



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 534 of 2006

REAL VENTURES LTD.
1ST PLAINTIFF

WILLIS OPUKA
2ND PLAINTIFF

ODHIAMBO M. T. ADALA
3RD PLAINTIFF

HORST KRUMEICH
.....4TH PLAINTIFF

VERSUS

AKIBA BANK LTD.1ST
DEFENDANT

ENDEB ESS DEVELOPMENT COMPANY LIMITED2ND
DEFENDANT

COMMISSIONER OF LANDS3RD
DEFENDANT

RULING

The Plaintiffs instituted this suit by way of a Plaint filed on 26th September, 2006. It comes out clearly out of that Plaint that this suit arises out of a charge dated 10th December, 1997. That charge was over property LR NO.4580/13 (hereinafter called the suit property). The 1st Defendant when it attempted previously to exercise its statutory power of sale under the said charge, the Plaintiff together with another entity called JAY-JO Holdings Limited commenced a suit namely HCCC No.907/2001. In that suit the parties attempted to resist the 1st defendant’s exercise of its statutory power of sale. That suit was transferred from the Central registry High court Nairobi to High Court Milimani Commercial Court and on being transferred the case was allocated Case No. 193 of 2006. It is averred in the Plaint in this suit that there is a subsisting injunction in HCCC 193 of 2006 restraining the 1st defendant from selling the suit property in exercise of its statutory power of sale. The Plaint further avers despite that injunction the

1st Defendant on 20th December, 2005 sold the suit property by private treaty to the 2nd Defendant. It is stated in the Plaintiff that the purported sale and transfer was fraudulent and ought to be set aside. The Plaintiff set out the particulars of fraud amongst which is that the 1st Defendant had made an application under HCCC No. 193 of 2006 seeking the dismissal of that suit for want of prosecution. The ruling of that application was due to be delivered on the 22nd September, 2006 now passed. That in support of that application the 1st Defendant legal officer had sworn an affidavit whereby she stated that the 1st Defendant was unable to sell the suit property because the Plaintiffs continued to scare away potential purchasers. The Plaintiff state in the Plaintiff the sale was done without notice either to themselves or to the court in HCCC 193 of 2006. The Plaintiff therefore concluded that the transfer to the 2nd Defendant was unlawful, null and void. The Plaintiff further states that since the said purchase the 2nd Defendant through its agents had harassed the tenants on the suit property some of whom are parties to this case as Plaintiffs. As consequence of that harassment a security officer of the Plaintiff was said to have been injured. In their prayers the Plaintiffs seek the setting aside of the sale, an injunction and restraining the 2nd Defendant from selling, transferring, leasing or assigning the title of the suit property. Further the Plaintiff seeks injunction against the 2nd Defendant or its agents from interfering with the quiet enjoyment of the suit property by the Plaintiffs. The Plaintiff also seeks the cancellation of the registration and transfer of the suit property to the 2nd Defendant. Finally, the suit seeks by a prayer for general damages as against the 2nd Defendant for trespass and assault. Simultaneously on filing the Plaintiff the Plaintiffs filed a chamber summons seeking interlocutory injunction against the 2nd Defendant. The prayers in that chamber summons are similar to the prayers in the Plaintiff. The affidavit in support of that application is sworn by a director of the 1st Plaintiff. The averments contained in his affidavit are similar to the averments in the Plaintiff. When the Plaintiff's counsel appeared under certificate of urgency on 26th September 2006, the court granted an interim injunction pending interpartes hearing on the 9th October, 2006. Before that date could reach the 2nd Defendant who was aggrieved by the exparte orders granted as aforesaid filed an application by way of Notice of Motion dated 2nd October, 2006 brought under Order XXXIX Rule 4 of the Civil Procedure Rules. The main prayer of that application is that the court will discharge the exparte injunction granted on the 26th September, 2006. When the court heard the 2nd Defendant's application under the certificate of urgency, on 2nd October, 2006 the court made an order that the application to be entertained first was the one filed by the 2nd Defendant. The affidavit in support of the 2nd Defendant's application was sworn by the Managing Director of the 2nd Defendant. The deponent began by saying that the Plaintiff's application for injunction was riddled with procedural irregularities which go to the jurisdiction of the Honourable court. He enumerated those irregularities as follows:-

