



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 462 OF 2013

ZADOK EAST AFRCA LIMITED :::::::::::::::::::::1ST PLAINTIFF

INSIGNIA LIMITED ::::::::::::::::::::: 2ND PLAINTIFF

VERSUS

FINA BANK LIMITED ::::::::::::::::::::: 1ST DEFENDANT

LEAKEY'S AUCTIONEERS.. ::::::::::::::::::::: 2ND DEFENDANT

R U L I N G

INTRODUCTION

1. The application before the Court is a Notice of Motion dated **18th July 2014** and filed in court on **21st July 2014**. The application is filed under Article 23, 40 and 159 of the Constitution of Kenya, Sections 1A, 1B and 3 A of the Civil Procedure Act, 2010, Section 104 of the Land Act, (Act no 6 of 2012) Order 40 rule 1 and Order 20 Rule 1 Of the Civil Procedure Rules; and all enabling provisions of the Law.

2. The application seeks to secure the following orders:-

1. ***This application be certified urgent and Service of the same be dispensed with in the first instance.***
2. ***Prayer number 3 be granted ex-parte in the first instance, pending hearing inter-partes.***
3. ***That an injunction do and hereby issue against the 1st Defendant, its agents, employees and any person acting under or through, restraining it from transferring, charging, selling, or in any manner dealing with the properties known as LR No. 12948/54 and LR No. 12948/59 Nairobi pending the hearing and determination of this application.***
4. ***That an injunction do and hereby issue against the 1st Defendant, its agents, employees and any person acting under or through, restraining it from transferring charging, selling, or in any manner dealing with the properties known as LR No. 12948/54 and LR No. 12948/59 Nairobi pending the hearing and determination of this suit.***
5. ***An order for an account of all the transaction between the Plaintiffs and the Defendants***

with respect to the facilities the subject of this suit.

6. An order cancelling any transactions including purported transfer, charge or sale of the properties known as LR No. 12948/54 and LR No. 12948/59 entered into or effected during the pendency of this suit, as null and void and an order of cancellation on any titles and/or entries upon the said titles made during the pendency of this suit.

7. Such other or further orders as the Court may deem apt in the circumstances of this suit.

8. An order of cost of the suit.

3. The application is premised on the several grounds set out therein and is supported by affidavit of **Caren Moracha** dated **18th July 2014**. In the said affidavit Caren Moracha who described herself as a director of the 1st Plaintiff states that the 1st Defendant has illegally set in motion a process to dispose off the suit property in complete disregard of the doctrine of *lis pendens* despite the fact that the matter is still pending in court, and despite the 1st Plaintiff not owing any money to the 1st Defendant. The deponent has proceeded to enter into a sale transaction with an undisclosed Third Party while a sale agreement subsists with the 2nd Plaintiff and without regarding the contract entered into with the 2nd Plaintiff or issuance of a completion notice as required under condition number 11 of the Law Society Creditors of Sale, 1989. The deponent states that the 1st Defendant actions amount to “unconstitutional” conduct of deprivation of the Plaintiff’s of their rights in property, as protected by Article 40 of the Constitution, and that amounts to breach of the Plaintiff’s fundamental rights to property. The same deponent has filed a supplementary affidavit dated 18th of August 2014 in further support of the application.

4. The application is opposed by the 1st Defendant/Respondent through a Statement of Grounds of Opposition filed in court on 24th July 2014, the gist of which is that this court lacks the jurisdiction to entertain this application on the basis that the application is *res judicata* having been determined in the Ruling of this court of 19th June 2014 and previously in Nairobi HCCC NO. 415 of 2011 and Nairobi HCCC No. 560 of 2011.

5. The 1st Defendant has also filed a replying affidavit on 30th July 2014 deponed to by Zakary Muturi Muchai who describes himself as a Senior Relationship Manager with the 1st Defendant Bank. The deponent refers to above said cases and depones that the issues in this matter have been determined in this court and that the current application is *res judicata*. The Respondent also relied on the supporting affidavit of Zakary Muturi Muchai sworn on 30th July 2014 and filed in court on the same date.

