



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1230 of 1999

DR PEREZ MALANDE OLINDO1ST PLAINTIFF

CATHERINE KALIMA OLINDO2ND PLAINTIFF

VERSUS

DIAMOND TRUST BANK LTD DEFENDANT

RULING

The Defendant by Notice of Motion dated 3.11.2006 brought under Section 3 A of the Civil Procedure Act seeks the following order.

“That pending the realization of the Defendant’s securities comprised in all those properties being L.R. Nos 9177/11 and 9177/12 KTALE TRANS NZOIA the proceedings herein be stayed.”

The application is based on the ground that: -

(a) this court has previously held that the defendant’s statutory power of sale in respect of the following properties is due and exercisable:

i. L.R. NO. 9177/11 KITALE TRANS ZOIA: and

ii. L R No. 9177/12 KITALE TRANS NZOIA.

(b) That the defendant has managed to realize the security L.R. NO. 7792/3 Kisembe Estate Langata.

(c) The Defendant wishes to realize the other securities to enable it to substantially reduce the amounts claimed by it in the counter-claim.

(d) The Plaintiff’s conduct herein and elsewhere shows that they will attempt to frustrate such realization.

Defence counsel did not rely on an affidavit in support of the application but relied on the court’s record. He submitted that the court has in about six instances found that the Defendant’s statutory power of sale in respect of the securities it holds being the plaintiff’s afore stated properties, has arisen and is exercisable. He referred to the chamber summons dated 3.9.99 which was ruled upon by the Hon Mr. Justice Onyango Otieno (as he then was) on 10.12.99. The court in that ruling found that there was no

challenge that the plaintiff could raise against the Defendant's intention to realize its securities. The judge in that ruling found that power of sale had arisen in 1994. Defence counsel further stated that prior to this present suit the 1st Plaintiff had filed HCCC NO. 2903 OF 1996, at Central Registry High Court. The injunction application in that suit was dismissed on 20.2.97. That the Plaintiffs in this present action filed a notice of motion on 14.12.2000 an injunction. This application was also dismissed. The Plaintiff once again filed an injunction on 19.8.2004 and on the Plaintiff being ordered to attend court to explain the allegation of abuse of the court's process the Plaintiffs instead withdrew that injunction application. That the plaintiff yet again filed another injunction application on 11.11.2004. The court declined to grant *ex parte* injunction and because of that refusal of the orders the defendant sold in a public auction its security L.R. NO. 7792/3 Kisembe Estate, Langata. The transfer of that property took place on 4.1.2006. The Plaintiffs filed another suit namely HCCC No. 246 of 2006 seeking to stop the transfer to the purchasers at the auction which the court declined. Defence concluded that the plaintiffs each time a sale of the securities is scheduled have moved the courts for orders of injunction. That orders granted to the plaintiffs in respect of those injunction application has each time caused the cancellation of the sale of the securities at great costs in respect of auctioneer's fees and advertisement. Defence counsel therefore submitted that unless stay is granted of this case that there is real danger that the plaintiffs will move the courts for injunction. Further that the Defendant has counter claimed the amount it is owed by the Plaintiff and it will be necessary to amend the counterclaim once the Defendant credits the amount realized at the auction. Defence counsel stated that the Defendant will seek stay for six months and if need be that period can be extended. He denied that in seeking the stay of proceedings the Defendant was frustrating the Plaintiff and stated that they were unaware that the Plaintiffs had obtained an *ex parte* hearing date of the suit. Defence relied on the book '*The Reform of Civil Procedural Law and other Essays in Civil Procedures*' on the passage relating to the court use of its inherent power to stop proceedings which were frivolous, vexatious or which are abuse of the court process. The said passage further stated that abuse of court process '**connotes that the process of the court must be used properly, honestly and good faith..... it means that the court will not allow its functions as a court of law to be misused..... where an abuse of process has taken place, the intervention of the court by stay even dismissal of proceedings may often be required by the very essence of justice to be done.**'

The Plaintiff opposed the application. The Plaintiff stated that the application is incurably defective for failing to rely on an affidavit. That it is also not based on any known provision of the law. That the defendant had previously sought orders for vacant possession of the properties charged to it but the court had dismissed that application. The Plaintiff was of the view that the present application was filed in bad faith because it was filed after the Defendant was served with the hearing notice of the main hearing which is fixed for 31st January 2007. The Plaintiffs finally stated that stay will greatly prejudice them because it amounts to stop the suit proceeding while granting the defendant the right to proceed with the realization of their securities.

I have considered the Defendants application, the plaintiffs replying affidavit and the arguments presented before me. I will start by being in agreement with the Defendant that the court can invoke its inherent power to stop any abuse of the court's process. I have noted that it is correct that the Plaintiff has made several injunction applications even after the court clearly found that the power of sale had arisen. That however, being the situation I find myself to be in agreement with the findings of my brother Hon. Mr. Osiemo in his ruling of 10.6.2002 on the Defendant's application for vacant possession of the securities when he stated: -

"Although the chargee has been given a go ahead to realize the security, the chargor's equitable remedy of redemption can only be extinguished after the offer by the highest bidder at the auction and the acceptance by the auctioneer by the fall of the hammer and after the signing of the contract at the auction."

Indeed the Plaintiffs right of redemption is alive and until a conclusive sale is conducted of their property. The defendant in seeking to stay the present suit seems to imply that the Plaintiffs' hands be tied while the defendant proceeds with realizations of its securities. It ought to be remembered that what has so far been dismissed are interlocutory injunctions. The suit itself has never been heard and in all probability the court might find after receiving evidence that the Defendant cannot exercise its power of

sale. Having that in mind it would be highly unjust to allow stay of the plaintiffs' suit while allowing the Defendant proceed with auction. I am of the view that a court of justice cannot grant the orders the defendant seeks.

Before concluding this ruling, I wish to respond to the Plaintiffs submission that the Defendant's application fails for failing to rely on an affidavit. I can find no rule which provides that an application will fail for failing to have an affidavit. The Defendant in support of its application relied on the court record. That in my view does not infringe any rule.

The finding of this court, having in mind that is stated herein before is that the Defendant's application dated 3.11.2006 is hereby dismissed with costs to the Plaintiff. Orders accordingly.

Dated and delivered this 26th day of January 2007

MARY KASANGO

JUDGE