



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

Civil Case 230 of 2008

POPAT INVESTMENTS LIMITED.....1ST PLAINTIFF

DAYALAL BHANJI & SONS LIMITED.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

This court dismissed an application for an injunction that was filed by the Applicant. While dismissing the application for injunction in its ruling of 3rd October, 2008, the court directed that the Respondent should not however exercise its power of sale over the suit property before giving the requisite notice as required under section 52 of the Indian Transfer of Property Act (ITPA) unless otherwise directed by the Court.

It is not disputed that the Respondent duly issued a Statutory Notice of Sale under Section 69A of the Transfer of Property Act (TPA) on 15th October, 2008 which was to expire on 15th January, 2009.

Before that notice expired, it is not disputed that the Applicant's attempt to go on appeal against this court's ruling of 3rd October 2008 bore no fruit. The Applicants have now come to this court seeking to have the court's order of 3rd October 2008 reviewed and an injunction granted and secondly, seeking to stop any dealing in the land as prescribed under section 52 of the Indian Transfer of Property Act (ITPA).

I have considered the grounds for this application as shown on the face of the application as set out herein above, together with the affidavit in support. I have also considered the grounds of opposition and the replying affidavit sworn by NEREAH OKANGA on behalf of the Bank. I have also considered the submissions by Mr. King'ara for the 1st Plaintiff and Mr. Munyu for the Defendant.

Various issues arise on this matter and I will consider them seriatim. The first issue concerns review of the order made on 3rd October, 2008. Order XLIV rule 1(1) of the Civil Procedure Rules is very clear on the requirements to be met in order for an application of review to succeed. That rule provides:

1(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

In paragraph 8 of Mr. Popat’s supporting affidavit it is deposed that the Defendant had, since the court’s ruling of 3rd October 2008, issued a statutory notice of sale over the suit property. In paragraphs 13 to 15, it is deposed that the four mortgage documents were defective. In paragraphs 17 it is deposed that the Defendant Bank lent further monies to the 2nd Plaintiff and that these were the sums now being claimed. On this point Mr. King’ara submitted that the Defendant did not act within the terms of the Contractual Agreement and so the sums so lent were not secured.

Mr. King’ara relies on the averments above as proof that there exists new and important matter or evidence which after due diligence was not within the Applicant’s knowledge. Counsel relied on the case of Orero vs. Seke Kisumu CA No. 53 of 1984 for the proposition that the Court should not interpret the provisions of section 80 of Civil Procedure Act and Order XLIV rule 1 narrowly but that it should allow a review of the judgment or order passed if the Applicant is aggrieved by it for any reason set out under rule 1 of Order XLIV.

Mr. King’ara argued that illegal and oppressive interest rates and charges levied against the mortgage accounts in a bid to demonstrate that the Applicant established a prima facie case. To demonstrate that charges levied were excessive, Counsel relied on the Interest Rates Advisory Centre (IRAC) Report in which the account was recalculated and which is annexure CP7 to this application. The report indicates that there was an overpayment of Kshs.11,774,364.50.

In support of the proposition that a party should not be allowed to benefit if it has breached Contractual Agreement, Mr. King’ara relied on the case of GIVAN OKALLO INGARI & ANOR VS. HFCK HCCC (Milimani) No. 79 of 2007, which I have considered in support of the argument that duty to prove that interest rates charged were proper, lies with the Bank. Counsel relied on the case of Prof. David M. Ndetei vs. Daima Bank Limited Milimani HCCC No. 2198 of 2000 which I have considered.

Mr. King’ara relied on the case of Zacharia Maangi vs. HFCK Limited, Milimani HCCC No. 598 of 2007 for the proposition that a report from IRAC may be prima facie proof that usurious interest rates were charged on monies lent. I have considered the case.

For the proposition that in certain circumstances dispute as to accounts can establish a prima facie case counsel relied on the case of John G. N. Ikubu v. HFCK Limited Milimani HCCC No. 432 of 2005. I have considered the cited case.

In support of the proposition that an injunction should be granted if the Bank varied interest rates without prior consent of the Minister for Finance, Mr. King’ara cited the case of Mom HCC No. 173 of 2006 Amrattal B Davda v. Oriental Commercial Bank. I have considered that case.

Mr. King’ara urged that the intended sale of the suit property was irregular and illegal as the Letter of Offer written to the Defendant’s Advocate by a prospective or interested purchaser was proof of the Defendant’s intention to dispose off the suit property long before the Statutory Notice was issued. Counsel relied on the case of Givan Okallo Ingari, supra, for the proposition that the Defendant should not benefit from its transgression. He also relied on Waithaka vs. ICDC [2001] KLR 774 for the proposition that if the Bank has been shown to have been highhanded and oppressive, an injunction should issue even if damages were an appropriate remedy. I have considered both cases.

