



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 339 of 2011

JAMES JUMA MUCHEMI & PARTNERS LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA1ST DEFENDANT

TUSKER MATTRESSES LIMITED2ND DEFENDANT

R U L I N G

1. On 8th September, 2011, the Hon. Mr. Justice Njagi allowed the Plaintiff's injunction application on condition that the Plaintiff deposited in court the amount claimed by the 1st Defendant. The amount ordered to be deposited was Kshs.367,201,556/10 which sum was based on a Deed of Settlement dated/executed by the parties on 11th March, 2011. The Plaintiff filed a Notice of Appeal and an application under Rule 5 (2) (b) of the Court of Appeal. While that application was pending, the Plaintiff came back to court and applied for injunction pending appeal whereby this court on 1st November, 2011 granted an injunction for 60 days with a view that the Court of Appeal would have dealt with the Plaintiff's aforesaid application under Rule 5(2) (b) of the Court of Appeal Rules.
2. On 10th January, 2012 the Plaintiff returned to court with another Notice of Motion seeking that the order directing the deposit of the sum of Kshs.367,201,556/10 be varied, that the order of injunction of 60 days be extended till the appeal is heard and determined in the Court of appeal. A further alternative prayer was that there be an order under Section 52 of the Indian Transfer of Property Act (1959) to restrain any dealings with the suit property. That application was made under order 40 Rule 7 and Order 50 Rule 6 of the Civil Procedure Rules, Section 1A and 1B and 3A of the of the Civil Procedure Act and Section 52 of the Indian Transfer Act (1882). The grounds upon which the motion was brought were set out in the body of the motion and the motion was further supported by the Affidavit of James Juma Muchemi sworn on 10th January, 2012.
3. The Plaintiff's case basically is that the Court of Appeal declined to certify the Plaintiff's application as urgent on 4th November, 2011, that the Plaintiff had faced hardship in complying with the orders of 8th September, 2011 as the only asset the Plaintiff has is the charged property, that whilst the amount agreed under the Deed of Settlement dated 7th March, 2011 was Kshs.398,000,000/- the value of the suit property was now Kshs.1.1. Billion, that the application had been brought timeously, that the Defendant will suffer no prejudice. The Plaintiff further contended that since the Defendant held not only the charge but a debenture over all the assets of the Plaintiff company, the Plaintiff could not deal with any of the company's assets without the consent of the 1st Defendant, that the suit property was adequate security.

4. Mr. King'ara, learned Counsel for the Plaintiff submitted that this court should apply the dicta in the cases of **Wilson –vs- Church (No.2) Ch. D (1879)** and grant the orders sought to avoid the pending appeal being rendered nugatory, that the title to the suit property is sufficient security to the amount ordered to be deposited by Hon. Njagi J on 8th September, 2011, that this court had jurisdiction to extend the time fixed by the order of 1st November, 2012 under Section 95 and order 50 Rule 6 of the Civil Procedure Act and Rules, that under Section 52 of the T.P.A, the property cannot be dealt with when there is active litigation in court. Counsel therefore urged that the application be allowed.

5. The 1st Defendant opposed the Application. It filed only submissions dated 20th July, 2012 which were ably adumbrated by Mr. Munyu, learned Counsel for the 1st Defendant. It was contended for the 1st Defendant that the application was res judicata, that the issues raised herein were the very same issues that had been raised in the application that was determined on 1st November, 2011, that to entertain the present application would to sit on appeal on the rulings of 8th September, 2011 and 1st November, 2011 respectively. Counsel relied on the cases of **Kombe –vs- Omar & 2 others (2008) 3 KLR 391** and **Greenfield Ltd –vs- Baber mawji CA No. 160 of 1997 (UR)**. that he order for extention of time having been given on 5th November, 2011, the Plaintiff should not be allowed to pursue it as it had had enough time since then to comply with the order of deposit, that Section 52 of the T.P.A was not applicable as the subject property was registered under the Registered Lands Act and not the Registration of Titles Act in respect of which the said section applies. As regards the equitable relief sought, Mr. Munyu emphasized that ever since the orders of 8th September, and 1st November, 2011 respectively had been made, there had been no effort to pay any part of the admitted sum. That the suit property cannot be adequate security if it cannot be realized and that since the debt was admitted, the application should be declined. Counsel urged that the application be dismissed.

6. I have considered the Affidavits on record, the written submissions, oral hi-lights of Counsel and the authorities relied on.

7. As set out above, this is an application under order 40 Rule 7 of the Civil Procedure Rules. The principle prayer sought is to vary the original order of Hon. Njagi J made on 8th September, 2011 granting the Plaintiff a conditional injunction. I am in agreement with the Plaintiff that there exists jurisdiction under Order 40 Rule 7 for the court in appropriate cases to interfere with an order of injunction made under Order 40. From the reading of that rule, that jurisdiction is discretionary and like in all other discretions, I believe the same must be exercised judiciously. Some of the things I believe the court will look at is if the circumstances have changed from the time the injunctive order sought to be varied was made, the position of the parties vis a vis compliance with the order and generally the justice of the case. There are no firm rules of law or practice that have been set down and I do not intend to pretend to set any here. The fact is, that discretion is perfectly clear.

