



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 76 OF 2015

RAPHAEL MBASHU WAKESHO.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated **13th February, 2015** was filed herein on **19th February, 2015** for orders that:

1. The matter be certified as urgent and that service be dispensed within the first instance (spent).
2. The Defendant/Respondent by themselves jointly and severally or by their servants or agents or those claiming under them be ordered to produce **Title No. NAIROBI BLOCK 79/172** which the Plaintiff gave to them.
3. The Defendants/Respondents by themselves be restrained from transacting in **Title No. NAIROBI BLOCK 79/172** belonging to the Plaintiff/Applicant until this suit is heard and determined.
4. That costs be provided for.

2. The Application is grounded on the affidavit of the Plaintiff/Applicant **RAPHAEL MBASHU WAKESHO** sworn on **13th February, 2015** as well as a Supplementary Affidavit sworn and filed on **30th July, 2015** in which he deponed that on the **9th August, 2010** he obtained a mortgage facility of Ksh 5.9 million from the Defendant/Respondent Bank. The loan was secured by a charge over his property **LR NO. NAIROBI BLOCK 79/172**. That after he repaid the loan, he approached the Defendant with a request for the discharge of the Charge and release of the Certificate of Lease. To that end he visited the Defendant/Respondent's offices on the **19th January, 2015** whereupon he was issued with a Certificate of Lease purporting to be for **LR NO. NAIROBI BLOCK 79/172**. That he was surprised to learn thereafter that that Certificate of Lease was a forgery. His efforts to get an explanation from the Defendant/Respondent as to why he had been issued with a fake Certificate of Lease in place of his genuine title document that he had charged to the Bank yielded no fruit, hence this suit.

3. In his Written Submissions filed herein on **30th July, 2015** the Plaintiff/Applicant's Advocates reiterated the foregoing and added that it was after the filing of this suit that the Defendant/Respondent informed him that it was investigating his complaint. Thereafter in the Respondent's Written Submissions dated **4th June, 2015** it was conceded that the title deed he had been given by the Bank was fake. He was thus invited to go and collect the genuine title deed.

4. The Plaintiff therefore urged the Court to issue an order of injunction against the Defendant as he stands to lose his property to fraudsters on account of the Defendant's negligent conduct. He relied on the cases of:

- a. **Giella Vs Cassman Brown & Company Limited (1973) EA 358.**
- b. **Nelson Omolo Achola Vs George Omondi Ajwala (2013) eKLR.**
- c. **Habib Bank AG Zurich Vs Eugene Marion Yakub CA No. 43 of 1982.**
- d. **Vivo Energy Kenya Limited Vs Maloba Petrol Station Limited & 3 Others (2015) eKLR.**

5. The Defendant denied any involvement in the issuance of the "fake" title contending that it should not be held responsible for the mistake/negligence of their common Advocate who was handling the mortgage transaction; that it nevertheless immediately instituted its own investigations upon being notified of the anomaly by the Plaintiff/Applicant, after which it notified the Plaintiff/Applicant vide a letter dated 26th March, 2015 that his title deed was available for collection, and that todate, the Plaintiff has not collected the title.

6. In the Written Submissions filed on 4th June, 2015 the Defendant/Respondent proffered the argument that the parties engaged the services of an independent common advocate to ensure perfection of the securities and take charge of the mortgage transaction to completion. Therefore, the Plaintiff/Applicant cannot turn around and blame the Defendant/Respondent for a fault attributable to their common advocate. Counsel relied on the cases of **Mrao Vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** **Habib Banki AG Zurich Vs Eugene Marion Yakub CA No. 43 of 1982** and **Vivo Energy Kenya Limited Vs Maloba Petrol Station Limited** to support their argument that the Plaintiff/Applicant has not met the threshold set out in the case of **Giella Vs Cassman Brown** to entitle him to prohibitory injunction, let alone the higher test for the grant of a mandatory injunction.

7. Having considered the grounds and the averments in the Affidavits of **Raphael Mbashu Wakesho**, upon which the Notice of Motion dated 13th February, 2015 was based as well as the Written Submissions filed by the Advocates for the parties, it is clear that most of the facts are not in dispute. The parties are in concurrence that the Plaintiff/Applicant was accorded a mortgage facility by the Defendant/Respondent in August 2010 for which he offered his title **LR No. Nairobi Block 79/172** as security. A charge was thus registered in favour of the Defendant/Respondent against the title pending repayment of the loan.

8. It was also common ground that the Plaintiff/Applicant completed servicing the facility whereupon, the Defendant/Respondent released the Certificate of Lease to the Plaintiff/Applicant along with a Discharge of Charge. Moreover, the Plaintiff/Applicant's contention that it was later brought to his attention that the Certificate of Lease he was given by the Defendant/Respondent was a forgery and that he accordingly notified the Defendant/Respondent thereof was also conceded by the Defendant/Respondent.

9. Subsequently to the filing of this suit, the Defendant/Respondent, having caused investigations to be carried out into the Plaintiff/Respondent's allegations confirmed the same. Thus it is the Defendant/Respondent's case that ***"...the 'genuine' Certificate of Lease was found and is now available for collection by the Plaintiff/Applicant."***

10. In the premises, it is apparent that the instant application has been overtaken by events as there is no dispute for the Court to resolve. What remains is for the Plaintiff/Applicant to visit the offices of the Defendant/Respondent and collect his Certificate of Lease as no order would be required in a case where a party admits a claim and is ready to comply. I agree with the submissions of the Defence Counsel that the Court would be acting in vain, if it were to issue superfluous orders, as sought herein.

11. In the case of **Eric V.J. Makokha & Others Vs. Lawrence Sagini & Others, Civil Application No. NAI. 20 of 1994**, the Court of Appeal had this to say:

"There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction ...is an invocation of the equitable jurisdiction of

the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, “Equity, like nature, will do nothing in vain.” On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it.” (Emphasis supplied)

12. It is noteworthy that both the Plaintiff/Applicant and his Counsel admit that they have since June, 2015 been aware that the certificate of title is available for collection but nevertheless proceeded to prosecute this application, instead of collecting his certificate and withdrawing the application. Such conduct flies in the face of the Overriding Objectives of the Civil Procedure Rules as set out in Section 1A & 1B thereof. On the other hand, the Defendant appears not to have acted with due dispatch in communicating the results of its investigations with a view to pre-empt this application.

13. It could very well be the case that the application was viable at the commencement of this suit. However what counts is whether at the time the court pronounces itself useful purpose would be served by the order sought. This was made clear in the case of **Rosslyn Estate Ltd vs. Underwood 22 EALR 196** thus:

This being a suit in equity, the relief which the court could grant had to be considered on the basis of the facts as they were at the date of judgment, not as they were at the date of filing of plaint.” (Per Briggs, JA)

14. In the result, I would dismiss this application but order that costs thereof be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF OCTOBER 2015

OLGA SEWE

JUDGE