



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 2 OF 2011

CATHERINE NJOKI

KARIUKI

(Suing as the Legal Representative of the Estate of Jerome Peter Ndung'uKariuki)...PLAINTIFF

VS

CONSOLIDATED BANK OF KENYA LIMITED.....
1ST DEFENDANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS.....2ND
DEFENDANT

RULING

1. Through a Notice of Motion application dated 12th March 2012 and expressed to be brought under Order 40 Rules 1, 2 and 3; Order 51 Rule 1 and 3 and Order 50 Rule 5 of the Civil Procedure Rules the plaintiff/applicant sought orders of an interim injunction to restrain the defendants from selling by public auction or in any other manner the property known as Nairobi/Block 75/230 situate in Buru Buru Estate Nairobi. The applicant further sought orders for reinstatement of a temporary injunction issued by this court on 9th December 2011 as well as orders for enlargement of time within which to comply with an order of the court made on the same day requiring the plaintiff to deposit a sum of Kshs. 4,000,000/- within 60 days from the date of the ruling. The application is based on grounds set out on the face of the application and is further supported by the affidavit of David NjeruNyaga, counsel for the plaintiff sworn on 9th December 2011.

2. The application was first brought under certificate of urgency and heard *ex parte* on 14th March 2012

during which the court allowed the prayers for a temporary injunction to issue against sale of the applicant's property pending the hearing of the application *inter partes*.

3. The prayer that the court is presently required to consider is whether the applicant should be allowed 60 days within which to deposit the sum of Kshs. 4,000,000/- as ordered by the court on 9th December 2011.

4. The grounds upon which the present application is made are that the ruling of the court of 9th December 2011 was delivered without the presence of counsel for the plaintiff. The absence was caused by the fact that the ruling was initially scheduled to be delivered on the same date at 12.00 noon but that the same was delivered at 2. 30 p.m. instead. The applicant was therefore not aware of the condition placed by the court upon the plaintiff to deposit a sum of Kshs. 4,000,000/- within 60 days of the ruling. She only learnt of the same on 5th March 2012 when auctioneers served her with a notice of intention to sell the property. It is therefore in the interest of justice that the plaintiff should be allowed a further period of 60 days within which to comply with that condition.

5. The application is opposed through a replying affidavit sworn on 22nd March 2012 by Mr. Francis Kakai, counsel for the 1st defendant/respondent. In the affidavit, counsel avers that the ruling of 9th December 2011 was preceded by a ruling notice dated 6th December 2011 and served upon the parties on 7th December 2011 in which the date for delivery of the ruling was stated to be 9th December 2011 at 12.00 noon. On the said 9th December 2011, the ruling was cause listed accordingly. Ruling was then delivered on the same day at 2.55 p.m. Counsel for the plaintiff or his clerk was therefore not diligent enough to ascertain when the ruling was to be delivered hence their failure to attend court for the delivery of the ruling. In any event, there having been sufficient notice of the ruling, the applicant is undeserving of the equitable relief sought as equity aids the diligent and not the indolent.

6. I have carefully evaluated the application based on the affidavit evidence placed before me as well as the as well as submissions by counsel for the parties. I am therefore able to make my view in this matter.

7. The applicant seeks an extension of 60 days within which to deposit a sum of Kshs. 4,000,000/- as ordered by this court on 9th December 2011. The only basis for the accommodation sought is that her counsel did not attend court during the delivery of the ruling and the condition to deposit the said sum of money was not therefore known to the applicant until 5th March 2012 when auctioneers served her with notice of intention to sell her property owing to her failure to comply with the court order aforesaid. Although the Court of Appeal in extending time in the case of **Kiarie vs. Njoroge [1986] KLR** recognized that an applicant should not be penalized for the mistakes of his agent, that proposition cannot apply uniformly to every case and must be applied *mutatis mutandis* the facts of the particular case before the court. In the present case, my take is that it is not enough for counsel for the applicant to claim not to have attended court when the ruling was delivered. Having been aware of the ruling date, counsel should have made efforts to find out if the ruling had been delivered and what its import was. That would have been a simple bring up inquiry. It is therefore incredible that counsel for the applicant did not follow up the ruling of the court from the date it was delivered on 9th December 2011 until the auctioneer served a notice of sale on 5th March 2012.

8. Even then, if indeed the plaintiff required 60 days from the date of the notice of the auctioneer, then the court should only be asked to allow 60 days from the date of service of that notice. The auctioneers' notice was served upon the applicant on 2nd March 2012. 60 days should expire on 2nd May 2012. The applicant should therefore be making arrangements to pay as the extension period sought has expired.

9. However, as the said date is now passed, I will as a matter of discretion, be prepared to give the applicant a final indulgence of 30 days within which to comply with the orders of this court granted on 9th December 2011.

10. In the circumstances, I am inclined to allow the plaintiff/applicant's Notice of Motion dated 12th

March 2012 in terms of prayer 4 on condition that the plaintiff shall deposit in court a sum of Kshs. 4,000,000/- within 30 days from today. In default, the interim injunction orders shall lapse and the 1st defendant have liberty to sell the charged property.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MAY 2012.

J. M. MUTAVA

JUDGE