



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

CIVIL CASE NO. 748 OF 2012

HAITHAR HAJI ABDI PLAINTIFF

VERSUS

DUBAI BANK (K) LTD. 1ST DEFENDANT

MODERN BELL & HAMMER ENTERPRISES 2ND DEFENDANT

R U L I N G

1. Before the Court are two applications for determination. The first application dated 3rd December, 2012 by the Plaintiff is brought under the aegis of **Order 40 Rules 1, 2 and 3, Order 51** of the *Civil Procedure Rules* and **Sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act*. The Plaintiff's substantive prayers in his application are for:
 - b. **THAT this Court be inclined to issue a restraining orders against the 1st and 2nd Defendant either by themselves, assigns, employees, servants, agents or any other person whatsoever acting for and on their behalf from selling, transferring, alienating, disposing off by public auction and/or in any other manner interfering with the Plaintiff's premises known as Land Reference No. MN/VI/116 (C.R No. 14318) Magongo Area Mombasa measuring 0.500 acres off Barack Obama Road Pending the hearing and determination of the application herein inter-parties.**
 - c. **THAT this Court be inclined to issue a restraining orders against the 1st and 2nd Defendant either by themselves, assigns, employees, servants, agents or any other person whatsoever acting for and on their behalf from selling, transferring, alienating, disposing off by public auction and/or in any other manner interfering with the Plaintiff's premises known as Land Reference No. MN/VI/116 (C.R No. 14318) Magongo Area Mombasa measuring 0.500 acres off Barack Obama Road pending the hearing and determination of the suit herewith.**
2. The Plaintiff's application is predicated upon the grounds set out in the application as thus: (a) that the 1st Plaintiff caused to be advertised for sale the aforementioned property, which in his contention, is invalid, improper, incompetent, unlawful and illegal, on the basis that no statutory notices were served, being in contravention of the law. (b) that the Plaintiff stands to suffer irreparable loss should the said orders not be granted as prayed for.
3. The Plaintiff's application is supported by his own Affidavit sworn on 3rd December, 2012. It reiterated the grounds of the application and the Plaintiff further deponed that the intended sale is unlawful. The Court on 4th December, 2013 granted the Plaintiff prayer b. above for temporary

