



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 33 OF 2018

EVANS MURIUNGI MATHENGE.....1ST PLAINTIFF

EUTICHUS MUTWIRI MATHENGE.....2ND PLAINTIFF

PRUDENCE MAKENA MATHENGE.....3RD PLAINTIFF

VERSUS

ZABON MATHENGE ITEWA.....1ST DEFENDANT

FAMILY BANK LIMITED.....2ND DEFENDANT

RULING

1. By a plaint dated 8th November 2018, the plaintiffs lodged this suit, as sons and daughter of the 1st Defendant, respectively. They alleged that they have put up a radio station in **Nyaki/Mwathankaru/1768 (0.30 Ha)** (hereinafter “the suit property”). Which had been charged by the 1st Defendant to the 2nd Defendant.

2. On the same date they filed a Motion on Notice praying for; temporary injunction against the sale and auction of the suit property pending the hearing and determination of the application, the supply of relevant statements with regard to the loan facility entered between the 1st and 2nd Defendant and a temporary injunction pending the hearing and determination of the suit.

3. It is not in dispute that, Zanira Co. Ltd, a company associated with the 1st defendant did, in or about August, 2015, obtain a loan of Kshs.20,000,000/- from the 2nd Defendant which was secured by the suit property. The loan was serviceable in 48 months. A Charge was duly executed with the spousal consent of **Naomi Mukiri**, the wife to the 1st Defendant, and eventually registered on 1st September 2015.

4. It is alleged that there was default in repaying the loan and the 2nd defendant issued the 3 three months statutory notice upon the 1st defendant on 12th October 2016. Thereafter, the 2nd defendant sought to realise its security which provoked the current suit.

5. On 17th December, 2018, the plaintiff’s application dated 9th November, 2018 was allowed as it was undefended. However, in March, 2019, the 2nd defendant applied for the setting aside of the said orders. On 3rd, June, 2019, that application was allowed as the Plaintiff’s failed to defend it. On that date, not only had the plaintiff’s not filed any response to the application but neither them nor their advocates appeared. The court thereupon fixed the plaintiff’s application dated 9th November, 2018 for hearing on 4th July, 2019.

6. Subsequently, the 2nd Defendant advertised the suit property for auction whereby on 17th June, 2019, the plaintiffs lodged a Motion on Notice under **sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules**. In that Motion, the plaintiffs sought an interim order of injunction to restrain the 2nd defendant from selling by public auction or otherwise the suit property, pending the hearing and determination of their application dated 9th November, 2019.

7. That application was based on the grounds set out on the body of the Motion and on the supporting and supplementary affidavit of **Evans Muriungi Mathenge**. These were to the effect that; the plaintiff’s advocates had inadvertently failed to file the grounds of opposition to the 2nd defendant’s application that was allowed on 3rd June, 2019; that the 2nd defendant had on 17th June, 2019 advertised the suit property for auction on 2nd July, 2019 and that if the injunction is not granted, the plaintiffs’ application coming up for hearing on 4th July, 2019 will be rendered nugatory.

8. At the hearing, **Mr. Muthomi** Learned Counsel for the plaintiffs submitted that; unless the order sought is granted, the hearing of the plaintiff's application set for 4th July, 2019 would be an academic exercise and that the scheduled auction of 2nd July, 2019 was in breach of **Rule 15 of the Auctioneers Rules**. Counsel observed that contrary to the 2nd defendant's assertions, the plaintiffs' application was not sub-judice and that the plaintiffs were not parties to the previous suits relied on by the 2nd defendant. Counsel relied on various authorities which the court has considered, and urged that the application be allowed.

9. The 1st defendant supported the application vide his replying affidavit sworn on 25th June, 2019. He admitted the claim by the 2nd defendant but stated that the loan had been regularly serviced. **Mr. Omari**, Learned Counsel for the 1st defendant relied on his client's affidavit.

10. The application was opposed by the 2nd defendant vide the replying affidavit of **Lawrence Anthony Ouma** sworn on 24th June, 2019. It was contended that no reason had been advanced for failure to attend court on 3rd June, 2019 by the plaintiffs; that the application was *sub-judice* the application dated 9th November, 2018 and that the plaintiff's had not disclosed the existence of **Meru HCCC No. 15 of 2017 Zanira Company Ltd v. Family Bank** and **Meru CMCC No. 218 of 2018 Evans Mathenge & 2 Others v. Zablon Mathenge Itewa & Another, respectively**.

11. **Mr. Macharia**, Learned Counsel for the 2nd defendant submitted that the further supplementary affidavit of the plaintiffs be struck out for having been filed out of time. That the inadvertence failure to file grounds of opposition to the 2nd defendant's application that was allowed on 3rd June, 2019 was no good ground to grant an injunction. That the plaintiff's had not applied to set aside the orders made on 3rd June, 2019 and that the plaintiffs had failed to disclose the existence of the two suits sworn to in the replying affidavit. Counsel referred to various authorities, which the court has considered, and urged that the application be dismissed.

