



No. 2/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL SUIT NO.215 OF 2008

JOPA VILLAS LLC.....PLAINTIFF

VERSUS

OVERSEAS PRIVATE INVESTMENT CORPORATION.....1ST DEFENDANT

HARVEEN GADHOKE.....2ND DEFENDANT

DANIEL MUTISYA NDONYE3RD DEFENDANT

R U L I N G

1. This matter came for interparte hearing on the **18th September 2014** with **Mr. Makori** appearing for the plaintiff and **Mrs. Opiyo** for the Defendants.
2. The both sides agreed that the Plaintiff/Applicant's application dated 5th August 2014 and the defendants' application dated 29th August 2014 be heard together and contemporaneously.
3. The application dated 5th August 2014 seeks substantive prayers namely paragraphs 2, 3 and 4 to wit;
 2. That this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership and/or title of the property described as LR No.27253/42 located at Mlolongo Area pending the hearing and determination of this application.
 3. That a permanent injunction do issue forthwith restraining the Defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer or any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership and/or title to the property described as LR No. 27253/42 located at Mlolongo Area pending the hearing and determination of this case

4. An order directing the Defendants to provide properly reconciled accounts hereto and to remove all amounts levied illegally to wit: compounded interest, penalties and collection fees.

The same is anchored on the grounds on the face of the motion namely:-

- a. The defendants have advertised the suit property for sale by private bids.
- b. They have given a deadline of 18th August 2014 for the bids.
- c. No statutory notice of sale was issued prior to the advertisement.
- d. The Defendants started a receivership of the property way back in 2008 and have been levying illegal penalties and illegal penalty charges.
- e. The Defendants are charging interest even when they are in control of the property.
- f. No accounts have been furnished.
- g. The interest herein is compounded whereas there is no arrangement for the same to be compounded.
- h. The defendant has shown bad faith.
- i. The activities of the Defendants have subjected the Plaintiff to irreparable loss, damage and harm.
- j. It is in the interest of justice that the orders sought be granted to avert gross miscarriage of justice to the Plaintiff/Applicant.

The same motion dated 5th August 2014 is supported by an affidavit of **John Paul Njoroge** sworn on the 5th August 2014 and 3 attached annexures.

4. The motion invokes the provisions of Article 159 of the Constitution of Kenya, Sections 1A,1B, 3A, Order 51 of the Civil Procedure Act Cap 21, Orders 40 Rules 1, 2, 3, 8, 10, 11 and all the enabling provisions of the law.

5. The Defendants/Respondents herein filed a counter-application dated 29th August 2014 in response to the Plaintiff/Applicant's motion dated 5th August 2014.

6. The motion dated 29th August 2014 seeks the following substantive orders namely:

4. That the temporary ex-parte injunction granted on 7th August 2014 be discharged or set aside forthwith.

5. That this court does direct the police to investigate the Plaintiff's director, J.P. Njoroge for perjury respect of the supporting affidavit dated 5th August 2014.

7. The application is based on the following grounds:-

1. The plaintiff herein obtained a temporary ex-parte injunction on 7th August 2014.

2. At the ex parte stage, the Plaintiff failed to disclose to the court the following material facts:

a. That this court has previously rendered Rulings on 20th May 2009 and 26th November 2009 in which the court dismissed the Plaintiff's three applications, viz: an injunction application, an application seeking an injunction pending appeal and the other for *inter alia* an order of prohibition restraining the sale of the

property based on *lis pendens*.

b. That the Court of Appeal on 19th November 2010 dismissed the Plaintiff's injunction application pending appeal.

c. That on 14th December 2011, the High Court (**Justice Njagi**) in **Milimani HCC 450 OF 2009**, dismissed an injunction application filed by depositors who had allegedly placed deposits in respect of the suit property, and which injunction application was also supported by the Plaintiff. This suit was a representative suit and covered the Plaintiff.

d. On 27th April 2012, the Honourable **Justice Odunga** in **Milimani HCC No. 83 of 2012** dismissed an injunction application filed by an alleged shareholder of the Plaintiff seeking to restrain the realization of the security.

e. That on 6th July 2012, the High Court (**Justice Ngugi**) issued a ruling in respect of the Plaintiff's fourth injunction application in the present suit, and indicted that it was time that the first defendant realized its security.

f. **Hon. Justice Majanja** in a Judgment dated 27th March 2013 in **Constitutional Petition No. 379 of 2012** held *inter alia* that the 1st Defendant herein could realize its security.

g. On 28th July 2014, Hon. Jacqueline Kamau in **Milimani HCC No. 458 of 2014**, dismissed an injunction application filed by a Company which claimed to have paid some monies to the Plaintiff herein as a deposit for units to be constructed on the suit property. The Plaintiff was the 4th Defendant in the suit and supported the injunction application. The injunction application in this matter was filed after the statutory notices under the Land Act had expired in October 2013.