- a) **The Plaintiffs are non-suited. The Plaintiff as drawn and filed discloses no reasonable cause of action against the second Defendant.**
- b) **The Plaintiff is bad in law for want of compliance with Order 1 Rule 12 and VII Rule 2 of the Civil Procedure rules.**
- c) **The Plaintiff as drawn and filed is bad in law for misjoinder of parties causes of action.**
- d) **The Plaintiff as drawn and filed is bad in law for misjoinder of causes of action.**
- e) **The 2nd, 3rd and 4th Plaintiffs have no *locus standi* to sue in respect of the title to property L.R. 4580/1 riverside Drive, Nairobi.**
- f) **The Plaintiff as drawn and filed is contra statute as against the Second Defendant, to wit the India Transfer of Property Act of 1882.**
- g) **The affidavit of Mukesh Vaya sworn on 25th of September 2006 in support of the application for injunction is fatally defective as it is premised on in admissible evidence and is in breach of the Evidence Act, Chapter 80 of the laws of Kenya and the Stamp duty Act, chapter 480 of the laws of Kenya.**

The deponent stated that as consequence of the aforesaid irregularities the court was made to issue an injunction on the 26th September, 2006 through non disclosure of material facts or that it was obtained on the basis of suppression of material facts. He further stated that on his inquiries he had confirmed that there was no injunction under HCCC 193 of 2006 which stopped the 1st defendant from exercising its statutory power of sale. That therefore the transfer of the suit property was not in breach of any order of the court. That further there was no order or caveat under HCCC 3232 of 1997. The deponent stated that the injunction application which was filed by the 1st Plaintiff in HCCC 907 of 2001 was dismissed by the Honourable Justice Kuloba on the 8th November, 2001. The deponent annexed a copy of the said ruling. That there had been no appeal filed as against that dismissal. The matter was again before the court on 26th March, 2002 and although an order was granted restraining the 1st defendant from selling the suit property that order was vacated by a consent of the parties filed in court on 3rd April, 2002. The deponent again annexed a copy of the said consent. In regard to HCCC 3232 of 1997, whose order was registered under the title of the suit property the deponent stated that the Plaintiff in that case was **Ranjit Singh Channa** who had sued the 1st Plaintiff herein. The deponent further stated the 2nd Defendant is a bona fide purchaser without notice of the suit property and that he had not been involved in any illegal dealings with the 1st Defendant. He stated further that the 1st Plaintiff is estopped by the law under the provisions of Indian Transfer of Property Act 1882 from challenging the transfer into the 2nd Defendant's name. That he further was of the view that the injunction order granted on 26th September, 2006, had the effect of restraining the 2nd defendant from entering its own property since the 2nd defendant was now the registered owner of that property. In oral submissions the 2nd Defendant counsel **Mr. Ochieng Oduol** stated that the exparte injunction granted to the Plaintiffs was on the basis of misinformation by the Plaintiffs. That the Plaintiff had led the court to believe that there subsisted an injunction under HCCC 193 of 2006. He drew the court's attention to the Plaintiffs' advocate's certificate of urgency where this misinformation was clearly evident. He further made submissions which were in line with supporting affidavit to the 2nd Defendant's application and in addition 2nd Defendant's counsel stated that the verifying affidavit in support of the Plaintiff's claim was sworn by the Director of the 1st Plaintiff and that the other Plaintiffs did not swear a verifying affidavit. He submitted that a director of a company can only swear to the acts of a company and not to any interests of 2nd, 3rd and 4th Plaintiffs. He submitted that each plaintiff ought in law to have sworn a separate and distinct affidavit to verify the Plaintiff. That having failed to do so they contravened order VII Rule 2 of the Civil Procedure Rules. Counsel was of the view that the court was led to issue an injunction on a fatally defective claim as a consequence of that violation. In regard to the Plaintiff's reliance to the existence of HCCC 193 of 2006, where the Plaintiffs relied on the alleged injunction therein, the 2nd Defendant's counsel stated that such reliance clearly showed a violation of section 6 of Civil Procedure Act which bars the court from hearing a parallel suit on the same subject matter. He said that the best action for the Plaintiff would have been to amend HCCC 193 of 2006 to include the new parties that are in this claim. That it was not right for the Plaintiffs to file this fresh suit. He submitted that if the court reaches a decision that it has jurisdiction to hear the present suit, then the court ought to look at material placed before it by the 2nd, 3rd and 4th Plaintiffs which is that they are tenants of the suit property. In support of that contention the Plaintiffs had relied on tenancy agreements which agreements had not been stamped in accordance with **The Stamp Duty Act** particularly section 19. Similarly the receipts of the purported payment of rents by the said Plaintiffs were not stamped in contravention of The Stamp Duty Act. In regard to that violation the 2nd Defendant said that those Plaintiffs lacked locus standi to file the present case. With regards to their status as tenants 2nd defendant stated that in the absence of those Plaintiffs swearing affidavits, to state their relationship with the 2nd Defendant the Court could not rely on the depositions of the 1st Plaintiff who was their former landlord.

