



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1540 OF 1999

ASSOCIATED WAREHOUSING CO. LTD 1ST PLAINTIFF

NITICHANDRA KRISHNALAL PANDYA 2ND PLAINTIFF

BHAVNA PANDYA 3RD PLAINTIFF

VERSUS

TRUST BANK LIMITED DEFENDANT

RULING

The Plaintiffs filed the Plaint herein on 25th June, 1999. The Plaint inter-alia prayed for an injunction restraining the defendant from advertising for sale, selling or otherwise alienating, mortgaging or otherwise dealing in or disposing of the Plaintiffs' suit premises being sub-division No 1532/IMM Mombasa until the hearing and determination of the suit. The Plaintiffs' further prayed for other restraining orders in terms of prayers (b) and (c) of the Plaint.

Together with the Plaint the Plaintiffs filed a Chamber Summons under Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. They also invoked all other enabling provisions of the law. By the said Application the Plaintiffs sought inter alia an injunction until judgment against the defendant by itself, servants, agents, advocates or auctioneers or any of them or otherwise from advertising for sale, selling by public auction or private treaty or otherwise howsoever or completing by conveyance or transfer of any sale concluded by auction or otherwise of the Plaintiffs' said premises.

The Chamber Summons further prayed for a prohibitory order in respect of further registration or change of registration in ownership, leasing, sub leasing, allotment, user, occupation or possession in respect of the said premises.

On 19th October, 1999, the court held:-

“In the circumstances the Plaintiffs who have all along maintained that they are willing to pay the balance outstanding after the set off have established a prima facie case and this application must succeed. An injunction is hereby granted restraining the defendants from proceeding with the sale of the Plaintiffs properties until the sum equivalent to the value of the six BCD's is set off against the outstanding loan.”

On 22nd January, 2001 the Plaintiffs filed another Chamber Summons under Order 39 Rules 1, 2, 3 and 9

praying for similar orders as the ones sought in the Chamber Summons of 25th June, 1999. This application was dismissed with costs in the presence of a representative of the applicant on 22nd May, 2001.

The entire suit was then dismissed on 4th April, 2003 for want of prosecution by the court of its own motion. The Plaintiffs then filed the current application on 8th January, 2004 under a Certificate of Urgency. The Plaintiffs obtained an ex parte injunction on 9th January, 2004 and the inter partes hearing was fixed for 23rd January, 2004.

Before the commencement of the inter partes hearing on 23rd January, 2004 the defendant's counsel applied to argue a preliminary objection contained in their Notice dated 19th January, 2004. The Respondents argued that this court has no jurisdiction to hear the Plaintiffs' application as it is functus officio. It further argued that the Plaintiffs' application offends Rule III of Order 39 of the Civil Procedure Rules. It is further submitted that the Applicants have violated the provisions of Order III of the Civil Procedure Rules.

I can dispose of the last ground of objection summarily. The record shows that on 8th January, 2004 the current advocates were granted leave to act for the Plaintiffs. Order III of the Civil Procedure Rules has therefore not been violated. The third preliminary objection is accordingly rejected.

The second preliminary objection that the application offends Rule III of Order XXXIX of the Civil Procedure Rules was argued by the Respondent's Counsel. I will consider the remaining 2 grounds of objection together.

The substantive preliminary objection is based on the fact that the Plaintiffs suit was dismissed for want of prosecution on 4th April, 2003. There is therefore no suit upon which the Chamber Summons under Order 39 Rule 1 can be based. Mr Shah submitted that as the suit was dismissed the ex-parte order of injunction obtained on 9th April, 2004 was irregularly obtained. In his view orders cannot be obtained in a spent suit.

Mr Shah further submitted that in a suit an applicant can obtain an ex parte injunction only once under Order 39 Rule 3 (2) of the Civil Procedure Rules. He submitted that on 16th January, 2001 the Plaintiffs filed an application for injunction and obtained ex parte orders. The orders obtained were never confirmed. Mr Shah further submitted that the Plaintiffs application of 25th June, 1998 was finally dismissed on 22nd May, 2001. The entire suit was dismissed on 4th April, 2003. In Mr Shah's view in the light of the dismissal of the Plaintiffs' suit and application for injunction, the present application does not lie.

In Reply Mr Kariuki counsel for the Applicant stated that the first application for injunction of 25th June, 1998 was heard inter partes and orders confirmed on 19th October, 1999. He submitted that the injunction was granted until the sum equivalent to the value of the 6 BCD's is set off against the outstanding loan. He stated from the bar that up to now the said 6 BCD's have not been set off.