- injunctive orders pending inter-parties hearing of the application.
4. The second application dated 10th December, 2012 was filed by the Defendant. The said application was brought under the provisions of **Order 40 Rules 7, 15 (1) (c) & (d)** and **Order 51** of the *Civil Procedure Rules* and **Sections 1A, 1B, 3A, 18 and 63(e)** of the *Civil Procedure Act*. It is the Defendants' prayer that the Orders as above issued by the Court on 4th December, 2012 by Mutava, J be discharged and/or set aside *ex-debito justitiae* and the application by the Plaintiff dated 3rd December, 2012 be dismissed and/or struck out. The application is predicated upon the grounds that the Plaintiff failed to disclose pertinent and material facts which would have prevented the Court from granting the *ex-parte* orders. The Defendants also maintained that the matter was *res judicata*, as the same had directly and substantially in issue, been dealt with in **Mombasa High Court Civil Suit No. 313 of 2009**. Further that the matter was *sub judice*, as the same cause of action was pending between the same parties in **High Court Comm. No. 17 of 2012 Mombasa High Court**, also formerly **High Court Civil Suit No. 458 of 2012 at Milimani High Court**. It is the Defendants' contention that the Plaintiff's application was made in bad faith, is untenable and an abuse of the process of the Court.
 5. The Defendants' application is supported by the Affidavit of **Nazir Madatali** sworn on 10th December, 2012. The deponent contended that the Plaintiff had failed to disclose the fact that he had previously filed suit involving the same cause of action, which matter was still pending in **High Court Comm. No. 17 of 2012** at the Mombasa High Court. Further, that the Plaintiff had made applications similar to the instant application, the same had been dismissed by **Ojwang, J** and **Tuiyot, J** in Mombasa on both occasions. It was the Defendants contention that the Plaintiff has deliberately sworn a false affidavit and as such the application should be dismissed and the temporary Orders issued and emanating therefrom be vacated. Further and in support of its application, the Defendants relied on the authorities of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996 (UR)**, **Ruaha Concrete Co. Ltd v Paramount Universal Bank Ltd & 2 Others High Court Civil Case No. 430 of 2002** and **National Bank of Kenya Ltd v Shimmers Plaza Ltd (2009) eKLR**.
 6. Both applications were aired before Court by way of submissions filed by the respective parties. In the submissions dated 22nd February, 2013 submitted on behalf of the Defendants by the firm of Kiplangat & Associates, the Defendants submitted that the Plaintiff had filed similar suits relating to the same subject matter in **H.C.C.C No. 313 of 2009** and **H.C.C.C No. 458 of 2012**, which matters are still pending for determination before Court. It was also the Defendants' submissions that the Plaintiff had filed a similar application seeking injunctive orders, which application was dismissed by **Ochieng, J** in his ruling delivered by **Odero, J** on 7th February, 2012. The Plaintiff filed a Notice of Appeal and, contemporaneously, an application for stay of execution pending the intended appeal on 23rd February, 2012, which application was dismissed by **Tuiyott, J** on 5th June, 2012. It is the Defendants' submission that had the Court been aware, on 4th December, 2012, that the Plaintiff had filed similar applications or that this information had been revealed to Court at that instant, then the injunctive restraining orders would not have been issued as against the Defendants.
 7. In the Plaintiff's submissions, it was reiterated that the Defendants flaunted the law and procedure with regard to debt recovery of the loan facilities extended to him. He averred that there was no notice of the intended sale and neither was he given any notices as per the Auctioneers Rules. This, he contended, was the basis of his application for the restraining orders, which the Court issued on 4th December, 2012. Unfortunately for the Plaintiff, the Defendants have come out claiming that the Plaintiff did not disclose pertinent and material information before the Court during the *ex-parte* hearing of the application dated 3rd December, 2012. The facts as adduced by the Defendants herein aforementioned, are not disputed by the Plaintiff, who relies on the invalidity or otherwise of the advertised sale and intended sale of his property. The impropriety, of which the Plaintiff accuses the Defendants, is that they failed to follow the laid down procedure for sale of land and should, therefore, not be allowed to ride roughshod as regards the statutory provisions.
 8. In determining what non-disclosure amounts to, **Emukule, J** in **Ruaha Concrete Co. Ltd & 2 Others v Paramount Universal Ltd & 2 Others** (supra) determined that;

‘Material non-disclosure means deliberately keeping away from the Court information which the Plaintiff knew and the Court ought to know.’

Emukule J. followed the Ruling of Akiwumi, JA (as he then was) in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others** (supra) in which the learned judge adopted the judgment of Warrington, J in **R v Kensington Income Tax Commissioners ex-parte Princess Edmond de Polignac** [1917] 1 K.B 486, the English Court’s determination on the issue of *ex-parte* orders held *inter alia*;

“It is perfectly settled that a person who makes an ex-parte application in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by him. This is perfectly plain and requires no authority to justify it.”

9. In the more recent case of **Walter Rau Neuser Oel Und Fett AG v Cross Pacific Trading Ltd** [2005] FCA 955 Allsop, J. in overturning his own orders issued *ex-parte* observed that;

“In an ex-parte hearing, it is the obligation of the party seeking orders, through its representatives, to take the place of the absent party to the extent of bringing forward all material facts which that party would have brought forward in defence of the application (See Thomas A. Edison Ltd v Bullock [1912] 15 CLR 678 as per Isaacs, J). That does not mean stating matters obliquely, including documents in voluminous exhibits, and merely not misstating the position. It means squarely putting the other side’s case, if there is one, by coherently expressing the known facts in such a way that the Court can understand in the urgent context in which the application is brought forward, what might be said against the making of the orders. It is not for the Court to search out, organize and bring together what can be said of the respondent’s behalf. That is the responsibility of the applicant, through its representatives.” (Emphasis mine).

The Plaintiff therefore, is encumbered to ensure that all pertinent and material facts, including the pending suits and dismissed applications, should have been brought to the attention of the Court at the time of the *ex-parte* hearing. Failure by the Plaintiff to disclose this vital information is tantamount to non-disclosure of facts which the Court would have considered in making its orders (See **Walter Rau Neuser Oel Und Fett AG v Cross Pacific Trading Ltd**).