The present injunction application was filed after the court issued the ruling on 28th July 2014 dismissing the injunction application. It is clear that the Plaintiff has been using the court process

to circumvent the realization of the security to perpetuity.

3. The non-disclosure of the above information amounts to material and fraudulent misrepresentation. Further, the Plaintiff misled the court by swearing in its supporting affidavit that the Plaintiff had never been served with statutory notices prior to the advertisement for sale of the suit property. The Plaintiff had been served with two statutory notices in accordance with the provisions of the charge document and its current advocates on record acknowledged this service and engaged the Defendants' advocate in various correspondences on the same.

4. The Plaintiff and its director **John Paul Njoroge** have perjured themselves on several occasions and the court ought to issue appropriate sanctions and restrain them from further abusing the court process by filing frivolous applications.

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5. The Plaintiff has never progressed its appeal against **Hon. Justice Lenaola's** ruling of 20th May 2009. By hearing the current application the court will be sitting on appeal of its previous decisions.

6. The injunction application is frivolous and clearly a flagrant abuse of the court process. The Defendant will suffer serious prejudice if the orders of 7th August 2014 are not set aside as the outstanding amount is substantial and the 1st Defendant has been unable to recover the loan amount and interest for 6 years.

The application is supported by the affidavit of **Harveen Gadhoke** sworn on the 29th August 2014 and the same has 9 annexures.

8. The Defendants/Applicants invokes the provisions of Order 40 Rule 7 of Civil Procedure Rule and Sections 1A, 1, 3A and 7 of the Civil Procedure Act.

9. The Plaintiff/Applicant has via **John Paul Njoroge** sworn an affidavit on 15th September 2014 in reply to the Defendant's application dated 29th August 2014.

10. The plaintiff's case is captured in the Supporting Affidavit of **John Paul Njoroge** sworn on the 5th August 2014 paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 which are to the effect that:

2. That on the 4th August 2014, he was notified by friends of an advertisement in the Daily Nation of the sale of the suit property. That the plaintiff had not been given any statutory notice prior to the advertisement of the property.

3. That the defendants were calling for private bids for the property, which compromises the transparency of the process.

4. That so far an appeal from the ruling made in this case by Honourable **Justice Waweru** is pending in the Court of Appeal.

5. That the suit is alive and the petitioners should not try to circumvent the due process of a matter pending in a competent court in Kenya by rushing the sale of the suit property which they have tried to do through private treaty.

a. That the plaintiff's respective rights and obligations herein have not been determined thus it is inherently contrary to the principles of fairness to dispose of the property in the manner sought by the defendants.

6. That the outstanding matters raised by this suit and the appeals need to be ventilated fully and determined as they challenge the legality and validity of the instrument that the defendants seek to realize, that in any event if the security is realized in spite of the pending suits they will be rendered nugatory.

7. That efforts had been made to sell part of the suit property for a sum sufficient to pay the principal claim, but the defendants have consistently frustrated this thus creating the impression that they are pursuing an unfair and unjust advantage against plaintiff.

8. That the interest of the defendants is really to grab the land and sell it off silently and while undervaluing the same.

9. That the Defendants by attempting to dispose of the land by way of a bidding process are circumventing the requirements set out in the law for disposing off property under a charge.

10. The plaintiff has also argued and responded to the application by the defendants in the Affidavit sworn by **John Paul Njoroge** on 15th September 2014 and particulars paragraphs 2, 3, 4, 6, 7, 8 and 9.

The same affidavit avers that: That paragraph 4 of his affidavit is totally unbelievable because there would be no reason for him to direct someone else to receive documents if he was present.

2. That **Elizabeth Nduta** is not an official of the Plaintiff and there was no basis upon which she was purportedly served with two notices by the said process server.

6. That a look at the document shows that it was posted to the USA and wonders How he would have received it there if he was in Kenya?

7. That the supposed receiver of the statutory notice is **JOPA VILLAS LIMITED**. The plaintiff in this case is **JOPA VILLAS LLC**.

8. That the issue of non-disclosure does not arise since the application was filed within an existing file and the court had an opportunity to look through the file and satisfy itself as to the validity of the application and history of the case.

9. That in any case if at all there is a previous application, the same was based on different grounds from those in the current application and it should be heard on merits.

