



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 6 OF 2019

BETWEEN

MANGUO DEVELOPMENT COMPANY LIMITED.....1ST PLAINTIFF

CHARLES KARANJA KAHAHU.....2ND PLAINTIFF

ANNE WAIRIMU WANYEKI..... 3RD PLAINTIFF

DAVID KABUBII KURIA.....4TH PLAINTIFF

SHADRACK THUKU KURIA.....5TH PLAINTIFF

ELIZABETH WAMBUI KURIA6TH PLAINTIFF

PINNACLE PROJECTS LIMITED7TH PLAINTIFF

WINLOUKE PROPERTIES LIMITED 8TH PLAINTIFF

AND

I & M BANK LIMITED..... 1ST DEFENDANT

WESTMINISTER COMMERCIAL AUCTIONEERS2ND DEFENDANT

RULING NO. 2

Introduction

1. The application for determination in this ruling is the plaintiff's Notice of Motion dated 3rd March 2020 made under **Order 40 rule 3** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** seeking the following orders;

[2] THAT pending the interparties hearing of this Application, this Honourable Court be pleased to issue an order of injunction restraining the Defendants whether by themselves, their proxies, servants, agents or otherwise from advertising for sale and/or alienating and/or disposing off, selling by public auction or competing any conveyance or transfer of sale concluded by auction or private treaty for the parcel of land known as LR No. Limuru/Kamirithu/4504.

[3] THAT pending the interparties hearing and determination of this Application, this Honourable Court be pleased to issue an order of injunction restraining the Defendants whether by themselves, their proxies, servants, agents or otherwise from advertising for sale and/or alienating and/or disposing off, selling by public auction or completing any conveyance or transfer of sale concluded by auction or private treaty for the parcel of land known as LR Limuru/Kamirithu/4504.

[4] THAT this Honourable Court be pleased to issue an order directing the parties herein to either jointly or independently appoint a valuer to carry out a current valuation of the suit property pursuant to the provisions of Section 97 of the Land Act.

[5] THAT an order directing the Defendants to render a complete, true and accurate statement of accounts of the Plaintiff's loan account showing the indebtedness to date.

[6] THAT cost of this application be borne by the Defendants.

2. The application is supported by the affidavit of David Kabubii Kuria, the 4th plaintiff herein, sworn on 3rd March 2020. The defendants opposed the application through the Notice of Preliminary Objection dated 5th March 2020. Both parties filed written submissions in support of their respective positions.

Background

3. Before I deal with the issues raised by the parties, it is important to give some background to the matter which is set out in the amended plaint dated 3rd March 2019(20). The 1st plaintiff is the registered proprietor of the LR No. Limuru/Kamirithu/4504 ("the suit property") and a customer of the 1st defendant ("the Bank"). By a letter dated 12th November 2015, the Bank offered and it accepted to a facility for Kshs. 450,000,000.00 for the construction of a shopping mall on the suit property.

4. Due to ballooning costs, the project stalled and the anticipated revenue to service the loan has not been realized. The 1st plaintiff therefore sought the Bank's assistance to restructure the facility. The 1st plaintiff engaged I & M Burbidge Capital ("Burbidge"), a subsidiary of the Bank, by a letter dated 8th November 2018 as its corporate finance adviser for the purpose of raising capital to complete the project by procuring investors. Although various options were explored, Burbidge informed the 1st plaintiff, by an email dated 11th November 2019, that the Bank was not willing to refinance the project without injunction of additional capital by the plaintiffs or additional security for Kshs. 350,000,000.00 which the plaintiffs' offered. The plaintiffs complain that despite this, the Bank proceeded to advertise the suit property for sale in circumstances that were inequitable as negotiation between them, the Bank and Burbidge were still ongoing.

5. The plaintiffs further averred that they engaged the Interest Rates Advisory Centre ("IRAC") to review the interest rates charged by the Bank. IRAC established that the Bank had, from December 2017, charged unlawful interest over and above the statutory limits provided under **section 33B** of the **Banking Act** amounting to Kshs. 99,882,277.86 which it continues to charge on its account.

6. The plaintiff also complained that the Bank has not complied with **section 97** of the **Land Act** by failing to carry out a current valuation of the suit property and its *reliance* on a valuation carried out in the year 2018 will irredeemably prejudice it.

