



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 203 OF 2009

Order XXXIX rule 4, order L, rule 1 and 17 of the Civil Procedure Rules

Section 3 and 3A of the Civil Procedure Act

Application to set aside order of the court

ABDIWELLI SHARIFF ABO.....PLAINTIFF

VERSUS

ABDIWELLI SHARIFF ABO1ST DEFENDANT

BILKIS KARA.....2ND DEFENDANT

MOHAMED FAROUK ARBI.....3RD DEFENDANT

MOHAMED SALAH ISMAIL.....4TH DEFENDANT

COMMISSIONER OF LANDS.....5TH DEFENDANT

RULING

This is a Notice of Motion application brought under order XXXIX rule 4, order L, rule 1 and 17 of the Civil Procedure Rules, section 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The application seeks the following prayers:

1. That the order for an injunction given by the court on 30th May, 2009 be discharged and or set aside.
2. That the costs of this application be borne by the Plaintiff.

The basis upon which the application is based is on the face of the application as follows:

- a) That the order issued by the court on 30th March, 2009 was obtained by deception and misrepresentation and non-disclosure of material facts.
- b) That court was misled that the 4th defendant had been served with an application bearing a hearing date

and therefore had notice of the hearing on 30th March 2009 which was not the case.

c) The copy of the chamber summons application dated 25th March 2009 served upon the 4th defendant on 27th March 2009 did not bear any hearing date and thus the 4th defendant did not have notice of the hearing on 30th March 2009.

d) The order extracted by the plaintiff's Advocates does not actually tally with the order made by the court on 30th March 2009.

e) The plaintiff has failed, refused and or neglected to serve the 4th defendants with the plaint and the verifying affidavit or other pleadings.

f) The plaintiff failed to disclose the following material facts to the court at the time of presenting the chamber summons application dated 25th March 2009: -

(i) That the 4th defendant was the registered owner of the suit property

(ii) That the Plaintiff did not have any registered or registrable interest in the suit property.

g) The plaintiff did not give any undertaking as to damages or furnish security for the payment of damages that the 4th defendant would suffer as a result of the grant of the order of injunction.

The application is supported by an affidavit sworn by Mr. Mohamed Salah Ismail, the 4th Defendant herein and annexures thereto, which I have considered.

The application was supported by 1st, 2nd and 3rd Defendants through their counsel, Ms. Ouma, in her submission during the hearing of this application.

The Plaintiff opposed the application. He has filed a replying affidavit sworn by the Plaintiff himself dated 14th May, 2009, and a further affidavit by the Court Process Server, Martin Muya dated 14th May, 2009.

Mr. Ombati for the Applicant has urged the court to set aside the interim injunction granted in this case on the grounds that the same was obtained through deception, misrepresentation and non disclosure of material facts. Mr. Ombati urged that the basis of that argument is the fact that the application served upon the 4th Defendant on 27th March, 2009 did not have a hearing date on it and that therefore the 4th Defendant was not informed that the matter was coming up for hearing before the court on the 30th March, 2009. The other deception, according to Mr. Ombati is the fact that the order extracted on 30th March, 2009 did not comply with the order granted by the court. Mr. Ombati urged that the court granted interim orders in terms of prayer 2, pending inter partes hearing but that the order extracted and served upon the 4th Defendant stated that an interim order had been granted pending the hearing of the application. Counsel has relied on the Halsbury's Laws of England, 4th edition, Vol. 24 paragraph 1111 and II12 for the proposition that an interlocutory injunction may be dissolved at any time before judgment or before the day named and further that an injunction will be dissolved if it was granted on suppression or misrepresentation of material facts, even if the injunction is about to expire.

The other ground argued by Mr. Ombati is that the Plaintiff did not serve the 4th Defendant with the plaint and the verifying affidavit at the time of service of the application as required under order XXXIX rule 3(2) of the Civil Procedure Rules. For that proposition counsel relied on the case of Nsubuga and Another vs. Mutawe.

The final ground argued is that the Plaintiff was guilty of material non-disclosure and that he failed to inform the court that the 4th Defendant was the registered owner of the suit property and that he had no

registrable interest in the title. Counsel relied on annexures 7 and 8 which are notices served upon the Plaintiff. With due respect to the counsel, annexures 7 and 8 are not notices to the Plaintiff as submitted. These are in fact a receipt for the deposit of the purchase price issued to the 4th Defendant by Messrs Kimani, Kairu & Co. and a letter by Kimani Kairu & Co. to Kepha Ombati and Co. relating to the suit property.

