



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 605 of 2003

**WINIFRED WAMBUI KINGORI.....PLAINTIFF/
 APPLICANT**

VERSUS

**PARAMOUNT UNIVERSAL BANK LIMITED.....1ST
 DEFENDANT/RESPONDENT**

**COMMISSIONER OF LANDS.....2ND
 DEFENDANT/RESPONDENT**

**ATTORNEY GENERAL.....3RD
 DEFENDANT/RESPONDENT**

R U L I N G

In a plaint filed herein on 25th September, 2003 the Plaintiff sought the following main reliefs:-

“1. That the 1st defendant acting by (itself), (its) lawful agents or servants be restrained from selling or otherwise disposing of or interfering with the plaintiff’s enjoyment of L.R. Nos. 14600 and 13824, both situated at KAREN, NAIROBI.

2. That the defendants be ordered to discharge the original charge and further charge over L.R. No. 14600 and the original charge over L.R. No. 13824 registered at the District Land Registry at Nairobi on 7th January, 2000, 10th August, 2001 and 26th July, 2001 respectively, and to release to the plaintiff motor vehicle KAK 047R or its value.

3. -----”

Together with the plaint the Plaintiff filed chamber summons dated 25th September, 2003 seeking two main orders as follows:-

“1. -----

2. -----

3. That the 1st defendant/respondent acting through (its) lawful agents or servants be

restrained by way of injunction from selling, transferring and/or in any other manner dealing with all those parcels of land known as L.R. No. 13824 (I.R. 64445) and L.R. No. 14600 (I.R. 71664) both situated at KAREN, NAIROBI pending the determination of this suit.

4. That the motor vehicle KAK 047R be released to the plaintiff/applicant.

5. -----”.

This application was never prosecuted. On 11th June, 2004 it was dismissed for want of prosecution with costs to the 1st Defendant.

The Plaintiff has now come to court by chamber summons dated 17th and filed on 28th February, 2006 seeking various orders. At the hearing of the application learned counsel for the Plaintiff sought to withdraw prayers 4, 5 and 6 of the application, and the same were marked withdrawn. The application was then heard upon prayers 2, 3 and 7, prayer no. 1 having been previously dealt with. Prayers 2, 3 and 7 are in the following terms:-

“1. -----

2. That the plaintiff’s application dated 25th September, 2003 dismissed by the ... court on 11th June, 2004 be reinstated and heard *inter partes*.

3. That pending the hearing and determination of the application dated 25th September, 2003 an order do issue restraining the defendants from selling, transferring, charging, taking possession of or otherwise howsoever, from exercising proprietary rights over the suit premises, to wit, L.R. Numbers 13824 and 14600, until this suit is heard and determined, and the order be registered with the respective land registries.

4. -----

5. -----

6. -----

7. That pending the hearing and determination of this application *inter partes*, interim orders do issue in terms of prayers 3, 4, 5 and 6 herein”.

The grounds for the application as they appear on the face thereof are:-

(i) That the Plaintiff was not aware that the application dated 25th September, 2003 had been dismissed.

(ii) That the Plaintiff is apprehensive that the 1st Defendant might sell the suit properties and thereby render the suit nugatory.

(iii) That the mistakes of the Plaintiff’s former counsel should not be visited upon her.

(iv) That the Defendants will not suffer any prejudice if the orders sought are granted.

There is an affidavit sworn by the Plaintiff in support of the application.

The application is opposed by the Defendants upon the grounds set out in the replying affidavit sworn by one MICHAEL TITUS RIITHO and filed in court on 7th March, 2006. Those grounds include, *inter alia*, that the application has been brought after undue delay which has not been satisfactorily or at all

explained; that no explanation has been given why the Plaintiff's counsel did not attend court on 11th June, 2004; that the Plaintiff has not satisfied the conditions for the grant of the injunctive reliefs sought; and that land parcel L.R. No. 13824 has been duly sold and transferred by the 1st Defendant to a third party in exercise of its statutory power of sale.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsel appearing, including the many cases cited. I heard the application on 10th March, 2006. No interim order was ever granted upon prayer no. 7. Because of the way it is worded, delivery of this ruling will render prayer no. 7 spent. I need say no more on it. That leaves prayers 2 and 3. Prayer no. 3 must of necessity depend on the outcome of prayer no. 2. If I allow prayer no. 2 I must then consider prayer no. 3. On the other hand, if I dismiss prayer no. 2, there will be no cause to consider prayer no. 3.

Prayer no. 2 seeks reinstatement of the Plaintiff's application by chamber summons dated and filed on 25th September, 2003 which was dismissed on 11th June, 2004 for want of prosecution when it came up for hearing as neither the Plaintiff nor her counsel attended court to prosecute the application. By the time of its dismissal, the application had been on the court record for over eight months. Being an application for interlocutory injunction one would expect that the Plaintiff would have been keen to expeditiously prosecute it. When it was filed on 25th September, 2003 it was placed before the duty judge who certified it as urgent and also granted an interim injunction pending hearing and determination of the application *inter partes*. The interim injunction was extended from time to time until it was ultimately discharged upon dismissal of the application on 11th June, 2004.

In the supporting affidavit the Plaintiff says, in effect, that she has been badly let down by her former advocates who failed to attend court on 11.6.2004 to prosecute the application and instead subsequently advised her that the interim injunction granted on 25.9.2003 was still in place protecting her properties pending hearing and disposal of the suit. She has further sworn that her former advocates further advised her that the application for injunction had been dispensed with in order to facilitate expeditious hearing and determination of the suit itself. Indeed the suit was fixed for hearing on two occasions for 31st October, 2005 (when it was taken out by the court) and 30th May, 2006 (when it was not listed as it was pending the present ruling.). In December, 2005 when she saw prospective buyers visit the suit properties she became alarmed and ultimately sought advise from her present advocates who, after they perused the court record, appraised her of the true state of affairs. The present application was then filed.

It appears to me from the material placed before the court that the Plaintiff has indeed been badly let down by her former advocates. They not only failed to attend court on 11th June, 2004 to prosecute the application for interlocutory injunction, but also lied to her that the application had been dispensed with in order to facilitate expeditious disposal of the suit itself. The record of the court shows that the date, 11th June, 2004, had been taken by consent by her advocates and the Defendants' advocates. After failing to attend court on 11th June, 2004, surely the Plaintiff's counsel must have taken steps to find out what happened to the application. He must therefore have known that the application was dismissed and the interim injunction discharged. But instead of taking appropriate steps to repair the damage done the Plaintiff's advocates just fixed the suit for hearing and lied to their client that the interim injunction was still in place!

A litigant must of necessity have faith in his/her legal adviser and trust him to look out for his best interests. It appears to me that the Plaintiff herein was never indolent. She took appropriate steps to find out from her former advocates what may be happening to her application for interlocutory injunction. As already seen, she never got the correct information or advice from them. The dismissal of her application was entirely the fault of her former advocates and not her fault at all, and a great injustice was occasioned to her. But I must balance her interest against that of the Defendants. Having considered all material placed before the court, I consider that the interests of justice demand that the Plaintiff do have a chance to prosecute her application by chamber summons dated 25th September, 2003. The Defendants will only suffer an inconvenience that can be well-taken care of by an award of costs. I will therefore allow prayer

No. 2 of the chamber summons dated 17th February, 2006 and set aside the order of 11th June, 2004. The chamber summons dated 25th September, 2003 is therefore reinstated. Orders accordingly.

I will now consider prayer No. 3 of the application. Notwithstanding how it is framed, it seeks an interim injunction to preserve the suit properties, L. R. Nos. 13824 and 14600 pending hearing and disposal of the chamber summons dated 25th September, 2003 (now reinstated). That is how I understand the prayer, and I shall proceed on that basis. It appears from documents exhibited in the replying affidavit that L.R. No. 13824 may have already been sold by the 1st Defendant in exercise of its statutory power of sale, as it was no doubt entitled to do, since there was no injunction in place to prevent it from doing so. Submissions were made with regard to the admissibility of those documents, but I think, with respect, that the learned counsels missed the point. I am not here called upon to decide whether or not the alleged sale of L.R. No. 13824 was proper or not. The issue is whether the property is still available for preservation pending hearing and disposal of the application for injunction. A sale agreement, a rent clearance certificate, a letter of consent and a transfer by chargee in exercise of power of sale are exhibited. It appears that indeed the property may have already been sold. But I see no evidence of the transfer having been duly registered already. At any rate, the other property, L.R. No. 14600, appears to be still available.

I hold the view that an interim injunction such as is sought will be in the interests of justice, otherwise the Plaintiff's application for interlocutory injunction (now reinstated) will be defeated before it is heard. Of course, I do not know what may have happened between the time the application was heard and now. I also cannot understand why the Plaintiff's learned counsel did not seek an interim injunction pending delivery of this ruling.

In the result the application by chamber summons dated 17.2.2006 is hereby allowed as prayed in prayer no. 2. It is also allowed in prayer no. 3 in the following terms. There shall be an interim injunction as sought in that prayer pending hearing and disposal of the chamber summons dated 25th September, 2003, and subject to the Plaintiff filing within five (5) days of delivery of this ruling an appropriate undertaking as to damages. The Defendants shall have the costs of this application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 2ND DAY OF JUNE, 2006.