



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI**

HCCC NO. 1247 OF 2002

JOSEPH KIARIE MBUGUA

Alias KIARII KAMWANA MBUGUA.....1ST PLAINTIFF

MBWANJI LIMITED.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

R U L I N G

In this application, the applicant seeks from the court orders-

1. THAT the court be pleased to issue a temporary injunction restraining the sale of the plaintiff's properties known as Ndumberi/Ndumberi/613/29 & 30, NDUMBERI/NDUMBERI/T.307, LR. No.96/5 KIAMBU DISTRICT, MOMBASA/MAINLAND SOUTH BLOCK 1/322 pending the hearing and determination of this suit.

2. THAT the cost of this application be provided for. The application is brought by a chamber summons dated 24th March, 2005 and expressed to be made under O.XXXIX rule 2 of the Civil Procedure Rules, S.3A of the Civil Procedure Act and all enabling provisions of the law. It is supported by the annexed affidavit of JOSEPH KIARIE MBUGUA alias KIARII KAMWANA MBUGUA, and is based on the grounds that-

(a) By a consent order dated 13th March, 2003, the parties agreed that the plaintiff was at liberty to pay the defendant a sum of Ksh.145million in full redemption of the properties charged to the defendant and enumerated at paragraphs 5 and 6 of the plaint herein

(b) In the alternative, the plaintiff was accorded a period of 90 days, which period was subject to extension in accordance with the said consent order, to endeavour to sell the said properties by private treaty and the proceeds thereof be remitted to the defendant in settlement of the said amount.

(c) By a further agreement on 5th August, 2004 it was agreed that the 1st plaintiff shall subdivide and sell his property known as L.R. NO.6755/1 situate at Kamiti and measuring 70 acres and remit the proceeds to the defendant.

(d) The 1st plaintiff has made every conceivable and diligent effort to complete the process of subdivision and sale thereof .

(e) The defendant who is well aware of the efforts has unreasonably declined to extend the period of payment as provided in the said consent order despite the 1st plaintiff's concerted requests and has now advertised the plaintiff's properties for sale by public auction for 31st March, 2005.

(f) The defendant has failed to serve a fresh notice to the 1st plaintiff in this respect particularly considering that the defendant did sell some of the 1st plaintiff's properties on 3rd August, 2005(sic) and the amount now owing is considerably less than what was initially stated. (g) The plaintiff is likely to suffer irreparable loss if the prayer for an injunction herein is not granted.

Opposing the application, the defendant has filed a replying affidavit through ZIPPORAH KINANGA MOGAKA, its Legal Services Manager. In that affidavit, Ms. Mogaka avers that the application is vexatious to the defendant and an abuse of the court process because the plaintiffs have in the past filed a multiplicity of unsuccessful applications seeking to restrain sale of the properties comprised in the present application. Particulars of the said applications are given in the affidavit, and copies of the respective orders given therein are also annexed to the affidavit. The deponent further avers that the grounds upon which the present application is founded are similar to the ones in the previous applications and have been considered by the High court and the Court of Appeal who have allowed the defendant to proceed with the sale of the suit properties. Ms. Mogaka further avers that the consent order referred to has been overtaken by effluxion of time and subsequent orders of the High Court, and the alleged agreement for payment of Ksh.400,000/= was without prejudice. She concludes by stating that the present application is not brought in good faith and that it ought to be dismissed as the plaintiffs are wholly undeserving of an equitable remedy.

At the oral hearing, Mr. Thongoi canvassed the application for the applicant while Mr. Rachuonyo appeared for the respondent. Mr. Thongoi referred to the consent order dated 19th March, 2003 and the agreement of 12th August, 2004 which he said supplemented the consent order. He then submitted that by the consent and subsequent agreement, the defendant relinquished its statutory power of sale. By proceeding to sell the plaintiff's property, the defendant has therefore breached the two agreements. The two agreements have superseded the defendant's statutory power of sale and given rise to a new cause of action, and therefore the issue of res judicata does not arise. He finally argued that this was a fit case for the grant of an order of injunction and urged the court to do so.

On his part, Mr. Rachuonyo for the respondent opposed the application arguing that there are valid legal charges over the property which confer the power of sale. There has been default since 1982, and the amount outstanding is about Ksh.700million. A valid statutory notice has been given. Furthermore, there has been previous litigation in which all the issues raised herein have been determined by this court and the Court of Appeal. In those circumstances, he submitted that any injunction given would be inequitable and would cause great injustice to the defendant.

Replying to the above response, Mr. Thongori contended that the defendants should be bound by the two agreements, and refusal to grant an extension of time is a unilateral and unreasonable exercise of discretion. He also submitted that fresh notices should be required.

After considering the application and the submissions of counsel, I note that the terms of the consent order dated 19th March 2003 speak for themselves. An application for review of that order failed in the High Court on 5th December, 2003 and the Court of Appeal on 3rd July, 2004. On 3rd August, 2004, some of the plaintiff's property was sold at a public auction. An attempt to impeach that auction sale came to nought as the application in respect thereof was dismissed by the court on 28th October, 2004.