EVIDENCE AND SUBMISSIONS OF THE PARTIES

6. The Applicant submitted that the Plaintiff’s suit herein was filed on 29th October 2013 challenging the purported exercise of statutory powers of sale by the 1st Defendant and simultaneously filed a Notice of Motion seeking interlocutory reliefs which was heard and determined by this court on 19th day of July 2014, but that the current application is informed by new development arising from the sale of the suit property to Senjia Limited in a manifestly illegal, irregular and improper way, which sale still left a balance sum of Kshs.38,471,652.50 and USD 135,573.69 which the 1st Defendant demanded from the Plaintiff. The Plaintiff submitted that the sale was improper on the grounds that no fresh Statutory Notice was issued, there was no valuation of the suit property; no money was owed to the 1st Defendant by the 1st Plaintiff, the 1st Defendant had failed to give an account of monies purportedly owed by the 1st Plaintiff, that the 1st Defendant exercised several modes of realising security instead of using only one mode, and that the 1st Defendant entered into a sale contract with a Third Party while there was in existence a sale contract between the 1st Plaintiff and the 2nd Plaintiff. The Plaintiff submitted that the said irregularities deprived the 1st Plaintiff of his property which is protected under Article 40 of the Constitution. Finally the Plaintiffs submitted that the suit property was protected under the doctrine of *lis pendens* and ought not to have been sold while the matter is still pending in court.

7. On their part, the 1st Defendant/Respondent submitted that this court lacks the jurisdiction to grant the orders sought in the instant application and a contrary finding would amount to this honourable court

sitting on appeal on the decision of this court delivered on 19th June 2014. The Defendant further stated that the entire application and the suit is an abuse of the court process as the orders sought herein are *res judicata* in light of the aforesaid Ruling delivered by this honourable court on 19th June 2014 whereat the Plaintiffs' Notice of Motion application for injunction was dismissed with costs. In addition to the above the entire application is also said to be *res judicata* in light of the rulings delivered by the honourable court in the following cases:-

i. Nairobi HCCC No. 415 of 2011 – Zadok Furniture Systems & Zadok East Africa Limited -vs- Fina Bank Limited

ii. Nairobi HCCC No. 560 of 2011 – Insignia Limited –vs- Zadock East Africa Limited, Fina Bank Limited & Leakey's Auctioneers

8. In so far as the instant application is premised on the doctrine of *lis pendens* the Respondent states that the same is untenable as the applicant has totally misconstrued and/or miscomprehended the application of the said doctrine. On the contrary the said doctrine is only available in instances of dispute on the ownership and/or title to property the subject of litigation. It was further urged that court delivered its Ruling on 19th June 2014 and the 1st Plaintiff's default continued unabated. The Respondent annexed and marked as "ZMM – 7a" and "ZMM – 7b" in the replying affidavit of 20th November 2013 and also annexed and marked as exhibit "ZMM – 2a" and "ZMM – 2b" respectively a copy of the statement of account CA 1112500009 and account CA 1111600018 both of which the deponent alleged have been verified under the provisions of section 177 of the Evidence Act. The deponent also stated that he is aware that the 1st Plaintiff was duly served with the Statutory 40 days' Notice to sell vide a notice dated 29.04.2013. The same is annexed and marked as exhibits "ZMM – 9a" and "ZMM – 9b" in the replying affidavit sworn on 20th November 2013.

9. As regards the issue of valuation of the suit property the dponetn referred this court to the valuation report dated 23.05.2013 annexed and marked "ZMM – 10" to the replying affidavit sworn on 20th November 2013. The 1st Defendant also caused the preparation of another valuation report on the suit property. I hereby annex and mark as exhibit 'ZMM-3' a valuation report carried out by Real Appraisal Limited on 19th June 2014. In the absence of a valuation report to challenge the foregoing the Respondent stated that the allegation by the 1st plaintiff that the suit properties are valued at Kshs 90,000,000.00 amounts to nothing but a hollow averment and hot air.

10. The Respondent submitted that the 1st plaintiff having failed to engage the bank with a view of regularizing the outstanding account, the 1st defendant bank rightfully exercised its statutory power of sale by entering into a contract of sale of the suit properties by private contract as duly provided for under section 98 of the Land Act, and indeed the 1st Defendant bank entered into an agreement to sell the suit properties to Senjia Limited who purchased the suit properties at the sum of Kshs 35,000,000.00. there was annexed and marked as exhibit 'ZMM-4' a copy of the said agreement for sale. It was submitted that the 1st Defendant duly credited the proceeds of the sale to reduce the 1st plaintiff's level of debt with the bank. The Respondent also submitted that at the time of the filing of the instant application the process of registering the transfer of the suit properties to Senjia Limited was at an advance stage.

