



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 284 of 2003

KOMASSAI PLANTATIONS LIMITED.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LIMITED.....DEFENDANT

RULING

The plaintiff has moved the court by chamber summons dated 2nd December 2005. The application is brought under OXXXIX Rule 2A (1) and (2) of the Civil Procedure Rules.

The application seeks the following order: -

“That the Defendant’s property comprising of moveable assets in the Defendant’s place of business situated in the Baroda House at Koinange Street, Nairobi, be attached for disobedience and or breach of the terms of the Order for injunction dated 27th May, 2003 issued by this Honourable court on 27th May 2003.”

The grounds supporting the application are: -

“(a) that in terms of the Order the court made on 27th May 2003 the defendant and or its servants and or agent and/or either of them were restrained from advertising for sale of the suit property known as L.R. 209.7696 Nairobi from selling the same by public auction or otherwise on 28th May, 2003 as threatened or at any other time and from otherwise interfering with or disposing of the plaintiff’s interest in the said suit property pending the determination of the suit herein;

(b) That in disobedience and/or breach of the terms of the above order of the court, M/s Baseline Auctioneers on behalf of the Defendant have by their Forty-Five (45 days Redemption Notice and Notification of sale dated 26th October 2005 threatened to sell by auction the plaintiff’s property known as L.R. 209/7696 Nairobi on 5th January 2006.”

The plaintiff filed this suit on 19th May 2003 and on the same day also filed an application for injunction to stop the defendant from selling, in exercise of its statutory power of sale the plaintiff’s property L.R. No. 209/7696 Nairobi. The sale was scheduled on 28th May 2003.

A ruling of that application was delivered by Hon Justice Nyamu on 27th May 2003. The plaintiff’s

through its director, deponed that the said ruling granted it an injunction, restraining the defendant from selling the charged property, pending the determination of this suit as well as cancelling the sale that was due on 28th May 2003.

Plaintiff's director further deponed that the extracted order and the Penal Notice were served on the defendant, their advocates M/s Maina Karanja in breach of that order the defendant, by giving a forty – five days notice have served that notice to M/s Jayantilal Popatlal Shah, Sobhajrachand Popatlah Shah and Himanshu Jayantilal Shah threatening to sell by auction the plaintiff's property known as L.R. No. 209/7696 Nairobi. That notice shows the scheduled sale is on 5th January 2006.

Plaintiff's learned counsel Mr Sehmi stated that the extracted order of the ruling of Hon Justice Nyamu has not been reviewed or set aside and although the defendant's counsel had sought a mention date the same was not reviewed. Counsel therefore stated that that order was binding on all parties and accordingly the defendant is not entitled to take the law into its own hands.

The defendant's counsel did not attend the hearing of the present application and the court, therefore did not get the benefit of hearing its opposition to the present application.

The plaintiff, in view of the alleged disobedience seeks an order for the attachment of the defendant's property.

I have looked at the typed ruling of Hon Justice Nyamu, delivered on 27th May 2003. The pertinent passages of that ruling, that are relevant to the present application, are to be found in page 11 as follows: -

“I would like to walk this path in the present case and hold that the applicant is entitled to an injunction and for the above reasons I do exercise my discretion in his favour,”

and Also page 12 to 13 is the following passage.

“The application is accordingly allowed to the extent indicated herein and tomorrow's (28/5/2003) auction is hereby cancelled. The application is allowed. However the Respondents are at liberty to issue a fresh notice, which complies with Section 69 A (a) of the T.P.A should they want to realise their security. Costs are to be in the cause as both parties were partially successful.”

The order extracted, hereof is in the following terms: -

“1. That the defendant and/or its servants and/or agents and/or either of them be and are hereby restrained from advertising the sale of the suit property known as L.R. No. 209/7696 NAIROBI or from selling the same by public auction or otherwise on 28th May, 2003 as threatened or at any other time and from otherwise interfering with or disposing of the plaintiff's interest in the said suit property pending the determination of the suit herein.

2. That the auction scheduled for tomorrow 28th may 2003 be

and is hereby cancelled.

3 That however the defendant/respondent are at liberty to issue

fresh notice which complies with Section 69 A (a) of the T.P.A. should they want to realise their security.

4. That the costs will be in the cause as each party has been

Partially successful.”

The immediate reaction to extracted order is that it seems to contradict itself.

One moment that order grants the plaintiff an interlocutory injunction pending the determination of the suit and at the other moment gives liberty to the defendant to sell the charged property, so long as appropriate notices were issued.

That extracted order does seem to conform to the typed ruling of the judge. I have however taken time to look at the handwritten ruling of the judge and I found that it is in the following terms: -

“I would like to walk this path in the present case and hold that the applicant is entitled to an injunction and or for the above reasons I do exercise my discretion in its favour. The application is accordingly allowed to the extent indicated herein and tomorrows auction is hereby cancelled. However the Respondent are at liberty to issue a fresh notice which complies with Section 69 A (a) of the T.P.A. should they want to realise this security.”

One would agree that the hand written ruling is far different in its terms as opposed to the typed ruling.

Order XX Rule 6 (1) provides:

“The decree shall agree with the judgment.....”

Order XX Rule 7 (6) provides:

“Any Order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in the like manner as a decree.”

It is clear from those two rules that a decree and an order should agree with the judgment or the ruling.

The Civil Procedure Act defines Order to mean

“.....the formal expression of any decision of a court which is not a decree.....”

In view of the inconsistency seen in the extracted order and the handwritten ruling I believe it is important to consider which of the two, either the handwritten ruling or the typed ruling, will be considered in considering whether the extracted order agrees or is a formal expression of the court's ruling.

Order XX Rule 2 and 3 in reference to delivery of judgments states that those judgments shall be written. The Oxford English dictionary defines the word write as:

“Mark (letters, words, or other symbols) on a surface, with a pen, pencil or similar implements.”

That definition does show that Order XX refers to handwritten judgments as being the judgments of the court. Having that definition in mind I find that the ruling that assist the court to determine what order was granted by the court is the handwritten ruling. That being the finding of this court, the plaintiff was then not granted an injunction pending the determination of this suit and the order extracted on 27th May 2003 is erroneous for failing to agree with the handwritten ruling and for failing for formally express the decision of the court.

The plaintiff's application dated 2nd December 2005 is therefore dismissed because the court's finding is that there is no disobedience of the order made by Hon Justice Nyamu. There shall be no order as to costs.

Dated and delivered this 20th day of December 2005.

MARY KASANGO

JUDGE