



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 465 OF 2015**

**SOUTH EASTERN KENYA UNIVERSITY ..... APPLICANT**

**VERSUS**

**UKAMBANI AGRICULTURAL INSTITUTE LIMITED .....1<sup>st</sup> RESPONDENT**

**NATIONAL BANK OF KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 4<sup>th</sup> December, 2015 principally seeks orders that pending the hearing and determination of the Appeal herein the 1<sup>st</sup> Respondent be restrained by way of an injunction from in any way parting with possession of, presenting or lodging the title documents in respect of L.R. No. 209/10350 or selling or transferring the said property. Secondly, that pending the hearing of the Appeal herein the 1<sup>st</sup> Respondent be ordered to forthwith return the title documents to M/s National Bank of Kenya for safe keeping.

2. It is stated in the supporting affidavit that on or about the 7<sup>th</sup> July, 2015 the Vic-chancellor of the Applicant, South Eastern Kenya University (hereinafter University) Prof. Geoffrey M Muluvi was informed of an order issued on 2<sup>nd</sup> July, 2015 by the Lower Court. The said order compelled the 2<sup>nd</sup> Respondent, National Bank of Kenya Limited (hereinafter the bank) to **“release the title to the property known as L.R. No. 209/10350 held in a safe deposit box at the Bank, ....to the current officers (Chairman-Stephen Ndambuki Muli and Treasurer – Eric Mutinda Mutisya) of the Plaintiff/Applicant forthwith and in any case, not later than 24 hours of this order.”**

3. It is further averred that a perusal of the said order revealed that the same was effectively a mandatory injunction order which had been issued *ex parte*. That the order which was issued in a Miscellaneous Civil Application was final in nature as there was nothing to litigate on once the title was released. According to the University, the 1<sup>st</sup> Respondent, Ukambani Agricultural Institute Limited (hereinafter UKAI) had lied under oath, misled the court and concealed the following information from the court:

- That parcel of land L.R. No. 209/10350 has a long history of litigation in respect of its ownership. The litigation involves the Respondents herein. The said property is subject of High Court Civil Case No. ELC No. 136 of 2009 where various orders have been issued culminating in a ruling delivered on 21<sup>st</sup> April, 2011. In the said ruling, the UKAI’s application for injunction was rejected by the court.
- The matter has also been subject of HC MISC. Application No. 578 of 2010 between Ukambani

Agricultural Institute Versus National Bank of Kenya Ltd where on 6<sup>th</sup> June 2011 the Hon. Justice Rawal (as she then was) held that M/s National Bank Ltd had released the title documents to rightful owners, that is, the University.

- That the property has also been subject of High Court No. 11 of 2010 where the Hon. Justice Majanja ordered that the *status quo* be maintained pending the hearing of HCC ELC No. 136 of 2009.
- That the said title document has been subject of a fraudulent charge and sale which led to the filing of High Court civil Case No. 172 of 2012 M/s Dubai Bank Ltd Vs. Ukamba Agricultural Institute Ltd.
- That the said title document has been subject of police investigations.

4. It is deposed that the university filed an application before the Lower Court seeking a stay of execution of the order in question and further seeking orders for the setting aside of the said orders. That the stay of execution orders were issued by the Lower Court but upon the service of the orders on the Respondents, the University was notified that the bank had already released the title documents pursuant to the court order. That efforts made by the University to have the title documents produced in court bore no fruit as the directors of UKAI were said to be out of the country. The court then made orders for the maintenance of the *status quo*.

5. It was further stated that UKAI filed a replying affidavit in response to the University's application. The bank entered appearance in the proceedings but did not file any response to the application. The application seeking setting aside orders was heard *inter parties* and was dismissed by the Lower Court.

6. The University was aggrieved by the said ruling, hence the appeal herein. The University is apprehensive that if an order of preservation of the title documents is not made, it stands to suffer substantial loss as the appeal will be rendered nugatory if the property is transferred.

7. In opposition to the application UKAI filed a replying affidavit through its Secretary General, Eric Mutinda Mutisya. In the said affidavit, it is deposed that the 1<sup>st</sup> Respondent is known as Ukamba Agricultural Institute (UKAI) and that the entity described by the University as Ukambani Agricultural Institute is not known to them. That UKAI is the registered proprietor of the parcel of land registered in Nairobi known as LR No. 209/10350. It is averred that following the orders made by the Lower Court for the release of the title documents by the bank to UKAI, the bank released the same to UKAI.