11. Finally, it was submitted for the Respondent that having extended financial accommodation to the 1st Plaintiff who failed to repay the same then the 1st Defendant's right to sell the secured properties to recover the outstanding sum supersedes the 1st Plaintiff's right over the suit properties. In any event the right to property as protected under Article 40 of the Constitution of Kenya extends as well to the financial accommodation belonging to the 1st Defendant but extended to the 1st Plaintiff.

ANALYSIS

12. I have carefully considered the application and the opposing submission of the parties. The issues which I raise for determination are as follows:-

i. ***Is this application res judicata? If so, are there aspects of the application over which this court may exercise jurisdiction?***

ii. ***Can differences in reconciliation of account be a grounds upon which to issue injunctive orders?***

13. In determining whether or not the issue at hand is *res judicata* will go back to the Ruling of this court delivered on 19th June 2014. The said Rule of 19th June 2014 was based on the application dated 28th October 2013 which was seeking that:-

3 (a) The Defendants be restrained from interfering with the interest of the Plaintiffs in the properties known as Land Reference Numbers 12948/54 and 12948/59 situated at Mountain view in Nairobi and in particular by selling the property by way of public auction slated for 31st October 2013.

14. In the said Ruling of 19th June 2014 this court found that the said application was *res judicata* in light of the Rulings delivered in Nairobi HCCC NO. 415 of 2011, Zadok Furniture Systems and Zadok East Africa Limited – Vs – Fina Bank Limited; and Nairobi HCCC No. 560 of 2011 – Insignia Limited – Vs – Zadok East Africa Limited, Fina Bank Limited and Leakey’s Auctioneers. I dealt with the Rulings in the above cases in this court’s Ruling of 19th June 2014 and I found that the said application dated 28th October 2013 was *res judicata*. It is noteworthy that the Plaintiff neither appealed that decision nor sought to have the same reviewed. That decision is still on record.

15. The current application which was filed about 30 days after the Ruling of this court of 19th June 2014, apart from seeking the same injunctive orders over the same suit properties being L.R No. 12948/54 and LR No. 12948/59 Nairobi seeks additional orders at prayers number 5 and 6 as follows:-

1. ***An order for account of all the transaction between the Plaintiffs and the Defendants with respect to the facilities the subject of this suit.***

2. ***An order cancelling any transactions including purported transfer, charge or sale of the property known as LR No. 12948/54 and LR NO. 12948/59 entered into or effected during the pendency of this suit, as null and void and an order of cancellation on any titles and/or entries upon the said titles made during the pendency of this suit.***

16. Without a doubt and except for the above two prayers, the prayers in this application relating to injunction over the suit properties are *res judicata*.

17. I will begin with the issue of *res judicata* as raised by the Defendants as this is a preliminary issue touching on the jurisdiction of this Court to hear the current application. The principle of *Res Judicata* is provided for in Section 7 of the **Civil Procedure Act** 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 subsequently raised, and has been heard and finally decided by such court.”

The Court of Appeal in the case **UHURU HIGHWAY DEVELOPMENT LTD -VS- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APPEAL NO. 36 OF 1996** had this to say on the issue of *res judicata* with regard to applications -

“What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?”

... There is no doubt at all that provisions of Section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of res judicata.

...There is not one case cited to show that an application in a suit once decided by courts of competent jurisdictions can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications with the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

18. Pursuant to above provisions, of the law, and the facts of this application, it is my finding that the current application in so far as it relates to any injunctive or restraining orders against interference by the 1st Defendant with the suit properties, in respect of the issues which have been canvassed before the court as stated above, is *res judicata*, and this court has no further jurisdiction, related thereto.

19. However, the current application has brought in aspects which have not been considered or determined by this court in any previous applications. These are the following two issues that is, firstly, that the 1st Defendant has not carried out a proper valuation to be the basis of any sale, and that in the absence of such a valuation this court has the jurisdiction to intervene and to stop the sale. This allegation, if it is true, is material and will warrant an intervention by this court. A security by chargor can only be sold after a valid valuation to establish the market value of the property. It must be noted that the interest of the chargee on security is to realise the security to the extent of the outstanding balances, and that in any sale of security it is the duty of the chargee to ensure a competitive market price of the property. The Plaintiff/Applicant alleges that the properties are worth over Kshs.90,000,000/= but no valuation has been offered to support the same. On the other hand the 1st Defendant has annexed two Valuation Reports one dated 23rd May 2013 annexure “**ZMM-10**” and which returned open market value of Kshs.30,000,000/= and another dated 19th June 2014 annexure “**ZMM-3**” which returned opened market value of Kshs.35,000,000/=. Both reports are by M/s Real Appraisal Limited. Those reports appear to have been specifically prepared for the purposes of the sale of the suit properties. Indeed it is not surprising that the properties were allegedly sold to a Third Party exactly at a sum of Kshs.35,000,000/=.

