



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 86 OF 2010

SAMSON NGUGI ICHUNG'WA T/A GRENAIR.....PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL & CREDIT

BANK LIMITED.....1ST DEFENDANT

RAJU DHANANI.....2ND DEFENDANT

JOSEPH GIKONYO

T/A GARAM INVESTMENTS.....3RD DEFENDANT

RULING

INTRODUCTION

1. There are three applications before this Court for determination as follows:-

- *The Plaintiff's application dated 16th March 2015*
- *The 2nd Defendant's application dated 11th December 2014*
- *The 1st and 3rd Defendant's Application dated 19th November 2014*

2. This Court will address the applications one at a time in the order stated above.

APPLICATION DATED 16TH MARCH 2015 - FOR REVIEW

3. The application is the Plaintiff's Notice of Motion dated **16th March 2015**. It was taken out under **Section 3** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**. It sought for the following orders:-

1. ...

2. THAT this Honourable Court do review, vary and/ or set aside the Ruling and Orders made in favour of the 2nd Defendant in regard to the Applicant's Application dated 10th April 2014 where the Ruling was delivered on 26th June 2014.

3. THAT this Honourable Court be pleased to give such other and further orders and/or directions in relation to this application and the suit at large.

4. THAT the cost of this Application be borne by the Defendants.

THE PLAINTIFF'S CASE

4. The Application was supported by the affidavit of the Plaintiff sworn on **16th March 2015**. The Plaintiff also filed written submissions on **28th April 2015** in respect of his application.

5. The Plaintiff averred that he was granted leave to file his Amended Plaint by the Court on 8th November 2013 which Plaintiff he filed on 14th November 2013. The 1st and 3rd Defendants filed their Amended Defence on 29th November 2013, whilst the 2nd Defendant filed his further Amended Defence and a Counterclaim on 2nd December 2013. The Plaintiff filed a Reply to the said Defences and the Counterclaim on 18th March 2014 and served them on 21st March 2014.

6. The Plaintiff further avers that it is at this time that his Advocate discovered that an interlocutory judgment in respect to the counterclaim had been entered in favor of the 2nd Defendant on 14th February 2014. It is his assertion that the Counterclaim sought determination of the proprietary rights of the suit property in the present suit, which rights the Plaintiff also sought to have determined. Therefore, the Plaintiff through his advocate filed an application dated **10th April 2014** seeking to set aside the interlocutory judgment entered on **14th February 2014** but the said application was dismissed with costs to the Respondent.

7. It is the Plaintiff's case that the Learned Judge erred in failing to consider that the prayers sought in the counterclaim were similar to those sought in the Amended Plaint in this suit and that it would be un-procedural to enter judgment in the counter claim before the suit was heard and determined. In that case, it is the Plaintiff's position that there is sufficient reason for the order and ruling to be reviewed.

8. In view of the foregoing, the Plaintiff urged the Court that it was in the interest of justice that the Ruling and order of 26th June 2014 be reviewed and discharged. Further, that the 2nd Defendant would not be prejudiced in any way if the orders were reviewed.

THE 1ST AND 3RD DEFENDANTS' CASE

9. The 1st and 3rd Defendants opposed the application by way of their Grounds of Opposition dated **28th April 2015** and filed on **29th April 2015** as well as their written submissions filed on even date.

10. It was their case that the Plaintiff failed to give any justifiable reason for review and/or setting aside the Ruling of 26th June 2014. According to them, there was no discovery of new and important material or evidence or an error or mistake apparent on the face of the record to warrant a review. It was further their case that the present application was made after an unduly long and unreasonable delay of 9 months after the date of the ruling, which delay has not been explained. It is therefore the 1st and 2nd Defendants' position that the Plaintiff is not entitled to the orders sought.

ANALYSIS AND DETERMINATION

11. I have considered the application, the affidavit in support, the Grounds of opposition as well as the written submissions by Counsel. Having done so, I take the following view of the matter.