Mr Kariuki admitted that the Plaintiffs filed a similar application dated 22nd January, 2001 which was dismissed on 22nd May, 2001 by Judge Mbaluto for want of prosecution. In Mr Kariuki's view these dismissals do not invalidate the Plaintiffs present application. He relied on ***REWAL VS THE MOMBASA HARDWARE LTD (1968) E A 392***.

In this case the Court of Appeal of East Africa the predecessor of our Court of Appeal held that an applicant whose case has been dismissed for want of prosecution is entitled to apply to have the order of dismissal set aside. The case with respect to counsel for the Plaintiff does not advance the Plaintiffs opposition to the defendant's preliminary objection. It may be relevant in the main application.

Mr Kariuki also relied on ***NAIROBI C A No 1 of 2003 ANSPAR BEVERAGES LTD VS DEVELOPMENT BANK OF KENYA LTD & OTHERS***. In this case an application for injunction was made in the Court of Appeal. It was allowed despite the fact the High Court had struck out the Plaintiff. The

learned Judges of Appeal stated at page 6 of the Judgment -

“In its intended appeal the applicant intends to move the court to resurrect the p laint, and if the appeal succeeds the plaint may be put back in its place. If that happens the applicant would be entitled to argue its chamber summons application on merits.”

On this authority Mr Kariuki urged me to find that the dismissal of the suit is not a bar to an application for injunction.

Mr Shah in reply distinguished the Anspar Beverages case arguing that the Court of Appeal was dealing with an application for injunction under the Court of Appeal Rules and the court properly exercised its appellate jurisdiction in allowing the injunction. Mr Shah submitted that the situation in the present application is different. He maintained that the court has no jurisdiction until the suit is restored. In his view a suit cannot be restored ex-parte.

Having considered the rival arguments on the defendant’s preliminary objection, I find as a fact that on 22nd January, 2001 the Plaintiffs through M/s Waruhiu K’Owade & Ng’ang’a Advocates filed a Chamber Summons in which they sought a temporary injunction against the defendant until judgment or further order from advertising for sale, selling by public auction or otherwise howsoever completing by conveyance or transfer of any sale of subdivision No 1532/IMM situate in Mombasa. The Plaintiffs further prayed for a prohibitory order against change of registration in the ownership, leasing, sub-leasing, allotment, user occupation or possession in the said subdivision No 1532/IMM until the hearing and final determination of the suit. The Plaintiffs further prayed for costs. This application was filed under a Certificate of Urgency.

On the same date it was filed, exparte orders in terms of prayers 1 and 2 of the said Chamber Summons were granted until the inter partes hearing which was to be on 2nd February, 2001. On 31st January, 2001 the defendant filed a Replying affidavit in response to the said Chamber Summons. On 2nd February, 2001 the same was adjourned to 7th February, 2001 and interim orders were extended accordingly.

On 7th February, 2001 the application was stood over generally but interim orders were extended until further orders of the court. The Chamber Summons was on 14th March, 2001 fixed for hearing inter partes on 7th May, 2001.

On 7th May, 2001 the application was adjourned to 22nd May, 2001 for hearing. Come this date, the advocate for the Plaintiff left the matter to the court whereupon the defendant’s advocate applied for the dismissal of the application. The application was then dismissed with costs.

The record further shows that on 4th April, 2003 the court of its own motion dismissed the Plaintiffs’ suit with costs.

In the light of the above circumstances is the Plaintiff entitled to bring the motion dated 8th January, 2004? In prayers 3 and 4 of the present Notice of Motion the Plaintiffs’ seek the same orders sought in the Chamber Summons dated 16th January, 2001 and filed on 22nd January, 2001 which application as already stated was dismissed on 22nd May, 2001 in the presence of their advocate.

In my view the Plaintiffs should either have applied to set aside the order of dismissal of their application dated 16th January, 2001 or should have appealed against the same. I find that the cause they have taken of filing a fresh application in respect of the orders of injunction was not available to them. The Plaintiffs were therefore not entitled to the orders of injunction given exparte on 8th January, 2004. The same are accordingly set aside with costs to the defendant.

The Plaintiffs may proceed to fix the application for the hearing of submissions in respect of prayer 5 of their Notice of Motion. It is so ordered.

Dated and delivered this 20th day of February, 2004.

F. AZANGALALA

JUDGE

20.2.2004