



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 605 OF 2003

WINFRED WAMBUI KINGORI.....PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LTD.....1ST DEFENDANT

JOHN IRUNGU WACHIRA.....2ND DEFENDANT

DAVID SWAO.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Chamber Summons application dated and filed 18th July 2013 was brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Chapter 21 and all other enabling provisions of the law. 2010. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.
2. Spent
3. **THAT this Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent, their agents, servants, employees or whomsoever from selling, alienating, transferring and/or disposing of the property known as L.R. No 14600 situated at Karen within the Republic of Kenya pending the hearing and determination of Civil Suit No 605 of 2003.**
4. **THAT the costs of the Application be provided for.**

THE PLAINTIFF'S CASE

2. The application was supported by the Plaintiff's Affidavit that was sworn on 18th July 2013. Her written submissions were dated and filed on 25th July 2014.

3. By a Charge dated 10th August 1999 and Further Charge dated 10th July 2001, the 1st Defendant advanced to the Plaintiff a sum of Kshs 3,000,000/= and Kshs 4,000,000/= respectively. L.R. No 14600 (hereinafter referred to as "the subject property") was offered as security to secure the said sums. The 1st Defendant also secured a Charge dated 10th July 2001 for the sum of Kshs 3,000,000/= over L.R. No 13824.

4. Upon default by the Plaintiff, on 17th March 2005, the 1st Defendant exercised its Statutory Power of Sale and sold L.R. No 13824 to the 2nd and 3rd Defendants herein. The said property was transferred to them on 4th July 2005.

5. The Plaintiff was apprehensive that the 1st Defendant would advertise the subject property which she said was her matrimonial home before the question of the sale of L.R. No 13824 at the sum of Kshs 3,000,000/= instead of Kshs 40,000,000/= had been resolved. The Plaintiff had now sought to have the 1st Defendant restrained from disposing of the subject property pending the hearing and determination of this suit.

THE 1ST DEFENDANT'S CASE

6. Timothy Kimani, the 1st Defendant's Legal Consultant swore a Replying Affidavit on behalf of the 1st Defendant herein. It was sworn on 30th September 2013 and filed on 9th October 2013. The 1st Defendant's written submissions were dated and filed on 8th October 2014.

7. Its case was that the Plaintiff's present application was *res judicata* as her previous applications for injunction were dismissed both by Kimaru J who heard her Chamber Summons application dated 27th November 2008 and by the Court of Appeal which heard her application in **Civil Application No NAI. 202 of 2002** seeking a stay of execution of the said learned judge's orders pending appeal. Both courts found that the Plaintiff's remedy lay in damages.

8. It therefore prayed that the Plaintiff's present application be dismissed as it was misconceived, mischievous, and unmeritorious amongst other things.

LEGAL ANALYSIS

9. From the perusal of the documents herein, it did appear to the court that the Plaintiff was apprehensive that the subject property would be sold at an undervalue in the same way L.R. No 13824 was sold for a sum of Kshs 3,000,000/=. In her Amended Complaint, she did seek a permanent injunction, damages for the undervalued property L.R. No 13824 and an audit of her accounts with the 1st Defendant so as to ascertain the exact principal amount borrowed and the interest accrued.

10. Evidently in the ruling of 1st July 2009, annexed to the Plaintiff's Supporting Affidavit and marked "C", Kimaru J declined to grant an injunction to restrain the Defendants, servants and/or agents from alienating, disposing of and/or selling L.R. No 13824 and L.R. No 14600. Being aggrieved with this ruling, the Plaintiff appealed to the Court of Appeal.

11. In the ruling of the Court of Appeal that was delivered on 12th April 2013 annexed to the Plaintiff's Supporting Affidavit Exhibit marked "D", it is indicated that the Plaintiff had sought the following orders:-

- a. **THAT an injunction be granted to restrain the 1st respondent from selling or disposing of all that property erected on LR No. 14600 situate at Karen within the Republic of Kenya pending hearing and determination of an intended appeal from the decision of Honourable Mr. Luka Kimaru delivered on 1st July, 2009 in HCCC No. 605 of 2003 at Nairobi (Milimani Law Courts).**
- b. **THAT an injunction be granted to restrain the 1st respondent from selling or disposing of all that property erected on LR No. 13824 situate at Karen within the Republic of Kenya pending hearing and determination of an intended appeal from the decision of Honourable Mr. Luka Kimaru delivered on 1st July, 2009 in HCCC No. 605 of 2003 at Nairobi (Milimani Law Courts).**

