



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE NO. 752 OF 2009

LAPORTE HOLDINGS LTD.....1ST PLAINTIFF
INTEX SECRETARIAL BUREAU LTD.....2ND PLAINTIFF

VERSUS

EQUITY BANK LTD.....DEFENDANT

RULING

By this application, the Defendant/Applicant applies for an order that this court be pleased to review its order of 11th December, 2009, and discharge the injunction issued against the Applicant. It also applies for the costs of this application. The application is brought by Notice of Motion dated 5th February, 2010 and taken out under Order XXXIX Rule 3 (4); Order XLIV Rules 1 and 4 of the Civil Procedure Rules; Sections 80 and 3A of the Civil Procedure Act, and all other enabling provisions of the law.

The application is supported by the annexed affidavit of Purity Kinyanjui and is based on the grounds that the Applicant is aggrieved by the order of injunction issued against it. It is the Applicant's case that the order was issued by mistake as the court relied on an issue of fact which was not canvassed before it and therefore there is a mistake apparent on the face of the record. Consequently, the order ought not to have been made and it does not serve any other purpose except to delay the realization of the security by the Applicant. In the circumstances, the Applicant contends that it is in the interest of justice that the injunction to be discharged.

Opposing the application, the Respondents filed a replying affidavit sworn by Symon Wachira Mwaniki on 17th February, 2010. In the said affidavit, the deponent concedes that the Judge considered the issue of the Statutory Notice in delivering her ruling. He also attests that the Applicant is introducing new evidence by bringing before this court exhibits which were not placed before the court earlier. He further states that on the advice of his Advocate, he verily believes to be true that the Applicant has not disclosed grounds for review of the order as there is no error apparent on the face of the said order. Similarly, no other grounds for review under Order XLIV are disclosed. Finally, he deposes that if the Applicants are

dissatisfied with the said order, then they are at liberty to appeal against the same and the grounds on the face of the application are only grounds for appeal. The application therefore lacks merit and ought to be dismissed.

With the leave of the court, both parties filed written submissions on which they relied entirely. After considering the pleadings and the rival submissions by the counsel, I find that the only issue to be determined in this matter is whether there is an error apparent on the face of the record. A reading of the ruling delivered by the learned Judge shows that in the last three sentences of the ruling, she rendered herself as follows –

“Statutory Notice as provided under Transfer of Property Act (TPA) is not served. It is only upon service of Statutory Notice of Sale can empower a chargee to sell the property charged without authority of the court. As no such Notice is served or referred to, I therefore allow the application and grant injunctions as prayed...”

The main ground upon which the Respondents oppose the application is summed up in the Respondent’s submissions that –

“Issuance of a Statutory Notice is the very basis of a chargee’s Statutory right of sale. It was upon the chargee to show at the hearing of the application dated 8th October, 2009 that such a right had accrued. They did not. Instead they are now seeking to introduce new evidence which was not before the judge at the time of delivering the ruling.”

It is to be observed that the Respondent in this matter was the applicant in the previous one which precipitated the application for review. As the Applicants, it was incumbent upon them to raise the issue of the statutory Notice if at all there was no Notice, or the Notice issued was faulty. Neither in the grounds on which the application was based, nor in the supporting affidavit, was the issue of the Statutory Notice raised. This implies that the Respondents were satisfied that the necessary Statutory Notice had been issued to them and that it was satisfactory. For that reason, it was not necessary for the Applicants to demonstrate that the right to sell the property had accrued as it was not challenged by the Applicants themselves. The Applicants herein could only have reacted to that issue if it had been raised by the Respondents.

A reading of the ruling delivered by the learned Judge demonstrates clearly that she delved into the issue of a Statutory Notice which was not an issue in the matter. By finding that the Statutory Notice provided for under the Transfer of Property Act was not served, and allowing the application by granting an injunction on that basis, the court went beyond the issues placed before it. With respect, that is an error on the face of the record which, in my view, warrants a review.

As the only ground on which the learned Judge granted the application for an injunction was due to the absence of the Statutory Notice, which was not an issue in the matter, I review the ruling and dismiss the application for the injunction. The injunction granted in the Order made on 11th December, 2009 is accordingly discharged, with costs to the Applicants. Orders accordingly.

DATED and DELIVERED at NAIROBI this 8th day of April, 2011.

L NJAGI

JUDGE