



REPUBLIC OF KENYA

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

CIVIL CASE NO 420 OF 2005

J.D.KABEBERI & ANOTHER:.....PLAINTIFF

VERSUS

INDUSTRIAL DEVELOPMENT BANK & NOR.....DEFENDANT

RULING

There are two Applications both by the Plaintiffs/Applicants for consideration by the court. The first is dated 7th April 2008 and was filed on the 14th April 2008. It is brought under Order IXA Rule 10, Order XXXIX Rules 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of the law. It is brought praying that the orders of 6th December 2007 dismissing the suit and all other consequential orders be set aside. That an injunction do issue against the Defendants by themselves through their servants employees and or agents restraining them from dealing with the Plaintiff's premises on LR. no. New Lak Trading Centre/78 in any manner whatsoever pending the hearing of the application and upon granting those orders then the suit be set down for hearing forthwith. It finally prays that costs be in the cause.

This first application is based on the grounds that Mr. Gitobu Imanyara has always been the advocate seized of the matter and he was seized of two matters on 6.12.2007 when this one came for hearing. That an Advocate without instructions, one Miss Kabage purported to hold brief for Mr. Imanyara contradicting earlier brief by advocate Musyoki leading to the dismissal of the suit. That the mistake of counsel who had no instructions should not be visited on the Applicant and the Applicant would suffer irreparably if the suit is not reinstated. It is supported by the Affidavit of J.D. Kabeberi who is described as shareholder and the managing director of the 2nd Plaintiff. He is the 1st Plaintiff in the suit. He deposes that he did not instruct Miss Kabage Advocate to act for him and reiterates what is in the grounds above. It is to be noted that nothing is stated in support of the prayer for a grant of an injunction.

The Application dated 18th April 2008 and filed in court on the same date is stated to be brought under Order XXI Rule 22 of the Civil Procedure Rules, section 3A of the Civil Procedure Act Cap.21 of the Laws of Kenya and all other enabling provisions of the law. It prays for a stay of execution of the court's orders of the 6.12.2007 and for costs. It is based on the grounds that:-

- a) The defendants are in the process of selling the applicants property known as Title Number New Lari Trading Centre/78.
- b) The Applicant has filed an application dated 7th day of April 2008 seeking to set aside the orders of the Hon. Justice Azangalala issued on the 6th day of May 2007.
- c) That should the intended sale by the Defendants proceed then the Application dated 7th April 2008

shall be rendered nugatory and the applicant stands to suffer irreparably.

d) It is in the interest of justice that the applicant seeks the orders herein. It is similarly supported by the affidavit of the 1st plaintiff.

These applications are opposed and grounds of opposition dated 23rd April 2008 and 5th May 2008 filed. These are that there was no order issued in this suit on 6th May 2007 as stated in the application or at all. That the order which dismissed this suit is not capable of execution and a stay thereof cannot arise in law and that the intended sale of New Lari Trading Centre/78 is not pursuant to an order of this court. That the order given in this suit on the 6th day of December 2007 was not ex-parte and cannot be set aside as sought in the application and that there is no basis in law upon which this court can properly issue an injunction restraining the defendants from dealing with Title No. New Lari Trading Centre/78.

The two Applications were urged together before me.

Mrs. Ligunya Learned Counsel for the Plaintiffs/Applicants applied orally under S.100 of the Civil Procedure Act to amend prayer 2 of the Application dated 18th April 2008 to read 6th December 2007 and not 16th May 2007. In her oral submissions she reiterated what is in the affidavits in support of the Application adding that the suit should be reinstated for justice to be met. Little was said on the prayer for an injunction.

The applications were opposed as on the grounds above. Mr. Ougo Learned Counsel for the Respondents relied on Order IX9B(4) of the Civil Procedure Rules where only the Defendant attends at the hearing on the date the suit is set to be heard. He submitted that the suit did not proceed exparte as Ms. Kabage Advocate was present for the Plaintiff save that she did not call any evidence. The court having dismissed the suit as the defendant did not admit any claim, counsel further submitted, the application before court could not succeed. He relied on some four authorities.