12. After hearing the Plaintiff's application, the Court of Appeal had the following to say:-

“After considering all the material placed before us including the oral submissions of all counsel for the parties, we are not persuaded on the arguability of the appeal in question. Having so found, it will not even be necessary for us to delve into the nugatory aspect but we can justifiably state that if the appeal were to succeed, the applicant has (sic) a remedy therein in the realm (sic) of damages and the appeal would not be therefore rendered nugatory in the circumstances. In the sum, we are not persuaded that this application meets the threshold required for such application to succeed It (sic) must therefore fail and the same is hereby dismissed with costs to the respondents.”

13. Notably, the Plaintiff was seeking injunctive orders to restrain the 1st Defendant from disposing of L.R. No 14600 pending the hearing and determination of the hearing of the case herein. Kimaru J had found that damages would be adequate remedy. Similarly, the Court of Appeal declined to grant similar orders pending the hearing and determination of the appeal on the ground that if the Plaintiff was to be successful, then she could be compensated by an award of damages.

14. As was correctly submitted by the 1st Defendant, the Plaintiff is trying to have a third bite at the cherry by trying her luck, for the third time, to obtain orders that were declined by Kimaru J and the Court of Appeal. This matter is *res judicata* within the meaning of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya), in which it is clearly stipulated as follows:-

“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 substantially raised, and has been heard and finally decided by such court.”

15. Consequently, this court's hands are tied as it cannot reverse the orders that were issued by Kimaru J and the Court of Appeal. In respect of the Statutory Notices, on pg 11 of his ruling, Kimaru J stated as follows:-

“Having evaluated the evidence in regard to service, I am of the firm view that the 1st defendant indeed served the statutory notices upon the plaintiff. The typographical mistake in the first name of the plaintiff i.e. the plaintiff was referred to as “Wilfred” and not “Winfred” did not render the said notices invalid. The notices were sent to the postal address the plaintiff had notified the 1st defendant. I did not buy the plaintiff's argument that there was lack of sufficient proof that statutory notices were sent by registered post on account of the fact that the registered letters did not contain certain particulars. I hold the 1st defendant discharged the burden placed on it to establish that it indeed issued the statutory notices in issue.”

16. The said statutory notices were therefore valid for all purposes and intent and need not be re-issued for the 1st Defendant should proceed to realise its security. However, it is, however, important to point out that the ruling by Kimaru J was delivered in 2009 which was before the enactment of the new land law regime in 2012.

17. The Plaintiff is entitled to equal protection and benefit of the law as has been set out in Article 27 of the Constitution of Kenya. Indeed, the Plaintiff ought to enjoy the benefits of the provisions of the Land Act Cap 280 (laws of Kenya) in the same manner as all chargors who would have been advanced financial facilities after the commencement of the said Land Act.

18. Accordingly, while the 1st Defendant is at liberty to exercise its statutory power of sale of L.R. No 14600, it must wholly comply with all the relevant provisions of the said Land Act save for the re-issuance of the three (3) months' statutory notice as the initial one was for all purposes and intent valid.

19. Having considered the pleadings, affidavit evidence and the written submissions and the case law in respect of the parties' case, the court found that the Plaintiff had not established any grounds under which it could reconsider the criteria that was set out in the case of **American Cyanamid vs Ethicon Limited [1975] AC 396** that she relied upon to be granted an injunction pending the hearing and determination of this suit as this matter was *res judicata*. The court therefore did not find any value in analysing the case law that was submitted in respect of the granting of an injunction herein as same issues had previously been considered by Kimaru J and the Court of Appeal.

DISPOSITION

20. For the reasons foregoing, the Plaintiff's Chamber Summons application dated and filed on 18th July 2013 but which should have been presented to the court as a Notice of Motion application was not merited and the same is hereby dismissed with costs to the 1st Defendant.

21. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 26th day of January 2015

J. KAMAU

JUDGE