12. The law on review is provided for under **Order 45 Rule 1** of the **Civil Procedure Rules**. It provides that for a review to issue, the party applying for the same has to demonstrate that there was discovery of new and important matter or evidence, which after the exercise of due diligence was not within the Plaintiff's knowledge or that there was some mistake or error apparent on the face of the record.

13. In the present application, the Plaintiff has applied for a review on account that the Judge in the ruling dated **26th June 2014** erred in failing to consider that the prayers sought in the counterclaim were similar to those sought in the instant suit therefore making the interlocutory judgment irregular. In the said ruling, the Court dismissed the Plaintiff's application for setting aside.

14. Whether or not to set aside a judgment is at the discretion of the Court, which discretion is unfettered and should be exercised in a just manner. Of course, the Court shall be guided by the well-enunciated principles of setting aside which I need not to reproduce herein. I have perused the said ruling of Havelock J. (as he then was) and there is nothing to show that he deviated from the principles of setting aside or that he exercised his discretion in an unjust manner. The said ruling gave reasons as to why the Plaintiff did not deserve the discretionary orders of setting aside. In any case, if it turned out that the Judge had not applied the said principles or that he exercised his discretion in an unjust manner the same would be a ground for appeal and not review. With regard to the issue of the interlocutory judgment being irregular, the Plaintiff raised the same issue in his application to set aside the interlocutory Judgment. The Court addressed the same in its ruling and if the Plaintiff is dissatisfied, that should be subject of an appeal.

15. In light of the above, the Plaintiff has not demonstrated that there was discovery of new and important matter or evidence, which was not within his knowledge, or that there was an error apparent on the face of the record as regards the ruling dated 26th June 2014. Therefore, he is not entitled to the orders of review under **Order 45 Rule 1** of the **Civil Procedure Rules**.

DISPOSITION

16. In view of the foregoing, the upshot of this Court's ruling is that the Plaintiff's Notice of Motion dated **16th March 2015** and filed on even date is not merited and the same is hereby dismissed with costs to the 2nd Defendant.

APPLICATION DATED 11TH DECEMBER 2014 – FOR SECURITY FOR COSTS

17. The Application before the Court is the 2nd Defendant's Notice of Motion dated **11th December 2014** and filed on even date. It is expressed to be brought under the provisions of **Section 3A** of the **Civil Procedure Act** as well as **Order 26 Rules 1, 5 and 6** of the **Civil Procedure Rules**. It sought for the following orders:-

1) ...

2) *THAT this Honourable Court do order the Plaintiff herein to furnish security for costs in favour of the 2nd Defendant herein.*

3) *THAT in default of the Plaintiff giving security for costs in favour of the 2nd Defendant herein within the time ordered by the Court then the suit herein be dismissed with costs.*

4) *THAT in the alternative the monthly rental income accruing from the suit properties be deposited in a joint interest earning account in the names of the Advocates for the Plaintiff and the 2nd Defendant.*

5) *THAT the costs of this application be provided for.*

THE 2ND DEFENDANT'S CASE

18. The application is based on the grounds set out therein and is supported by the Affidavit of the 2nd Defendant sworn on **11th December 2014**. The 2nd Defendant filed his written submissions dated **2nd April 2015** on even date.

19. He averred that he purchased the suit properties on 9th February 2010 at a public auction held by the 3rd Defendant on instructions of the 1st Defendant herein exercising its rights as a Chargee. He paid to the 1st Defendant the full purchase price of Kshs. 16,500,000/= and the suit properties were transferred to him. He further averred that the funds used to purchase the suit properties was obtained from a loan facility of Kshs. 20,000,000/= from Equity Bank which facility he is servicing to date. He had initially intended to use the rental income from the suit properties to service and repay the loan facility.

20. It is his case that the Plaintiff is currently in possession of the suit properties and has continued to collect rental income from the said properties. He is further apprehensive that the Plaintiff is not financially capable to pay back the rental income he is collecting from the suit properties should the Counterclaim be granted by the Court.

21. In the circumstances, the 2nd Defendant urged the Court to order the Plaintiff to furnish security for costs and mesne profits pending the hearing of the suit.