20. The Plaintiff/Applicant alleges that the suit properties are worth over Kshs.90,000,000/= while the 1st Defendant purports to have sold the same at Kshs.35,000,000/=. It is common knowledge that property marked in Nairobi appreciates widely even within one year. The Plaintiff may not be convinced that the same Valuer in 2013 returned a valuation of Kshs.30,000,000/= and in 2014 that of Kshs.35,000,000/= and the property is then allegedly sold at exactly that amount. Even this court is not convinced that the valuation process of the suit properties was transparent or fair. For the 1st Defendant to purport to sell the suit properties on the strength of a valuation from the same firm, and at exactly the returned market price without any variations at all appears to have been improper process. An independent Valuer ought to have done the second valuation to avoid a suspicion that there were other considerations. Pursuant to the foregoing I find that the valuation process was not transparent and if allowed, would amount to denying the Plaintiffs their constitutional right to property. The right to property is protected under Article 40 of the Constitution and can only be taken away in a lawful and transparent process.

21. The second issue which emerged and which this court has jurisdiction over is the manner in which the 1st Defendant sought to sell the suit properties to a Third Party by Private Treaty while the 1st Defendant was aware that the 1st Plaintiff had already entered into an agreement to sell the same to the 2nd Plaintiff. In deciding to sell the property to the Third Party while knowing that there was already an agreement of sale between the 1st Plaintiff and the 2nd Plaintiff, the 1st Defendant acted in utmost bad faith. The property belonged to the 1st Plaintiff and so where the 1st Plaintiff had, with approval of the

1st Defendant, secured a purchaser by private arrangement, it was incumbent upon the 1st Defendant to act in good faith and to give the 1st Plaintiff a chance before purporting to take a drastic action of selling the same to a Third Party. In the exercise of Statutory Right of Sale, a chargee at all times owes the chargor at least the duty of a transparent process. This transparency starts from the issuance of statutory notice, to advertising of the sale, the valuation of the property and the staging of an auction, or the process of engaging in a Private Treaty. The chargee must not be seen to be having a particular interest in these processes except for carrying out its duties in relation to the realisation of the security. It is my finding that this process from valuation of the suit properties to the identification of the alleged private purchaser was never transparent enough and was tainted with bad faith. That kind of process cannot transfer title to the purported buyer of the suit properties unless the said process undergoes scrutiny of the full hearing. It is on the foregoing basis that this court finds the jurisdiction to intervene in this matter and to grant the injunctive orders stopping the sale and/or transfer of the suit properties to the alleged Third Party pending the hearing and determination of the matter in a full hearing.

22. The issue number two which I raised herein is whether or not differences in reconciliation of accounts can found a basis for the issuance of injunctive orders. To answer this issue, it is now trite law, and nobody objects to the same, that differences in reconciliation of accounts cannot be the basis of granting an injunction. Those differences can be reconciled as the suit proceeds to hearing, and any party who is aggrieved after the hearing will always have a remedy in damages. In that regard, this court is able to give the remedy to render accounts as prayed in prayer 5 of the application.

23. In the upshot, I make orders as follows:-

a. The 1st Defendant shall avail to the 1st Plaintiff/Applicant an account of all the transactions between the Plaintiffs and the Defendants with respect to the facilities the subject of this suit. This shall be done within 14 (fourteen) days of this Ruling.

b. An order of injunction against the 1st Defendant and/or its agents or employees restraining the 1st Defendant from selling, transferring, charging or in any way or manner dealing with the properties known as LR No. 12948/54 and LR No. 12948/59 Nairobi, pending the hearing and determination of this suit.

c. Any purported sale or transfer of the suit properties mentioned in Order (b) above to any Third Party is herewith cancelled pending the hearing and determination of the suit.

d. This suit must be heard and determined within a period of 12 months from the date of this Ruling. After the expiration of the said 12 months the injunctive orders herein shall automatically lapse.

e. Parties shall meet own costs of this application.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Simiyu holding brief for Mutubwa for Plaintiffs

Akech for the Defendants

Teresia – Court Clerk

