



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 518 OF 2004

MANJIT SINGH SETHI & OTHERS.....PLAINTIFFS

VERSUS

PARAMOUNT UNIVERSAL BANK & 2 OTHERS.....DEFENDANTS

RULING

This litigation has had a fairly long and acrimonious history. The passions of the parties, and sometimes those of their counsels, have risen sky-high. This is not surprising as some two valuable landed properties and huge sums of money are involved. A number of judges have dealt with the dispute before. I am the latest. I am unlikely to be the last. Ruling and orders have been made before by various judges, some of them appearing to contradict others. Judges have been asked to disqualify themselves from hearing the dispute for one reason or the other. Some of them have succumbed to the pressure and disqualified themselves.

The litigation started as Nairobi HCCC No. 430 of 2002 before this court wherein the same Plaintiffs sought orders, in effect, to restrain the 1st Defendant (hereinafter called the Bank) from exercising its statutory power of sale, *inter alia*. Filed together with the plaint in that suit was an application for temporary injunctions, both prohibitive and mandatory, pending hearing and disposal of the suit. The application was not heard before hearing of the suit itself commenced before Ondeyo, J (as she then was), who partly heard the suit. In the course of that hearing the Judge issued an order of temporary injunction against the Bank.,This appears to have so infuriated the Bank that it applied for Ondeyo, J. to disqualify herself from further hearing the suit and accused her of bias. The Judge disqualified herself. Ibrahim, J. subsequently declared all the proceedings before Ondeyo, J and all orders made by her to be null and void on account of her so disqualifying herself. I am on my part, and with respect, not certain about the propriety of that declaration by Ibrahim, J, notwithstanding that he was at a later stage supported in the declaration by Emukule, J.

By and by, Mutungi, J heard *inter partes* the application for temporary injunction. On 14th October, 2003 he dismissed it, having found that the Plaintiffs had not established a *prima facie* case with a probability of success and that in any event damages would be adequate remedy to them. That application had been brought under Order 39, Rules 1, 2 and 3 of the Civil Procedure Rules (the Rules.) Following its dismissal the Plaintiffs brought another application for temporary restraining orders under section 52 of the Indian Transfer of Property Act (the Act). That application was heard *inter partes* by Ibrahim, J.He allowed the application on 7th November, 2003 but reserved his reasons which he subsequently delivered on 20th January, 2004. It was the Bank's stand that the orders of Ibrahim, J. flew in the face of the orders of Mutungi, J. of 14th October, 2003. At any rate the Bank did on 5th May, 2004 sell the suit properties to the 2nd and 3rd Defendants in realization of its securities. It is a hotly contested issue whether these sales

were in violation of the orders of Ibrahim, J of 7th November, 2003.

Following these sales the Plaintiffs applied for orders to restrain the Defendants from evicting them from the suit premises, *inter alia*. When the application came up for *inter partes* hearing before Emukule, J. on 16th June, 2004 the Defendants raised a preliminary objection to both the application and the suit. In upholding the preliminary objection in a considered ruling dated and delivered on 21st September, 2004 Emukule, J made various findings of both law and fact. He also held that Ibrahim, J. lacked jurisdiction to grant some of the orders that he granted on 7th November, 2003, that in any event those orders expired on 6th April, 2004, and that the sales and transfers of the suit properties on 5th May, 2004 were lawful. He struck out the suit with costs and ordered that the Plaintiffs were at liberty, subject to the law of limitations, to institute fresh proceedings if they so desired.

The Plaintiffs then instituted the present suit by plaint dated 23rd September, 2004. They sought various declarations and orders in respect to the two suit properties, *inter alia*. Together with the plaint they filed a chamber summons of the same date in which they sought various temporary injunctive reliefs pending hearing and determination of the suit. When the application came up for hearing *inter partes* on 7th March, 2005 the Defendants raised a preliminary objection to the same upon the grounds (notice thereof dated 20th December, 2004):-

- 1.) That the application and the suit are *res judicata* vide HCCC Nos. 430 of 2002 and 63 of 2003.
- 2.) That the Plaintiffs are vexatious litigants and ought, under Order 24 of the Rules to settle all outstanding costs in regard to the previous suits before they are granted audience by the court.
- 3.) That the suit properties having been sold and transferred, the Plaintiff's equity of redemption has been extinguished.
- 4.) That for the same reason the Plaintiffs' remedy, if any, lies in an action for general damages against the 1st Defendant.
- 5.) That in fact and in law the orders sought in the application cannot be granted as the Plaintiffs have no legal rights over the suit properties to be protected.
- 6.) That the Plaintiffs are guilty of concealment, distortion and non-disclosure of material facts.
- 7.) That on the whole the application and the suit are an abuse of the process of the court.

