REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 462 of 2009

WOOLWICH INVESTMENTS LTD ……..…….. PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI …..…......…. DEFENDANT/RESPONDENT

RULING

The defendant has moved to sell the property of the plaintiff known as LR. No.330/357 situate along Gitanga Road Nairobi for alleged arrears of rates payable to the defendant which the plaintiff has allegedly defaulted.

The plaintiff herein brought this suit against the defendant seeking several declarations as follows:

a. A declaration that the purported demand notice issued by the defendant to the plaintiff dated 1st November, 2007 is unlawful and therefore null and void.

b. A declaration that the rates payable over the suit property relate to its use as a single residential house.

c. A declaration that no event of default has occurred or arisen under the Rating Act consequently the defendant is not entitled to exercise its legal right under the Rating Act or at all.

There is a prayer, as a result, of an injunction to issue to retrain the defendant by itself, its servants, or agents or otherwise howsoever from exercising its statutory right under the Rating Act as the right to do so has not accrued to it.

The plaintiff further prays for general and punitive damages as against the defendant for breach of its fiduciary duty to the plaintiff and misrepresentation by the defendant.

Following the filing of the said suit, the plaintiff filed an application dated 26th August, 2009 by way of Chamber Summons under Section 3A of the Civil Procedure Act and Order XXXIX rules 1(a), 2, 3 and 9 of the Civil Procedure Rules seeking injunctory orders against the defendant as set out therein.

The grounds upon which the injunctory orders are sought are that:

1. The defendant intends, unless restrained, to sell by public auction or otherwise dispose of, alienate, transfer and/or interfere with the plaintiff's interest in the suit property.

2. The defendants statutory power of sale under the Rating Act over the suit property LR. No.330/357 has not arisen.

3. The purported intention to sell the suit property has no legal basis as the defendant has not complied with the mandatory provisions of the Rating Act.

4. The purported intention to sell the suit property is not proper as no valid notices in law have been issued and cannot therefore entitle the defendant to exercise its alleged statutory power of sale of the suit property.

5. No notice and/or notification of sale has been served upon the plaintiff pursuant to Section 15(d) and (d) of the Auctioneers

Rules (1997); and

6. The defendant has over the years applied erroneous rates on the plaintiff's property which rates are harsh, oppressive unconscionable and are in the circumstances highly prejudicial to the plaintiffs.

The application is further supported by an affidavit sworn by Pradeed K. Shah, a director of the plaintiff who reiterates the pleadings and the grounds set out in the application, among other issues.

The application is opposed and there is a replying affidavit sworn by Karisa Iha the Defendant's Acting Director of Legal Affairs Department. In the said affidavit Mr. Iha avers that the defendant has complied with all statutory provisions and the action taken by the defendant is in line with the proceedings in RMCC No.10 of 2008 between the City Council of Nairobi and Woolwich Investment Ltd. who is the plaintiff herein.

The said proceedings are based on the arrears of rates plus interest thereon payable on the suit property. It is also the case of the defendant that summons and notices were served in accordance with the provisions of the Rating Act (Cap.267) Laws of Kenya. In that regard, the orders sought by the plaintiff herein should be addressed under the said civil suit and therefore this case should be considered sub-judice. Additionally, the orders sought are defective as they are disguised as an appeal, are vexatious, misplaced and misconceived and should be regarded as an abuse of the court process. He finally asks for the dismissal of the same with costs. Warsame J on 31st August, 2009 gave restraining orders until this application is heard and determined.

Both learned counsel have filed written submissions which I have read. I am guided by the provisions of the Rating Act aforesaid and the pleadings herein. For the plaintiff to succeed, it must be shown that there is a *prima facie* case with a probability of success and that if the order is not granted, the plaintiff is likely to suffer irreparable loss where damages will not be adequate compensation. If the court is in doubt, then it shall decide the matter on a balance of convenience.

The defendant has submitted that there has not been documentary proof of ownership of the said property by the plaintiff. However, it is the defendant who has identified the plaintiff as being connected to the suit property and therefore it is not upon the plaintiff to prove ownership thereof.

Be that as it may, the merits of this matter have to be addressed. There are several outstanding issues to be resolved in respect of this case. Whether or not the rates are due and payable is a very serious issue. Whether or not the suit property should be addressed as residential or commercial premises is also a very serious issue. There is also the issue of whether or not the notices have been properly served under the relevant provisions.

I have looked at Section 17 (4) of the Rating Act (cap.267) which provides as follows:

"(4). Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be therein specified, and the summons may be served –

(a) by post; or

(b) by fixing it on or to some conspicuous part of the land; or

(c) by any mode of service authorized by any rules made under the Civil Procedure Act."

I have seen the returns of service filed by Morris Kuria Kinuthia the Court process server who has been serving summons and/or notices related to the present suit. In the return made in the affidavit of service sworn on 24th February, 2009 the process server at paragraph 5 said as follows:

"That the suit property consists of an inhabited old dilapidated building whereby I proceeded to serve the said documents upon the defendant by way of affixing the same at the gate of the suit property as there was nobody legally authorized to receive service on behalf of the suit property."

There is yet another affidavit sworn by the same person on 9th March, 2009 wherein at paragraph 5 the same words are used.

In yet another affidavit of service by the same person, sworn on 17th May, 2009, there is confirmation at paragraph 4 that the notice to show cause was served by way of affixing the same on a conspicuous place of the suit property which place has not been identified. There is another affidavit of service sworn on 15th June, 2009. The same process server served a notice of notification of sale by affixing the same on a conspicuous place of the suit property which place has also not been identified.

This mode of service adopted by this process server, to say the least, is very unsatisfactory. Having sworn an affidavit to the effect that the suit property was uninhabited and dilapidated there is no way the plaintiff was expected to have known of any process that was going on against it. The provisions of law cited herein above provide that service could have been done by any mode authorized by any rules made under the Civil Procedure Act. The best way in the circumstances of this case to have effected service was by way of advertisement in the local press. Why the defendant elected to use the mode so used is perplexing and would suggest that there is more than meets the eye in this case.

There is one more issue that I would want to comment on in respect of this case. Section 25 of the Rating Act aforesaid confers upon any magistrate empowered to hold a subordinate court of the 1st class to hear and determine suits for the recovery of rates under this Act. It is common knowledge that the pecuniary jurisdiction of magistrates is determined by law and from time to time His Lordship the Chief Justice may increase that jurisdiction. In the instant case there is no justification why a magistrate sitting at the City Court should determine a matter of this pecuniary magnitude without any enhancement by the Chief Justice aforesaid. In any case, the highest pecuniary jurisdiction that has so far been allowed under the said enhancement is that of the Chief Magistrate with a limit of Kshs.3 million and therefore while respecting the provisions of this particular section, it is now desirable to address the same in line of the several cases filed by the defendant demanding rates against the defaulters.

It would not have been appropriate for the plaintiff herein to seek reliefs under RMCC No.10 of 2008 as suggested by Mr. Iha because the cause of action in this court goes beyond the issues before the lower court. In any case, the two courts are not of concurrent jurisdiction.

Having said so, I am persuaded that the plaintiff has shown a prima facie case with a probability of success and that alone justifies the granting of the orders sought. Accordingly the application dated 26th August, 2009 must succeed. An injunction shall now issue in favour of the plaintiff/applicant against the defendant and the same shall hold until this suit is heard and determined.

The plaintiff shall also have the costs of this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 18th day of February, 2010.

A. MBOGHOLI MSAGHA
JUDGE