REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 9 of 2000

HEZBON JUMBA SABAN

PHANISE AGEYO JUMBA ……..……PLAINTIFFS/APPLICANTS

VERSUS

NATIONAL BANK OF KENYA LTD……....DEFENDANT/RESPONDENT

RULING

The present application dated 19th May 2009 is brought under Sec. 3A, 34 and 63 of the Civil Procedure Act and order XXXIX rule 2, Order XLI rule 4 and Order L rule 1 of the Civil Procedure Rules.

The applicant seeks;

(i). Orders of temporary injunction to be issued restraining the defendant, its servants and/or agents from disposing off by way of sale or otherwise land parcel No. Bungoma Township/586, E. Bukusu/S. Nalondo/2308 and 2192 pending determination of this application.

(ii). The defendant be ordered and directed to comply with the judgment and decree issued by Justice A.G. Ringera on 28th June 2002 and ruling of Justice Mbogholi Msagha on 9th July 2008 by serving the plaintiffs with the requisite statutory notice as provide by the RLA.

(iii). There be a stay of the ruling of Justice A. Mbogholi Msahga pending the hearing and determination of an intended appeal to the court of appeal against the said order and ruling.

(iv). In addition and or alternative to (iii) above, a temporary injunction be and is hereby issued restraining the defendants, its servants and or agents from disposing by way of sale or otherwise land parcel No. Bungoma Township/586, E. Bukusu/S. nalondo/2308 & 2192 pending the hearing of an intended appeal against the ruling and order of 9th July 2008.

The application is supported by 13 grounds listed on the face of it and on the supporting affidavit sworn by Hezbon Jumba Saban sworn on 19th May 2009.

The application is opposed and the defendant/respondent has filed a replying affidavit sworn by Damaris Wanjiku Gitunga advocate on 17th May 2012.

Counsels for the parties then agreed to proceed by way of filing submissions.

The written submissions were filed and the same was then set down for ruling. I will endeavor to

determine the prayers in sequence but after a brief highlight of the background of this matter.

From my perusal of the court file, I noted the following;

(a). this suit was determined after taking of viva voce evidence and judgment delivered by Justice A.G Ringera on 28th June 2002. In my understanding of the reading of this judgment, is it dealt with the issue of the statutory notice as given by the defendant/applicant then and was not a bar to the subsequent notices if properly given as per the Law.

This comes out at page 2 of the judgment where the judge had this to say;

"The issue is whether the defendant could validly exercise a statutory power of sale as at 25th January 2000."

The judge found that the defendant could not exercise its powers of sale for failing to serve the notice as provided in law (p.12).

The judge held also that the court cannot issue a permanent injunction to restrain a charger from forever exercising a statutory power of sale unless the charges are invalid. The defendant was thus at liberty to realize the securities upon complying with the provisions of the Registered Land Act. (*repealed)* and the Auctioneers rules (page 13).

The defendant subsequently issued a fresh statutory notice and advertised the properties for sale. As a consequence of the advertisement, the plaintiffs filed an application dated 25.9.2003 seeking injunctions to restrain the defendant from selling the land, in exercise of its statutory power of sale.

Justice Mbogholi Msagha heard and determined the application vide a ruling he delivered on 9th July 2008. According to the ruling of Justice Mbogholi Msagha, he analyzed justice Ringera's judgment and stated that the orders/judgment did not hinder/bar the defendant from realizing the securities until accounts had been provided. His finding was that the defendant was at liberty to sell as long as they complied with mode of service of the statutory notice.

He dismissed the said application. The applicants were not satisfied and lodged a notice of appeal against part of the said ruling to the court of appeal.

While this appeal is pending, the defendant once again advertised the suit properties for sale. The applicants are not happy with this move hence the present application (dated 19th May 2009). It is noteworthy that the defendants issued a statutory notice for the 3rd time to sell the suit properties. They have filed this application.

The applicants in their supporting affidavit swear at paragraph 3 & 4 state that there was no privity of contract between them and the defendant. That the suit parcels are agricultural land requiring consent of the LCB, which consent had not been given, no statements of accounts were supplied, no statutory notices as required under RLA has been served.

Under paragraph 6 they aver the court directed the defendants to supply them with statements. At paragraph 12, the 1st applicant states that they are dissatisfied partly with Justice Mbogholi Msagha's ruling on matter touching on accounts. He then states what they are entitled under paragraph 13 of his affidavit which notices required to be served on them as those under Sec**. 65 (b), 75 and 77 (6) of RLA** (*repealed*) and notice under the Auctioneers Rules.

They deny having been served with any notice hence the intended sale is null and void. They thus seek this court to stop the sale until the defendant has complied with the ruling of 9th July 2008 on issue of service or stay pending outcome of their appeal.

In submission, counsel for the applicant urge that the applicant has made out a case for the interlocutory injunction sought. It is his submission that the applicant has met the threshold to warrant the issuance of the orders. He has cited several case law in support of this line of submissions. Finally the applicants state that the balance of convenience tilts in their favour as they have extensively developed the suit parcels and are in possession.

The respondent in their submissions disagrees with the applicant's contention. They submit that they have complied with the judgments directive to serve the notices which they have done vide annexed copies of documents marked as DQG 2 (a) & (b), DWG 3 (a), (b) & (c) & DWG 2 (a) & (b) in the affidavit of Damaris. They did take all the requisite steps as required by law and hence are entitled to sell the properties.

It's further their submissions that the applicants do not deserve the granting of equitable reliefs because of their inequitable conduct of not paying the debt for over 11 years. That the plaintiffs have not laid any sufficient reason of there being an irreparable loss. It is their view that the balance of convenience tilts in their favour given that they are a reputable institution capable of paying damages if any due to the applicants. The respondent also raised issue that this application is res judicata. In support of their submissions which I have literally summarized, they cited and annexed several case law.

Prayer (a) and (b) of the application was already determined as there is an existing temporary of injunction pending the determination of this application.

In respect of prayer (c) , the applicants want the respondent to comply with the judgment and decree of Justice A.G. Ringera issued on 28th June 2002 and ruling of Justice Mbogholi Msagha of 9th July 2008. The jest of the two orders was a requirement on the respondent to serve notice as per the law and to supply the plaintiff/applicants with statements of accounts.

The applicants contend this hasn't been done. I will not touch the issue on accounts for two reasons; first, the matter is pending on appeal and secondly, it was not raised before this court for my consideration. In any event, I cannot sit on appeal on a matter that is already determined. I will therefore handle only the issue of service of statutory notice and granting of stay/injunction reliefs. In paragraph 15 & 16 of the applicant's affidavit contention that they have not been served with any notice as required by the law. The respondent on their part pleads that the notice was properly served. In paragraph 9, 10 & 11 of the replying affidavit, they annex proof of service. Annexture DWG 2 (a) is a letter of demand dated 5th August 2008 while annexture 2 (b) is a list of registered parcels with Postal Corporation of Kenya dated 7th August 2008. The list has name of the applicant at No. 10. The applicants did not file any further documents by way of affidavit to admit or deny receipt of this letter or state the address given in the list as not belonging to them. In their affidavit, they have used the same address therefore this court can only conclude the address was proper and belongs to them.

Under Sec. 153 of RLA cap 300 (repealed) a notice under the Act was deemed as served if 153 (c) ***"if sent by registered post to him at his last known postal address or at his last known address in Kenya."*** In the instant case, the address used by the respondent is the same one the applicant has used in the application.

I therefore find that the service of statutory notice was properly effected. A notice under the Auctioneers rules was also challenged to not having been served. Again annexture DWG 3 (a), (b) (c) & (d) are letters and notification of sale respectively addressed to the applicants. The dates given as per the letters are 19th march 2009 and annex 3 (e) is copy of registration of the mail dated 19th March 2009. The applicants did not file any response to challenge the authenticity or otherwise of the said annextures. This leaves this court satisfied that the notices were duly served. In annexture 3 (e) item 12 in the list and referred to as parcel No. 05 is a registration addressed to the D.C. Bungoma. The respondent therefore met the requirements to permit them in realizing the securities as permitted by law.

The authorities/case law cited by the applicants as refers to failure to serve the statutory notices and having held otherwise does not add value to their submission/case.

In Kositany & another vs. ICDC & another, the case referred to service on a deceased director. In the case of Gichora Vs. Family Finance Building Society,the judge held that once the chargor alleges non-receipt of the statutory notice, it is the charger to prove such notice was sent. The present respondent has availed to court receipt to prove that the letter was actually sent. In holding No. (3) of the above case, date of service was lacking and therefore date when the 90 days was running was unknown. In the instant case, the date is clearly showing on the post marked registered list of parcels as 7th August 2008 hence the cited authority is not relevant. Similarly the case of Muigai Vs. HFCK Ltd. & another, notice was sent to a wrong address could not be deemed to have been served. The applicant did not contest the address given/provided by the respondents as to which they sent the letters. The upshot of this is, I dismiss this prayer of the application.