In support of the 2nd Defendant's application counsel relied on the book Commercial Litigation: **Pre-emptive Remedies Sweet and Maxwell 1997 61** the following portion

“Per Warrington L. J.:

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 by him. That is perfectly plain and requires no authority to justify it.”

The 2nd Defendant’s counsel submitted that if this court concluded that it had no jurisdiction to hear the present matter it then will have to reach a conclusion that it has no power to make *ex parte* orders. In support of this proposition counsel relied on the case of **Owners of Motor Vehicle “Lilian S” –vs- Caltex Oil (K) Ltd. (1989) LLR 1653 (CAK)** and of the following portion:-

“it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

2nd Defendant’s counsel submitted that under Order XXXIX Rule 4 of the civil Procedure Rules the court has jurisdiction to set aside the *ex parte* orders of injunction. In this regard counsel relied on the case **Wea Records Limited –vs- Visions channel 44 & Others (1983) All ER Page 589**. Counsel relied on the following passage:-

“the proper course for an applicant seeking to challenge an *ex parte* order was to apply to the judge who made the order or to another High court judge to discharge or vary it, and to appeal to the court of Appeal only after that application had been heard and determined”.

On this argument counsel also relied on the case **London City Agency (JCD), Ltd and Another –vs- Lee and Others (1969) 3 All ER 1376** on the following passage:-

“I do not see why an injunction granted *ex parte* should be immune from being varied or discharged on an *ex parte* application. I cannot believe it to be the law that however clearly it has been established that it would be wrong for the injunction to continue in force unchanged, the court is impotent to discharge or vary it until notice of motion has been given and has expired”.

The counsel summarized his argument by stating that the court can discharge an *ex parte* injunction if cogent facts are brought to the court to show the court had no jurisdiction to issue the order. He faulted the certificate of urgency sworn by the Plaintiff’s advocate which he stated was not candid and he stated that ought not to be in case of an officer of the court.

The 1st Defendant’s counsel supported the application and further stated that from the pleadings of the plaintiff it is clear that the injunction order was obtained by suppression of the material facts. 1st Defendant’s counsel referred to the grounds in support of the Plaintiff’s injunction application and also to the supporting affidavit where the plaintiff stated that there was a subsisting suit namely HCCC 907 OF 2001. Having stated so the 1st Defendant’s counsel said that in the Plaintiff it was pleaded that the present suit is materially different from HCCC 907 of 2001. He posed a rhetorical question that if there is material difference between the two suits how the Plaintiff then could rely on the previous suit in its injunction application in this suit by saying that there was a subsisting injunction. He further stated that although the Plaintiffs accepted there was a consent which vacated orders granted by the court, it however, continued to allege that the injunction continued to subsist until determination of the suit.

The application was opposed by the Plaintiff’s counsel. The affidavit in reply was sworn by the director of the 1st Plaintiff. The said director stated that the present application by the 2nd Defendant was geared to delay the interpartes hearing of the Plaintiff’s application. He averred in his affidavit that the

Plaintiffs' claim discloses a cause of action against all the Defendants. In response to the submissions in relation to Section 6 of the Civil Procedure Act the deponent stated the issues in this case are not directly in issue in the previous suit. That HCCC 193 of 2006 is presently pending ruling before the Honourable Justice Waweru. He stated that the Plaintiffs did not have to comply with Order 1 Rule 12 of Civil procedure rules in that this present suit is not a representative suit. He further stated that the Plaintiffs had made full disclosure of all material facts and that the order of injunction was granted with all those facts before the court. The deponent stated that there was an order of injunction in force forbidding any dealing or transfer of the suit property by the 1st Defendant. That the variation by the consent which had been used by the Defendants in their argument merely related to a Receiver. The Plaintiff deponed that an injunction issue on 26th March, 2002 subsisted until the disposal of this case. With regard to HCCC 3232 of 1997 the Plaintiff deponed that the order issued therein had been registered against the title and that therefore the property when it was transferred to the 2nd Defendant was encumbered and was not free for such transfer. He said that it would be clear to the court considering the application by the Plaintiffs and this replying affidavit that the Plaintiffs had made full disclosure of material facts. The Plaintiffs' counsel **Mr. Kalove** submitted that the 2nd Defendant had failed to disclose to this court any new matters that the Plaintiffs failed to disclose at the time of obtaining the exparte order. He stated that the Defendants had accepted that there was an injunction in place when the transfer took place in favour of 2nd defendant. He further submitted that whether the court was to believe the Plaintiffs or the Defendants as the existence of an injunction under HCCC 193 of 2006 the decision would rely on facts which this court cannot determine in the absence of the court file HCCC 193 of 2006. The Plaintiffs' counsel accepted that the Plaintiffs in coming to court had two options; one was to amend the Plaint in HCCC 193 of 2006 to include the new parties and the second option was to chose to file a fresh suit. He submitted that the Plaintiffs chose the 2nd option. He stated that the Plaintiffs chose the second option because the court file in regard to HCCC 193 of 2006 could not be traced because of the pending ruling. That given the urgency of the matter that was before court where the 2nd defendant was said to have created chaos on the suit property the Plaintiffs chose to file this present suit. In the regard to Section 6 of the Civil Procedure Act the Plaintiffs' counsel said that it only applies where litigation was between the same parties and the action were similar. In this case the parties he said were different except the 1st Plaintiff and the 1st Defendant. In regard to submissions on Stamp Duty Act, the Plaintiffs' counsel submitted that the Act did not relate to interlocutory proceedings and therefore, he was of the view that evidence of the tenancy agreements could be received at interlocutory stage without necessarily complying with that Act. He stated that Section 19 of the Stamp Duty Act is subject to Section 3, 20 and 21. Those sections showed that there is room given for late stamping of documents. The Plaintiffs relied on **CA No.72 of 1998 Nasir Ibrahim Ali & 2 others vs Kamlesh Mansukhal Damji Pattni & another**. Counsel said that this case showed that where a party would be affected by the outcome of a case they ought to be joined in that case. Counsel also relied on the case of **Mbugua v Olang & another [1989] KLR**. Counsel said that this case showed that the principle to be applied in an application to discharge an order. He relied on the first holding as follows:-

“As with all summary remedies, the courts are always exceedingly careful in applying the rule because it is a fundamental principle that no person shall be shut out from having his case heard by the court so long as there is a fairly arguable case, even though it might appear to the court that it is unlikely to succeed. Recourse should be had to this summary process in plain and obvious cases.”

The Plaintiffs' counsel submitted that the 1st Defendant had failed to give notice to the 1st Plaintiff of the sale of the suit property. In the absence of such notice he was of the view that the 1st Defendant had no right to exercise its statutory power of sale. In this regard he relied on **CA No.177 of 1998 Trust Bank Limited vs George Ongaya Okoth**.

The 2nd Defendant in his brief response said that the Plaintiffs had failed to reply to the issues in its application. If indeed an order was granted for injunction until determination of HCCC 193 of 2006, 2nd Defendant stated that would have been in contravention of Legal Notice No.128 of 2001. This notice limits the court to grant an exparte injunction only for fourteen days. He further submitted that if the 2nd Defendant had breached an injunction, the Plaintiffs ought to have enforced that injunction by contempt

proceedings in the existing suit rather than filing a fresh suit.

I have considered the submissions that have been raised before me. Before delving into arguments I wish to make the following remarks:

Firstly the Plaintiffs in this case have pleaded in their plaint that the sale to the 2nd Defendant was without notice to them. I have looked at the Plaint filed by the 1st Plaintiff in HCCC 193 of 2006 where the Plaintiff accepted that service of statutory notice had been effected by the 1st Defendant but contended in that suit that such service was null and void. Secondly it would seem that the basis of this present case is the charge in favour of the 1st Defendant by the 1st Plaintiff of the suit property. That being the case it is also pertinent to note that HCCC 193 of 2006 was based on the charge amongst other pleas.

The Plaintiff has pleaded that there was caveat issued under HCCC 3232 of 1997 which caveat was registered under the title and which caveat would have brought to the attention of the Defendants that the suit property is encumbered. The Plaintiff failed despite the present challenge to its ex parte injunction to produce before this court a copy of the order that was registered under the title. Moreover, HCCC 3232 of 1997 was a suit filed against the 1st Plaintiff seeking to stop the eviction of the tenant namely Ranjit Singh Channa. So it was a suit that was filed by that tenant to protect its position as a tenant. The court cannot understand how the 1st Plaintiff can derive a right under such a suit. I have considered the submission made by the 2nd Defendant in regard to the lack of verifying affidavit by the 2nd, 3rd and 4th Plaintiffs. It is clear from Order VII Rule 1 (2) of the Civil Procedure Rules that there is a requirement that every Plaint be accompanied by an affidavit sworn by the Plaintiff to verify the correctness of the averments contained in the Plaint. I do not accept the submissions by the Plaintiffs' counsel that the verifying affidavit by the Director of the 1st Plaintiff sufficed to verify the Plaint on behalf of 2nd, 3rd and 4th Plaintiffs. It is clear that the rule requires that every Plaintiff would verify the correctness of the Plaint for themselves other than where there is a representative suit. It therefore follows from that finding of the court is that there is no claim before the court on behalf of 2nd, 3rd and 4th Plaintiffs. They are therefore not entitled to orders of injunction as sought in the application. On that basis alone the order of injunction issued on 26th September, 2006 in favour of 2nd, 3rd and 4th Plaintiffs would be discharged. It is accepted by all parties that there is subsistence suit namely 193 of 2006 between the 1st Plaintiff and the 1st Defendant. Having so accepted the Plaintiffs in filing the present suit violated section 6 of the Civil Procedure Act. This Section bars the court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in the previous suit. The Plaintiffs ought not to have filed the present suit in view of the previously filed suit. What the Plaintiff ought to have done is to appropriately amend the pleadings to accommodate the new parties. An issue that was raised by the Plaintiffs' counsel that in the absence of the availability of the court file that is HCCC 193 of 2006 the Plaintiffs had no option but to file a new suit is rejected by the court. The Plaintiffs ought to have requested the registry to open a skeleton file and on the basis of that skeleton file ought to have appropriately moved the court for the orders sought. The Plaintiffs' counsel submitted that the present suit brought out new facts because now the property has been sold. In response I would ask a rhetorical question, is the court expected to hear the case relating to the alleged illegal sale of the suit property as pleaded in this suit then on another date proceed to hear a case relating to wrong service of statutory notice and wrong debiting of interest rates as pleaded in HCCC 193 of 2006? That to my mind would bring confusion and cannot be allowed by the court. The Plaintiffs' submission is therefore rejected.