12. This is an injunction application. The plaintiffs have sought that the 2nd defendant be restrained from selling the suit property pending the hearing of their application set for 4th July, 2019. Before I consider the merits thereof, I need to address the issues raised by **Mr. Macharia** for the 2nd defendant which I consider to be preliminary in nature.

13. Counsel applied that the supplementary affidavit and list of authorities filed by the plaintiffs on 27th June, 2019 be struck out for having been in breach of the order of the court made on 25th June, 2019. The same were filed but not served within two days as directed. Although it is true that the said documents were in clear breach of the subject order, I decline to strike them out because, **Mr. Macharia** acquiesced to their use by the Mr. Muthomi. It was wrong for **Mr. Macharia** to wait for **Mr. Muthomi** to rely on the said documents extensively in his address to court, then turn around to have them struck out yet much of what was contained therein had been submitted to and was on record.

14. The second objection was that the current application was *sub-judice* the application dated 9th November, 2018. I do not agree with that submission. Before the application was heard, Counsel for the plaintiffs had sought to have the two applications heard together but on the objection by Mr. Macharia, the court ruled that the two applications were different and distinct from each other. The present application seeks interim orders to sustain the status quo pending the hearing of the application dated 9th November, 2018.

15. The other objection raised by the 2nd Defendant was that the plaintiffs had not disclosed the existence of **Meru HCCC No. 15 of 2017 Zanira Company Ltd v. Family Bank** and **Meru CMCC No. 218 of 2018 Evans Mathenge & 2 Others v. Zablon Mathenge Itewa & Another**. I have looked at the pleadings in the **HCCC No. 15 of 2017**, the plaintiffs were not parties to that suit.

16. The fact that the plaintiffs are children of the directors of **Zanira Co. Ltd**, the plaintiff in that suit, that does not by itself put an obligation on the plaintiffs to have disclosed that suit. There was no evidence that they were aware of that suit. In any event, there was no obligation on their part to disclose the existence of that suit.

17. As regards **Meru CMCC No. 218 of 2018 Evans Mathenge & 2 Others v. Zablon Mathenge Itewa & Another**, it was not disputed that the same had been withdrawn with no adverse orders having been made therein. In this regard, I am of the view that the non-disclosure of the two suits by the plaintiffs, either in the main suit or in the present application, did not in any way make the plaintiffs to be inequitable.

18. Having disposed of the preliminary issues, I will now consider the application. The application was based on two grounds; that the orders in force were set aside on 3rd June, 2019 due to inadvertence mistake of the plaintiffs to file the grounds of opposition and that the auction slated for 2nd July, 2019 was in breach of the law.

19. My view is, the argument that the failure to file grounds of opposition was in advertence mistake would have been a valid ground if the application was seeking to set aside the *ex-parte* proceedings of 3rd June, 2019. Since the application does not seek to set aside the aforesaid orders, the ground does not hold any water.

20. In any event, the failure to file the grounds *per se* was not the only basis for the grant of the orders of 3rd June, 2019. The plaintiffs and their advocate failed to appear. No reason was advanced for their not-attendance.

21. The only valid issue raised in the application was that the 2nd defendant intended to carry out the auction of the suit property on 2nd July, 2019 in blatant breach of **Rule 15 of the Auctioneers Rules**. That the advertisement had only given 14 days' notice instead of more time as presupposed under the law. According to Counsel for the plaintiffs, the notice should have been more than 14 days. **Mr. Macharia** did not address this issue.

22. The relevant part of **Rule 15 of the Auctioneers Rules** provides:-

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immoveable property-

a) ...

.....

e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement”.

23. From the foregoing, it is clear that **Mr. Muthomi’s** interpretation is correct that the auctioneer must give more than 14 days’ notice between the date of advertisement and the day of auction. The plaintiffs’ contention was that the auctioneer had only given 14 days in the present case.

24. I have seen the advertisement produced as **“EMM-02”**. It is an advertisement in the **Daily Nation** of 17th June, 2019. It notified that the auction of the suit property would be on 2nd July, 2019. A calculation of the days from 17th June, 2019 would show that 14 days would end on 1st July, 2019. The 2nd July, 2019 would be the 15th day therefore outside the 14 days’ notice. To my mind therefore the notice given by the 2nd defendant was not in any way in breach of **Rule 15 of the Auctioneers Rules** as alleged by the plaintiffs.

25. I note that the order sought by the plaintiffs is only meant to maintain the *status quo* pending the hearing of the plaintiff’s application dated 9th November, 2018 on 4th July, 2019. That is a valid prayer. Public interest demands that legal proceedings should not be in vain.

26. However, in the present case, the plaintiffs have themselves to blame. They did not attend court on 3rd June, 2019 neither did they seek the bringing back of the date for the hearing of their application dated 9th November, 2019. I think sometimes the loss should be left to fall where it lies.

27. In the premises, I find the application to be without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED and DELIVERED at Meru this 1st day of July, 2019.

A. MABEYA

JUDGE