



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

**Civil Case 413 of 2009**

**LEON INSURANCE BROKERS LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**K REP BANK LTD .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DALALI TRADERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Chamber Summons dated 20<sup>th</sup> July 2009 is brought under Order 39 rules 2 and 9, Order 39 Rule 1, 2, 3 of Civil Procedure Code and Section 3A of Cap 21 and seeks Orders:

- (1) Stay and temporary injunction restraining the Respondent from transferring or in any other way whatsoever dealing with all that property known as LR Kajiado/Kitengela 12004 measuring 45 acres pending the hearing and determination of this suit.
- (2) That Managing Director of the first Respondent Kimanathi and the proprietor of 2<sup>nd</sup> Defendant be detained in prison for a term not exceeding 6 months for disobedience of court order herein issued on 11<sup>th</sup> June 2009.
- (3) That costs be paid by the Respondents.

On 22<sup>nd</sup> day of July 2009 Advocate for Defendants prepared a Notice of Preliminary Objection which was filed on 23<sup>rd</sup> July 2009. The grounds of the Preliminary Objection is that the Plaintiff's current application and the suit are fatally defective as it falls short of the requirements of mandatory provisions of law and the same should be struck out or dismissed with costs

- (2) that the application should have been instituted with leave of the court.
- (3) that there have been no personal service of the order endorsed with Penal Notice
- (4) and the order is ambiguous and is not directed to any particular person
- (5) that the application is an abuse of court process.

Preliminary Objection only was argued first. The Defendant relied on a decision of this court in HCC No 287/2008. In that case Preliminary Objection raised were that

- (1) Suit and application cannot be against 3<sup>rd</sup> Defendant for want of locus standi,

- (2) That the prayers being sought in both plaint and application are incapable of being granted.
- (3) That in any event the suit is an abuse of the process given the admitted existence of HCC No. 1928 of 2000.
- (4) This suit and application does not disclose any cause of action against the third Defendant

In that Ruling the court stated

**“It is clear then that the equity of redemption is extinguished when a mortgagee has entered into a valid sale agreement with a third party. What if the right to exercise power of sale was wrongfully exercised?”**

The court proceeded to uphold Preliminary Objection and ordered the suit and application to stand dismissed the decision of Court of Appeal in Civil Appeal No 36 of 1989. This was an appeal against committal to jail for contempt of court by failure to obey order of court

**“That the status quo be maintained”**

It was not maintained and High Court Judge found contempt proved and committed the Appellant. The Court of Appeal found that no copy of the order was served on the first Appellant with an endorsement of the penal consequences in case of disobedience before the application for his committal for contempt was made.

The Court of Appeal stated:

**“We have no doubt that since the correct procedure was not followed in bringing the application for contempt there was no competent application before the learned Judge and consequently there is no basis upon which the committal of the first Appellant can be sustained.”**

Furthermore in HCC No 72 of 2007 Peter Kinyua Nganga vs. James Wachira Munene where the rules and procedure of contempt proceedings were explained by the court.

Other authorities regarding the application for contempt proceedings were cited and it came out that application by Notice of Motion can be made only with leave of court granted under Chamber Summons ex parte. And that the order breached must be served upon the contemnor personally, endorsed with **“Penal Notice”**.

The Applicant cited John Mbasio and 4 others vs. the City of Nairobi and others where court found the contempt of court was committed. Further authority is HCCC No. 274 of 1999 Mary Wanjiru Gitau vs. Margaret Wangechi Wachira. In that authority the court dismissed the procedure involved in detailed submissions of both Counsel and finally dismissed the Preliminary Objection.

In this case the Preliminary Objection raises the issue of failure to seek leave of the court and the issue of service of order of injunction endorsed with Penal Notice of the consequences.

The service was not personal. However the affidavit of service sworn by Ismael Mwaura sworn before a Commissioner of Oaths on 20<sup>th</sup> July 2009 shows that the proprietor of 2<sup>nd</sup> Defendant a Mr. Stephen Karanja Kangethe was served but he refused to sign or stamp the copies held by process served.

Also it is sworn how the first Defendant (Corporation) was served. The Managing Director Mr. Kimanthi Mutua directed the Process Service to the Company Secretary Mrs Mary Chege who refused to sign the order.

On 23<sup>rd</sup> July 2009 Mary Chege an employee of the first Defendant swore a replying affidavit and admitted that (paragraph 15 (b) ) court order was served on a different representation of the Bank other than the one sought to be cited and that the order was served after the sale had taken place and that the Managing Director was never personally served with the court order or the Penal Notice.

At paragraph 15 she admits that the order was served but was not endorsed with Penal Notice. The court does note that the parties agreed to argue the Preliminary Objection firstly. From what is stated in the affidavits of the Respondent the issue of service of order upon the Respondents is disputable. However it is clear the contempt proceedings were not commenced in accordance of the set down procedure.

Therefore the Preliminary Objection on this point raised on the application dated 20<sup>th</sup> July 2009 is upheld.

Regarding the issue of stay prayed under prayer 3 of the said application and order of temporary injunction restrain the Defendant/Respondent from transferring or in any other way the property No. Kajiado Kitengela/12004. The Respondent says the sale was already completed by the time the injunction order was served.

There is no dispute that the order already issued was shown to the auctioneers between 9.45 a.m and 10.25 a.m. The affidavit of process server Ismael Mwaure shows that at around 10.00 a.m he proceeded to the offices of auctioneer and delivered the court order to him. He acknowledged service but refused to sign copies. He thereafter proceeded to the offices of the first Defendant and met the Managing Director of Company Mr. Kimanthi Mutua who directed him to office of Company Secretary Mrs Mary Chege to whom he tendered the court order. She accepted but declined to sign the copies.

The auctioneer Stephen Karanja Kangethe swears that he sold the property by public auction on 11<sup>th</sup> June 2009 at 10.30 a.m. to the highest bidder Mr. Sammy Githika Mwangi for Shs. 9,000,000/=. Furthermore he swears that at around 11.00 a.m. he was served with court order which he received in protest the auction sale having been completed at 10.30 a.m that day.

The plaintiff prays for a permanent injunction do issue to restrain the Defendants from entering, advertising for sale, selling, disposal of, alienating and or in any other manner whatsoever intermeddling with the Plaintiffs ownership quiet possession and or the enjoyment of the suit property.

In the circumstances it appears to me that there is a serious question to be resolved by the court whether the purported sale was valid.

In answer of the Preliminary Objection the court upholds the objection numbered 2, 3, 4, and 5 and 6 regarding prayer 4 in Chamber Summons dated 20<sup>th</sup> July 2009 for failure to commence contempt proceedings. And the same is dismissed.

Regarding objection that the suit is fatally defective. It is clear that the plaintiff pleads a proper cause of action and it would be unjust to cut off the Plaintiff from being heard and render this suit nugatory.

Orders accordingly. The costs shall be in the cause.

Dated and delivered at Nairobi this 8th day of June 2010.

**J. N. KHAMINWA**  
**JUDGE**