



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 245 OF 2010

ABDULGADER SHARIFF SALEH & JAMAL SHARIFF SWALEH

t/a JINGO TOURS & SAFARIS LTD.....PLAINTIFFS

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LIMITED

DALALI TRADES.....DEFENDANTS

AS CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 164 OF 2010

ABDULGADER SHARIFF SALEH & JAMAL SHARIFF SWALEH

t/a JINGO TOURS & SAFARIS LTD.....PLAINTIFFS

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LIMITED

JOHNSTONE K MULI t/a KITHEMU AUCTIONEERS.....DEFENDANTS

RULING

1 In order for the reader to understand the conclusion of this Ruling it is imperative for me to set out the background of the matter.

BACK GROUND

2 ABDULAGADER SHARIFF SALEH and JARMAL SWALEH trading as JINGO TOURS & SAFARIS (herein after referred to as the plaintiff) obtained financial facility from SOUTHERN CREDIT

BANKING CORPORATION LIMITED (hereinafter referred as the defendant). That facility was secured by chattels mortgage over plaintiff's motor vehicle registration No. KAU 356P; and a legal charge over plaintiff's property registered as MOMBASA/BLOCK XVII/797.

3 The plaintiffs filed two suits namely Mombasa High Court Civil cases Nos. 165 of 2010 and 245 of 2010 against the defendant in relation the above mentioned financial facility.

4 By HCC No. 165 of 2010 the plaintiffs sought an order of injunction to stop the defendant from selling motor vehicle registration No. KAU 356 P. On 19th July 2010 the court in entertaining ex - parte, plaintiff's application dated the same date granted interim injunction restraining the defendants from selling motor vehicle registration No. KAU 356 P. That order was extended from time to time.

5 By HCC No. 245 of 201, the plaintiffs sought restraining orders of injunction to stop the defendant from selling by public auction the property MOMBASA BLOCK XVIII/797. By entertaining the plaintiff's application dated 28th May 2010, ex-parte, the court granted interim order of injunction restraining the defendant from auctioning the property MOMBASA/BLOCK XVII/797. That ex-parte order was extended from time to time.

6 Although parties filed a consent letter signed by both learned counsels for the plaintiffs and defendants, dated 4th October 2010, that consent, as far as I can discern from the proceedings was not, and has not to date been adopted as an order of the court. The consent was to effect that HCC NO. 165 of 2010 and HCCC NO. 245 of 2010 be consolidated. Despite the fact that the consent was not adopted the two files in those cases were placed together following the order of Justice Mwongo of 29th October 2012 that the files be placed together. Orders have accordingly, since that date, been made as though the two files were consolidated.

7 On 2nd July 2014 the two cases were fixed for hearing. The plaintiff learned counsel sought an adjournment on the ground that the plaintiffs had not complied with the pre -trial directions as required under Order II of the Civil Procedure Rules. The court on that day granted the plaintiffs an adjournment as sought but discharge the interim orders granted to the plaintiffs. What in essence that meant was that both the interim injunctions in respect to the motor vehicle registration No. KAU 356 P and in respect to the immovable property MOMBASA/BLOCK XVIII/797 were discharged and vacated.

NOTICE OF MOTION DATED 13TH APRIL 2015

8 The plaintiffs by the above stated Notice of Motion seeks the following orders:-

(a) That this Honourable court be pleased to issue a temporary stay of execution of the advertising for sale, disposing off, trespassing onto, selling by "public auction" and/or "private treaty" and/or in any other manner interfering with the plaintiffs properties to wit L.R.NO. MOMBASA BLOCK XVII/797 STADIUM AREA ALONG WAJIR ROAD, MOMBASACITY, MOMBASA COUNTY (hereinafter "the suit property") against the defendants whether by themselves, their servants, agents, workers, employees, proxies and/or any other persons howsoever pending the hearing and determination of this suit.

(b) That this Honourable court be pleased to issue an order requiring the first defendant to render accounts in respect of Account numbers 0301668201 Asset backed finance in the names of JINGO TOURS AND SAFARIS and the first and second plaintiffs herein.

(c) That this honourable court be pleased to issue such other orders it deems just and convenient to meet the ends of justice.

9 What is clear from the plaintiff's affidavit in support of that Notice of Motion is that the plaintiffs alleges that the defendant has not issued them with statutory notice before embarking on the sale by auction of the immovable property; and that the defendants have failed to provide statements of account

of the amount due.

10 It is not clear to me whether the defendant's failure to specifically respond to those two issues is due to the sheer exhaustion, due to multiplicity of the plaintiff's applications in these matters was due to the fact that the plaintiffs are correct in alleging that they had not been served with statutory notices as required by law, and that the defendants had indeed failed to supply to the plaintiffs with statements of their account.

11 In my view it was not enough for the defendant, through the replying affidavit of Brian Asin, to state that the plaintiffs by their paragraph 8 of their supporting affidavit can be supposed to have admitted or acknowledged receipt of the statutory notices. The defendant should have annexed those statutory notices in order to satisfy the burden of proof they bore by virtue of section 107 to 109 of the Evidence Act Cap 80.

12 The defendant by the replying affidavit of Brian Asin did not at all address the plaintiffs' allegation that the defendant had failed to supply them with statements of account.

13 I have considered the plaintiffs' Notice of Motion and as well as the defendant's replying affidavit and the parties written submissions. Having so considered those documents I do find that the defendant failed to shift the burden of proof in respect of issue of the alleged lack of statutory notices and statements of account. For that reason the plaintiffs are entitled to an injunction. Such an injunction however will be limited up to the time the defendant serves the plaintiffs with statutory notices as required under the Land Act 2012; and up to the time the defendant complies with all other requirements set out under the Land Act 2012; and up to the time defendant supplies the plaintiffs with up to date bank statements. Such a limited injunction is in keeping with the court of Appeal decision in the case **NATIONAL BANK OF KENYA LIMITED -V- SHIMMERS PLAZA LIMITED (2009) e KLR** where the court of Appeal stated:

“We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”

14 Further I do not find the plaintiff's Notice of Motion to be in breach of the doctrine of res judicata because the issues of the lack of statutory notice and lack of statements of account had not been raised in the plaintiff's previous applications.

CONCLUSION

15 In the end I grant the following orders:

(a) An injunction is hereby granted restraining the defendant from selling property MOMBASA BLOCK XVIII/797 by public auction or otherwise until such time the defendant shall comply with the provisions of the Land Act 2012.

(b) For the avoidance of doubt the defendants on complying with the provisions of the land Act 2012, and if the plaintiffs are still indebted to the defendant the defendant can proceed to sell the property MOMBASA BLOCK/XVII/797 by public auction.

(c) The costs of the Notice of Motion dated 13th April 2015 shall be in the cause.

DATED and DELIVERED at MOMBASA this 24th day of September 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

C/Assistant -

For the Plaintiffs:

For the defendants:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE