



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 227 OF 2010

HUSSEIN SHARRIF OMARPLAINTIFF

-V E R S U S-

DIAMOND TRUST BANK KENYA LIMITEDDEFENDANT

JUDGMENT

1. **HUSSEIN SHARRIF OMAR** the Plaintiff herein seeks two orders. That the Court do grant an injunction to issue against the Defendant restraining Defendant from selling or alienating property **MSA/BLOCK XVIII/510 (the property)**. Plaintiff sought by Chamber Summons dated 5th July 2010 an interlocutory injunction in the same terms pending hearing and determination of the suit. It is not clear why that application has all these years not been heard interpartes. I received party's submissions on that application and Defendant's Preliminary Objection on 21st October 2014.

2. It is not denied that the Defendant advanced financial facilities to a Mohamed Shariff Omar (**Deceased**) and Omar Shariff Hashim to enable them run a transport business. It is also not denied that the said facilities were secured by a charge over the property which is registered in the name of Mohamed Shariff Omar (Deceased). It is also not denied by September 2010 the repayment of those financial facilities were in arrears.

3. The Plaintiff has filed this suit on behalf of the Deceased Estate, in his capacity as the personal representative of that Estate.

4. Defendant through the affidavit of Elizabeth Hinga the Head of Debt Recovery Unit deponed that the Deceased person representative was served with the Statutory Demand before public auction was set of the property. Annexed to that affidavit is a letter dated 9th September 2009 which is addressed to-

“The Personal Representative

The Estate of Mohamed Shariff Omar

P.O. Box 80494-80100

MOMBASA.”

It is that letter Defendant relied upon and proceeded to instruct an auctioneer to sell the property by public auction. It is deponed on behalf of Defendant that the property was put up for sale by public auction on 27th May 2010 but since the highest bid failed to meet the reserve price that sale was not concluded. That the second sale by public auction which was set for 8th July 2010 was stopped when this Court granted an interim ex parte injunction.

5. The Plaintiff has annexed a Limited Grant of Letters of Administration ad Colligenda bona, issued in respect to the Estate of the Deceased. The Court appointed by that Letter of Administration the Plaintiff and Husna Shariff Agil as co-administrators.

6. Plaintiff denied receiving the Statutory Notice of Sale of the property and it is on that ground of non service of that notice that he seeks an injunction in this suit.

7. The Defendant in addition to opposing the Chamber Summons by way of replying affidavit and written submissions also objected to the suit on two fronts.

8. Firstly that the suit should be struck out because it was filed by one Administrator yet that the Court by the Limited Grant appoint two people to represent the Estate of the Deceased. Defendant relied on provisions of Order 31 Rule 2 which provides-

“Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them.”

9. The Defendant’s second objection is that Section 67 of the Law of Succession Act Cap 160 does not afford capacity to a holder of Limited Grant to file a suit. Defendant’s objection was not clear because the Plaintiff and his co-administrator were granted power to file a suit to defend Deceased’s property, which is what the Plaintiff was doing by filing this case. That objection was also not well taken because of the Court of Appeal decision in the case MORJARIA –Vs- ABDALL (1984)KLR where that Court held as follows-

“Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the Law of Succession Act as provided by rule 36(2) of the Probate and Administration Rules, the grant was specifically limited to “the purpose only” of representing the appellant in this appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant’s son and his step-mother to represent the appellant in this appeal.”

The grant issued therefore to Plaintiff and his co-administrator is valid to enable them to prosecute this case.

10. There are only two issues for my determination. First is whether the Plaintiff’s suit is defeated by failure to join the co-administrator. Secondly is whether Defendant’s right of sale of the charged property has arisen.

11. On the first issue I uphold Defendant’s submission that Plaintiff’s CO- administrator should have been joined in this case. What however is the effect of failure to join that co-administrator? That failure does not necessarily lead to striking out the suit. Order 1 Rule 10(2) of the Civil Procedure Rules will come to aid the Plaintiff. It is in the following terms-

“(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. In my view apart from the above provision, the striking out a suit on the failure to join a party would militate against the overriding objective of the Civil Procedure Act and against the dictates of Article 159 of the Constitution.

Accordingly an order will therefore be made to join in this action the co-administrator.

13. On the second issue I find the Defendant failed to prove service of the Statutory Notice. The Statutory Notice dated 9th September 2009 was sent to Box Number 80494-80100. It was according to Defendant's annexures sent by Registered Post. Defendant did not attach the Certificate of Postage. When one considers that Plaintiff and his co-administrator were only issued with the Limited Grant in June 2010, it becomes clear that the Statutory Notice was wrongly addressed to personal representatives of Deceased before such representatives were appointed by the Court. Secondly the address seen in the Limited Grant shows that Defendant's Statutory Notice was not received by Plaintiff and his co-administrator. I therefore find that the Defendant's right to sell the charged property has not arisen. The Defendant will be required, if it intends to realize its security to issue fresh Statutory Notice. Until it does so an injunction will be issued. This would be in keeping with holding of the Court of Appeal in the case NATIONAL BANK OF KENYA LIMITED -Vs- SHIMMERS PLAZA LIMITED (2009)eKLR where the Court stated-

“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. 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 a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did exercise his discretion judicially in the circumstance of this case when he granted an order of injunction until the determination of the suit.”

14. In the end having considered parties submissions and evidence I grant the following orders-

(a) The Plaintiff shall amend his Plaintiff where the only amendment shall be the joining as co-Plaintiff HUSNA SHARIFF AGIL as 2nd Plaintiff, which amended Plaintiff shall be filed and served within 21 days from today's date.

(b) An injunction is hereby issued restraining the Defendant from selling or alienating property MSA/BLOCK XVIII/510 until such time the Defendant shall serve Statutory Notice of Sale as per law required.

(c) The costs of Chamber Summons dated 5th July 2010 shall be in the cause.

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE