



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 106 of 2009

MOSES NDUNGU MUNGAI PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED 1ST DEFENDANT
GARAM INVESTMENT AUCTIONEERS 2ND DEFENDANT
SPORTLIGHT INTERCEPTS LTD 3RD DEFENDANT
FRANCIS NGIGI 4TH DEFENDANT

RULING

1. The plaintiff who is also an applicant filed the present suit on 20th February 2009. He simultaneously filed an application by way of chamber summons in which he is seeking for orders to restrain the 1st and the 2nd defendants from conducting a public auction of the property known as NAIROBI BLOCK 111/1607. The auction was scheduled for 24th February 2009. This matter was brought under a certificate of urgency; it was duly certified as urgent and fixed for hearing on 24th February 2009.
2. However on the day of the hearing, the plaintiff and his counsel did not attend court, thus the application was dismissed for want of prosecution. On 5th March 2009, the applicant filed another application seeking for similar orders. By a ruling rendered by **Khaminwa J** on 4th May 2009, the second application was struck out as it was deemed an abuse of the court process.
3. The applicant has now filed yet another chamber summons dated the 16th November 2009 seeking for orders that he be granted leave to amend the plaint. Pending the hearing and determination of the suit, he sought for an order of injunction restraining the defendants from dealing with the suit premises. He also sought for a prohibitory order restraining the defendants from registering a transfer over the suit premises.
4. This application is premised on the grounds that on 23rd October 2009, the proposed third defendant advertised the plaintiff's property for sale and the sale was scheduled for 6th November 2009. The applicant claims that he was not served with the statutory notice as provided for in the charge and also the notice by the auctioneers. Moreover, the applicant has filed an appeal against the orders of this court after the application for injunction was dismissed. The above grounds were expounded further by the matters deposed to in the supporting affidavit by the plaintiff sworn on 13th November 2009.
5. He has annexed the memorandum of appeal, the notice in the newspapers where the plaintiffs' property was advertised for

sale on 6th November 2009. Counsel for the applicant argued that the auction that was purportedly staged by the 1st defendant was full of irregularities as the plaintiff was not served with a statutory notice or the auctioneers notice as provided for under the Auctioneers Rules. He annexed an affidavit by **Mr. Stephen Kinyanjui** and **Gabriel Ndungu** who attended the auction with him but they claim there was no auction that was conducted.

6. However, the plaintiff learnt that his property was purportedly sold through an auction to the 4th defendant by the 3rd defendant, that is why the plaintiff is now seeking to amend the pleadings to include the 3rd and the 4th defendants. The plaintiff is also seeking for an order to set aside the sale of the suit premises. Counsel submitted that it is necessary to join the 3rd and the 4th defendants as parties to these proceedings. The court has wide discretion under **order VI A rule 3 and 5 of the Civil Procedure Rules** to allow an amendment in the interest of justice even if the amendment seeks to introduce a new cause of action, the court may at any time of the proceedings allow an amendment.

7. Counsel cited the case of **Central Kenya Limited vs Trust Bank EALR (2000) EA 365 (COK)** where the Court of Appeal that:

“The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; Beoco Ltd v Alfa Laval Co. Ltd (1994) 4 All ER 464 adopted”

8. Counsel for the applicant conceded that the proposed 4th defendant was not served with this application and due to the nature of the application, and bearing in mind there is an appeal pending before the Court of Appeal it is only fair that the status quo be maintained by the court granting an interim order pending the hearing of the appeal.

9. This application was opposed by the respondent; they relied on the replying affidavit sworn by **Peter Kige**, sworn on 26th November 2009, as well as notice of preliminary objection which was argued in response. Counsel submitted that the application before the court is incompetent for combining an application for leave to amend the suit and at the same time seeking for restraining orders against parties who are not even parties to the suit. The proposed amendment seeks to introduce the 3rd and the 4th defendants. The 4th defendant was not even served with the application.