8. The 1st Defendant has opposed the application on the grounds, inter alia, that the matter is res judicata and that the Plaintiff has had two orders extending time to pay but has not complied with the order to pay and/or deposit the claimed sum. That the original period of 30 days was granted on 8th September, 2011 by Hon. Njagi J for 30 days and on 1st November, 2011 for 60 days. I do not think that the matter is res judicata. I have looked at Section 7 of the Civil Procedure Act and the cases relied on by the Defendants of **Kombe –vs- Omar (Supra) and Greenfield Ltd –vs- Baber Mawji (Supra)** and I do not think they apply here. The application that was made by the Plaintiff and determined on 1st November, 2011 was one for injunction pending appeal and not for varying the order of injunction of 8th September, 2011 under Order 40 rule 7. Further, I believe that although the Plaintiff had been granted extention twice to deposit the claimed sum, that does not bar it from making the present application under Order 50 Rule 6 of the Civil Procedure Rules in so far as no other application had been made under that provision of the law.

9. The other ground upon which the application was made was under Section 52 of the Transfer of Property Act. I think this point was not well taken. I think Mr. Munyu was right that this Section is not applicable in that the suit property herein is registered under the Registered Land Act (Cap 300) now

repealed. Section 52 used to apply to properties registered under the Registration of Titles Act and other pieces of Land Registration. All these have now been repealed as from 12th May, 2012. In any event, since the issue was raised before Hon. Njagi J, the fact that he did not rule on it does not allow the Plaintiffs to raise it again. I have always known the law to be that a matter which has been raised before a court and no decision is made thereon is deemed to have been declined.

10. Mr. King'ara submitted quite rightly that a court of law should guard against an appeal that has been filed and/or preferred by an unsuccessful party from being rendered nugatory. I agree with the dictas of Brett and Cotton L.JJ in the English case of **Wilson –vs- Church (supra)** that a court should exercise its best discretion in a way to prevent an appeal from being rendered nugatory. That may be so but such a discretion can only be exercised on the material before court. While I am alive to the fact that that statement of law was made on an application for stay pending appeal, I believe the same will also be applicable when the court applies the overriding objective inherent in Sections 1A and 1B of the Civil Procedure Act. That is, doing justice to the parties before court.

11. What is then the material before this court for which its discretion to do justice is called upon to be exercised. The debt in this matter was agreed at Kshs.398,000,000/- by a Deed of settlement executed on 7th March, 2011, both Hon. Njagi J and the Court of Appeal found therefore that the debt is not seriously disputed, Hon. Njagi granted the Plaintiff 30 days on 8th September, 2011 to deposit the amount claimed. This court also extended the injunction for another period of 60 days on 1st November, 2011. This was also extended in January, 2012. All these extensions, I believe were geared towards assisting the Plaintiff either to comply or to take the best steps possible to save the suit property. I am alive to the fact that the suit property is now valued two or three times the amount of the debt. I say so having in mind the valuation report dated 3rd January, 2012 and produced by the Plaintiff. I am also of the firm believe that banks are not in the business of selling other people's properties, but they are also entitled to recover their outlays when the borrowers either default or show tendencies and/or are outrightly unwilling to repay whatever they have borrowed.

12. Whilst I am alive to all the foregoing, what is disturbing is that ever since the order of 8th September, 2011 was made not a penny has been received by the 1st Defendant. There is no material before me to show that there has been any effort at all to either comply with the order of Hon. Njagi J or to make any repayment at all. I believe and I should state here and now that if there was any scintilla of evidence of any effort of either to deposit the amount ordered, or repayment to the 1st Defendant of any sum or negotiation with any other financier to take over the facility from the 1st Defendant or any other like effort on the part of the Plaintiff to deal with the 1st Defendant and the debt in good faith, this court would not have hesitated to grant the Plaintiff a life line to save its valuable property. Indeed, it would have been within the discretion of the court to vary the terms of the injunction into less stringent than they are. Had there been any effort to pay or any payment at all, taking into consideration the value of the suit property, this court was willing to bend back and accommodate the Plaintiff. However, there was no evidence to show that there was the alleged attempt to settle the matter at Kshs.350million as submitted by Mr. King'ara.

13. All in all, everything points towards the Plaintiff coming to equity without doing equity. It does not give proposal how it intends to settle the undisputed debt, it only wants to enjoy the injunction whilst the 1st Defendant is out of pocket to the tune of the amount claimed. I think the justice of the matter demands that the application be refused.

14. Accordingly, the Plaintiffs Notice of Motion dated 10th January, 2012 is hereby dismissed with costs to the 1st Defendant.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE