REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 64 of 2007

JACKSON KARANJA KAMAU……..PLAINTIFF

V E R S U S

SOLOMON ALULA KADIMA……DEFENDANT

R U L I N G

On 25th April 2007 the Plaintiff commenced these proceedings by way of a plaint. On the same date, he filed an application for an injunction, to restrain the defendant from interfering with his occupation of, and activities on the suit property. The plaintiff had expressed a hope that if the court were to grant the orders sought in the application, he would be enabled to peacefully make developments on the piece of land in question.

The application was filed under a certificate of urgency, and the court did so certify it. Upon certifying the application as urgent, (on 25th April 2007), the court directed that it be listed for hearing on the next day, at 12.00 noon.

When the matter came up before the court on the 26th of April 2007, the defendant did not attend court. However, as the plaintiff had filed an affidavit of service, which showed that the defendant had been duly served with the Plaint, Application and affidavit, the court proceeded to hear the application, notwithstanding the absence of the defendant.

After giving due consideration to the application the court gave a ruling in which it observed, inter alia, as follows: -

"As the defendant has not filed anything in answer to the application, although he was duly served, the court accepts the plaintiff's affidavit as reflecting the factual position. In other words, I find and hold that the plaintiff was the purchaser of the suit property, even though it is yet to be transferred to him. This finding is on a prima facie basis, founded on the material already before the court."

Subsequent to the issuance of the injunction to restrain the defendant, he brought an application under a certificate of urgency, seeking to review, discharge or set aside the injunction orders. This ruling is in relation to that application.

Before delving into the substance of the application, I feel obliged to note that the application was filed on 7th May, 2007. On that same date, the court certified it as urgent and directed that it be heard on 10th May 2007 at 10.30 a.m.

The court records show that on 10th May 2007, Mr. Wanyonyi Advocate appeared for the defendant, whilst the plaintiff was in person. The records also show that the plaintiff sought and was granted an adjournment, so as to enable him instruct an advocate. The plaintiff had also indicated that he had only just served the defendant with his replying affidavit.

On that date, the defendant's application was adjourned to 17th May 2007.

Notwithstanding the fact that the date was fixed by consent of the parties, the plaintiff failed to attend court on 17th May 2007.

In determining the application, the first issue I need to determine is whether or not the defendant had been served with the plaint and the plaintiff's application dated 25th April 2007. The defendant says that he was not served, whilst the plaintiff insists that service was effected upon the Defendant, in his (the Plaintiff's) presence.

As far as the defendant is concerned, he could not have been served with the application in Kitale, whereas on the material day he was not in Kitale. He says that on 25th April 2005, when he was allegedly served in Kitale, he had;

"travelled from Narok Via Nairobi on the night of 25/4/2007 together with my wife …."

In that respect, the plaintiff submits that that statement is an untruth, as the defendant's wife had sworn an affidavit in which she stated that the defendant was resident in Nairobi.

There is no doubt that in the affidavit of Phanice Nasimiyu Masika, she says that the defendant, who is her husband, currently resides in Nairobi.

Had the foregoing been the only discrepancy in the evidence tendered by the defendant and his wife, I would have held that the same was not material, as in the defendant's affidavit, he did explain that his residence in Narok was only for a temporary period whilst he was doing charcoal business.

But it is noteworthy that as far as Phanice was concerned, she took;

"*Easy Coach on 24th April, 2007 and proceeded to Nairobi where my husband currently resides where I arrived on the morning of 25/4/2007."*

On the other hand, the defendant deponed that;

"*On 23/4/2007 my wife PHANICE NASIMIYU MASIKA came to Narok where I was temporarily residing…"*

He went on to say that;

"*I travelled from Narok Via Nairobi on the night of 25/4/2007 together with my wife…"*

Thus according to the defendant, his wife had travelled to Narok on 23/4/2007, and they then travelled from there, together, on the night of 25/4/2007. Yet the wife says that she travelled to Nairobi, arriving there on the morning of 25/4/2007.

In the circumstances, there is doubt whether the defendant's wife was in Narok from 23/4/2007 upto the night of 25/4/2007 when she travelled together with her husband to Kitale, Via Nairobi.

In my considered view, something does not add up, between the story told by the defendant, and the version of his wife.

Therefore, the court is unable to ascertain which of the two versions was accurate, regarding when and where to the defendant's wife travelled shortly after she was released from police custody in Kitale.

It is perhaps necessary to point out that the defendant's wife had been arrested on 19/4/2007, in relation to the money which the plaintiff had paid as purchase price for the land that is the subject matter of this suit. The arrest was made after the plaintiff had lodged a complaint with the police, at Kitale.

For that reason, the defendant submits that the plaintiff ought to have disclosed to this court that he had also caused the arrest of the defendant's wife, in respect to the very same issue which he later brought before this court.