Mr. King’ara also invoked the doctrine of Lis Pendens under section 52 of the ITPA which stipulates as follows:

“During the active prosecution in any court having authority in [Kenya] ...of a contentions suit or

proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred otherwise is dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

Counsel relied on the principle upon which the doctrine rests as enumerated in the English case of BELLANY vs. SABINA. This case was not provided but the following cases where the doctrine was applied were provided to wit; Ruaha Concrete Co. Limited v. Paramount Universal Bank, Milimani HCCC No. 430 of 2002; Sophia House Limited v. Barclays Bank, HCCC Milimani 435 of 2004; Surinder Mediratta v. KCB HCCC No. 21 of 2005 and finally Mawji vs. USIU [1976] KLR 185. In the latter case Madan, J. held:

“Only a foolhardy purchaser or a fraudulent purchaser would purchase a property which is actually the subject matter of litigation.... It would be a poor and insufficient, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to third party. The court must protect the status quo.”

Regarding validity of the mortgage Mr. King’ara submitted same was not witnessed by two persons as required and that therefore no Statutory Power of Sale could arise, the Mortgage being defective. For this proposition counsel relied on section 59 of the ITPA which provides

“Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagee and attested by at least two witnesses.”

Counsel also relied on Milimani HCCC No. 319 of 2003 Anthony Athanas Ngotho v. NIC Bank Limited where Azangalala, J. stated:

“...I am not satisfied that the validity of this mortgage is beyond question. Yet this mortgage forms the basis of the Respondent’s statutory power of sale. If the Respondent purported to exercise its statutory power of sale under the suspect mortgage, then the exercise of the purported power of sale may be wrong. This apparent defect in the mortgage shows a prima facie case with a probability of success for the application and damages would not be an adequate remedy for the applicant.”

In regard to the issue whether the matter was res judicata, Mr. King’ara relied on Mulla the Code of Civil Procedure 16th Edition which states:

“It is necessary to not only show that the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings. The cause of action for a proceeding has no relation whatsoever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other word to the media upon which the plaintiff or the applicant asked the court to arrive at a conclusion in his favour.”

Mr. King’ara contended that new and important matters had arisen since the ruling of 3rd October, 2008 hence this application for review to enable the court have the full picture of all the facts and evidence before it in order to reach an informed decision, counsel relied on the case of Kanorero River Farm Limited & Others vs. National Bank of Kenya [2002] 2 KLR 207 where court held:

“In my judgment provided the fresh application is grounded on new facts which could not have been relied on it the earlier application, it would not be precluded by the doctrine of res judicata.”

Counsel distinguished the case relied on by Mr. Munyu, Lucy Wairimo Mwaura vs. Aswanchand Hirji Shah and Others HCCC No. 113 of 1996 on grounds that in the cited case the application brought a second Applicant under similar provisions of law and seeking the same prayers as the former application

unlike in this case where the current application seeks review and the previous sought injunctive relief.

On issue whether there was an abuse of the court process counsel relied on Bullen and Leake and Jacob's Precedents of Pleadings where the authors define same as follows:

“The term ‘abuse of the process of the court’ is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith’ and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation.

The term ‘abuse of process’ is often used interchangeably with the terms “frivolous” or “vexatious” either separately or more usually in conjunction. An action is an abuse of the process of the court where it is “pretence less” or “absolutely groundless” and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted.”

On valuation of suit property counsel submitted that same had not been done. He relied on annexed valuation reports CP4 and CP5 where property was valued at open market value 50 million, forced sale value 40 million.

I have considered submissions, cases and texts cited by counsel.

In answer to the application Mr. Munyu for the Defendant proposed that the application was res judicata. Counsel argued that at the time the first application was considered and determined, the Defendant had not issued the Statutory Notice and that the court directed it to issue one before proceeding to dispose of the suit property. Counsel urged that the court made several findings including the fact the Applicant was indebted to the Defendant and had stopped paying the outstanding sum; that the veracity of the IRAC report could only be tested at the trial. Counsel relied on section 7 of the Civil Procedure Act and explanation 4 there under and urged that the issues presented to this court in the current application were directly and substantially in issue in the application heard and determined on 3rd October, 2008.

Mr. Munyu urged that all issues relating to whether the Plaintiff owes the Defendant any money, whether there is breach of the Banking Act and Central Bank Act and all issues relating to the validity or otherwise of the mortgages and all reliefs sought in the current application ought to have been raised by him in the earlier application and in support hereof relied on the case of Kombe vs. Omar & Others [2008] 3 KLR 391 for the proposition that the doctrine of res judicata applies to applications in the same suit counsel relied on the case of Lucy Wairimu Mwaura vs. Aswinchand Hirji Shah & Others HCCC No. 1130 of 1996. I have considered each of these cases.

