under the doctrine of lis pendens and section 106 of the Land Registration Act, (previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (Repealed) that pending final determination of this suit in accordance with the law, **ALL FURTHER REGISTRATION** or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the Charged properties with any land registry, Government department and all other registering authorities be and is hereby*

prohibited in **ALL THAT** parcel of land known as **Title No. Nairobi/Block No. 72/2915**.

(c) Interlocutory mandatory injunctions do issue compelling the Defendant to render a true, proper and accurate account to the Plaintiff(s) and the court on the actual status of the charge account(s).

(d) Costs of and occasioned by this application be provided for.

4. The Applicant's case is that on or about February 2009, the Plaintiff requested the Defendant for a term loan of Kshs. 30,000,000 for the specific purpose of building hostels for the school run by the Plaintiff's company. That pursuant to the said request, the Defendant issued the Plaintiff with a letter of offer dated 13th May 2009, whereby the Defendant agreed that the term loan would be liquidated in monthly installments of Kshs. 757,730 inclusive of interest for a term of 60 months.

5. Further and pursuant to the terms of the said letter of offer, the Plaintiff purportedly created a Charge over title No. Nairobi/Block No. 72/291 ("herein the suit property") in favour of the Defendant to secure the repayment of the monies advanced. However in breach of the said terms of the letter of offer, the Defendant from inception has varied the interest rates to a figure higher than those agreed, without notice to the Plaintiff thereby inflating the Plaintiff's purported indebtedness to the Defendant.

6. That the terms of the letter of offer dated 1st July 2009, provided that the loan of Kshs 30,000,000 would attract interest of such rate or rates not exceeding any maximum permitted by law and subject to a minimum of the Bank's Kenya Shillings Base Rate plus 2% per annum on reducing balance however, the Charge document varied this position by its clause No. 2 which pegged the interest rate to the industry average

7. The Applicant argues that the variation of interest amounts to an increase of the rate of Banking without Ministerial approval contrary to the provisions of section 44 of the Banking Act. Therefore the said variation is illegal as the consent of the Minister for Finance was not sought or obtained prior to the said increase.

8. That on or about June 2011, the Plaintiff received a notification of sale from Valley Auctioneers who were purportedly instructed by the Defendant to sell the property because of the Plaintiff's purported default. The advertisement led to the reduction in enrolment of student and as a result the Plaintiff collected less school fees and was unable to meet its financial obligations.

9. That on or about November 2011, the Plaintiff filed a suit vide High Court Commercial Case Number 520 of 2011, seeking among other Orders, a permanent injunction to restrain the Defendant from interfering, selling, alienating in any way Title No. Nairobi/block No. 72/2915.

10. The Applicant averred that the suit was heard and dismissed on the 7th August 2014. However soon after the suit was concluded the Parties entered into negotiations and recorded a consent order dated 27th November 2014. Pursuant to the consent order the Plaintiff was to pay Kenya Shillings Twelve Million (12,000,000 from the sale of some properties it was in the process of disposing of. Unfortunately the Plaintiff was unable to dispose of the property within the required time frame and as such was unable to fully comply with the terms of the consent

11. That the plaintiff sought for an extension of time to allow it more time to dispose of the properties to enable it to repay the monies however the Defendant declined and on March 2015, the Defendant purported to instruct Valley Auctioneers to advertise the suit property for auction on the "30th day of April," however the sale did not proceed on that date, and the property was subsequently re-advertised on 24th November 2016.

12. That despite advertising the suit property for sale, the Defendant is yet to serve the Plaintiff with a statutory notice as provided for under section 90 of the Land Act 2012. Further there has been no valuation and/or proper valuation of the suit property within the last one year to determine the fair market.

13. The plaintiff avers that the intended sale is illegal, oppressive and fraudulent and premature as the Defendant has yet to comply with the provisions of the Land Act 2012 and the Auctioneers Act and Rules.