THE PLAINTIFF'S CASE

22. In opposition to the application, the Plaintiff swore a Replying affidavit on 13th February 2015 and filed it on 17th February 2015.

23. The Plaintiff averred that the 2nd Defendant had filed several applications to scuttle efforts for the commencement of the present suit. He averred that the 2nd Defendant had filed several applications seeking to evict him as well as levy for distress of rent, which applications were dismissed by this Honourable Court. The Plaintiff's case is that if this Court were to grant prayer 4 of the present application it would amount to sitting on its own appeal having previously dismissed applications by the 2nd Defendant for distress of rent. In prayer 4, the 2nd Defendant seeks for orders of depositing the rental income in a joint interest earning account of the parties. It was further the Plaintiff's case that the 2nd Defendant could not sneak issues already heard and determined by this Court.

24. In view of the foregoing, the Plaintiff urged the Court to dismiss the application with costs.

ANALYSIS

25. I have considered the application, the affidavits in support and opposition thereto as well as written submissions by Counsel. Having done so, I take the following view of the matter.

26. The Plaintiff's submission is that the present application is *res judicata*, the 2nd Defendant having filed similar applications and the same were dismissed. It is the Plaintiff's view that the 2nd Defendant's previous applications on levying distress for rent, are similar to the present application. This Court does not agree with the Plaintiff's argument. An application for security for costs under **Order 26** of the **Civil Procedure Rules** is no way similar to an application to levy distress for rent, which is obviously brought under different rules. Prayer No. 4 of the present application which seeks for orders that the Plaintiff deposit the rental income in a joint interest earning account is not incompatible with orders for security for costs and cannot amount to levying distress for rent. Therefore, the Court's finding is that this application is not **res judicata**.

27. Turning to the substance of the application, on 14th February 2014, the 2nd Defendant was granted an interlocutory Judgment in his favour against the Plaintiff for possession, rent and mesne profits from the suit properties. The Plaintiff sought to set aside the interlocutory Judgment but the same was dismissed by

Havelock J. (as he then was) in his ruling dated 26th June 2014. The Plaintiff subsequently sought a review of the said ruling dismissing his application for setting aside. This Court has already found that the Plaintiff did not establish grounds to warrant a review of the said ruling.

28. It is therefore, not clear why the 2nd Defendant would want a security for costs for rent and mesne profits instead of executing the said Interlocutory Judgment. This Court is of the view that the interlocutory Judgment compromised prayer (f) in the Amended Plaint dated 14th November 2013 as against the 2nd Defendant. The said prayer sought a declaration that the 2nd Defendant was not entitled to rent for the Plaintiff's occupation. On the other hand the 2nd Defendant in his counterclaim sought for orders of vacant possession to the suit premises, special damages of loss of income and mesne profits. These orders were granted to the 2nd Defendant vide the interlocutory Judgment of 14th February 2014. It therefore means that the 2nd Defendant is now entitled to rent having been granted vacant possession and mesne profits in the interlocutory judgment. In the circumstances, prayer (f) of the Amended Plaint cannot stand and the same is therefore spent.

29. This Court is called upon under **sections 1A and 1B** of the **Civil Procedure Act** to ensure the just and expeditious resolution of disputes as well as the efficient disposal of the business of the Court. In the circumstances herein, the Court has already determined that prayer (f) against the 2nd Defendant was compromised by the interlocutory judgment herein. This was in essence the only prayer against the 2nd Defendant. The rest of the prayers were directly related to the 1st and 3rd Defendants. Therefore, it is plain that there will be no necessity whatsoever to proceed for a hearing on the issue of whether or not the 2nd Defendant is entitled to rent.

DISPOSITION

30. Accordingly, this Court *suo motto* declares that the Plaintiff's suit against the Defendant is spent. In that case, the 2nd Defendant's application for security of costs will not be necessary.

31. In the upshot the 2nd Defendant's Notice of Motion dated 11th **December 2014** and filed on even date is not allowed. However, the 2nd Defendant is at liberty to execute the Interlocutory Judgment entered in its favour on 14th February 2014.

