



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E023 OF 2020

BETWEEN

CRESTA INVESTMENTS LIMITED..... PLAINTIFF

AND

GULF AFRICAN BANK LIMITED.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING NO. 2

1. The application for consideration is the Plaintiff's Notice of Motion dated 30th June 2020 made, inter alia, under **Order 42 rule 6** and 7 of the **Civil Procedure Rules** and seeks the following substantive orders:

[7] THAT pending the hearing and determination of the Intended Appeal against the ruling/order delivered on 26 June 2020, there be a stay of the said Ruling/order of the said court and consequential orders and proceedings arising therefrom in particular the recovery of Ksh. 500, 000.00 being the sum deposited in court awarded by the said ruling/order.

[8] THAT pending the hearing and determination of the intended appeal; this Honourable Court be pleased to grant a temporary injunction restraining the Defendant/Respondent either by themselves or through their agents and servants from selling in public auction or any in other manner dealing with Plaintiff/Applicant's property known as L.R No. 209/18559 (original Nos. 209/74/5/1 and 209/74/5/2) situate in Westlands within Nairobi City County.

[9] THAT pending the hearing and determination of the intended appeal; this Honourable Court be pleased to grant a temporary injunction restraining the Defendant/Respondent either by themselves or through their agents and servants from advertising, offering for sale and or auctioning Plaintiff/Applicant's properties known as L.R No. 209/18648 (UNIT C) on Nextgen Mall along Mombasa Road within Nairobi City County and L.R No. Dagoretti/Riruta/s.282 Riruta within Nairobi City County.

2. The application was supported by the affidavit and supplementary affidavit of Alfred Omwansa Momanyi sworn on 30th June 2020 and 13th July 2020. The 1st defendant ("the Bank"), opposed the application through the affidavit of its replying affidavit of its legal officer, Lawi Sato, sworn on 8th July 2020. The parties also filed brief written submissions which their advocates highlighted briefly.

3. Before I deal with the application, I wish to point out that three parties, Sawan Kenya Limited, Benard Kariru Wanjiru and Expressy Cabs, filed applications dated 14th July 2020, 16th July 2020 and 13th July 2020 respectively seeking to be joined as interested parties to the suit and for injunction restraining the Bank from selling the suit properties. Barnard Kariru Wanjiru is a tenant in LR DAGORETTI/RIRUTA/S.282, Sawan Kenya Limited is tenant of LR No. 290/181559 – Mirage Westlands and Expressy Cabs a tenant of LR No. 290/18648. They all claimed that as tenants they had not been served with a notice of intention to sell the charged properties as required by **section 96(3)(e)** of the **Land Act**.

4. On 20th July 2020, I allowed the proposed interested parties to be joined to the suit but declined to grant an interim injunction for several

reasons. First, I had already heard and dismissed the Plaintiff's application for injunction. Although a tenant has a right to be served with a notice to sell the charged property under **section 96(3)(e)** of the **Land Act**, it has no greater interest in the suit property than the chargor. Second, an interested party, unlike a plaintiff or defendant, has no direct claim against any party and no relief is due to it even if the claim proceeded to trial. Moreover, an application for injunction under **Order 40** of the **Civil Procedure Rules** is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all. I now turn to the Plaintiff's application for stay and injunction pending appeal.

5. It is not in dispute on 26th June 2020, I dismissed the Plaintiff's application for injunction to restrain the Bank from exercising its statutory power of sale. In the same order I directed that the sum of Kshs. 500,000/- deposited in court by the Plaintiff as a condition for grant of the order of injunction pending the hearing and determination application be released to the Bank in order to settle the costs of the postponed auction and any balance credited to the Plaintiff's loan account.

6. The Plaintiff is entitled to and has indeed evinced its intention to exercise its undoubted right of appeal. What I am called upon it is determine whether I should grant orders of stay and injunction pending hearing and determination of this appeal. In this regard the parties are agreed that I have the jurisdiction to grant the orders of stay and injunction despite the fact that I have dismissed the application for injunction (see **Madhupaper International Limited v Kerr CA Civil Application No. NAI 116 of 1985 [1985] eKLR** which approved the decision in **Erinford Properties Limited v Chesire County Council [1974] 2 All ER 448**).

7. The application for stay is in respect of the order directing release of the Kshs. 500,000.00 deposited in court. This sum was deposited in court by the Plaintiff as a condition for grant of the temporary injunction. Since the application for injunction failed, the Plaintiff was required to pay the costs for the aborted auction. The Plaintiff does not deny its indebtedness to the Bank hence it cannot suffer irreparable loss by money being credited to its loan account to reduce its indebtedness after payment of costs of the failed auction.

8. In support of the application for injunction, the Plaintiff has urged that if the injunction order is not granted, the appeal will be rendered nugatory. The Plaintiff urged that if the suit property is sold it will suffer substantial loss. It contended that the Bank has undervalued the suit property contrary to **section 97** of the **Land Act** as the last valuation of the properties was done in 2018 and should the properties be sold; it shall suffer irreparable injury.

9. The stance taken by the Respondents is that the Plaintiff has not established grounds to warrant grant of a stay and injunction. Counsel submitted that the Plaintiff had not proved that it would suffer substantial loss since it was indebted to the tune of Kshs. 241,851,288.08 as at 7th July 2020 and has stopped making monthly instalments. The Respondents submitted that the issue of valuation of the suit property ought to have been raised at the hearing of the application for injunction and could not be raised at this stage.

10. Having considered the arguments of counsel, I am alive to the fact that the Plaintiff ought to be given an opportunity to agitate the appeal. But I am not unsympathetic to the Bank's position as it is owed a substantial sum of money. At the hearing, I asked Ms. Kituku, counsel for the Plaintiff, what terms the court, if it was minded to, grant an injunction pending appeal. She stated that the Plaintiff was prepared to deposit Kshs. 10,000,000.00. Ms Abuya, counsel for the respondent, considered this sum derisory in light of the overall debt.

11. In making the order, I have taken into account the right of the plaintiff to pursue its right of appeal without fear of the fact that it would be rendered academic if the properties are sold. On the other hand, 1st defendant has a right receive what is due to it as the subject matter of the appeal is preserved given that the Plaintiff has admitted its indebtedness.

12. I therefore allow the Notice of Motion dated 30th June 2020 on the following terms:

(a) THAT pending the filing of an application for injunction pending appeal before the Court of Appeal within a period of **three (3) months**, the Defendants are restrained from selling in public auction or otherwise the properties known as LR No. 209/18559 (original Nos. 209/74/5/1 and 209/74/5/2) situate in Westlands within Nairobi City County, LR No. 209/18648 (UNIT C) on Nextgen Mall along Mombasa Road within Nairobi City County and L.R No. Dagoretti/Riruta/s.282 Riruta within Nairobi City County.

(b) THAT Plaintiff shall deposit with the 1st Defendant, the sum of Kshs. 12,000,000.00 on or before 27th July 2020 and shall thereafter pay the 1st Defendant, Kshs. 10,000,000.00 by the 5th day of every subsequent for the next three (3) months aforesaid.

(c) THAT in default of any payment on its due date, the order of stay shall stand discharged without further reference to the court.

(d) THAT the costs of this application shall be in the suit.

DATED and DELIVERED at NAIROBI this 21st day of JULY 2020.

D. S. MAJANJA

JUDGE

Ms Kituku instructed by S. S. Malonza Advocates LLP for the plaintiff.

Ms Abuya instructed by Walker Kontos Advocates for the defendants.