



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

CIVIL CASE NO. 752 OF 2009

LAPORTE HOLDINGS LIMITED

INTEX SECRETARIAL BUREAU LIMITED.....PLAINTIFFS

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

R U L I N G

1. The Application before me is dated **21st August 2012** and filed on **22nd August 2012**. It is expressed to be brought under **Rule 8 High Court Practice Rules, Order 20 Rules 1, 2 & 3 and Order 8 Rule 3** of the **Civil Procedure Rules**. The Applicants are seeking for orders that a temporary injunction do issue restraining the Defendant or any person claiming through the Defendant from transferring Land Parcel No. LR 209/11296/44 or interfering with the Plaintiffs' occupation of the same pending the hearing and determination of this suit. The Applicants are also seeking for leave to amend their Plaint.
2. The Application is based on the grounds stated in the application thereof and is supported by the affidavit of **Symon Wachira Mwaniki**, who is described as a director of the Plaintiffs, and sworn on **21st August 2012**.
3. The Application is opposed vide the Replying Affidavit of **Purity Kinyanjui** sworn on **13th September 2012**.
4. Briefly, there was a previous application by the Plaintiffs dated 8th October 2009 seeking to stop the Defendant from selling a parcel of land known as L.R No. 209/11296/44 (**herein referred to as "the suit property"**). The application was heard and determined. By way of a ruling dated 11th December 2009, the Plaintiffs were granted an injunction restraining the Defendant from selling the suit property pending the hearing and determination of the suit. The Defendant being dissatisfied with the said ruling applied for a review which was heard and consequently the Court delivered a ruling on 8th April 2011 discharging the orders of injunction earlier issued on 11th December 2009.
5. It is averred on behalf of the Plaintiffs that the Ruling pertaining to the review was to be delivered on Notice which Notice the Plaintiffs never received. The director of the Plaintiffs avers that he came to learn that the suit property had been sold sometime in June 2011 by way of private treaty at a price of Kshs. 8,000,000/=. He further avers that he asked the Defendant to provide him with

- details concerning the alleged sale but they only provided him with a letter dated 8th February 2012 and Statements of accounts with respect to certain accounts. According to the Director he never received the letter dated 8th February 2012 and was never served with any Statutory Notice.
6. It is also averred by the Plaintiffs' Director that their Advocate perused the file of the suit property at the lands office and established that no transfer had been effected. It is further averred that if indeed the property was sold then it was done at an undervalue as the same is worth Kshs. 15,000,000/=. To this end a valuation report dated 15th August 2012 was attached to the Supporting Affidavit sworn on behalf of the Plaintiffs. It is obvious that the aforesaid valuation report cannot be used as a yardstick to determine whether the property was undervalued. The said report is dated 15th August 2012 while the sale by private treaty was done sometime in June 2011. It is common knowledge in the current market that properties rapidly appreciate in value.
 7. It is the Plaintiffs' case that under Section 52 of the Transfer of Property Act the Defendant could not transfer the property to a 3rd party during the pendency of the suit without express authority of the Court. According to the Plaintiffs, the Defendant has secretly and fraudulently purported to sell the suit property with a view to depriving them of the same to frustrate the pending suit. It is further the Plaintiff's case that in view of the changed circumstances it is necessary to amend the Plaintiff to allow the Court to arbitrate on the validity of the alleged sale as well as the issues raised initially.
 8. In opposing the application, it is deposed on behalf of the Defendant that the matter herein is *res judicata* and that the Plaintiff has failed to disclose a prima facie case. It is also deposed for the Defendant that Section 52 of the Indian Transfer of Property Act is inapplicable. It is further deposed that the current application is already spent and that the orders sought will be unenforceable, if at all they have to issue.
 9. It is the Defendant's case that the security in question, that is the suit property, was ripe for realisation after the injunctive orders issued by Honourable Justice Khaminwa were discharged by the ruling of Honourable Justice Njagi.
 10. The application was prosecuted by way of written submissions.
 11. I have considered the Application, the affidavits both in support and opposition as well as the written submissions. The main issue for determination is whether the Applicant is entitled to the orders sought.
 12. The Plaintiffs' current application is for an injunction restraining the Defendant or any person claiming through the Defendant from transferring the suit property or interfering with the Plaintiffs' occupation of the same pending the hearing and determination of this suit. The Plaintiffs are also seeking leave to amend their Plaintiff.
 13. The Plaintiff's case is mainly that no notice of delivery of the Ruling by Justice Njagi was issued as anticipated and that they were never served with any Statutory Notice. To dispense with the issue of Statutory Notice, once a valid Statutory Notice has been issued there is no requirement to issue a fresh one every other time the chargee wants to exercise its statutory power of sale. See: **SAMEH TEXTILES INDUSTRIES LIMITED VS DELPHIS BANK LIMITED, Milimani Civil Case No. 2186 of 2000 (unreported)**. In this case it is not in dispute that the statutory power of sale had arisen and the Defendant had issued a valid Statutory Notice to that effect.
 14. It is also the Plaintiff's case that the Defendant is barred by section 52 of the Transfer of Property Act from transferring the suit property herein. It is my considered view that the said section is not applicable since the Defendant had the right to realise the security by disposing the suit property herein when the Plaintiffs' injunctive orders were discharged on 8th April 2011 by this Court. The Plaintiff averred that their Advocate perused the file of the suit property at the lands office and

established that no transfer had been effected. The Plaintiff did not provide any form of evidence to substantiate this allegation.

15. It is submitted on behalf of the Defendant that the Plaintiffs application is *res judicata* as a prayer for injunction was heard and determined on review where the injunction was discharged. According to the Defendant, the applicants have never filed an appeal against the ruling for review rendering the present application *res judicata*.

16. The doctrine of *res-judicata* is one of general application and is given statutory approbation in **Section 7** of the *Civil Procedure Act* which provides;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

17. The plaintiffs' earlier application which was by way of chamber summons dated 8th October 2009 was seeking for an injunction to restrain the Defendant from selling by public auction or otherwise disposing off the suit property pending the hearing and determination of the suit. It is my considered view that this injunction and the one that the Plaintiffs are currently seeking are similar in nature. The point of departure is in the timing and wording.

18. The former injunction was sought for when the property had not yet been sold while the latter is being sought after the sale of the said property. The latter injunction is seeking to restrain the Defendant from transferring the suit property. A transfer is part of the process of the sale. Therefore, in essence, the injunction sought for in the Plaintiffs' former application is being sought for in the current one.

19. It is not in dispute that the issue of injunction has previously been dealt with before this Court, when Justice Njagi discharged the injunction orders granted in the ruling dated 11th December 2009. Therefore, this court cannot deal with an application that was previously handled and determined before this Court. If the Plaintiffs were dissatisfied with the Ruling or the manner in which it was delivered, the proper forum would have been a stay pending appeal or setting aside of the said ruling.

20. The Plaintiffs are also seeking for leave to amend their Plaint. The Plaintiffs' case for amendment is that circumstances have changed and it is necessary to amend the Plaint to allow the Court to arbitrate on the validity of the alleged sale as well as the issues raised initially. On the other hand it is the Defendant's case that the amendments sought by the Plaintiffs will not seek to add any value to the Plaintiffs' claim as the Defendant adhered to the due process of the law in realizing the security. I agree with the Defendant's submission that amending the Plaint now will serve no useful purpose.

21. In the upshot, the Applicant's Notice of Motion dated **21st August 2012** is hereby dismissed with costs to the Defendant.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

No Appearance for the Plaintiff

Otieno for the Defendant

Teresia – Court Clerk