



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 272 of 2004

BUPSON BUILDERS LTD 1st APPLICANT

JASWNDER KAUR SONDHI 2nd APPLICANT

VERSUS

KENYA COMMERCIAL BANK RESPONDENT

R U L I N G

The Application has been brought through Notice of Motion under Order L.R.17, Order XXXIX Rule 1, 2 and 3 Civil Procedure Rules and Section 3A and Section 63(e) Civil Procedure Act and Rule 3(1) and (2) of the High Court Practice and Procedure (Vacation) Rules. The Application seeks the following Order:-

“That the Defendant by themselves, servants or agents be restrained by temporary injunction from selling, auctioning, alienating or otherwise disposing off Plot No.Nakuru Municipality Block 11/162.”

During the hearing of the application, the Applicants were represented by Mr. Matiri while the Respondent was represented by Mr. Githua. According to Mr. Matiri, the property had been advertised for sale on 8th April, 2005. The Applicants also sought to reinstate their application dated 16th August, 2004, for hearing. The Applicants are relying on the affidavit of Jaswinder Kaur Singh in which he states that the 1st Plaintiff had instructed the firm of Kamyu Karimi & Co. Advocates to file the present suit in Nairobi. Later, the said firm wrote to them saying that the matter had been transferred to Nakuru and that the status quo was to be maintained. However, the said letter was the last correspondence that he received from the said firm of Advocates. Subsequently, the deponent was surprised to be served with a fresh notification for sale by the Auctioneers. Mr. Matiri further submitted that unknown to the Plaintiff the matter was brought to Nakuru and given a new number. Thereafter, the Defendant’s advocate took the initiative and listed the application for hearing on 25th January, 2005, and the firm of Kamuyu, Advocate failed to turn up. Due to the above, the application was dismissed for non-attendance. According to Mr. Matiri, the Plaintiff only became aware of the dismissal on 21st March, 2005. Mr. Matiri submitted that the failure to attend court on 25th January, was a mistake by Mr. Kamuyu and hence he urged this court not to visit that mistake on the head of an innocent litigant.

On the other hand, Mr. Githua has opposed the application on the ground that no reasons had been advanced in support of prayer No.1(one) to show that the Applicant is entitled to an injunction.

Apart from the above, Mr. Githua has submitted that the Applicants have deliberately failed to produce an

affidavit from the Advocate on record to show why he never attended the hearing. He believes that such an affidavit could have been only ground to show whether there was any mistake. Further to the above, Mr. Githua took issue with the Applicants who never got in touch with their Advocate for a period of about 5 months – from 3rd September, 2004 to 25th January, 2005. In addition to the above, he submitted that the court had no materials to decide on the negligence or otherwise of the former Advocate. In conclusion, he submitted that there are no reasons for reinstating the application that had been dismissed.

This Court has carefully perused the submissions by both counsels. Apart from the above, I have also perused the Court file carefully. It is apparent that this case was transferred to Nakuru by Hon. Justice Azangalala on 3rd September, 2004. Specifically, he stated that the status quo should be maintained. Consequently, the application was fixed for hearing on 25th January, 2005 when the same was dismissed due to non-attendance by Kamuyu, Karimi, Advocates. The dismissal was perfectly justified since no reasons were given at that particular time for the absence of the learned Counsel. However, the Applicants have now explained the reasons why they never attended court on that date. That was because their Counsel never communicated to them. That information was not available to my brother viz, Hon. Justice Kimaru before he made his order. Besides the above, I have also carefully perused both the Plaintiff and the Application dated 16th August, 2004. There is no doubt in my mind that both of them raise weighty and crucial legal issues which can only be fully determined after each party has been granted ample opportunity to ventilate his or her case. Besides the above, it would be expecting too much from the Applicants to get an affidavit from his former Counsel admitting negligence.

Given the above analysis, I hereby grant an injunction restraining the Defendants by themselves, servants or agents from selling, auctioning, alienating or otherwise disposing off Plot No. Nakuru Municipality/Block 11/162 pending the hearing of the application dated 16th August, 2004. The said latter application is hereby reinstated.

Since it was the Plaintiffs/Applicants and their Counsel who were at fault – they will pay the Respondent throw away costs before the hearing of the above application.

Those are the orders of the Court.

MUGA APONDI

JUDGE

28th September, 2005

Ruling read signed and delivered in open court in the presence of Mr. Matiri for Plaintiff/Applicant. Mr. Kimatta for Githua for Respondent.

MUGA APONDI

JUDGE

28th September, 2005.

Both Counsels - present

Court

By Consent, hearing on 16th November, 2005.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005.