14. However, the Application was opposed by the Defendant/Respondent on the ground that it is res judicata and an abuse of the Court process. The Respondent averred that the Plaintiff has previously filed another suit between the same parties namely HCCC 520 of 2011 in which the issue of whether the Defendant should exercise its statutory power of sale over the suit property Number Nairobi/Block 72/2915 was directly and substantively heard and determined and which is the same issue in the current suit.

15. Subsequently a consent order was filed in Court on 28th November 2014, under which it was agreed as follows:-

(i) That the outstanding liability due from the Plaintiff to the Defendant be settled at the sum of Kshs. 65,000,000 and which sum would continue to accrue interest at the rate of 14% p.a. until payment in full with effect from 27th November 2014.

(ii) That the Plaintiff shall forthwith pay to the Defendant a sum of Kshs. 3,000,000 being the 1st installment and which sum shall be remitted to the Defendant in any event not later than 27th November 2014.

(iii) That the Plaintiff shall pay the 2nd installment of Kshs. 3,000,000 to the Defendant on or before 30th December, 2014.

(iv) That the Plaintiff shall pay the balance of agreed sum by monthly installments of kshs. 3,000,000 each payable on or before 30th day of each succeeding month with effect from 30th January, 2015 until full payment.

(v) That the Plaintiff and the Defendant will share Defendant's Advocates legal charges on a 50:50 basis to be paid forthwith and shall also share Auctioneers costs herein against on a 50:50 basis.

(vi) That the Plaintiff shall withdraw any Notice of Appeal or any other legal proceedings filed in any other Court given this Consent by the Parties.

(vii) That in default of compliance of any of the consent terms herein above the agreement to settle the debt (sic) at Kshs. 65,000,000 on the above terms shall stand withdrawn by the Defendant and the Defendant will be at liberty to forthwith exercise its statutory power of sale over the suit property and recover the total sum plus interest due and owing to the Defendant and this being the sum due and owing before this compromise and consent was reached.

16. The Respondent argued that the Plaintiff has not honoured any of the above consent terms save for numerous attempts made to sell the suit property pursuant to the consent order and due to the Plaintiff's failure to comply with the consent order, the Plaintiff has come to Court of equity with unclean hands and a Court of equity ought not to protect a Party with unclean hands.

17. That the consent order referred to herein does not make reference to any intended disposal of the property by the Plaintiff and as such the Defendant is a stranger to the averments in relation to the same.

18. The Defendant denied the Plaintiff's averments that it has paid over Kshs 20,000,000 since the filing of the consent order and averred that the suit property is currently vacant and there are no students residing on the same and therefore the Applicant has deliberately lied on oath.

19. The Respondent further argued that the Plaintiff voluntarily charged the suit property to secure facilities accorded to it by the Defendant and therefore the Defendant is rightly entitled to exercise its

statutory power of sale. Neither has the Plaintiff disclosed to the Court any property which it intends to dispose of to redeem the loan.

20. The Parties agreed to dispose of the Application by filing written submissions and highlighting the same. I have considered the same and raise the following issues for determination.

(i) *Whether the Plaintiff's suit and Application are res judicata.*

(ii) *Whether the Plaintiff has satisfied conditions for grant of a temporal order of injunction and an order of lis pendens;*

(iii) *Who should bear the costs of the application.*

21. In relation to the 1st issue of res judicata, the Defendant argued that the issue raised herein, of whether or not a statutory notice was served, was heard and determined in the former suit and it was held that indeed the Plaintiff was served with a statutory notice and therefore the issues pleaded by the Plaintiff in their application and in the supporting affidavit, namely; variation of interest rate without notice, failure to serve statutory notice, and lack of proper valuation of the suit property ought to have been made grounds of attack in the former suit and are dealt with therefore they are accordingly res judicata.