11. The plaintiff via **Mr. Makori** Advocate submitted that they are contesting sale of the subject matter by private bids and he alluded to annexure JNP I a newspaper cutting.

The advocate submitted that the property has been under receivership by the Defendants since 13th November 2008. He submitted that no audited accounts have been rendered to the plaintiff to show amount raised. He referred the court to the bundle of documents in the Defendant's record of annexures pages 146 to 149 showing expenses by Defendants and their Advocates.

12. The Advocate also submitted that the sale is being undertaken without any current valuation being done. The Advocate referred the court to the Defendant's bundle of documents pages 148 which exhibits the receiver's expenses which includes valuation expenses incurred in the year 2012.

13. On the Defendant's application, the Advocate submitted that the affidavit of service on service of Statutory Notice does not make sense in that it alleges the notice was sent via **FED EX** and at the same time it shows a letter SMI a stamp by **Jopa Villas Ltd** yet the plaintiff is **Jopa Villas LLC**.

14. On the issue of multiple applications by the Plaintiff, the Advocate submitted that the instant matter is the only one filed by the Plaintiff. He referred the court to the rulings on the record (in the Defendants bundle of documents) Pages 32

Pages 35 to 79

Pages 80 to 93

Pages 94 to 108

Pages 109 to 125

and thus submitted that the plaintiff has not filed multiple suits. The Advocate further submitted that the delay in disposal of the matter was occasioned by the facts that the file had been taken to the Judges and Magistrates Vetting Board and was held up there for quite some time.

15. Finally, **Mr. Makori** submitted that the orders of **Mabeya Judge** stopping sale vide page 125 of the Defendants bundle of documents were set aside by **J.Kamau Judge** triggering the requirement of the issuance of a fresh statutory notice. He sought the court to grant Motion as prayed.

16. The Motion was strenuously opposed by **Mrs. Opiyo** for the Defendant who also argued the Defendants counter application. She submitted that, on prayer 4 seeking the reconciliation of the accounts, the Plaintiff is estopped by the fact that by a letter dated 17th July 2013 on page 139 of the Defendants bundle of documents the plaintiff never replied nor disputed the furnished account to date or any part of content thereof.

17. In response of the injunction sought in the application, she submitted that the court has no jurisdiction to grant yet another injunction or consider the application.

She further submitted that the court has previously dealt with various applications for injunctions; thus considering application herein amounts to the court sitting on appeal over the same rulings.

The Advocate referred the court to:

- Notice of appeal on page 15 of bundle of documents dated 21st May 2009 and Ruling by **Justice Ngugi** on page 90-93.

Mrs. Opiyo submitted that; The Plaintiff's submissions that he is raising new issue is neither here nor there as the same is seeking an injunction. She cited **HCC No. 708/2008 Magnate Ventures Ltd. Versus City Council of Nairobi & Others** particularly on page 47 in which relying on **Uhuru Highway Development Ltd. Versus Central Bank of Kenya & Others (Civil Appeal No. 36/1996)**, it was held:

“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 within a suit. If that were not the intention, we can imagine that the court could and would be inundated by new applications after the original one was dismissed”.

Mrs. Opiyo also cited **Section 98 of Lands Act** and argued that, the same provisions provide various options on exercise of power of sale without restrictions to any.

On the failure to provide account, **Mrs. Opiyo** submitted that, the same was not rendered since the subject matter is a project but not a going concern.

18. On the issue of failure to have a current valuation done before sale, the Advocate submitted that the same is raised prematurely as only bids are being invited from the prospective buyers and in any case the valuation issue can only be raised after the sale and she referred to **Section 97 of Lands Act**.

19. On the issue of Statutory Notice not being served, she submitted that the same is addressed by the affidavit of service filed on 2nd September 2014. She submitted that there was direct service of the same via **FED EX** and registered post. She submitted that the above modes of service are provided in the charge subject herein.

Further she argued the firm of the advocate herein acknowledged service of Statutory Notice in both instances on 14th June 2014 and referred the court to page 138 and page 13A of the bundle of documents.

She submitted that the firm of Advocate for the plaintiff is not candid enough on issue of service and she seeks an enquiry on the perjury disclosed by the affidavit by **Mr. Enonda** sworn on the 5th August 2014.

20. On Defendants' application, the Advocate raised basically the issue of jurisdiction of the court on entertaining the current application and the fact that there was material non-disclosure on the part of the plaintiff.

