



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 31 OF 2007.

HON. JUSTICE (RTD) ALEX ETYANG..... APPELLANT.

VERSUS

NATIONAL BANK OF KIENYA.....RESPONDENT.

R U L I N G.

1. The application dated 4th September, 2012, is made by the respondent in this appeal preferred by the appellant against the ruling of the lower court delivered on 28th November, 2007, in SPMCC 437 of 2004.

In that ruling, a temporary injunction order obtained earlier in favour of the appellant was discharged and set aside thereby paving way for the respondent to exercise its statutory power of sale respecting property described as L.R. No. Kapkoi/Mabonde Block 1/(ex-prison) 119 belonging to the appellant.

2. The present appeal was thus filed on the 28th November, 2007, and on the 30th November, 2007, the appellant applied for stay of the offending orders. However, the application was dismissed on the 25th November, 2008 and on the 17th June, 2009, the appellant made a fresh application for a temporary injunction pending the hearing and determination of the appeal. Interim orders were granted on 30th June, 2009, restraining the respondent from selling the suit property pending inter-parties hearing of the application on 6th July, 2009.

3. On 6th July, 2009, the court heard the appellant in the absence of the respondent and extended the temporary injunction orders to such time that the appeal shall be heard and determined. The appeal was never set down for hearing after that date and three years down the line, on the 20th April, 2012, the appellant informed the court that the parties were negotiating the matter. The claim was however, refuted by the respondent thereby prompting the court to give the appellant upto the 21st May, 2012, to provide a positive way forward or have a notice issued to him to show cause why the appeal should not be dismissed.

4. On the 21st May, 2012, the appellant appeared in court and requested for more time. He was given upto the 25th June, 2012, on which date he did not appear and the matter was stood over generally. Even then, no date had been set by the appellant for the hearing of the appeal. The present application dated 4th September, 2012, was therefore filed by the respondent on the 17th September, 2012. The application seeks to have the temporary injunction order issued against the respondent on 6th July, 2009, reviewed, varied and set-aside.

5. The application is based on the grounds contained in the body of the appropriate notice of motion as supported by the averments contained in the supporting affidavit dated 4th September, 2012, deponed by the respondent's legal manager.

Ultimately, the application came up for hearing on 18th November, 2013, but due to the preliminary objection filed on 28th February, 2013, by the appellant the court directed that the objection be heard prior to the application on another date.

The date was never taken by the appellant in the registry and instead the respondent on the 3rd March, 2014, fixed the date as the 3rd June, 2014.

6. On 3rd June, 2014, the appellant informed the court that the preliminary objection had been overtaken by events. Consequently, the court in the presence of both parties fixed the 6th October, 2014, as the date for the hearing of the present application dated 4th September, 2012.

Come the 6th October, 2014, none of the parties appeared in court. The matter was stood over generally upto 12th November, 2014, when the respondent fixed the 4th February, 2015, as the date for the hearing of the present application.

7. On 4th February, 2015, the appellant failed to appear despite being served with the necessary hearing notice as indicated in the affidavit of service filed herein on the same date.

The respondent made appearance through the learned counsel, Mr. Langat, who argued the application by relying on the averments in the supporting affidavit. He contended that the appellant went into slumber after obtaining the interim injunctive orders which in any event, were to operate for only one year. He further contended that the appellant has had about five (5) years but made no progress in prosecuting his appeal.

8. Not only did the appellant fail to appear at the hearing of the application, he also failed to file a response to the application either by way of a replying affidavit or by way of filing grounds of objection.

The application therefore remained unopposed and ought therefore be granted without much ado. In any event, the respondent has shown good grounds as to why the temporary orders granted to the appellant should be set aside. It is evident, that the appellant, has grossly abused the court process by his conduct of obtaining a temporary injunction order against the respondent, without any serious intention to set a date for the hearing of his appeal. He thus succeeded in unreasonably delaying the exercise of statutory power bestowed upon the respondent thereby going against the spirit and purpose of Sections 1A and 1B of the Civil Procedure Act. It is therefore just and fair that the application be granted to the extent that the temporary injunction orders issued against the respondent on the 6th July, 2009, be and are hereby set aside.

9. In addition, and in exercise of the inherent powers of this court donated by Section 3A of the Civil Procedure Act, the appeal filed by the appellant on the 28th November, 2007, be and is hereby dismissed for want of prosecution. The respondent shall have the costs of the appeal and this application.

Ordered accordingly.

[Read and signed this 18th day of February, 2015.]

J.R. KARANJA.

JUDGE.