Mr. Munyu contended that no new matter has arisen in the matter and that the issuance of the Statutory Notice was a direct consequence of the ruling of 3rd October, 2008. Counsel further contended that the initial application was not dismissed on grounds it was brought prematurely for lack of a statutory notice had been issued but on the basis of specific findings made therein.

The question which begs for an answer is whether the current application is res judicata on the basis urged by Mr. Munyu or at all. It is trite that a party is not precluded from instituting another application for an injunction as long as the fresh application was grounded on new facts which could not have been relied upon in the earlier application. See Kanorero River Farm Limited & Others vs. NBK Limited [2002] 2 KLR 207. That case was cited by Mr. King'ara. The Judge in that case found that indeed the application was not res judicata as it was grounded on new facts, further that the Applicants were not in default and therefore the Judge granted the injunction.

The basis upon which this current application is grounded has been set out herein above. These are basically that the Defendant had issued a Statutory Notice, the fact of the IRAC report demonstrating no monies are owed by the Plaintiff, the fact of the invalidity of mortgages, the flouting of the Banking Act; the lack of a valuation and of course on the principle of Lis pendens.

The issuance of the Statutory Notice is sufficient per se to be used as a new matter to support the application. The Applicant must show that it has new facts which could not have been relied upon in the earlier application. Considering the application, the only matter which is alleged to be a new fact is the IRAC report which demonstrates that no monies are owed by the Plaintiff, the issue of the invalidity of the mortgages, the flouting of the Banking Act; the lack of a valuation and the principle of Lis pendens. With due respect to the Applicant's Advocate, all these matters were within the knowledge of the Applicants at the time the initial application was argued. They are matters which if they exercised due diligence, they could have been in a position to discover. The validity of the mortgagees is a matter that the Applicants ought to have discovered if they had exercised due diligence since they had copies of the mortgages even at the time the initial application in this matter was argued in court. The issue of the amounts owing whether the Applicant was indebted to the Respondent is a matter that included discussion on interest charges and which were considered at length in the initial application. Had the Applicant exercised due diligence it ought to have included a report from IRAC in support of its claims regarding the charges. The IRAC report per se cannot be said to be a new matter which the Applicant could not have discovered earlier.

The issue of the compliance with banking is a matter that was also considered at length and the court did not only consider the issue of the compliance with the Banking Act alone but also considered the issue of compliance with the Central Bank Act and therefore this is also not a new matter to the Applicants.

The issue of valuations or lack of them was also discussed at length in the court ruling after the initial application was heard. It cannot be said that, that is a new matter which was not within the Applicant's knowledge when the initial application was heard.

The issue of the principle of Lis pendens was foremost the consideration by court and that is why it made an order requiring the Defendant to issue a statutory notice in the prescribed form in order not to sell the suit property through private treaty as it clearly was emerged in the evidence and the submissions of the Respondent's Advocate when the court considered the first application. In any event, the court found that the Applicant was in default of payments to the Respondent and that no payments had been made for a considerably long period of time. The Applicant cannot hide behind the principle of Lis Pendens as a clock or panacea to evade meeting its obligation under the contract between it and the Respondent.

The case of Kanorero River Farm Limited is distinguishable from the instant case because the Judge in that case found that there were new facts raised in the second application/suit in that the Applicants were not in default and that the Respondents statutory Power of Sale had not arisen. The reverse is the position in this case. The Applicant is in default as it has not met its obligation under the contract and the sums remain outstanding to date. No attempts have been made to pay the sums claimed by the Respondents and no offers have been made by the Applicants in its application before the court. The legal position is that even if the Applicant was disputing the sums claimed by the Respondent as due, the only time that the court would stop the Respondent from exercising its statutory power of sale is if the monies in dispute were deposited in court or paid to the Respondents. For this position, I rely on Halsbury's Laws of England Vol. 32 (4th edition) paragraph 725 where it is stated as follows regarding instances when a chargee or mortgagee can be stopped from exercising its statutory power of sale:

“725 When a mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage; the claim is excessive”

Having come to this conclusion, I do find that the application before me lacks in merit and the same is dismissed in its entirety with costs to the Respondent.

Dated at Nairobi this 10th day of July, 2009.

LESIIT, J.

JUDGE

Read and signed in presence of:

Mr. King'ara for the 1st Plaintiff

Mr. Munyu for the Defendant

Dated at Nairobi this 17th day of July 2009.

LESIIT, J.

JUDGE