



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 411 of 2007

KELLY PETROLEUM LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY BANK LTD1ST DEFENDANT

P.V.R. RAO.....2ND DEFENDANT

R U L I N G

On the 26th of October, 2007 this court delivered a ruling in which it dismissed an application by Kelly Petroleum Ltd (hereinafter referred to as the applicant), for inter alia an order of permanent injunction restraining East African Building Society Ltd, and P.V. Rao (hereinafter referred to as the 1st and 2nd respondents respectively), from disposing of the plaintiff's interest in LR.No.10823/54 - IR No.75763 and LR No. 209/8872 - IRNo.59627.

The applicant has now come back to this court by way of a notice of motion brought under sections 80 and 3A of the Civil Procedure Act, and Order XLIV Rule 1 & 2 of the Civil Procedure Rules, seeking to have the order made on 26th October, 2007 reviewed and an order made granting the plaintiff the injunction which was sought. The application is supported by an affidavit sworn by the applicant's director Susan N. Muritu as well as grounds stated on the body of the application.

In short, the applicant contends that it has discovered new and important evidence, which despite the exercise of due diligence, was not within the applicant's knowledge, and could not be produced by the applicant at the time when the order was made. The evidence referred to is a search at the Lands registry, and investigations, which have revealed that contrary to the representations earlier made to this court, property known as LR No.10823/54 has not been disposed off while the respondents are still looking for buyers in respect of the property known as LR No.209/8872.

The respondents object to the application on several grounds. These include: the fact that the substratum of the application is completely misguided as the ratio decidendi of the ruling of 26th October, 2007 was not whether or not the properties had been sold to 3rd parties; and the contention that there was no legal or factual basis for the order of review to be granted. Counsel for the respondent has submitted that the application before the court is fatally defective as the order sought to be reviewed was not annexed to the application. It was argued that the applicant not having made any search or request for information on the title before the ruling was made, there was no exercise of due diligence. It was further submitted that under Section 60 of the Indian Transfer of Property Act, a mortgagor's equity of redemption may be extinguished where there has been a sale of property. Counsel for the respondent distinguished sale of the property from the actual transfer of the property which comes after the sale. He maintained that once the

Equity of redemption was extinguished by the sale of the property the mortgagor's only remedy lies in damages. Counsel cited the following authorities in support of his submissions:

1. ***Captain Patrick Kanyagia & Another vs Damaris Wangechi & 2 Others NBI Civil Appeal No. 150 of 1993 (Unreported)***
2. ***John Miring'u Kariuki vs Equity Building Society & 3 Others NBI HCCC No.145 of 2005 {Milimani} (Unreported)***
3. ***Caesar Njagi Kunguru vs Kenya Commercial Bank NRB HCCC No.1543 of 2000 {Milimani} (Unreported)***
4. ***James Muhia Kiarie vs James Kangei Mweru & Others NBI HCCC No.582 of 2002 {Milimani} (Unreported)***

Counsel for the respondent further submitted that the ruling of the court made on the 26th of October, 2007 turned on several issues, and not just service of a valid notice which was only one of the issues. Relying on the case of **John Francis Muyodi vs Industrial & Commercial Development Corporation and Another Nairobi Civil Appeal No.67 of 2004** it was submitted that the applicant had failed to establish any of the circumstances upon which an order for review can be made.

Section 80 of the Civil Procedure Act allows a person who considers himself aggrieved by a decree or order, from which no appeal has been preferred, or from which no appeal is allowed, to apply to the court which made the order for review of that decree or order. Order XLIV Rule 1 of the Civil Procedure Rules which provides the procedure for making applications for review states as follows: -

(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 reason, 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.

Thus Order XLIV Rule 1 clearly sets out the circumstances under which an order for review can be made. Although there are several different circumstances any of which may give rise to review, the applicant herein has relied on one i.e. discovery of new and important matter or evidence. Therefore, the issues which arise are, firstly, whether there was discovery of new "matter or evidence". Secondly whether the "matter or evidence" was not available to the applicant at the time of making the order notwithstanding the exercise of due diligence.

The new evidence or matter alleged by the applicant is the discovery of information leading to the conclusion that the two properties LR No.10823/54 and LR No.209/8872 have not been disposed off. The basis for the information is the results of an application for a certified copy of title in respect of LR No.10823/54 - IR No.75763 made to the lands office on 30th of November, 2007 by the applicant's advocate which revealed that the certificate of title in respect of that property is still registered in the name of John Muritu Kigwe. There is also an investigation done by one Jeremiah Kongo Kihara a process server on 13th November, 2007 which revealed that the premises occupied by the applicant along Ndume Road were being viewed by prospective buyers. As a result, the applicant urges the court, to find that the respondent misled the court, on the status of the ownership of the two properties, which made the

court to refuse to grant the order of injunction sought by the applicant, believing that the two properties had been disposed off and therefore the applicant's remedy lied in damages.

I have considered whether the information relied on by the applicant is new matter or evidence. The issue of sale of the properties was raised by the respondent during the hearing of the chamber summons dated 13th August, 2007. The respondent maintained that it had exercised its statutory power of sale and that the two properties had been sold as per sale agreements which were duly exhibited. This contention was contained in an affidavit sworn by the 1st defendant's legal officer on 17th of September, 2007. The applicant therefore had the opportunity if it so wished to counteract that contention by conducting a search at the Lands registry or conducting any other investigations before the order dismissing its application for injunction was made.

It was alleged that the file in respect of the two properties were missing from the Lands office at the time of making the previous order. That allegation has however not been substantiated. Indeed annexure 'SWM2' to the affidavit of Susan W. Muritu sworn on the 5th December, 2007 shows that the search was conducted after the delivery of the ruling, the request having been made on the 30th, November, 2007. There is nothing from Lands office showing that any request was made before that date. As regards the investigations there is no explanation why this was not done earlier. Moreover, the affidavit of the process server Jeremiah Kongo Kihara shows that he relied entirely on hearsay information. Further the property which the process server visited has not been properly identified so that it is not clear which property it is.

Therefore, the applicant has failed to show that the information relied upon was information which with the exercise of due diligence, could not have been obtained at the time when the order was made. Further, the "new" evidence relied upon, does not negate the respondent's contention that the two properties have been sold. All it shows in respect of LR No.10823/54 is that no transfer of the property has been done. As was pointed out by the counsel for the respondent, Section 60 of the Transfer of Property Act as amended by Act No. 20 of 1985, provides that the mortgagor's equity of redemption can only be exercised "***before the mortgagee has either by public auction or private contract entered into a binding contract for sale of the mortgage property.***" What is relevant therefore is the contract of sale and not the actual transfer of the property.

Finally, I come to the conclusion that the applicant has failed to satisfy this court, that there has been discovery of new and important evidence which was not within the applicant's knowledge, or could not with the exercise of due diligence be produced at the time the order was made. Accordingly, I find no merit in the notice of motion dated 5th December, 2007 and dismiss the same with costs.

Those shall be the orders of this court.

DATED THIS 8TH DAY OF MAY, 2008

H.M. OKWENGU

JUDGE

In the presence of: -

Adera H/B for Machio for Applicant

Kipkorir for Respondent