



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE 692 OF 2004 C

STANDARD CHARTERED BANK KENYA LTD.....PLAINTIFF

-V E R S U S

ALI NOOR ABDI1ST DEFENDANT

WETANGULA & COMPANY.....2ND DEFENDANT

KARIONGO INVESTMENTS LIMITED.....3RD DEFENDANT

R U L I N G

This is an application for review of the court order made in this matter on 10th March, 2005. The application is made under O.XLIV Rule 1 of the Civil Procedure Rules and the inherent power of the court, and is brought by way of a Notice of Motion dated and filed on 14th March, 2005.

The grounds upon which the application is based are that-

1. There has been discovery of new and important evidence which was not within the knowledge of the plaintiff at the time the order was made.
2. On 11th March, 2005, the advocates for the third defendant, for the first time, informed the plaintiff's advocates that:
 - (a) criminal charges had been brought against Daniel Ndung'u whose evidence is relied on in the ruling
 - (b) An order had been obtained by the third defendant against the first defendant to the effect that the first defendant is not to interfere or in any way meddle with the third defendant's use, possession and ownership of the suit premises
3. The plaintiff is at risk of losing both the money and the property in question. The application is also supported by the annexed affidavit of NANCY OGINDE, the company secretary of the plaintiff in this case.

Through its advocates on record, the second defendant filed some 8 grounds of opposition on 17th March, 2005. These are that-

- (i) The application does not lie ab initio
- (ii) The application is incompetent, bad in law and an abuse of the court process

(iii) The court has no jurisdiction under O.XLIV Rule 1 to issue an injunction.

(iv) The inherent power of the court cannot be invoked when there is an express provision dealing with an issue.

(v) The application for injunction is res judicata

(vi) The alleged new and important evidence was not in existence at the time the order of 10th March, 2005 was made and does not fall within the provisions of the cited provisions of the law to warrant review of the order as alleged or at all.

(vii) In the alternative and without prejudice to ground 6 above, if the alleged new evidence was in existence at the time the order was made, the same was within the knowledge of the plaintiff and was brought before court and considered by the court before making the order. The evidence does not therefore form a ground for review or warrant review under the cited provisions of the law or at all.

(viii) The plaintiff and the 2nd defendant herein are not parties to Nairobi HCCC 219 of 2005 and the interim order made therein on 28th February, 2005 is not relevant to the issues in this matter and does not so affect the plaintiff's rights as to warrant the review of the order of 10th March 2005 in this case.

At the hearing of the application, Mr. Kiragu appeared for the plaintiff/applicant, Mr. Kanyeki for the 1st Defendant/respondent, Mr. Ojiambo for the 2nd defendant/respondent, and Dr. Khaminwa for the 3rd defendant/respondent. I have considered the submissions of all counsel and the authorities cited to the court. The position taken by the plaintiff/applicant is that there is some new evidence which was not to hand on 10th March, 2005, and that evidence, if it was availed at the material time, would have been of significance to the court. Mr. Kiragu urged the court to take that evidence into account as a basis for a review of the order made on 10th March, 2005. Before that can be done, I find it prudent to consider, at this stage, some of the grounds of opposition raised by the second defendant/respondent.

In ground No.4, it is stated that the inherent power of the court cannot be invoked when there is an express provision dealing with an issue. I agree. The inherent power of the court should be invoked only when the rules are silent. As long as a particular procedure is provided for under the rules, there is no need at the same time to invoke the court's inherent jurisdiction. In the instant case, the application before the court seeks a review of an order of the court. Such reviews are provided for under O.XLIV of the Civil Procedure Rules. The application is expressed to be brought under O.XLIV of the Rules as well as under the inherent power of the court. However, the applicant was careful not to base the application exclusively on the inherent power of the court, but this power was invoked in addition to the Rule which is specifically provided for. I don't think that this is fatal in any way.

In grounds 3 and 5, respectively, the second defendant states that the court has no jurisdiction under O.XLIV Rule 1 to issue an injunction, and that the application for injunction is res judicata. Again, I agree with the first limb of these two grounds. As for the second limb, I think that this is where the inherent power of the court becomes relevant. If, but only if, the court, after review, comes to the conclusion that it is necessary to issue an injunction, it may make such an order for the ends of justice to be met, and I don't think that it would be res judicata to do so. In an appropriate case, the court has jurisdiction to grant an injunction even after dismissing an application seeking an injunction. It was so held in *ERINMORE v. CHESHIRE COUNTY COUNCIL* [1974] 2 All E.R., wherein Megarry J. said that it was competent for the court to grant an injunction pending appeal against a court order dismissing an application for an injunction. In the same breath, I think that where the court is satisfied that it ought to review its order, and that the grant of an injunction would appropriately meet the ends of justice, it is not res judicata for the court to grant such an injunction. Coming back to the application, OXLIV Rule 1 (1) of the Civil Procedure Rules under which the application is made provides as follows-

“Any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred...and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be

produced by him at the time when the decree was passed or the order made... may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”

The order which is the subject matter of this application was made on 10th March, 2005. This application was filed in court on 14th March, 2005. I am satisfied that the same was made without any delay.

As for the merits of the application, it is noteworthy that a few things happened between the hearing of the application giving rise to the order sought to be reviewed, and the date of the order. On 25th February, 2005, the 3rd defendant filed a suit against the 1st defendant and 3rd defendant’s erstwhile advocates who had sworn an affidavit to clarify issues and confirm that the suit property was sold by the 3rd defendants to the 1st defendant. That sale is now the subject matter of HCCC No.219 of 2005 in which the 3rd defendant herein seeks against the defendants, inter alia-

“(a) A declaration that the 1st plaintiff (3rd defendant in this application) is still the lawful owner of L.R. No. 36/VII/498 Eastleigh, Nairobi.