22. The Court was referred to the provisions of section 7 of the Civil Procedure Act and cases of **HCCC (Nbi) No.1249 of 1998 Samuel Kiiru Gitau vs John Kamau Gitau and Kamunye & Others vs The Pioneer General Assurance Servicing Limited 1972EA 263.**

23. I have gone through the submissions filed by the Applicant and I find that they did not respond to these submissions by the Respondent that the suit and the Application herein are res judicata. I have also gone through the documents annexed to the Replying Affidavit and noted that on 23rd January 2013, Hon. Justice J.B. Havelock(Rtd.) delivered a ruling on the Plaintiff's notice of motion dated 21st November 2011. The Plaintiff had sought for an order of temporary injunction to preserve the suit property pending the hearing and determination of the suit. Among the grounds cited was that no valid statutory notice had been served as per the Supporting Affidavit sworn by Abok J. Odero.

24. At paragraph 10 of the ruling, the Court considered the issue regarding the service of the Statutory Notice and concluded that the Plaintiff was properly served with the Statutory Notice.

25. Subsequently, the Court heard the main suit based on a Plaint filed dated 21st November 2011 in which the Plaintiff sought for prayers that the Auctioneers notice of sale dated 2nd June 2011 be declared irregular, illegal and invalid in the absence of a Statutory notice and an order of permanent injunction restraining the Defendant from disposing of the suit property and general damages resulting from the advertisement of the suit property for sale.

26. The court delivered a Judgment in the matter on 7th January 2015 whereby the Plaintiff's suit was dismissed with costs to the Defendant.

27. I note that at paragraph 21 of the Judgment the Court reiterated its finding in the ruling on 23rd January 2013 that the Plaintiff could not deny that it had been properly served with the Statutory notice and observed that nothing had emerged from the viva voce evidence which could change the mind of the Court in that regard.

28. I have considered the prayers in the Plaint herein and find that prayer (a) thereof is seeking for a permanent injunction to restrain the Defendant from interfering with the suit property. That prayer is in all respect similar to prayer (b) sought for in the Plaint in the suit HCCC 520 of 2011.

29. I have also considered the prayers in the Application herein and the prayers that were sought for in the Notice of Motion Application in the suit HCCC 520 of 2011 and find prayer 3 which basically seeks for

an order to stop the Defendant from disposing of the suit property is the same prayer that was also sought for in Notice of Motion Application in the suit HCCC 520 of 2011.

30. Indeed the Applicant has admitted under paragraph (h) and (i) of the grounds in the support of the Application that the suit HCCC 520 of 2011 was seeking for a permanent injunction to restrain the Defendant from selling the suit property and it was heard and dismissed.

31. It is therefore clear to the Court, prayer 3 of the subject Application has been canvassed before in HCCC 520 of 2011 as the same is similar to prayer 3 of the Notice of Motion Application dated 21st November 2011.

32. I therefore uphold the Respondents submissions that that matter is res judicata. Section 7 of the Civil Procedure Act states that:

“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”

33. This doctrine of res judicata has been considered in numerous authorities and in the case of Kamunye & Others (supra) the Court had this to say;

“The test whether or not a suit is barred by res-judicata seems to be, is the Plaintiff in the secured suit trying to bring before the Court, in another way and in the form of a new cause of action, a transaction which has already been put before a Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res-judicata applies not only to points upon which property belonged to the subject of litigation and which the Parties exercising reasonable diligence, might have brought forward at the time.”

34. In relation to this issue of Temporal Injunction the Applicant submitted that it is premised on Order 40 Rule 1 of the Civil Procedure Rules and granting an Order of a temporary injunction is a matter of judicial discretion which must be exercised in accordance with the defined legal principle. That traditionally, on the basis of the well accepted principles set out by the Court of Appeal in ***Giella vs Cassman Brown & Co. Ltd. (1973) EA 358***. In that case the Court laid down three conditions to be satisfied before granting injunctive relief;-

(i) *Is there a prima facie case?*

(ii) *Does the Plaintiff stand to suffer irreparable harm?*

(iii) *On which side does the balance of convenience lie?*

35. The Plaintiff argued that it has established that on a balance of convenience since no Statutory notice was issued as required by the law in accordance with section 90(1) of the Land Act, the Plaintiff stands at a risk of losing and it is more convenient to save the suit property from sale by the Defendants until the final determination of this suit.

