



REPUBLIC OF KENYA

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

Civil Case 1945 of 2000

PETER MUGO KIBUCHIPLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The Notice of motion application is dated 21st October, 2008 and it seeks to review the orders of this court issued on 16th October 2008 restraining the Defendant/Applicant from exercising its statutory power of sale over the parcel of land known as INOI/KERUGOYA/437. It is expressed to be brought under order XLIV, order L, Order XXXIX rule 4, XLIX rule 5 of the Civil Procedure rules and section 3A of the Civil Procedure Act.

The grounds upon which the application is premised are on the face of the application which I have considered. The main ground is that the Plaintiff in this suit passed away and that he has not been substituted more than one year since his death. The Defendant's contention is that on the 16th October 2008 when the court issued an injunction on the application by the Plaintiff's Advocate, the suit had abated because the Plaintiff had passed away and there had not been any substitution.

The Defendant is aggrieved by the injunctive orders issued by the court on the grounds that the suit had abated at the time that the injunction was issued. In the court's ruling of 16th October, 2008 the court was very clear that the suit had abated and that the representatives of the Plaintiff were yet to file an application to revive the suit. The court gave the injunction with those points clearly in its mind for purposes of preserving the suit property and to prevent injustice to parties who would be affected if the injunction was not granted. In fact the court went further and noted that the Defendant Bank was seeking to sell the suit property one and half years after the death of the deceased and that, without any evidence of service of a notice regarding that sale. It was to prevent the Defendant from taking advantage of the death of the Plaintiff by selling the suit property without giving any proper notice. It is against the court's order of 16th October, 2008 that the current application is premised.

Mr. Aluoch for the Defendant has argued that that injunction should be set aside because the court was misled into granting the application since at the time it was granted the Plaintiff had long died and had not been replaced and, therefore, the suit had abated. The court was in fact not misled in granting the injunction but the court deliberately gave that injunction to give the Plaintiff's representatives an opportunity to revive the suit in order to pursue the interest of the estate of the deceased over the suit

property. The court in fact made an order at the time that the injunction was granted to the effect that the Applicant should prepare a proper application to revive the suit. The most important issue at this point is whether the representatives of the Plaintiff had taken any steps towards reviving this suit.

I have considered the submissions by Mr. Muhoro. It is very clear that no application has been filed, either to extend time or to substitute the Plaintiff. Mr. Muhoro has chosen to challenge the application by the Defendant but has failed to address the most important issue which is whether since the injunction was granted, the representatives of the Plaintiff had taken any step towards reviving the suit. Mr. Muhoro has also addressed the issue of a purported sale of the suit property in spite of the injunction order. Our only comment is that, if any sale of the suit property took place, either on the 10th October 2008 or thereafter, during the subsistence of the injunction, then that sale is illegal, irregular, and if it was conducted at all, after notice of the injunction order was given, then it was conducted in contempt of the court order. That however is an issue for another day. As for now, the representatives of the Plaintiff have been given enough time to revive this suit. What appears is that after obtaining the injunction order on 16th October 2008 they were now content and have gone to sleep over their rights. They have only themselves to blame for being indolent and not taking up the challenge that the court gave them to institute proceedings to revive this suit.

For now, I will allow the Defendant's Notice of motion application dated 21st October, 2008 and discharge the injunction forthwith.

I must hasten to order that the discharge of this injunction does not validate any action by the Defendant taken between now and the date that the injunction was granted, which is 16th October, 2008.

I must also add that for justice to be met to both parties, the Defendant should not sell the suit property before giving the requisite notices.

Dated at Nairobi this 24th day of July, 2009.

LESIIT, J.

JUDGE

Read and signed in presence of:

Oluoch holding brief Mr. Muhoro for the Defendant/Applicant

Ms. Edewa holding brief Mr. Mburu for Plaintiff

LESIIT, J.

JUDGE