It is the court's turn now. On the 6th December 2007 Mr. Musyoki advocate applied for an adjournment of the suit. It was refused and time for the suit to be heard was given as 11:30 a.m by the court. At the appointed time it was neither Mr. Imanyara advocate nor Mr. Musyoki advocate in court but Ms. Kabage advocate. She represented herself to the court as having been instructed to hold brief for Mr. Imanyara. She applied for an adjournment and when it was refused she stated that she had now been called and instructed by the plaintiff to seek an adjournment. This and what was said earlier to court by Mr. Musyoki advocate did not add up and only raised doubts in the court's mind about the reason earlier given for the adjournment. The court rejected it and noted that Ms. Kabage advocate was not counsel instructed for the plaintiff and as such had no business seeking an adjournment. The defendant's counsel then prayed to court that the plaintiffs' suit be dismissed. The court then proceeded thus;

“The suit having been called out for hearing twice and there being no appearance for the plaintiffs and there being no sufficient cause shown for the failure of the plaintiffs and their counsel to attend, I am inclined to dismiss the suit. The defendants do not admit any part of the claim and has (have) not raised a counterclaim or setoff. In the premises the plaintiffs' suit is dismissed with costs to the defendant(s). Orders accordingly.”

This court will now deal with the limp of the prayer that deals with stay of execution. Upon the court dismissing the suit there was at best an order for dismissal of that suit. That is not a positive order in favour of the Respondents which is capable of execution and so the court fails to see what it is sought to be stayed. This was the case in the case of **VENTURE CAPITAL & CREDIT LTD. V.S. CONSOLIDATED BANK OF KENYA LLTD. NAI. CA.34/2003.** Order IXA Rule 10 of the Civil Procedure Rules under which the Application of the 7th April, 2008 is brought states;-

“Where judgment has been entered under this Order

The court may set aside or vary such judgment and

And any consequential decree or order upon such

Terms as are just.”

This Order deals with non-attendance at the hearing. The rule above deals with setting aside judgment obtained ex parte. The question then arises whether the Defendant was heard ex parte as claimed by the plaintiffs. In the morning when the case was first called out and Mr. Musyoki advocate stood to hold Mr. Imanyara’s brief, that was not ex parte. At 11.30 p.m. when Ms. Kabage advocate stated that she held brief for Mr. Imanyara advocate, that was not ex parte. Up until this point therefore the plaintiffs were represented by counsel and what transpires in court was not ex parte and hence the case of **DIN MOHAMMED V.S. LALJI VISRAM & COMPANY (1937) AEACA1** comes into play. But what about at 11.30 at the point where Ms. Kabage advocate claimed to have suddenly been instructed by the plaintiffs to act for them? The moment the prayer for adjournment at this point was refused, and the said Ms. Kabage advocate was declared not the counsel for the plaintiffs, and as the plaintiffs were themselves not in court then at that stage, which is the crucial moment set for the hearing of the suit, then the case was heard ex parte. There was no judgment entered on the 06.12.2007 so that there can be an application to set it aside and the orders made on that date are incapable of execution. That then deals with the issue of stay of execution as prayed for in the application dated 18/04/08. Before I leave this point it is noted that the plaintiffs were themselves not in court on 06.12.2007. The Advocates for the Defendants M/S Orarao & Company had on the 29th January, 2007 invited M/S Gitobu Imanyara Advocates for the plaintiffs to meet at the court registry on 5th February, 2007 to take a hearing date. The court file shows that on the 5th February, 2007 the hearing date was taken exparte in the absence of counsel for the plaintiffs with a note that Hearing Notice to issue. And it must have issued because that is the reason someone was in court at 9. a.m. for the plaintiffs. I note that no reasons are given for the plaintiffs’ absence from court on 06.12.2007. What then would their counsel have done even if he was present when the case was called out for hearing? It was the plaintiff’s case and not the counsel’s. There are no grounds and/or reasons given as to why the suit should be revived and the same shall remain dismissed.

Nothing was urged on an injunction and there cannot be an injunction being granted on a suit that is dismissed. So much for that.

The upshot of the above is that the plaintiffs applications dated 07/04/2008 and 18/04/2008 are for dismissal and they are so dismissed with costs.

DATED AT ELDORET THIS 18TH DAY OF FEBRUARY, 2009

P.M.MWILU

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF MARCH 2009

J.W.LESIIT

JUDGE

IN THE PRESENCE OF:-

.....C/C

.....Advocates for the Plaintiff

.....Advocates for the Defendant