



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 324 OF 2008

JULIUS MUSILI KYUNGAPLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK..... 1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISE..... 2ND DEFENDANT

JAMES MURIUKI KARAYA..... INTERESTED PART

RULING

1. The Application before court is the Notice of Motion dated 16th March 2015 filed by the Plaintiff for the following orders:
 - i. Spent
 - ii. That pending hearing and determination of prayers 3, 4, 5, 6 and 7, there be issued conservatory order for *status quo* to ensure that
 - a. The 1st Defendant and interested party are restrained from registering a transfer over Plot LR No. 2812/1/MN.
 - b. The interested party does not evict or in any manner physically remove the Plaintiff from Plot RL No. 2812/1/MN.
 - iii. Leave be granted to the Plaintiff to file and serve an amended plaintiff in the manner shown in the attached draft
 - iv. That upon being served with the amended plaintiff, the defendants and the interested party be at liberty to file and serve amended defences.
 - v. That upon compliance with the prayers/orders (3) and (4) above, this Honourable Court be pleased to determine the constitutional issues raised by the plaintiff in the amended plaintiff before hearing and determination of the rest of the claim.
 - vi. That pending the hearing and determination of this suit, there be issued a conservatory order for status quo to ensure that:
 - a. The 1st Defendant and the Interested Party are restrained from registering a transfer over Plot LR No. 2812/1/MN
 - b. The Interested Party does not evict or in any manner physically remove the Plaintiff from Plot LR No. 2812/1/MN
 - vii. Costs of the Application be provided for.

2. The Application is supported by the Plaintiff's Affidavit sworn on 16th March 2015. The gist of the Plaintiff's Application is that he intends to amend the Plaint to capture the element of damages as well as the associated constitutional issues. That the Plaintiff further wishes to amend the Plaint and plead that: as at September 1997, he had cleared all the liabilities with the 1st Defendant; the second further charge dated 4th September 1997 was null and void; and that the 1st Defendant was not a chargee and section 69 of ITPA could not come into play.
3. Briefly, the Plaintiff's case is that he had filed suit by way of Plaint dated 12th November 2008 seeking for orders that the charge dated 4th September 1997 be declared a nullity, that mandatory orders of injunction be issued to restrain the sale or alienation of Plot LR No.2812/1/MN and a Chamber Summons Application dated 12th November 2008 seeking orders against the Defendants and the Interested Party to whom the property was sold in a public auction. That the application for interim injunction was dismissed by the High Court and an appeal to the Court of Appeal was also disallowed. The Plaintiff now seeks to amend his Plaint and plead damages.
4. In opposing the Application, the Defendants filed Grounds of Opposition dated 24th March 2015. The Defendants opposed the Application on grounds that:
 - i. The issue of whether or not the Plaintiff is entitled to interlocutory relief is *res judicata*.
 - ii. There is no constitutional issue raised in the suit.
 - iii. There is ample remedy available in substantive law as opposed to constitutional law.
 - iv. That the finding by the Court of Appeal that the Plaintiff has a remedy in an action for damages automatically excludes the prayers for conservatory orders sought.
 - v. The prayers for leave to amend the plaint are simply an excuse meant to prop up the prayers for conservatory orders
 - vi. That the question of whether the Plaintiff is entitled to conservatory order can only be revisited once the amendment sought has been allowed and an amended plaint filed.
 - vii. The application is frivolous, vexatious and an abuse of the court process.
 - viii. That the Plaintiff is using the application to delay the matter hence abusing the court process.
- ix. The Plaintiff's conduct so far clearly shows a litigant keen to file multiple applications but who dreads a full hearing of this suit.
5. The Plaintiff cited **Order 8 Rule 3 (5)** of the Civil Procedure Rules and submitted that the amendments sought arise out of the same facts and do not raise a new cause of action. That the amendments are necessary to determine the issues in contest between the parties and to prevent multiplicity of suits. That the delay in seeking the amendments was due to the fact that Civil Appeal No. 3 of 2013 was still pending in court and the same was determined on 12th February 2015. That even if the amendments sought introduce a new cause of action the Defendants will not suffer prejudice as they can have corresponding leave to amend their pleadings.
6. On conservatory orders, the Plaintiff submitted that determination of the proposed constitutional issues will be merely academic if the process of registration of the transfer and vesting of an interest in the Interested Party is allowed. The Plaintiff submitted that he has established a *prima facie* case with a probability of success and that he will suffer irreparable harm since the constitutional breaches he complains of cannot be adequately compensated in monetary terms. On balance of convenience, the Plaintiff submitted that the preservation of *status quo* is heavily in favour of granting the conservatory orders sought.
7. The Defendants opposed the Application and submitted that the same is *res judicata* in view of the court's ruling dated 28th May 2010 and the Court of Appeal's judgment of 12th February 2015. That the issues the Plaintiff has raised in the present application are the same issues that he raised in the previous applications in this court. That it does not matter that the Plaintiff now calls the order he is seeking "conservatory orders".
8. The Defendants submitted that the alleged constitutional issues that the Plaintiff refers to are non-