8. It was further stated that the title was the subject of a sale agreement between UKAI and Dubai Bank (Kenya) Ltd. That the suit property was also a subject of various court cases including HCCC 172 of 2012 where the Appellant is an interested party and sought similar order; and JR 406 of 2012 where vesting orders and mandatory mandamus orders have been made in favour of various parties. That the title was forwarded to Dubai Bank (Kenya) Limited through the treasurer, UKAI pursuant to an order made in HCCC 172 of 2012. That Dubai Bank (Kenya) Limited has since gone into liquidation and UKAI is not aware of the status of the title. UKAI termed the instant application as an abuse of the process of the court as the Lower Court has already dealt with the application. That the application is *res judicata* and if the orders sought are allowed, the appeal will have been determined. UKAI described the University as a stranger to the suit property.

9. The University in a response contained in their further affidavit deposed that UKAI has not indicated when the title was released to Ms Dubai Bank (Kenya) Limited and that UKAI is vague concerning the whereabouts of the title. The University further states that UKAI's directors were on 29<sup>th</sup> December, 2015 charged with offences relating to the fraudulent sale of the said property.

10. The 2<sup>nd</sup> Respondent, National Bank of Kenya Ltd did not file any response to the application. Orders were made by this court on 31<sup>st</sup> May, 2016 (Aburili, J) that excused the 2<sup>nd</sup> Respondent from these proceedings.

11. The application was canvassed by way of written submissions which I have duly considered.

12. On whether to grant or refuse an injunction, the principles applicable were well settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss would be suffered and if in doubt, the court will decide on a balance of convenience.

13. As stated by the Court of Appeal in the case of **Thomas Nyakamba Okong’o v Co-operative Bank of Kenya Ltd [2012] eKLR**

**“In determining this application, I am well aware that at this stage the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”**

14. On whether the application under consideration is *res judicata*, Section 42 rule 6(6) of the Civil Procedure Act provides as follows:

**“ Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.**

The application is therefore not *res judicata*.

15. The University’s case is that UKAI misled the Lower Court and concealed material facts from the court. The University has exhibited the following cases:

- HCCC No. 136 of 2009 Ukambani Agricultural Institute Limited vs South Eastern Kenya University & another.

Wherein UKAI’s application for an order of injunction in respect of the suit property was dismissed with costs by Hon. R. N Nambuye, J (as she then was).

- HC Misc. APPL. 578 of 2010 Ukambani Agricultural Institute Limited vs National Bank of Kenya Limited in which UKAI’s application seeking orders for the bank to handover the title in respect of the suit property was dismissed. In the said suit, Hon Rawal, J (as she then was) observed as follows:

**“The legal Notice No. 102 of 2008 (dated 18<sup>th</sup> July, 2008 ) also was mentioned and as per clauses 3 and 4 of the said Notice, the above referred University is the successor to UKAI and further states that all rights, liabilities and assets held by or on behalf of UKAI existing at the commencement of the order shall be automatically and fully transferred to the said University college which was established under the said legal Notice No. 102.**

**The said letter has also mentioned that the University College was unable to establish the whereabouts of one of the signatories namely Onesmus Kauma Mwati who was one of the signatories to access the safe Deposit held by the defendant. The required undertaking for indemnity was also stipulated in the letter.**

**As per the replying affidavit, the content of the Safe Deposit was leased to Prof Raphael Munavu on his sole signature.**

**The above are the facts which are undisputed or indisputable”**

- HC (Constitutional and Human Rights Division) Petition No. 11 of 2010 was stayed by Hon. Majanja, J pending the determination of HCCC 136 of 2009.

16. Through the aforestated cases the University has *prima facie*, established it's interest in the suit property as UKAI's successor. Although UKAI has exhibited a title deed in it's name, the title to the suit property is still being litigated on. The submissions on the question of absolute proprietorship and the constitutional right to property can only come in upon the conclusion of the cases between the parties.

17. Although UKAI has in it's replying affidavit mentioned a sale agreement with Dubai Bank (Kenya) Ltd and also alluded to orders made in HCC 72 of 2012 and JR 406 of 2012, the copies of the said cases have not been exhibited herein. There are no annexures in the form of any letter or document before this court to confirm that the title to the suit property was forwarded to Dubai Bank (Kenya) Ltd. The date the title is said to have been released to Dubai Bank (Kenya) Ltd is not disclosed in the replying affidavit. I would agree with the University's counsel that UKAI is vague in that respect. It is also noteworthy that UKAI has not rebutted the evidence that it's directors were arrested on the 29<sup>th</sup> December, 2015 and charged with offences of obtaining money while falsely pretending to be in a position to sell the suit property.

18. The submissions made by the counsels on the question of the miscellaneous application filed in the Lower Court without any substantial suit and the issues relating to the value of the property and the pecuniary jurisdiction of the magistrate courts etc are issues to be dealt with in the appeal herein.

19. With the foregoing, the conclusion of this court is that the application had met the threshold for the grant of the orders sought. Consequently, I allow the application with costs.

Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of Sept, 2016

**B. THURANIRA JADEN**

**JUDGE**