10. The jurisdiction to set aside an order of the Court is set out under the provisions of **Order 40 Rule 7** of the *Civil Procedure Rules*. The provision reads:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

In the ruling of Ringera, J (as he then was) in **High Court Civil Suit No. 92 of 2002 Edward Karanja Ragui v Barclays Bank of Kenya** the learned judge held as follows on the issue of varying or setting aside Court orders:

“In my opinion, as an order for injunction is an equitable remedy issued to prevent the ends of justice from being defeated, it may be discharged or set aside if it is shown to be unjust or inequitable to maintain it in force. (See Civil Suit No. 1357 of 2001 Reef Building Systems Ltd v Nairobi City Council). (Emphasis mine).

Furthermore, in the Ruling of Kariuki, J in **George Muraya Kirira v A.M Enane** (2006) eKLR the learned judge held;

“...the Court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if it does not serve the ends of justice. It must be borne in mind that an injunction order is a discretionary remedy issued to protect legal and equitable rights and where it is issued at an interlocutory stage, it is meant to preserve the subject matter or to maintain the status quo.”

Lastly, Lady Justice Sitati in Jane Ngonyo v A. Abdalla & 3 Others (2010) eKLR reiterated the importance of disclosing information within the applicant’s knowledge. She held *inter alia*;

“She wanted to cover the court’s eyes to the fact that she was not supposed to carry on with any activity on the suit property until the appeal before the NET was heard and determined. The Plaintiff has admitted that the said appeal is yet to be heard and determined. If the Court at first instance had been given this information by the Plaintiff, I am clear in my mind that the interim order of injunction would not have been granted.” (Underlining mine).

11. On the *res judicata* point, section 7 of the *Civil Procedure Act* provides as follows:

“7. 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 any 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.”

Explanation. (4) under section 7 as above reads:

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

As per Deverell JA in the case of Ukay Estate Ltd & Anor. v Shah Hirji Manek Ltd Civil Appeal No. 243 of 2001 reported at (2006) eKLR stated:

“The key phrase in both the main section and the Explanation is ‘the matter directly and substantially in issue’. It has to be borne in mind that neither the Section nor the Explanation mentions of the ‘cause of action’.

I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit. In cases where the cause of action is the same the task will be easier than in cases where the cause of action is different but the matter directly and substantially in issue is the same.”

Ochieng J. dwelt upon the case of Kanorero River Farm Ltd & 3 Ors v National Bank of Kenya Ltd HCCC No. 699 of 2001 as per Ringera J. as follows:

“As I understand the law, the doctrine of *res judicata* applies to both suits and applications, whether they be final or interlocutory. Indeed section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined as prescribed by rules. Applications for a temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called *res judicata*.”

Ochieng J. then quoted from the well-known Court of Appeal decision in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Ors** (supra) where it was held as follows:

“That is say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* applying to applications within the suit. If that was not the intention, we can imagine that the courts would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as they ought to be an end to litigation. It is this precise problem that section 89 of the Civil Procedure Act caters for.”

In my opinion, the Plaintiff’s Application dated 3rd December 2012 as well as this whole suit quite clearly falls under the plea in bar of *res judicata*

12. The grounds adduced by the Defendants’ in their application dated 11th December, 2012 and their submissions dated 22nd February, 2013, to my mind satisfy the basis upon which an injunction order issued may be varied and/or set aside by the Court. In following the rulings of **Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd** and **R v Kensington Income Tax Commissioners** (supra), the Court is empowered and may exercise its unfettered jurisdiction in setting aside the ex-parte orders. The Orders as made by this Court on 4th December 2012, as reiterated in **Reef Building Systems Ltd v Nairobi City Council** (supra) by **Ringera, J.**, do not serve the interest of justice, and were in any event, obtained irregularly as the Plaintiff failed to disclose information within its knowledge that would have aided the Court in rendering an informed decision on his application. The upshot is that the Plaintiff’s Notice of Motion application dated 3rd December, 2012 lacks merit and stands dismissed. In the purview, the Defendants’ Notice of Motion application dated 11th December, 2012 is allowed and accordingly, the Orders issued on 4th December, 2012 are set aside. The Defendants will have the costs of both applications.

DATED and delivered at Nairobi this 28th day of June, 2013.

J. B. HAVELOCK

JUDGE