Meanwhile, on 6th August, 2004, the plaintiff wrote to the defendant referring to a meeting between Hon. Stephen Ndicho, who would appear to have been the plaintiff's emissary, and the defendants. Part of the letter said-

“...I accept to pay Ksh.400,000/= in the instant and continue to pay the same each end month while at the same time I subdivide my 70 acres of parcel of land at Kamiti and sell the same which proceeds will be paid directly to the bank until the entire debt of

Ksh.145million is liquidated. Kindly accept my first instalment for cheque No.137866 of Ksh.400,000/= and please acknowledge receipt of the same and acceptance of this my prayer.”

The letter is signed by J.K. Mbugua.

The defendants responded by their letter dated 12th August, 2004. In that response, they referred specifically to the plaintiff's letter dated 6th August; the statutory notices issued to M/s Mbwani Limited and Joseph Kiarie Mbugua alias Kiiru Kamwana Mbugua in regard to the debt of Farmers Industry Limited by the bank advocates dated 22nd December, 2003; the ruling delivered in the High Court in this case on 5th December, 2003; the ruling delivered on 2nd July, 2004 in the Court of Appeal; and the sale by public auction of five of the ten properties charged to the bank on 3rd August, 2004. The defendant then wrote-

“The bank has, without prejudice to the above, agreed to your proposal to pay Sh.400,000/= per month with effect from 31st August, 2004 as you subdivide and sell your Seventy (70) acres of land at Kamiti on the following conditions... Kindly note that the Sh.145million is not and has never been deemed by the bank to be in full settlement of the debt due to the bank, if was the amount agreed upon in full redemption of the ten charged properties, if payment was made within 90 days from 5th December, 2003.

The arrangement fell through resulting in the Court of Appeal application that was dismissed paving way of the auction of the properties...”

Two main points to be observed from this letter are that (a) the arrangement for the payment of Ksh.400,000/= per month pending the sale of the 70 acre parcel of land was accepted by the bank on a “without prejudice” basis and (b) that the 90 days period has long since expired and the decision of the Court of Appeal had paved the way for the auction of the properties.

The record shows that pursuant to this arrangement, the plaintiffs paid the Ksh.400,000/= for only 3 months on 6th August, 2004; 6th September, 2004, and 5th November, 2004. They did not pay any instalment in October, 2004, nor any other instalment after 5th November, 2004. On 18th November, 2004, the plaintiffs wrote to the managing director of the defendant bank regarding the sub-division of the 70-acre parcel of land, informing the defendant that approval had been given by Kiambu Country Council as well as by the Commissioner of Lands. In the said letter, the plaintiffs posed some questions which I find strange. They said-

“ Our question is:-

First, would you like to come and see these documents? Secondly, would you like us to give you these plots so that you can sell yourselves, or would you like them in form of money or what would you like?”

I find the questions strange because two of the conditions upon which the defendant bank agreed to give the plaintiffs time to subdivide and sell the 70-acre parcel of land were-

“(2) That you will sell the said property through an Estate Agent approved by the bank.

(3) That the proceeds therefore, will be remitted by the Estate Agent directly to the bank to reduce your liabilities in our books.”

The questions are therefore strange because the bank had already made it clear that all they wanted was for the proceeds of sale to be paid directly to the bank to reduce the plaintiffs' liabilities. And the bank's position was taken for good measure. If the bank involved itself in the actual sale, it risked being accused of selling the plots at throw away prices as had happened at the auction sale of 3rd August, 2004. The questions therefore fly right in the face of the conditions set out by the defendant bank.

I have already observed that contrary to the arrangement for the payment of Sh.400,000/= per month with effect from August, 2004, the plaintiffs paid for only 3 months, and the last payment was made on 5th November, 2004. Commenting on this lapse in their letter to the defendant bank dated 10th February, 2005, the plaintiffs said-

“The whole exercise is an expensive one and has cost us a considerable amount of money so far. We are continuing to incur heavy costs in an effort to complete the exercise as expeditiously as possible. The result has been that our cash flow position has been seriously affected being the reason why we have been forced to temporarily suspend payment of the agreed monthly instalments of Ksh.400,000/=. We request for your indulgence in this respect...”

It seems to me from their conduct that the plaintiffs cannot be trusted to keep their word as they don't seem to be serious about honouring their undertakings. To allow them to hold the defendant bank to its word while at the same time they cant keep their side of the bargain would be akin to allowing them to blow hot and cold. It would be inequitable.

They have not honoured one of the conditions upon which the bank agreed to give them time to subdivide and sell the property, and on that ground the bank is not bound to await the subdivision and sale of the plots. The plaintiffs have only themselves to blame.

I note from the court record that this is the fifth application filed by the plaintiffs against the defendant in a span of two and a half years, and all the applications involve substantially the same property. All their applications have been unsuccessful. The defendant is not under any obligation to extend the 90 day period which expired a long time ago. Having issued the statutory notices on 22nd December, 2003, the defendant bank is under no obligation to issue such notices afresh.

In sum, I find that the plaintiffs' application is without merit and I accordingly dismiss it with costs to the defendant/respondent.

Dated and delivered at Nairobi this 26th day of May 2005

L. NJAGI

JUDGE