- existent. That the Plaintiff's Application violates the principles of leave to amend pleadings which are: a party is allowed to make amendments as may be necessary for determination of the real question in controversy; to avoid multiplicity of suits, that no new inconsistent causes of action is introduced; that no vested interest or accrued legal right is affected; and that the amendments can be introduced without injustice to the other side.
9. The Interested Party too submitted that the Application is *res judicata* as the prayers sought are the same ones that the Plaintiff had previously sought. The Interested Party submitted further that the alleged constitutional issues are not constitutional issues per se since the Plaintiff has not shown the court that his rights and/or freedoms under the Bill of Rights have been violated, infringed or are threatened.
 10. In my analysis of the pleadings filed by the Defendant/Respondent and the Interested party, I deduce that the objections is directed more to the grant of conservatory orders than request to amend the plaint. The defendant submitted that the constitutional issues the plaintiff is referring to are non-existent. I have perused the draft amended plaint annexed as "JMK-5" and the proposed amendments sought to be introduced. They are both referring to some constitutional and non-constitutional issues and revolve around the initial dispute. It is thus my considered view that the amendments would be necessary to avoid filing multiple suits. The prejudice if any to be suffered by both Respondents can be cured by award of costs and or leave to amend their pleadings as the case may be.
 11. On the grant of conservatory orders, the Plaintiff submits that it is necessary so as not to render his suit a mere academic exercise. Both the Defendant and the Interested Party submit the prayer is *res judicata* by virtue of the Court of Appeal decision that disallowed the application for interlocutory injunction. I have had an opportunity to read the ruling delivered by the Court of Appeal on 12th February 2015 in regard to the application for injunction which ruling was annexed as "JMK-2". I find that the reasons/arguments given herein for seeking the issuance of conservatory orders were similar to what was canvassed before the Court of Appeal. The decisions of the Court of Appeal is binding on this court and by asking this court to grant the conservatory orders of statusquo sought is equivalent to asking this court to review the decision of a higher court. In my view the most appropriate process for the applicant to undertake is once the amendment is done he can to move the Court of Appeal to review its orders. It is not open to this Court to grant the "conservatory orders" being sought.
 12. As regards prayer no 5 of the notice of motion, the Plaintiff is asking the court to hear his suit piecemeal in relation to the amendments which are all contained in the amended plaint. There is no provision of the law cited by the applicant for the court to consider such a prayer. In my opinion, if the Plaintiff felt that he had serious constitutional issues to be determined before this suit is heard, then he ought to have filed a constitutional petition. What is currently before this court are disputes all interlinked with the issue of sale of the suit property in a public auction. The matters raised in the draft amended plaint must somehow be heard together as the so called constitutional issues have arisen as a consequence of the public auction. I do find the orders sought in prayer no. 5 as not capable of being granted in the circumstance of this case.
 13. In conclusion, I do allow prayers no.3 & 4 of the motion. Prayer no. 5 is dismissed for being made without basis and lacking in merit. Prayer no. 6 is also dismissed on account of being *res judicata*. The costs of the application awarded to the defendant and the Interested Party.

RULING Dated, Signed & Delivered at Mombasa This **30th** day of **October 2015**

A. OMOLLO

JUDGE