In prayer (d), the applicants seek a stay of execution of the ruling and order given by the honourable justice Mbogholi Msagha pending hearing and determination of the intended appeal. In paragraph 25 and 26, the applicants aver if the sale proceeds while their appeal on the order of accounts is pending, they will suffer substantial loss. In paragraph 28, the 1st applicant states that the respondent has completely been unable to supply the accounts as ordered by Justice Ringera and that the accounts placed before the court are inaccurate, irregular and erroneous in several aspects and do not amount to compliance with the decree issued by court. Paragraph 29 annexes the draft memorandum of appeal marked as HJS 5.

That is all this court is told about the appeal. In the submission, counsel for the applicant mention nothing about steps on prosecuting the appeal. In fact the substance of the submissions is that the respondent is yet to comply with judgment and ruling of Justice Ringera & Mbogholi Msagha respectively as regards service of statutory notice. It is therefore difficult for this court to perhaps get information as to what steps the applicant has made in preparation of the record or prosecution of the appeal although granting of stay is a discretionary order, there are certain conditions which must be met before the court can exercise its discretion. In the case of Stephen Wanjohi vs. Central Glass Industries Ltd. Nbi. HCC No. 6726 of 1991, Hayanga J (as he then was) stated that for the court to order stay of execution the applicant must demonstrate;

(i). substantial loss
(ii). Sufficient cause
(iii). No unreasonable delay
(iv). Provide security.

These are the requirements set under order 42 rule 6 (1) & (2). The respondents counsel has quoted several case law in regard to stay of execution. One of the cited cases is Nbi. Milimani HCCC No. 65 of 2007 – Ginialu estates Ltd. Vs. International Finance Corporation which is totally unrelated to the terms of granting of a stay.

In the same vein they quoted Nbi. Civ. App. No. 84 of 2008 – Kileleshwa Service Station Vs. Kenya Shell Ltd.

"a stay does not reverse, annul undo or suspend what already has been done or what is not specifically stayed …… but merely suspends the time required for the performance of the mandates stayed to preserve the status quo pending appeal".

In my view this case law is not applicable in the instant case as the suit parcels of land have not been sold hence the stay will not be annulling or undoing an act but merely staying the sale of the suit properties.

From the record, it is not disputed that the applicants owe the defendant/respondent a debt arising out of a charge. This is so because the applicants did not prefer an appeal on this finding by Justice Ringera. They are only hanging on a thin rope of being supplied with accounts and I understand the frustrations of the respondent in their attempts to recover the debt which attempts are expensive and have failed. However, I cannot deny the applicant his right to appeal the matter. This court can't delve on the merits or otherwise of the pending appeal. I will therefore exercise this discretion on their favour. I do grant a stay but conditional on their part depositing with the respondent half of the disputed loan amount a sum of Kshs.

12.5 million within a period of 60 days from the date hereof. The 12.5 million is treated as security in favour of the respondent. The reason for putting the condition is because irrespective of the applicants enjoying interim orders of stay/injunction pending determination of this application from 2009 to date, nothing has been shown to this court that they have listed the said appeal for hearing or taken any steps to have the same put for hearing. Secondly, security is one of the terms for granting stay where the court deems it necessary. The bank is a reputable institution which can refund the applicants their money in case the appeal is successful. The existence of a debt is also not disputed. The dispute is how much which the reason the appellants are demanding for account is.

Lastly in prayer (e), I have already dealt with paragraph (d) above therefore I will not deal with it. Prayer (d) serves the same purpose prayer (e) was seeking to do.

The respondent had raised the issue of res judicata and it is imperative that I deal with it before I conclude this matter.

Again the respondents counsel did avail to this court several authorities in support of this limb of the argument. They argue that all the issues raised were similar to the issues already substantially and conclusively adjudicated upon by this court on merits.

The court is thus functus officio. The applicants sought both orders of injunction and/or stay pending appeal. There is already filed and annexed to the present application a notice of appeal. It is therefore not proper to state the matters in issue are the same as the orders sought are strictly to stay the exercise of the statutory power of sale pending the determination of appeal. There had been no determination reached as regards stay pending appeal.

As already explained above, I will not deny the applicant such right. Therefore the doctrine of *res judicata* does not apply in the instant case.

I would therefore allow the application in respect of prayer (d) with costs to the respondent. In the default of the applicants complying with furnishing of the security the stay shall automatically lapse.

Orders accordingly.

RULING DATED, SIGNED, READ and **DELIVERED** in open court this 14th day of March 2013.

***A.* OMOLLO**

JUDGE.