I have considered the lengthy submissions of the learned counsels appearing. They quoted a multitude of authorities. But I think the issues raised are fairly straight-forward and easily determined. I will consider first the issue of *res judicata*. The principle of *res judicata* is set out in section 7 of the Civil Procedure Act, which provides:-

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is plain that HCCC No. 430 of 2002 was never heard and finally decided. It was struck out. Even the application that precipitated the order of striking out was not itself heard and finally decided. The suit and the application were struck out upon a preliminary objection raised to the application. Without in any way appearing to review the ruling of Emukule, J, I must observe with respect that he made various findings of fact that could only have been properly made upon a consideration of the merits of the application before him or indeed upon a proper hearing of the action itself. The long and short of it is that the issues raised both in the application by chamber summons dated 24th May, 2004 before Emukule, J. and the suit itself were never heard and finally decided. Determination of those issues would have required, at least in

part, findings of fact, either upon the affidavits before the court, or upon a proper hearing of the suit. Such findings of fact could not be properly made upon a preliminary objection to hearing of the application and the suit. In these circumstances therefor, the defence of *res judicata* cannot be properly raised with reference to HCCC No. 430 of 2002. Nor can it be properly raised with reference to HCCC No. 63 of 2003. Even assuming that the said suit was between the same parties or between parties under whom they or any of them claim, litigating under the same title, and that the issues in the present suit were also directly and substantially the same in that previous suit, there is no evidence before the court that the suit was heard and finally decided. An application for temporary injunction, such as the present one, will normally be geared toward preserving the subject-matter pending hearing and determination of the suit. As long as the new suit has been validly and properly instituted, I do not think that a plea of *res judicata* can be properly raised to such application in the new suit upon the ground that there was a similar application in the previous suit, which application was heard and determined. I therefore hold that the present suit and application are not *res judicata*.

The second ground of the preliminary objection is that the Plaintiffs are vexatious litigants and ought therefore under Order 24 of the Rules to settle all outstanding costs in the previous suits before they are granted audience in the present suit. The short answer to this ground is that there is nothing to stop the Defendants from seeking an appropriate order of stay of suit under Order 24 aforesaid. They have not done so and the court is not here considering such application.

Grounds 3 and 4 of the preliminary objection are that the Plaintiff's equity of redemption has been extinguished on account of the sale and transfer of the suit properties, and that therefore the Plaintiffs' remedy, if any, lies in an action for damages against the 1st Defendant. It will be recalled that it is contested whether the sales and transfers of the properties were in violation of the orders of Ibrahim, J of 7th November, 2003. Findings of fact will have to be made in respect to this issue. They cannot be made in this preliminary objection. Nor could they have been properly made, as I have already respectfully observed, by Emukule, J. upon the preliminary objection before him. In my view therefore, and I so hold, these two grounds of the preliminary objection are also not well-taken. By the same reasoning ground No. 5 must also fail. That ground is that the Plaintiffs have no legal rights over the suit properties to be protected by the orders sought.

Ground six of the preliminary objection is that the Plaintiffs are guilty of concealment, distortion and non-disclosure of material facts. In my view these findings of fact can only be made upon a consideration of the application on merit, not upon a preliminary objection.

The last ground of the preliminary objection is that on the whole the application and the suit are an abuse of the process for the court. Inasmuch as all the issues between the parties have never been heard and finally determined I do not find that the suit and application are an abuse for the process of the court.

For all the above reasons the preliminary objection is overruled with costs to the Plaintiffs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JUNE, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF JUNE, 2005