7. At paragraph 43 of the amended Plaint, the plaintiff summarised its case as follows:

[43] The actions of the 1st Defendant in inter alia unlawfully charging the Plaintiffs interest to the tune of Kshs. 99,888,227.86 as at November 2019, its failure to supply the Plaintiffs with comprehensive statements of accounts despite several demands and its inconscionable conduct in leading the Plaintiffs to believe that they, through I & M Burbidge Capital, would source additional financing of Kshs. 350,000,000 translates to an undeniable infringement to the Plaintiffs right of redemption.

8. The plaintiffs therefore sought the following reliefs in the amended plaint:

[b] A permanent injunction restraining the Defendants whether by themselves, their proxies, servants, agents or otherwise from advertising for sale and/or alienating and/or disposing off, selling by public auction or competing any conveyance or transfer of sale concluded by auction or private treaty for the parcel of land known as LR No. Limuru/Kamirithu/4504 registered in the name of the 1st plaintiff.

[c] An order directing the 1st Defendant to render a complete, true and accurate statement of accounts of the Plaintiff's loan account showing the indebtedness.

[d] A declaration that the 1st Defendant failed and/or neglected in its duty to keep proper accounts of the Plaintiffs loan account and unlawfully charged the Plaintiffs interest contrary to the Law.

[e] An order directing the 1st Defendant to compute outstanding arrears less the illegal interest charged.

[f] An order that the Plaintiffs be awarded special and general damages for the Defendant's breach of contract and duty of care.

[g] That the Plaintiffs be awarded aggravated damages.

[h] Costs of the suit

Ruling dated 27th February 2020

9. The plaintiffs filed three applications being Notices of Motion dated 19th January 2019, 5th February 2020 and 8th February 2020 all seeking to restrain the defendants from selling the suit property by way of public auction. On 27th February 2020, I dismissed all the applications on the following terms:

[1] The question I have decide today, 27th February 2020 is whether to restrain the 1st defendant from selling the suit property from exercising its statutory power of sale. According to the plaint, four prayers are sought in relation to the suit property. Prayers (a) and (b) are in respect of the sale that was due in November 2018 and related to a notification of sale dated 1st November 2018 which has now been overtaken by events. The only viable prayer is prayer (c) seeking full accounts.

[2] The Notices of Motion dated 19th January 2019, 5th February 2020 and 8th February 2020 are all in respect of a new sale that is not the subject of the plaint hence there cannot be a prima facie case with a probability of success in respect of the sale scheduled tomorrow, 28th February 2020. In the circumstances, the said applications are dismissed with costs.

10. On the same day and after dismissing the applications, I granted the plaintiffs leave to amend their plaint. It is pursuant to this leave that they filed the amended plaint dated 3rd March 2019 (20). Since the defendants have raised a preliminary objection, I will deal with it first.

The Preliminary Objection

11. The defendants' Preliminary Objection dated 5th March 2020 states that this court lacks jurisdiction to entertain the Notice of Motion dated 3rd March 2020 and that it is an abuse of the court process as it is *res judicata*. The objection is based on the ground that on 27th February 2020, this court dismissed three similar applications namely; the Notice of Motion dated 14th January 2019, the amended Notice of Motion dated 17th January 2019 and the Notice of Motion dated 18th February 2020.

12. The defendants pointed out that the application dated 3rd March 2020 was seeking similar orders based on the following grounds as the previous applications. First, that the 1st plaintiff was never served with the requisite statutory notices. Second, that the Bank never supplied statements of account. Third, that the parties were negotiating with the purpose of reaching an amicable settlement. Fourth, that the Bank was charging unlawful interest rates. Last, that the Bank did not conduct a valuation of the property.

13. Counsel for the defendants submitted that the orders sought in the present application and the issues raised therein have already been determined in the three previous applications hence the application cannot be entertained.

Plaintiff's response

14. The plaintiffs position was that the Notice of Motion dated 3rd March 2020 was not *res-judicata* on the ground that the previous applications were struck out on the basis that the prayers sought in the application were not supported by the prayers in the plaint. Counsel for the defendant submitted that the court did not determine the previous applications on merit and that even after determining the application, the court granted the plaintiffs leave to amend their plaint which was done.