APPLICATION DATED 19TH NOVEMBER 2014 – FOR DISMISSAL OF SUIT

32. The application before the Court is the 1st and 3rd Defendants' Notice of Motion dated 19th November 2014. It was taken out under Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules. It sought for the following orders:-

1. That the suit against the 1st and 3rd Defendants be marked as spent and or overtaken by events and be dismissed.

2. That the 1st and 3rd Defendants be awarded costs of the suit.

THE 1ST AND 3RD DEFENDANTS' CASE

33. The application was supported by the affidavit of MARION KARANJA, an Advocate of the High Court, which was sworn on **19th November 2014**. The 1st and 3rd Defendants also filed written submissions in respect of the three applications herein on 29th April 2015.

34. The 1st and 3rd Defendants aver that the Plaintiff instituted the present suit on 17th February 2010 having previously instituted HCCC No. 592 of 2008 and HCCC No. 287 of 2009, all seeking an injunction against the 1st Defendant's exercise of its statutory power of sale over Title Numbers Kikuyu/Kikuyu Block 1/48 and Kikuyu/Kikuyu Block 1/55 (hereinafter referred to as "the suit

properties”). The Plaintiff had filed various applications in the present and previous suits all seeking an injunction against the sale of the suit properties which applications were all dismissed. The 1st and 3rd Defendants referred to the rulings in HCCC No. 287 of 2009 by Kimaru J. and the ruling of Koome J. in the present suit.

35. Pursuant to the dismissal of the said applications, the suit properties were sold by way of public auction on 9th February 2010 and subsequently registered in the 2nd Defendant’s name and respective Certificates of Lease issued on 1st December 2010. This prompted the Plaintiff to file the application dated 8th December 2010 in the present suit seeking an injunction against the 2nd Defendant, which application was dismissed on 8th April 2011.

36. The Plaintiff was thereafter granted leave by the Court on 8th November 2011 to file an Amended Plaintiff, which he did on 14th November 2011. According to the 1st and 3rd Defendants, prayers (a), (b), (c) and (e) of the said Plaintiff relates to matters that have already been conclusively dealt with by this Court in the rulings of Kimaru J. and Koome J. as stated above. The ruling of Kimaru J. conclusively found that the 1st Defendant was entitled to sell the suit properties while that of Koome J. found that the suit properties had been validly sold in the public auction of 9th February 2010.

37. It is therefore the 1st and 3rd Defendants’ case that the Plaintiff’s amended Plaintiff in the present suit does not raise any other issue(s) that has/have not been heard and determined by this Court. Their position is that all the issues raised in the said Plaintiff are res judicata having been previously heard and determined by this Court. It is further their case that the Court has already determined that the Plaintiff’s proprietary rights over the suit properties have been extinguished and the 2nd Defendant is the bona-fide owner hence the prayers as contained in the Amended Plaintiff are automatically spent.

38. In view of the foregoing, the 1st and 3rd Defendant urged the Court to allow the application to avoid them being dragged along in endless matters that have already been conclusively determined by this Court.

THE PLAINTIFF’S CASE

39. The Plaintiff opposed the application by way of its written submissions dated 28th April 2015 and filed on even date. It is his case that the Charge in this matter as drawn was fatally defective and could not confer upon the 1st Defendant any statutory power of sale. He also contended that the property was grossly undervalued and that the sale was riddled with fraud.

40. The Plaintiff maintained that the present suit provided additional circumstances to the other suits. It argued that there were several outstanding issues between the Plaintiff, the 1st and 3rd Defendants. It was therefore the Plaintiff’s submissions that the present application be dismissed.

ANALYSIS AND DETERMINATION

41. I have considered the application, the affidavit in support thereto and the written submissions by Counsel for the respective parties. Having done so, I take the following view of the matter.