She referred court on authority of **Civil Application 256/2013 Ahmed Musa Ismael and Others Versus Kumba Ole Ntamorua & Others** where the court held that:

“Deliberate concealment of material facts can only be seen as an attempt to mislead the court and to steal a match on opposing parties. It also compromises an applicant's chances of obtaining a favorable exercise of Court's discretion”.

Relying on DAVID KAMAU GAKURU VS NATIONAL INDUSTRIAL CREDIT BANK LTD; the court held,” an injunction being an equitable remedy cannot be granted to a party who has demonstrated openly by his conduct that he is undeserving of equitable relief.”

21. On concealment and non-disclosure of material facts, the advocate submitted further that **HCC No. 83/2012**, the plaintiff herein was the 5th Defendant. The same case dealt with the subject matter herein. She further submitted that **Odunga Judge** on page 78 of the bundle of document found collusion in the case.

Further **Mrs. Opiyo** submitted that on page 109 to 125 of the bundle of documents is a ruling of **Kamau**

J in HCC 458/2013 where the Plaintiff was co-defendant and same involved the same subject matter.

She submitted that the Defendants have been held in litigation for 6 years as a result of these cases trying to realize the security in the matter herein.

22. The Defendants' advocate submitted that the other judges in the stated suits/rulings have held that the security should be realized. She continued to submit that it is a mockery of justice for such a delay in realizing security. She informed the court that the debt stands at **Ksh.5.7 million USD**. She alluded to paragraphs 34, 35, 37, 40, 51 and 58 of judge Kamau's ruling.

She further informed the court that there is an application for injunction dated 19th February 2013 by the Plaintiff which is still pending and urged the court to end the circus herein where the Applicant/Plaintiff is abusing the court process thwarting the realization of the security.

23. In a rejoinder, **Mr. Makori** for the Plaintiff further submitted that the court should be slow on limiting its jurisdiction and that the court should supervise the exercise of statutory powers of sale. He submitted that the court being a court of justice should end litigation in a just version.

He concluded by submitting that the work of a receiver is not like of a liquidator. Accounts are required in the case herein but none has been rendered by the receiver.

24. The issues for determination are:

1. Whether the plaintiff has established a case for the grant of an injunction pending hearing and the determination of the suit herein?
2. Whether the Defendants should be directed to render an account in terms of the prayer No. 4 of the Motion dated 5th August 2014?
3. Whether the court could direct the police to investigate the plaintiff's director **J.P. Njoroge** for perjury in respect of the Supporting Affidavit dated 5th August 2014?

25. I have perused the pleadings by parties, affidavits, submitted authorities and the oral submissions by the both sides advocates. I have also perused a plethora of rulings on record by various Judges.

26. The Plaintiff/Applicant prays for temporary injunction and an account whereas the Defendant prays for the discharge of exparte orders granted on 7th August 2014, and for the police to investigate **J.P. Njoroge** for perjury. The grant of interlocutory injunction is now trite law that the conditions set by the Authority of **Giella versus Cassman Brown Co. Ltd. (1973) EA 358** have to be established. In the leading judgment read by **Spry, VP** it is stated:

“The grant of an interim injunction is an exercise of judicial discretion and an appellate cannot interfere unless it be shown that the discretion has not been exercised judicially...The conditions for grant of an interlocutory injunctions are now settled in East Africa. First, an applicant must show prima facie case with probability of success. Secondly, an interlocutory injunction will not normally granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

However, the 3 conditions are not only factors to be considered but also the circumstances and situation surrounding the matter including the parties conduct antecedent to the grant or refusal of the relief. We should not lose sight to the fact that the relief is an equitable one and the court would not exercise discretion favourably to a party who seeks relief while his conduct does not meet the approval of a court of equity.

27. The court will also be alive to the provisions of overriding objectives provided by Section 1A of Cap 21, national values and principles of governance set out in Article 10(2), (b)(equity, justice), and 159(2) a, b, d of the Constitution of Kenya.

28. I have stated above in light of the fact that the subject matter herein has been subjected to not less than 5 applications for injunctions in a bid to stop its disposal and at the moment it is subjected to an appeal pending in the Court of Appeal which also seeks to preserve the same pending hearing and disposal of the suit herein.

29. No reason has been advanced as to why the suit herein and the appeal pending aforesaid have not been heard and determined. It behooves on the plaintiff who owns the same 2 cases to expedite their disposal. But be that as it may, the duty of the court herein is to subject the issues herein set to the facts and law and make a finding in one way or the other.

30. The first principle of granting interim injunction is whether a prima facie case with a probability of success has been demonstrated? The core contentious issues by the plaintiff and facts spawning grievances are set out on the face of the Motion namely:

- a. The Defendants have advertised the suit property for sale by private bids.
- b. The Statutory Notice of sale was not issued prior to the advertisement.
- c. The receiver has not rendered accounts.

