



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 485 OF 2008

HENRY NDUNGU KINUTHIA.....PLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA.....1ST DEFENDANT/RESPONDENT

TERRACECRAFT (K) LTD.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The Notice of Motion before the court is dated and filed in court on 27th May 2014. It is brought under Section 3A of the Civil Procedure Act, Order 39 Rule 4 of the Civil Procedure Rules 2010, Civil Procedure (Amendment) No. 2 of 2012 and Section 5 of the Judicature Act and all other enabling provisions of the law.

2. The application seeks the following orders:-

1. ***This application be certified urgent and service of the same be dispensed with in the first instance.***
2. ***This Honourable Court do cite the 1st Respondent Managing Director namely Jeremy Awori, the Company Secretary Judy Nyaga and Head of Corporate Recoveries at Barclays Bank of Kenya Limited ken Kiura for contempt of this court's order of 22nd February 2011 and commit them to civil jail for a period of 6 months or less as the court shall please.***
3. ***A warrant of arrest and detention to civil jail do issue against Jeremy Awori Judy Nyaga and Ken Kiura.***
4. ***Costs of this application be awarded to the Applicants.***
5. The application is premised on the grounds stated therein and is supported by affidavit of **Henry Ndungu Kinuthia**, the Plaintiff herein, dated 27th May 2014 with annexures attached thereto.
6. The Respondents have opposed the application through a Notice of Preliminary Objection dated and filed in court on 30th May 2014 and Grounds of Opposition dated and filed in court on 30th May 2014.
7. Briefly, the Applicants case is that this court on 22nd February 2011 issued injunctive orders pending the finalization of the suit herein, and that the contemnors have flagrantly disobeyed those orders thereby bringing to disrepute the dignity of this court. Those orders were in the following terms.
 - i. ***An order of injunction be and is hereby issued restraining the Defendants/Respondents by themselves, their agents or advocates or auctioneers or any of them, that is to say from interfering with the Plaintiff's rights public auction or otherwise howsoever at any other time***

or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever interfering with the Plaintiff's ownership and title to LR No. 14970/105 Ruanda Evergreen Nairobi and LR No. 7785/851 Runda Mae Nairobi pending the hearing and determination of this suit.

- ii. *An order be and is hereby made under Section 52 of the Transfer of Properties Act, 182 of India (amended) that during the pendency of this suit, all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all those parcels of land known as to LR No. 14970/105 Runda Evergreen Nairobi and LR No. 7785/851 Runda Mae Nairobi with any land registry, government department and all other registering authorities be and is hereby prohibited.*
- iii. *Cost of the application be in the cause.*

6. The Applicant submitted that by Notice of Appeal dated 28th February 2011, the 1st Defendant/Respondent sought to appeal the said order but the same has not been pursued and is still pending. The said orders have not been reviewed or appealed against and remain in operation pending the hearing and determination of the suit. The matter is still pending hearing and determination in this court and is in fact was due for full hearing on 26th June 2014.

7. It was further submitted for the Applicant that in blatant disobedience and contempt of the said order, the Defendants/Respondents have instructed an auctioneer who has proceeded to issue an illegitimate and illegal 45 days Redemption Notice and a Notification of Sale of properties belong to and registered in the name of the Plaintiff namely:-

i. LR No. 14970/105 (I.R. No. 52697) Baobab Banks-Runda Estate Nairobi.

ii. LR No. 7785/851 (I.R. No. 83206) Pan African Insurance Avenue-Runda Estate Nairobi City.

8. The properties are purportedly valued at Kshs.50,000,000 and Kshs.60,000,000 respectively. The sale is allegedly scheduled for 17th June 2014 by public auction purportedly under Section 96 of the Land Act 2012. It was submitted that the non-compliance with the said orders exposes the Plaintiff's properties to risk and it is imperative that court orders be obeyed in order to safeguard the rule of law. The Defendants/Respondents acts are said to be in contempt of the orders of this Court. The actions or omission in this case amount to a deliberate defiance of the court order and should be punished by this court. The Applicant submitted that no explanations have been advanced to explain why the instructions to the auctioneer were given yet the orders were within the knowledge of all the Respondents, the Ruling having been delivered in their presence and that of their representatives in court. It was submitted that it is in the interest of justice and the integrity of the Judiciary that the 1st Respondent be cited for contempt and its Managing Director, Company Secretary and Head of Corporate Recoveries be committed to civil jail.

9. The Respondents, on their part have raised a Preliminary Objection arguing that this application contravenes the mandatory provisions of Section 5 of the Judicature Act, and that it is brought under the wrong provisions of the law. The Respondents further submitted that the application is fatally defective for having been filed without the leave of the court and in any event the subject injunction had lapsed as per the mandatory provisions of Order 40 Rule 6 of the Civil Procedure Rules. The 1st Respondent's actions were based on the aforesaid mandatory provisions of the law, and therefore the 1st Defendant cannot be held to be in contempt of the court.