36. That the Defendant is not likely to suffer any loss if the injunctive relief is indeed granted to the Plaintiff since the same would be adequately be compensated by an award of damages.

37. The case of ***Dhariwal Hotels Limited vs Southern Credit Banking Corporation Limited*** was cited as giving guiding principles in application for injunctions and which held as follows:-

“However, where there is doubt as to the legal right an interlocutory injunction will be granted It is necessary that the Court should find a case which would entitle the Plaintiff to relief at

all events. It is quite sufficient for it to find a case which shows that there is a substantial question to be investigated and that the status quo should be preserved until the question can be finally disposed of.”

38. The Respondent did not deem it important to respond to the submissions after his argument that the suit is res judicata and therefore the issue of prima facie cannot arise.

39. I have already made a finding that the prayer relating to an order of temporal injunction is res judicata and in that case there is no need to consider the arguments by the Applicant as to whether there is a prima case or not. I therefore decline to grant prayer 3 of the Notice of Motion Application herein.

40. I now move to the 2nd prayer of lis pendens. The Applicant submitted extensively on this doctrine to the effect that it is necessary for final adjudication of the matters before the Court and in general interest of public and good and effective administrative of justice. It therefore overrides a title obtained during the pendency of proceedings touching on the property and prohibits a Party from transferring property to others pending determination of the litigation on the parties rights on the property. That Lis pendens is therefore the jurisdiction or control that courts obtain over property in a suit awaiting determination of the suit and the principle underlying the above doctrine is to maintain the status quo unaffected by the act of party to the litigation pending its determination and that any transfer of the suit property or any dealing with such property during the pendency of the suit is prohibited except under the authority of the Court. If anybody wants to alienate, he can do so only with the permission of the Court.

41. The Applicant relied on two cases;- ***Ruaha Concrete vs Paramount Universal Bank*** and ***Mawji vs US International University & Another.*** (google)

42. I notice that the Respondent did not submit on this issue of lis pendens arguing that the suit and the Application is res judicata.

43. I have considered the submissions by the Applicant and I find that having declined to grant prayer 3 of the Application herein, that paves way for the Defendant to proceed with the disposal of the suit property in a lawful manner. If that is so, then the issue of lis pendens does not arise.

44. I also note that the consent that was recorded by the Parties herein on 28th November 2014 provided inter alia:

“ That in default of compliance of any of the consent terms herein above the agreement to settle the debt (sic) at Kshs. 65,000,000 on the above terms shall stand withdrawn by the Defendant and the Defendant will be at liberty to forthwith exercise its statutory power of sale over the suit property and recover the total sum plus interest due and owing to the Defendant and this being the sum due and owing before this compromise and consent was reached.”

45. The Applicant has admitted that it did not fully comply with this consent and therefore the Respondent has the right to proceed with the disposal of the property and this Court cannot stop them. This is informed by the fact that the consent herein referred to was entered into as far back as the year 2014. If the Applicant was serious in liquidating the sum sought it should have showed the Court evidence to that effect.

46. I also note that the Applicant’s suit HCCC 520 of 2011 having been dismissed, the Applicant has chosen to file a fresh suit seeking for inter alia same orders as were sought for in the previous suit. This is not just an issue of res judicata, but a total abuse of the Court process and must be condemned as such. This kind of conduct cannot entitle the Applicant to enjoy the discretion of the Court in the grant of an order of Temporary injunction which is an equitable relief.

47. I think I have said enough in this matter and my finding therefore are that this Application is devoid of merit I dismiss it with costs to the Respondent. However, if the Respondent want the suit herein struck out they are at liberty to move the Court formally.

Ordered accordingly.

Dated, delivered and signed in an Open Court this 23rd day of October, 2017.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Chimei for the Applicant

Mr. Bundotich for the Respondent

Teresia..... Court Assistant