Even before I go far on the above issue, I have to allude to Lenaola Judge ruling of 20th May 2009. **Judge Lenaola** in a ruling delivered on 20th May 2009 on interim injunction herein on page 11 held that:

“I am clear in my mind that the Applicant is running away from obligations lawfully imposed and with full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the first Defendant to recover its monies lawfully advanced. That is a tradition that I cannot depart from ... our courts must uphold the sanctity of lawful commercial transactions.”

The judge made above finding after analyzing the entire case and found that there was no prima facie case.

The question is, can this court now find that there is a prima facie case on the basis of the alleged invitation of private bids, advertisement without Statutory Notice and failure to render account as alleged and thus stop sale pending hearing and determination of the suit herein?

31. The Applicant/Plaintiff is not indicting whether since the rejection of the said application of the injunctive relief the legal and factual contours of the case have changed to warrant the re-looking of the same and thus find that there is a prima facie case.

32. If for example the Plaintiff has repaid the amount due, it could urge the court and demonstrate the change of the substratum of the suit and invoke equitable remedy of injunction. As the matter stands now, the content of the plaint which originated the claim remains intact. The debt remains unpaid with the interest escalating as time goes by.

33. However, on the grounds cited in support of injunction, the court makes the following observations:

Section 98(1) (d) Lands Act, 2012 sanctions the chargee or receiver who is entitled to exercise power of sale, like in our instant case to have sale conducted by private contract. This would sanction the invitation of private bids. If any law is violated by invitation of the private bids, the Applicant should have pointed out during the hearing of application herein.

34. On the issue as to whether a Statutory Notice was issued prior to the advertisement, the letter by **Kaplan & Straton** dated 14th June 2013, **Enonda, Makololoo, Makori & Co. Advocates** dated 21st June 2013 and **Wambugu & Muriuki Advocates** dated 25th June 2013 demonstrate unequivocally the issuance of the Statutory Notice as submitted by the Defendants' advocate herein.

35. On the issue of the rendering account and valuation, the same is premature and can always be raised at the trial of the main suit. Same cannot be used to forestall the power of exercise of sale as confirmed in the ruling of **Lenaola J.** herein.

In the authority of **Magnate Ventures Ltd. and Others versus City Council of Nairobi**, court held:

“...There must be an end to applications of a similar nature;...wider principles of res-judicata apply to applications within a suit...”

Lenaola J. having found that there was no prima facie herein and sanctioned exercise power of sale, I will be violating the rule of res-judicata to hold otherwise. The court has also been displeased by the fact that the Applicant has not in its entire application alluded to all or any of the applications and rulings on injunctions made herein. The non-disclosure aforesaid amounts to concealment of material facts. Refer to **Ahmed Musa Ismael versus Ntamurua and 4 others (2014) eKLR.**

36. On the second condition of granting injunctions, which is in any case ought not to be considered in event the prima facie test failed, is whether the failure to grant the injunction sought would occasion the Plaintiff irreparable damages. Judge Lenaola found that same test/condition failed. But most importantly, the Court of Appeal in the application arising from Judge Lenaola's ruling held that:

“We are satisfied that the refusal to grant application (for injunction) would not render the success of the appeal nugatory.”

Both the Court of Appeal and the High Court rejected to grant an order to stop the exercise of power of sale by the Defendants herein.

37. I find that the Applicant who still stands indebted to the Defendants has not demonstrated how it would suffer irreparable damage. The 1st Defendant is instead the one suffering financially by being kept out of his funds for close to 6 years now. This goes without saying that the balance of convenience tilts in favour of the 1st Defendant who needs to recover the advanced amount.

38. The totality of the above finding leads this court to the conclusion that the application dated 5th August 2014 must fail. The Defendants' application dated 29th August 2014 succeeds in prayer No. 4.

39. As for prayer No. 5, after perusing the material before the court, the court finds that it is just the same be left at the Defendants liberty to pursue the same during trial by subjecting **J.P. Njoroge** to cross-examination on his affidavit sworn on the 5th August 2014.

40. The court thus makes the following orders:

1. Application dated 5th August 2014 is dismissed.
2. The exparte orders granted herein on 7th August 2014 be and are hereby discharged and set aside forthwith.
3. Costs of the both applications are awarded to the Defendants.

DATED, SIGNED and DELIVERED at MACHAKOS this 26TH day of SEPTEMBER, 2014.

CHARLES KARIUKI

JUDGE