



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 109 OF 2004**

**KATHERINE K. MBITI.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**DANIEL MBITI MATHIU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 2<sup>nd</sup> August, 2010 is brought under the provisions of Section 99 of the Civil Procedure Act. The applicant is seeking for an order that this court do amend the its Ruling dated 29<sup>th</sup> June, 2004 to reflect the subject property which was described as NTIRIMITI SETTLEMENT SCHEME/244 instead of NTIMIRITI SETTLEMENT SCHEME/224. This application is supported by the grounds stipulated by the body of the application and the matters deposed to in the supporting affidavit sworn by KATHERINE MBITI on 2<sup>nd</sup> August, 2010.

2. According to the applicant, she filed a suit seeking for an order of injunction to restrain the defendant from selling a property known as NTIRIMITI SETTLEMENT SCHEME/244. However in the Chamber summons, the property was inadvertently described as NTIRIMITI SETTLEMENT SCHEME/224. The court considered the application and in its Ruling dated 29<sup>th</sup> June, 2004 the Judge variously referred to the suit property as NTIRIMITI SETTLEMENT SCHEME/244 and 224 but in issuing the restraining order, the order referred to No.224. Counsel for the applicant submitted that this was an error because it is not borne out of the pleadings. The plaint is clear that the orders were sought in respect of No.244 and it is evidently clear the intention of the parties was in regard to Plot No.244 which was charged to the 1<sup>st</sup> defendant. There is no way the court could have issued an order for Plot No. 224

which is not pleaded in the plaint and not charged to the 1<sup>st</sup> defendant.

3. This application was opposed by counsel for the 1<sup>st</sup> defendant, he relied on the Replying Affidavit sworn by WAKONYO IGERIA on 23<sup>rd</sup> August, 2010. It was submitted that the court granted the orders according to the application that was before it. The Chamber Summons sought a restraining order in respect of Plot. No.224 and a party to a suit is bound by its own pleadings. In this case, the court had ordered fresh notices be issued which the 1<sup>st</sup> defendant issued in respect of Plot No.244 because the debt had not been serviced. It was further submitted that the injunction was issued on the grounds that a statutory notice which was issued eight years earlier, was no longer effective. Thus the applicant has been guilty of inordinate delay and granting this application would be un equitable because plaintiff has not serviced the loan.

4. This application is brought under the provisions of Section 99 of the Civil Procedure Act which provides as follows:-

***“Clerical or arithmetical mistakes in judgments, Decrees or orders, or errors arising therein from any Accidental slip or omission, may at any time be Corrected by the court either of its own motion or On the application of any of the parties”.***

The application that was before the court, that is the Chamber Summons dated 26<sup>th</sup> February, 2004 sought for the following orders:-

***“1. THAT the 1<sup>st</sup> defendant by itself, its agents, and/or servants be restrained from selling and/or in any way disposing off land parcel LR 3734/653 Mageta Road Nairobi and NTIRIMITI Settlement Scheme/224 pending the hearing of this application inter-parties.***

***2. THAT the 1<sup>st</sup> defendant by itself, its agent and/or servants be restrained from selling and/or in any way disposing off land parcel L.R 37/653 Mageta Road Nairobi and NTIRIMITI/Settlement Scheme/224 pending the hearing and determination of this matter”.***

3. The plaint upon which the above application is predicated seeks for an order in respect of Plot No.244. It is obvious the Judge who heard the application, relied on the matters pleaded in the chamber Summons that he was determining. The mistake was made by counsel for the applicant who drafted the Chamber Summons and not by the court. It is also submitted by counsel for the respondent and correctly so, that a party is bound by their own pleadings. The respondent also raised a valid issue that the order of injunction was predicated upon a statutory notice which has now been overtaken by events. Counsel for the respondent also raised the issue of delay of six years in bringing this application which was termed as inordinate.

4. Bearing in mind the reasoning in the ruling, that the injunction in this case was granted on the grounds that the statutory notice that was issued was defective, and the fact the plaint makes reference to Plot No.244 and the Chamber summons also sought for orders of injunction in respect of Plot No.244, it will not be in the interest of justice to grant this application. Although it is acknowledged the court can correct a mistake, the issue here is whether this mistake can be rectified by this court at this stage without causing an inconvenience to the respondent.

5. I have considered the orders of 29<sup>th</sup> June, 2004 and I am not satisfied that this was an error that can be rectified as provided for under Section 99 of the Civil Procedure Act. The applicant should have filed an application to amend the Chamber Summons because as indicated above a party is bound by their own pleadings and this was a mistake by counsel and not the court. This also having been an injunction to stop the 1<sup>st</sup> respondent from exercising his statutory power of sale the life of that injunction is an issue to

consider bearing in mind the principles set out in the case of NATIONAL BANK OF KENYA LTD VS SHIMMERS PLAZA LIMITED [2009] eKLR where Court of Appeal held that :-

***“The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. `***

***We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgage from exercising its statutory power of sale solely on the ground that the mortgage has not issued a valid notice, then in our view, the order of injunction should be limited iIn duration until such time as the mortgage shall Give a fresh statutory notice in compliance with the law.***

***We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit”.***

For the aforesaid reasons, this application cannot be granted and it is hereby dismissed with costs to the 1<sup>st</sup> respondent.

RULING read and signed at Nairobi this 10<sup>th</sup> day of January 2011.

**M. K. KOOME**

**JUDGE**