On the submissions that the parties being different in this present suit only a new action could be filed is also rejected as stated hereinbefore the previous pleadings ought to have been amended to accommodate the new facts and new parties. I find that I am in total agreement with the 2nd Defendant's submissions that the tenancy agreements relied on by the Plaintiffs breached The Stamp Duty Act. Section 19(1) of the said Act provides;

“Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty.

unless it is duly stamped.”

It follows that the tenancy agreements and the tenant's receipts cannot be accepted in this court in the absence of them complying with Section 19. I do not accept that the provisions of Section 19 only relates to full hearing and not interlocutory matters. Such a submission is not supported by that Section. Those documents are therefore a nullity as far as the application for injunction by the plaintiffs is concerned. There is one other matter in regard to 2nd, 3rd and 4th Plaintiffs in looking at the pleadings they would still not to have a locus standi in this matter. The Plaintiffs' claim really surrounds the alleged illegal sale of the suit property. The 2nd, 3rd and 4th Plaintiffs have no standing in pleading that the sale was illegal. The only way that the 2nd, 3rd and 4th Plaintiffs can have a standing in this claim is in regard to the alleged assault. But there again according to the documents relied upon by the Plaintiffs the alleged assault was upon the security officer of the 1st Plaintiff. The court therefore concludes that the said Plaintiffs have no locus standi and it would seem their addition to this claim was superfluous. I find that I am in total agreement with the submissions of the 2nd Defendant that the Plaintiffs ought to have moved by way of contempt proceedings to enforce the injunction allegedly subsisting in HCCC 193 of 2006. It was not open to the Plaintiffs to file this fresh suit. Order XXXIX of the Civil Procedure Rules adequately provides for moving the court in that regard. In this regard I have one thing to say on the issue of advocates when they come on certificates of urgency. Ordinarily the certificate of urgency matters come hurriedly before the Duty Judge and the court lays a lot of reliance on submissions made by the counsel for applicants. It is therefore of utmost importance that these officers of the court would be truthful in their submissions at that exparte stage and ought make the fullest possible disclosure of all material facts. It would be a sad day when the court would wholly question veracity of the statements by the counsel. It ought also to be remembered that the legal profession is a noble profession and whatever one does that nobility ought to be upheld. That is why I find it repugnant that a counsel would sign a certificate of urgency which contains untruths. Perhaps a time will come or may be it is ripe now that certificate of urgency will be sworn under oath. I find that the Plaintiffs suit violates legal provisions in two fronts;

- 1) If indeed there is a violation of an existing injunction the plaintiffs ought to have moved by way of contempt proceedings in that case.
- 2) If indeed there was no injunction the Plaintiffs in filing the present suit violated Section 6 of the Civil Procedure Act.

In considering the submissions and authorities brought before me I have no hesitation to grant the orders sought by the 2nd Defendant in the following terms:-

- 1) That the exparte temporary injunction granted by this court on 26th September, 2006 is hereby discharged.
- 2) That the costs of the Notice of Motion dated 2nd October, 2006 are hereby awarded to the 2nd Defendant as against the Plaintiffs.

Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 11th day of October, 2006.

MARY KASANGO

JUDGE