



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 315 of 2007

NYALI CONSTRUCTION & ELECTRICAL SERVICE LIMITEDPLAINTIFFS

VERSUS

BARCLAYS BANK OF KENYA LTD.DEFENDANTS

RULING

Nyali Construction & Electrical Services Ltd, the plaintiff herein, took out a summons in which it prayed for an order of injunction to restrain Barclays Bank of Kenya Ltd, the defendant herein by itself, its officers, agents and or servants from advertising for sale, selling by public auction or by private treaty, alienating, charging or in any way dealing with the property and title number Mombasa/Block 1/28 pending the hearing and determination of this suit. The summons is supported by the supporting and the further affidavit of Beatrice Obiero. The defendant Bank resisted the summons by filing the replying and further affidavits of Pius Okello and Faith Majiwa respectively. The application was heard on 11th December 2007 and ex parte orders of injunction were given.

The learned advocates each filed written submissions and the matter came up for oral highlighting on 30/04/2008. One preliminary issue was raised by the defendant against the application. It is said that the plaintiff is guilty of material non-disclosure and perjury. It is alleged that the plaintiff filed the application which was accompanied by the affidavit of Beatrice Obiero sworn on 11th December 2002 in which the deponent averred that the title No. Block 1/28 was never charged. It said that by then the plaintiff knew that the property was charged with the defendant but opted to cheat to obtain the ex parte orders.

In the further affidavit of Beatrice Obiero, the plaintiff avers that it was not aware of the existence of the alleged charge. I have considered the preliminary issue and I think it is necessary to dispose of it before dealing with other grounds. From the averments and submissions can it be said that the plaintiff was guilty of material non-disclosure and perjury? To get the answer, it is important to examine the material which was placed before this court when the plaintiff appeared ex parte before this court. In ground (c) of the summons, the plaintiff states as follows:

“The plaintiff has not charged the suit property to the Defendant or any other party”.

At paragraph 7 of the affidavit of Beatrice Obiero it is deponed as follows:

“That I aver that no charge was created by the plaintiff over the suit property as the plaintiff had

not as at that time acquired the suit property. Accordingly, I verily believe that the suit property did not secure any liability whatsoever.”

Exhibited in the affidavit of Pius Okello, is a copy of a letter dated 29th January 2002 in which the plaintiff wrote to the defendant requesting the transfer of the suit premises to the plaintiff from the directors while retaining the charge in favour of the defendant. The same was confirmed by the letter of the same date authored by A.A. Amadi. These two letters were not disclosed to this court. The property was transferred to the plaintiff from Clement Otieno Okumu and Benjamin Olayo Kisimba subject to a charge of 9/8/1995 executed by Clement Okumu and Benjamin Kisimba. In the end I must uphold the preliminary objection. I find the plaintiff guilty of material non-disclosure. Having come to that conclusion, I do not need to consider the other grounds. In **R =vs= Kissington Income Tax Commissioners [1917] 1 KB** at page 509 Warrington L.J. said:

“It is perfectly well settled that a person who makes an ex parte application to the court, that is to say, in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained. That is perfectly plain and requires no authority to justify it.”

At page 513 Scrutton L.J. said:

“When an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and penalty by which the court, enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action it has taken on the faith of the imperfect statement.”

It is clear that the plaintiff intended to conceal the fact that it purchased the premises subject to the charge dated 9th August 1995. In a nutshell the plaintiff was not as innocent as it portrayed itself at the ex parte stage.

For the above reasons I dismiss the summons dated 11th December 2007. I also discharge the ex parte orders obtained on 11th December 2007. Costs of the application is given to the defendant.

Dated and delivered at Mombasa this 23rd day of June 2008.

J.K. SERGON

J U D G E

In open court in the presence of Miss Ileli h/b Kontos for the Defendants and Mr. Kadima h/b Mabeya for plaintiff.