I have considered the issues that are raised by the Advocates. The Plaintiff's Advocate on the other hand opposed the application and relied on the affidavit by the Plaintiff and the process server. Counsel submitted as stated by the Process Server in his affidavit, that the 4th Defendant was served with the application and that the application served upon the 4th Defendant had a hearing date. Counsel contended further that the copy annexed to the Applicant's application was a copy which the 4th Defendant's Advocate requested the process server to provide to him, which had no date.

Regarding the order extracted from the court, counsel submitted that the extracted order was in terms with the order granted by the court. Counsel has also submitted that the Plaintiff in his plaint has pleaded that the same was fraudulently carried out and that the sale is the subject of investigations by police.

Regarding service of the summons and the plaint, Mr. Korongo for the Plaintiff submitted that the summons were not ready from the court and therefore he was unable to serve the same with the application.

I have considered the submissions by the Advocates for the 4th Defendant/Applicant and the Plaintiff/Respondent together with those by Ms. Ouma for the 1st, 2nd and 3rd Defendants. The latter did not file any affidavits at all.

The court has power to set aside an injunction which has been obtained through material non-disclosure or through deception or misrepresentation. Mr. Ombati has elaborated in his submissions what deception or misrepresentation or non-disclosure was involved in this case and Ms. Ouma for the other Defendants has supported those submissions.

Regarding the issue that the application served upon the 4th Defendant did not bear the date when the application served was to be heard, that is a matter that is very contentious. The process server who effected service upon the 4th Defendant has, in paragraph 4 of his affidavit deposed that the application he served upon the 4th Defendant had a hearing date of 30th March 2009, clearly indicated using a pen, and that it was the same pen which the 4th Defendant used to acknowledge receipt of the documents by signing at the back. The issue of whether or not the application served upon the 4th Defendant had a date is a contentious issue and the court cannot at this stage rule either way.

Regarding the order extracted from the court, with due respect to Mr. Ombati for the Applicants, I do not see any difference between the order extracted and the order granted by the court. The fact that the court stated that the interim order granted was granted pending interpartes hearing means the same thing as the order extracted and served upon the Defendant which provided that the interim order granted was so granted pending the hearing of the application. There is absolutely no misrepresentation in the two orders. They are the same and are not misleading. Indeed they speak for themselves.

Regarding the failure to serve the plaint and the summons as required under order XXXIX rule 3(2), Mr. Korongo for the Plaintiff has explained that the summons for direction were not ready at the time he served the application and that was the reason why the summons and the plaint were not served upon all the parties in the suit. I think that is a reasonable explanation for the failure to serve the two documents. In any event, when the Plaintiff's Advocate appeared *ex parte* before the court, he was ordered to serve the application dated 25th March, 2009 upon all the Defendants for purposes of a mention for the further directions of the court on 30th March, 2009. I do not see any misrepresentation or deception in the Plaintiff's failure to serve the two documents upon the Defendants.

Regarding the Applicant's arguments that the Plaintiff failed to disclose to the court that the 4th Defendant was the registered owner of the suit property. Paragraph 17 of the plaint speaks for itself. It states that the suit property was sold to the 4th Defendant without the knowledge of the Plaintiff and the particulars of fraud are given under that paragraph. The Plaintiff was in occupation of the house at the time of the contested sale. That is clearly stated in the plaint. It cannot be argued that the Plaintiff failed to notify the court that the 4th Defendant was registered as owner of the property as what the Plaintiff is alleging is that fraud was involved.

Having come to the conclusion I have of the matter, I rule that there is no basis upon which the interim orders granted by this court on the 30th March, 2009 should be set aside as there was no material non-disclosure, deception, misrepresentation or any other fraudulent act or omission on the part of the Plaintiff to warrant the setting aside of this order. I rule that the parties should argue the pending application interpartes on a date to be agreed upon by the parties. The 4th Defendant's application is therefore dismissed with costs.

Dated at Nairobi this 12th day of June, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Maluki holding brief Mr. Ombati for the Applicant/4th Defendant

N/A for Mr. Korongo for the Respondent/Plaintiff

Ms. Kabuki holding brief Ms. Ouma for the 1st, 2nd and 3rd Defendants/Respondents

LESIIT, J.

JUDGE

Court: By consent application dated 25/3/2009 be heard on 13/7/2009. Interim orders extended till then.

LESIIT, J.

JUDGE