42. The 1st and 3rd Defendant’s case is that prayers (a), (b) (c) and (e) of the Amended Plaintiff filed on 14th November 2013 relate to matters that have already been determined by this Honourable Court. The prayers in the Amended Plaintiff are as follows:-

a. An Order of injunction restraining the Defendants whether by themselves or their servants and/or agents, or Advocate or auctioneers or any other person acting through them or otherwise from doing the following acts or any one of them that is to say from interfering with the right of possession, advertising for sale, disposing or selling by public auction or otherwise howsoever at any other time or by the Plaintiff’s ownership of the title to and interest in ALL THAT parcel of

land known as Kikuyu/Kikuyu Block 1/48 and Kikuyu/Kikuyu Block 1/55;

b. A declaration that the Charge dated 6th August 2007 is null and void and of no effect and not binding on or enforceable as against the Plaintiff and that the Plaintiff is discharged from the said Charge and from all or any liability thereunder;

c. A declaration that the purported sale of the Plaintiff's properties known as Kikuyu/Kikuyu Block 1/55 by the 3rd Defendant on 9th February 2010 or any other date thereafter is null and void ab initio and if the said properties have been transferred to the 2nd Defendant or any other 3rd Party or parties, the said transfers be cancelled forthwith and the said properties do revert to the Plaintiff;

d. Costs of the suit together with interest thereon;

e. A declaration that Registration of the suit properties in the favour of the 2nd Defendant on 29th November 2010 and the Certificate of Lease dated 1st December 2010 be and are hereby nullified;

f. A declaration that the 2nd Defendant is not entitled to rent for the Plaintiff's occupation of the suit premises through the hearing and determination of this case.

43. According to the 1st and 3rd Defendants, the issues raised in the Amended Plaint filed on 14th November 2013 were conclusively determined by the rulings in HCCC No. 287 of 2009 by Kimaru J. and the ruling of Koome J. in the present suit. Unfortunately, the 1st and 3rd Defendants did not attach the said rulings for ease of reference by this Court. However, the Court stumbled upon the ruling of Koome J. in this suit dated 9th November 2010 whereby the Judge dismissed with costs the Plaintiff's Chamber Summons application dated 15th February 2010. In the said application, the Plaintiff had sought for orders to set aside the purported sale of the suit property and to restrain the transfer of the suit properties to the 2nd Defendant. As already stated the application was dismissed and therefore the aforesaid orders were not granted. There is nothing on record to show that the Plaintiff appealed against the said orders. In the circumstances prayers (a) and (b) of the Amended Plaint have been overtaken by events and are not available to the Plaintiff. It is not in dispute that the suit properties herein were sold by way of public auction and the same transferred to the 2nd Defendant.

44. With regard to the ruling of Kimaru J. in HCCC No. 287 of 2008 delivered on 4th November 2009, the same was not attached by the Defendants and therefore it is not clear what orders in particular the Plaintiff sought for. However, the Plaintiff does not dispute that they made an application for injunction orders and the same was dismissed by Kimaru J. The 1st and 3rd Defendants' provided excerpts of the said ruling in its submissions and from the same it appears that the Court found that the Defendants could not be restrained from exercising their statutory power of sale. Indeed, this Court is in agreement with the 1st and 3rd Defendants that prayers (a), (b), (c) and (e) have been determined by this Court in its previous rulings. The Plaintiff having not appealed against the said orders is barred by the rule of *res judicata* as provided for under **section 7 of the Civil Procedure Act**, from litigating on the same before this Court.

45. With regard to prayer (f) in the Plaintiff's Amended Plaint, the same relates to the 2nd Defendant and has nothing to do with the 1st and 3rd Defendants. In the circumstances foregoing, it is plain that the suit against the 1st and 3rd Defendants as per the Amended Plaint filed on 14th November 2013 is spent or overtaken by events. It should also be noted that a party should not litigate in piece-meal and litigation must come to an end. The issues being raised by the Plaintiff in its Amended Plaint are not issues that are new or that he could have not discovered then. The same should have been raised in the previous suits or applications.

DISPOSITION

46. Accordingly, the upshot of this court's ruling is that the 1st and 3rd Defendants' Notice of Motion dated 19th November 2014 and filed on 25th November 2014 is merited and the same is hereby allowed as prayed.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF JULY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Njenga for the Plaintiff

M/s Karanja for the Defendants

Teresia – Court Clerk