Whether the present application is res judicata

15. Both parties relied on the case of ***Uhuru Highway Development Limited v Central Bank of Kenya and 2 Others NRB CA Civil Appeal No. 36 of 1996 [1996] eKLR*** where the Court of Appeal held that the principle of *res judicata* applied to interlocutory applications. The Court held as follows:

The judge in that case (Shah, J. as he then was) ruled that an application for interlocutory injunction having been decided on the principles laid down in the well known case of Giella Vs Cassman Brown a similar application cannot be brought once again even in a subsequent suit when the former suit, in which the application was dismissed, stood struck out on account of the proceedings therein being incontestably bad. Shah, J. said:

“My view is that what was decided by Githinji J. bars me from a very similar application now in a fresh suit filed to rectify the initial mistakes made procedurally by the applicants on the simple basis that Githinji, J. decided the injunction application on merits as laid down in Giella vs Cassman-Brown Principles.”

*“The Court of Appeal went further in **Pop-in (Kenya) Limited appeal (Civil Appeal No. 80 of 1988, unreported)** and relying upon the case of **Yat Tuns Investment Co. Ltd. Vs. Dao Heng Bank & another [1975] A.C. 581** stated that, (putting it in a summary form) parties must bring before court, exercising reasonable diligence, all points that they could take and that points not taken then cannot be taken again as the same would amount to an abuse of the process of Court.”*

*The long and short of all this is that once an application for injunction within a suit has been heard and determined under the principles as laid down in **Giella vs. Cassman-Brown**, a similar application cannot be brought unless there are new facts, not brought before court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling. Such cases, of course, must be very few and far in between. In the result, the appeal must fail and is hereby dismissed with costs.*

16. The question in this case is not so much the principle as it is whether it applicable to the facts of the case. It is true that the court dismissed the previous applications on the ground that there was no prima facie case as the impugned sale had already been overtaken by events. The applications were grounded on the basis that the defendants failed to issue mandatory statutory notices envisaged under **sections 90 and 96 of the Land Act**, that the plaintiffs had received various investor proposals and they were in the advanced stage of negotiations.

17. Contrary to the assertion by the counsel for the plaintiffs, the applications were not struck out but dismissed. The essence of *res judicata* is that the court is not only debarred from dealing with issue that were actually determined but also matters which ought to have been placed

before the court for determination. Since the court dismissed all the applications, all the issues raised in the applications merged into the final decision and are not open for re-litigation unless the applicant presents new facts which could not have been discovered without due diligence. Upon review of the facts, I am not convinced that any new facts have emerged that would warrant investigation. Nor do I think the fact that the court granted leave to amend the plaint changes this conclusion.

Determination

18. Notwithstanding the conclusion I have reached, I am not convinced that on the basis of the material before me, the plaintiffs' have established a prima facie case on the balance of probabilities. The plaintiffs have admitted that the 1st plaintiff is indebted to the Bank. The issue of interest goes to the extent of indebtedness and it is well established that the court cannot restrain the Bank from exercising its power of sale merely on the ground that the debt is disputed. Further, the plaintiffs have not shown that they have made substantial payments of the principal and interest, that the court would, on a prima facie basis state that the Bank has received more than the principal.

19. In the amended plaint, the plaintiffs' removed the assertion that they had not been served with statutory notices required under **section 90 and 96** of the **Land Act**. They therefore tacitly admit that the Banks's statutory power of sale has arisen. The amendment introduces a further complaint that the Bank has not carried out a current valuation of the suit property as required by **section 97** of the **Land Act**.

20. Under **section 97** of the **Land Act**, the chargee has a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under **Rule 11(b)(x)** of the **Auctioneers Rules**, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. Since the initial sale that led to the filing of the suit was in January 2019, the valuation relied on must have lapsed by the time of the proposed sale in March 2020.

21. Since the Bank is entitled to sell the suit property pursuant to its power of sale, a fact the plaintiffs admit, it is also entitled to follow the procedures necessary to exercise that power including valuation of the property in compliance with the law. In that regard and having regard to the admission of indebtedness by the plaintiffs, I would not grant an injunction to restrain from selling the suit property pending the hearing and determination of the suit merely because it is alleged that a valuation has not been carried out by the Bank. In my view, the Bank is entitled to sell the suit property as long as it complies with the legal requirements.

Disposition

22. The Notice of Motion dated 3rd March 2020 is dismissed with costs to the defendants.

DATED and DELIVERED at NAIROBI this 18th day of MAY 2020.

D. S. MAJANJA

JUDGE

Mr Osamba instructed by Osamba Otieno and Company Advocates for the plaintiffs.

Mr Wawire instructed by Wamae and Allen Advocates for the defendants.