10. I have carefully considered the application for contempt. I have also confirmed from the court file that indeed this court issued the aforesaid orders, and that the same have not been set aside, reviewed or indeed stayed pending appeal, or that they have been discharged after an appellate process. To that extent, the facts as narrated by the Applicant remain factual and correct. What remains is for me to determine, in light of the Preliminary Objection and Grounds of Opposition is if indeed this application is meritless or a non starter, as alleged by the 1st Respondent. The said Preliminary Objection and Grounds of Opposition shall then be the issues herein.

11. The 1st Respondent has submitted that the application contravenes the mandatory provisions of Section 5 of the Judicature Act. This submission is quite vague, as the learned counsel, M/s Karanja did not explain how the application contravene Section 5 of the Judicature Act. That Section merely provides the High Court and the Court of Appeal with the jurisdiction to punish for contempt of court in the same way the High Court of Justice in England does in order to protect the authority and dignity of subordinate courts. Subsection 2 deals with how to appeal any punishment for contempt. I therefore do not see the relevance of Section 5 of Adjudicator Act to this application in so far as it can aid the 1st Defendant.

12. The second point in the Preliminary Objection is that this application is brought under the wrong provisions of the law. A cursory look at the provisions of the law cited for the application reveals that it is filed under Section 5 of the Judicature Act, and other provisions of the law. However, a crucial Section being Order 40 Rule 3 is omitted. It is under this order that the court can have the jurisdiction to punish contempt of court arising from a breach of injunction or interlocutory orders without the Applicant having first to seek the leave of the court. The omission of this Order 40 Rule 3, which itself provides the jurisdiction in case of contempt found under Order 40, does not augur well for this application. The Applicant instead cited Order 39 Rule 4. This Order deals with Arrest and Attachment before Judgement and Rule 4 provides procedure where a Defendant fails to furnish security. He may be committed to prison. The Order 39 Rule 4 has no relevance herein.

13. This point of Preliminary Objection is important if read together with ground one of opposition. The 1st Defendant has opposed the application on the grounds that it is fatally defective for having been filed without leave of the court. The proper position is that contempt of court proceedings emanating under Order 40 of the Civil Procedure Rules do not need the leave of court to commence. They commence by virtue of order 40 Rule 3 that is, upon breach of the injunctive or the interlocutory order issued. The court on its own motion can also commence these proceedings. The relevant fact here for the Respondent is that since the jurisdiction of this court is granted under Order 40 Rule 3, it is important for the Applicant to cite that Rule to avoid an accusation that the Applicant did not seek the leave of the court. The Preliminary Objection on the grounds that this application is brought under the wrong provision of the law, is hereby sustained, and on that basis these proceedings cannot go any further.

14. However, under Order 40 Rule 3 of the Civil Procedure Rules this court can on its own motion punish contempt of court arising under that order. The 1st Defendant's counsel did rightfully submit that the subject injunction has lapsed as per the mandatory provisions of order 40 Rule 6 of the Civil Procedure Rules. Rule 6 states as follows:-

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months (12) from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

15. The injunction the subject matter of this application was issued on 22nd February 2011. Clearly 12 months have since passed. However, that does not mean that the injunction lapsed. The order says that *“unless for any sufficient reason the court orders otherwise.”*

16. Whether there was sufficient reason or not, I do not know. What is on record, however, is that the Judge in her wisdom issued the injunctive orders herein *“pending the hearing and determination of this suit”*. That is clear enough. That order is not against the law in Order 40 Rule 6. Rather it complements Order 40 Rule 6. If the Respondents were unhappy with that order, they ought to have applied to have it set aside or reviewed or they could even have appealed against it. To decide, unilaterally, that it was an illegal order was itself an act in contempt of the said court order. This court on its own motion has the jurisdiction to punish such contempt.

17. I am satisfied that the contemnors, aware of this courts orders issued on 22nd February 2011, injuncting any proceedings in the said suit properties, in flagrant disobedience thereto, brought the authority and the dignity of this court in disrepute, and for the reason I find them in contempt of this court.

18. The contempt proceedings are quasi-civil quasi-criminal in nature, and after giving the parties a chance to submit on mitigation, I make the following orders:-

- a. *The above said contemnors shall serve a jail term of 30 days from today. They shall be jailed at the Lang'ata Women Prison or at the Industrial Area Prison, depending on their genders.*
- b. *The order number (a) above will be dispensed with if the contemnors pay a fine of Kshs.15,000/= each within 7 days from today.*
- c. *This matter will be mentioned on 24th October 2011 should the contemnors choose order (b) above.*
- d. *Costs herein shall be for the Applicant.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mirie holding brief for King'ara for Plaintiff/Applicant

Orara and M/s Karnja Defendants/Respondents

Atelo – Court Clerk