First, it must be appreciated that there are facts which do give rise to claims of both a civil as well as a criminal nature.

Secondly, it is to be noted that by virtue of Section 193A of the Criminal Procedure Code;

"*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings.*"

That section suggests that even though the plaintiff may have lodged a complaint with the police, that would not be a bar, in itself, from instituting these civil proceedings.

However, it is also important to pay particular attention to the provisions of Section 175 (2) of the Criminal Procedure Code. That section empowers a court which convicts a person of an offence, if it should find that the facts proven in the case, also constitute a civil liability to the complainant, to order the convicted person to pay to;

"*the injured party such sum as it considers could justly be recovered as damages in civil proceedings.*"

Once the court trying the criminal case awards the injured party under section 175 (2), the said award would be, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect to that liability. It is for that reason that I uphold the defendants submission, that the plaintiff ought to have disclosed to this court that he had also lodged a complaint with the police.

Furthermore, such a disclosure would enable the court to make an informed decision on how to proceed with the case appropriately, with a view to ensuring that the possibility of two inconsistent positions were not taken by the two institutions, on the same matter. In effect, the failure by the plaintiff to disclose to this court that he had lodged a complainant with the police was material.

In the celebrated case of OWNERS OF THE MOTOR VESSEL "LILLIAN'S" V CALTEX OIL (KENYA) LIMITED [1989] KLR 1, at page 18, the Court of Appeal said;

"*The necessity of full and frank disclosure is even* greater in an exparte application.

In the Andria (Vasso) [1984] 1 Q.B 477 at page 491 letter G Robert Goff L.J. (as he then was) in the course of reading the judgment of the court observed as follows: -

It is axiomatic that in exparte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the exparte application, even though the facts were such that, with full disclosure, an order would have been justified."

The Court of Appeal went further to cite from the judgment of Ralph Gibson LJ in BRINK'S MAT LTD V ELCOMBE [1988] 3 A II ER 188, at page 192, wherein it was held as follows;

"the material facts are those which it is material to the Judge to know in dealing with the application as made; materiality is to be decided by the assessment of the applicant or his legal advisers."

If material non-disclosure is established, the court is required to be astute enough to ensure that the plaintiff who had obtained an exparte injunction without full and frank disclosure is deprived of any advantage he may have derived by that breach of duty. But then again, it is not for every omission that an injunction will be automatically discharged.

In this case, I have come to the conclusion that there was at least one material non- disclosure. The question therefore is whether or not, in the circumstances prevailing herein, the orders earlier obtained should be discharged varied or reviewed, as asked for by the defendant. To my mind, the starting point is the fact that as at the time when the court granted the order, it was convinced that the defendant had been duly served.

But as has now transpired, the defendant has made available to the court, two tickets which show that he and his wife travelled from Nairobi on the night of 25/4/2007. In the circumstances, although it was not clear when exactly either the defendant or his wife got to Nairobi, there is no legal basis for the court disregarding the two tickets. In effect, even though the defendant and his wife do not appear wholly transparent, in their story, on a balance of probability I find that the defendant was not served with the application.

Accordingly, when the court proceeded to hear and determine the plaintiff's application for an injunction, it did so on the wrong premise that the defendant had been served, whilst no service had been effected. On that basis, justice demands that the orders which were issued be discharged, so as to accord the defendant an opportunity to respond to the application, if he should be so minded. In the result, the orders granted on 26th April 2007 are hereby set aside in their entirety, with costs to the defendant in any event.

This order on costs is also influenced by the fact the Plaint filed in court was unsigned, thus rendering it invalid. As was held by the Hon. Ringera J. (as he then was) in MUTUKU & 3 OTHERS V UNITED INSURANCE CO.,LTD [2002] 1 KLR 250, at page 254;

"As regards the validity of the defence filed on 11/1/2001, no authorities were cited for the proposition that an unsigned pleading has no legal validity. Be that as it may, I am in agreement with the submission that an unsigned pleading cannot be valid in law. To my mind, it is the signature of the appropriate person on a pleading which authenticates the same. An unauthenticated document is not a pleading of anybody. It is a nullity."

That being the case herein, where the plaint on record was unsigned, it follows that the very foundation upon which the plaintiff could have mounted his application for an injunction is a nullity, which could not therefore sustain the application at all.

In *SHAH V INVESTMENTS & MORTGAGES BANK LTD [2001] 1 E.A. 275, AT PAGE 280,* the Court of Appeal held that in Kenya, any party who files an unsigned plaint runs the very grave risk of having that plaint struck out as not complying with Order VI rule 14 of the Civil Procedure Rules.

As there is no application before me for striking out the unsigned plaint, for now, I will not take that step.

Dated and delivered at Kitale, this 6th day of June, 2007.

FRED A. OCHIENG

JUDGE