(b) A declaration that the purported transfer of L.R. No.36/VII/498 to the 1st defendant or any other party is null and void.

(c) ...

(d) A permanent injunction restraining the defendants herein, their agents, servants and/or anyone acting on their behalf from interfering, dealing in any way with the said premises ... and the plaintiff to resume peaceful occupation and use of the said premises...”

The plaint introduces a new dimension to property L.R. No.36/VII/498, which property provides the central link between HCCC No. 219 of 2005 and this case. In this case, the court declined to grant to the plaintiff the injunction it had sought. In a nutshell, the facts were that the plaintiff extended a banking facility to the 1st defendant in this case against the security of the aforesaid property. The underlying presumption was that the 1st defendant was the legal owner of the said property, having bought it from the 3rd defendant. Although the 3rd defendant made some feeble representations that it was the legal owner of that property, the loopholes in those representations have, prima facie, been almost sealed by the information subsequently provided in HCCC No.219 of 2005 in which the 3rd defendant has sued the purported owner of L.R. No. 36/VII/498. This is really the crux of the matter. Who is the legal owner of this property – is it the 1st defendant or the 3rd defendant? The court in HCCC No.219 of 2005 will have to make a finding and determination on that question. If the court finds that the property belongs to the 1st defendant in this matter, the plaintiff’s security will be intact, and all they will have to do will be to smooth the ruffled feathers of the perceived invalidity of the charge document. If, however, the court rules that the property belongs to the third defendant, then the plaintiff will have advanced money to the 1st defendant against some false security, and the plaintiff could easily lose the Ksh.20million advanced to the 1st defendant.

In his submissions before this court in the application dated 29th December, 2004, Mr. Murugara for the plaintiff insinuated, without saying it in so many words, that if the 2nd defendants paid the money to the 3rd defendant on behalf of the 1st defendant as suggested by Mr. Ojiambo, then the conduct of the 2nd defendant was unethical. In my ruling, I observed in passing by that this court was not the proper forum for a debate on that issue. I wish to add, however, that if the 2nd defendants paid the purchase price of the suit property to the third defendant on behalf of the 1st defendant, they are entitled to recover the money from that defendant. This may be done either by retaining the loan advanced to the 1st defendant through the 2nd defendants, or by suing the 1st defendant. Either of those options will be dictated by the validity or otherwise of the security offered by the 1st defendant. If the suit property legally belongs to the 1st defendant, the security is, prima facie, valid. But if it belongs to the third defendant, then the security is not valid. In the latter event, the plaintiff would seem to have a better claim to the Ksh.20million than both the 1st defendant and the 2nd defendant. An adjudication of the criminal charges levelled against the second defendant in HCCC No. 219 of 2005 will, in all probability, pave the way and show the shape and direction which this matter is likely to take.

Against the background of these developments, the plaintiffs are strongly beginning to emerge as the innocent victims of the piece. Whether they are genuine victims or not will depend on who wins the tug of war between the 1st defendant and 3rd defendants. In note from ground No. 6 of the grounds of opposition that the 2nd defendant takes the position that the alleged new and important evidence was not in existence at the time the order of 10th March, 2005 was made. In the alternative, the 2nd defendant states in ground No.7 that in the alternative, if the alleged new evidence was in existence at the time the order was made, the same was within the knowledge of the plaintiff and was brought before the court and considered by the court before making the order. Mr. Ojiambo for the 2nd defendant argued the second point at length. However, both positions are not supported by the evidence on record.

The hearing of the first application ended on 27th January, 2005 and the ruling in respect thereof was reserved initially for 23rd February, 2005. However, for reasons beyond its control, the court did not sit from 10th February to 2nd March, 2005. When it resumed on 3rd March, 2005, it gave the 10th March, 2005 as the date of the Ruling. Between 27th January, 2005, and 10th March, 2005, the 3rd defendant sued the 1st defendant by a plaint dated 21st February, 2005 and filed in court on or about 25th February, 2005. It was from the chamber summons application filed in court at the same time that all the other information about Mr. Daniel Ndung'u having been arraigned in a criminal court were revealed. Indeed, the annexed copy of the charge sheet discloses that he was arrested on 8th February, 2005, and appeared in court on 9th February, 2005. Copies of the relevant documents were forwarded by the 3rd defendant to the plaintiff under cover of a letter dated 11th March, 2005, and received on the same date at about 3.00pm. If these dates are anything to go by, they show clearly that these new activities started taking shape from early February till the end of that month, which was before the date of the ruling, and that they were not known to the plaintiff until 11th March, 2005, which was the day after the date of the ruling.

From this exposition, it is evident that the new and important evidence was in existence at the time when the order of 10th March, 2005 was made, and that it was not known to the plaintiff until 11th March, 2005.

By reason of the foregoing, I am satisfied that there are in this matter some developments which constitute new and important matter which was not within the plaintiff's knowledge, and could not be produced by the plaintiff at the time the order of 10th March, 2005 was made. Yet, the matter is such that it is bound to affect the plaintiffs fortunes in this matter, possibly for the better. I am therefore persuaded that it is fair and proper to review the court's order made herein on 10th March, 2005, which I hereby do. I accordingly make the following orders.

1. That the defendants herein be and are hereby restrained, whether by themselves, their agents or servants from removing, disposing or otherwise dealing with the payment of Sh.20,000,000/= made to the first defendant by the plaintiff which is currently being held by Kenya Commercial Bank Limited, Tom Mboya Branch in Account number 235802861 until the hearing and determination of this case or further order of the court.
2. That the order herein above be and is hereby directed to Kenya Commercial Bank Limited.
3. Costs in the cause.

Dated and delivered at Nairobi this 28th day of April 2005

L. NJAGI

JUDGE