



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 101 of 2001 (1)

NAMAI ODDER BEATRICE PLAINTIFF

VERSUS

KENYA REINSURANCE CORPORATION LTD. DEFENDANT

RULING

On 26th January 2001 the Plaintiff herein filed suit by plaint dated 25th January 2001 seeking a declaration and orders for accounts. Contemporaneously with the plaint the Plaintiff also filed an application by chamber summons on the same date seeking a temporary injunction to restrain the Defendant from selling the Plaintiff's land in exercise of the Defendant's statutory power of sale pending hearing and determination of the suit. That application was expressed to be brought under Order 39, rules 1 (a), 2 and 3 of the Civil Procedure Rules. The application came up for hearing on 1st March 2001. That date has been taken by consent of the parties' advocates in court on 5th February 2001. There was no appearance for the Defendant and the Plaintiff presented his application *ex parte*. The court (Khamoni, J.) granted the temporary injunction sought and costs of the application. The Defendant, by an amended notice of motion dated 16th August 2001, sought an order to set aside the *ex parte* hearing of the application on 1st March 2001 and the temporary injunction granted. The court record does not show that the said application was ever prosecuted or otherwise disposed of. It remains on the court record. The Defendant filed another application by notice of motion dated 24th June 2002 seeking an order to discharge the temporary injunction granted by Khamoni, J. on 1st March 2001. This is the application that I heard on 25th November 2005, and which is the subject of the present ruling.

The Defendant had filed yet another application by notice of motion dated 18th July 2002 seeking the very same order sought in the application dated 24th June 2002. But having prosecuted the earlier application dated 24th June 2002, I will order that the latter application dated 18th July 2002 be marked as withdrawn with costs to the Plaintiff if he had filed any papers in opposition thereto.

It is not apparent from the records why it has taken the Defendant so long to prosecute the application dated 24th June 2002. The temporary injunction granted on 1st March 2001 has in the meantime remained in place. The suit itself has never been heard. The application is stated to be brought under Order 39 rule 4 and also under Order 10 rule 1 of the Civil Procedure Rules. Rule 4 of Order 39 aforesaid provides that any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. Rule 1 Order 10 deals with discovery by interrogatories. It is not relevant to the present application.

The grounds for the application as stated on the face thereof are that the Plaintiff has defaulted in payment of mortgage instalments and is in arrears; that the Plaintiff is truly and justly indebted to the Defendant for the sum claimed on the plaint; and that the Plaintiff is merely trying to buy time and denying the Defendant its just dues. There is a supporting affidavit sworn by one **JANE F. OTIENO**, the Senior Legal Officer of the Defendant, which elaborates those grounds.

The application is opposed by the Plaintiff upon the grounds set out in grounds of opposition dated 23rd October 2002. Those grounds are, that the application is an abuse of the court process on account of the previous similar amended application dated 16th August 2001 pending before the court; that the application is incurably defective as the same does not comply with Order 50, rule 15(2) of the Civil Procedure Rules; that the affidavit sworn in support of the application is defective as the same does not comply with Order 18, rule 4 of the Civil Procedure Rules; and that the application lacks merit. There is a replying affidavit sworn by the Plaintiff in which she repeats her plea for an account, *inter alia*. She also denies that she owes any money to the Defendant. The issues of the defectiveness of the application and the affidavit sworn in support thereof were taken up as a preliminary objection which was overruled by Emukule, J. on 2nd June 2005.

I have considered the submissions of the learned counsel appearing, including the cases cited. The amended notice of motion dated 15th August 2001 sought an order to set aside the *ex parte* proceedings before Khamoni, J. of 1st March 2001. The Defendant appears to have abandoned that application. It was entitled to abandon the application. However, it ought to have sought to properly dispose of the application by way of withdrawal of the same before filing the present application. Inasmuch as the present application seeks to discharge the injunction granted pursuant to the *ex parte* proceedings of 1st March 2001, the present application filed before disposal of the amended notice of motion dated 16th August 2001 could be seen to be an abuse of the process of the court. But I will not so hold. I choose rather to dispose of the application on merit.

The Defendant's complaint is that the Plaintiff continues to enjoy the temporary injunction granted on 1st March 2001 without making any payment towards the monies owed to the Defendant. The Defendant further says that the Plaintiff is truly and justly indebted to it in mortgage instalments and arrears. But there is no counterclaim in the defence filed by the Defendant. In the Plaintiff's replying affidavit she denies that she owes any such mortgage instalments or arrears to the Defendant. She accuses the Defendant of refusing to provide her with an account of all the monies that she has paid to the Defendant. There is no complaint by the Defendant that since she obtained the temporary injunction the Plaintiff has not taken any steps to prosecute her suit, or that she has delayed in such prosecution, or that she has obstructed the hearing of her suit. If there were such complaints and the same found to be merited, the court would have no hesitation in discharging the temporary injunction. There are no such complaints by the Defendant.

The court record does not show that the Plaintiff has failed to expeditiously prosecute her suit, or that she has obstructed the expeditious hearing of the suit. Instead, it is the Defendant who has filed many applications which it has not prosecuted at all or expeditiously.

In these circumstances it would be unjust to discharge the temporary injunction granted on 1st March 2001 whose purpose was to preserve the Plaintiff's property pending hearing and disposal of her suit. I will therefore refuse the application by notice of motion dated 24th June 2002. It is hereby dismissed with

costs to the Plaintiff. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED ON THE 10TH DAY OF FEBRUARY, 2006.