10. There are serious allegations made against the proposed defendant in the proposed amended plaint and until the pleadings are amended and the proposed parties are joined in the suit they are mere strangers to the prayers sought the application was also faulted for lacking in merit. The affidavit by **Peter Kige** details how the property was sold after the necessary statutory notices were issued and the auctioneers issued the notice and advertised the property for sale. The property was sold at a public auction as per the agreement of sale.

11. The plaintiff should have made a single application to amend the pleadings, but he is now using a short cut by combining the prayers for injunction and amendments. Moreover the application does not meet the threshold for granting an injunctive relief. There is no prima facie case with a probability of success that has been demonstrated by the pleadings. According to the proposed amendments, the plaintiff is seeking for monetary compensation as a result of the sale of the suit premises.

12. The 1st defendant is a financial institution and if the plaintiff is able to prove a claim for he can be compensated for. The

plaintiff took a loan which as at July 2008, stood at over 400 million and if an injunction is issued it will continue to accrue interest. The plaintiff has never paid even a single penny from 1997 when the loan was granted and he cannot be entitled to an equitable relief. Finally, there are various suits that the applicant filed from the year 2000. **HCCC NO. 11 OF 2000**, which was transferred to Milimani Commercial Courts and became **HCCC NO.620 OF 2002, and HCCC NO. 220 OF 2004**. For all those reasons counsel urged the court to dismiss the plaintiff's application.

13. The thrust of the matters raised in this application is whether the applicant should be granted the orders to amend the pleadings, the order of injunction and prohibition to stop the transfer of the suit premises. There is no doubt the plaintiffs' application is slovenly drawn. It is common ground that an application to amend pleadings should have preceded the one for injunction. This is because orders cannot be issued against a party who is not already a party to the suit. The plaintiff admits that the suit property was sold in an auction by the 3rd proposed defendant to the 4th proposed defendant.
14. However, the 4th proposed defendant was not served with this application in which orders are sought to stop the transfer of the property which he bought. Those orders will fundamentally affect the proposed 4th defendant and they cannot be issued before he is served with the application. I agree with counsel for the applicant that the court has a wide margin of appreciation in matters of amendments of pleadings. This is to allow all the issues in controversy be brought before the court for determination as long as the amendments does not result in prejudice or injustice to the other party which cannot be compensated for in costs.
15. I find that the proposed amendment will greatly prejudice the 4th defendant because he was not even served with this application. On the merit of the application there is a long line of the decided cases by the High Court and the Court of Appeal especially the case of **Billy Nyangah vs Khan & Associates CA NO.104 OF 2001 (2003)** where an applicant applied to reinstate an application which was dismissed for want of prosecution. The trial Judge refused to allow the application to reinstate the dismissed application; the applicant went ahead and filed another application which the Court of Appeal held was an abuse of the court process.
16. Similarly in this matter I find the plaintiff's application for injunction was dismissed for want of prosecution on 24th February 2009, another application filed on 5th March 2009 and was struck out, I have no difficulty in arriving at the conclusion that this particular application is also an abuse of the court process. Further, even considering the merits of this case, the plaintiffs' case does not disclose a prima facie case with a probability of success. The plaintiff has perfected the art of filing multiple suits in order to frustrate the 1st defendant from realizing the statutory power of sale under the charge. The plaintiff has not brought any evidence before this court to show that he paid the loan that he borrowed from the 1st defendant.
17. On the part of the respondent they have shown the statutory notices were sent. The auctioneers issued the notices of sale and advertised the property for sale and actually sold the property to the 4th defendant. For those reasons, the plaintiff has not established a prima facie case with a probability of success to warrant the granting of the orders sought. The Court of Appeal has explained what constitutes a prima facie case in their Lordships decision in the case **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

18. In the result I find the application dated 16th November 2009 not only incompetent for combining the prayers for amendment and injunctions but also lacking in merit. It is dismissed with costs to the 1st defendant.

RULING READ AND SINGED ON 12TH MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE