



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 311 OF 2015

JAVAID IQBAL KHAN1ST PLAINTIFF

MANIZA SHARIF JAVAID IQBAL2ND PLAINTIFF

VERSUS

IQBAL TRANSPORTERS LIMITED.....1ST DEFENDANT

BANK OF BARODA (K) LIMITED2ND DEFENDANT

RULING

1. The Plaintiffs have filed a Notice of Motion dated 9th February 2019 (the application) seeking the following prayers:

a. That the time for compliance and/or for rectifying any default to redeem property commonly known as Maissonette No. 6 erected on that parcel of land known L.R. No 1870/VI/52 be extended for a period of twenty-four (24) months or for such other period as the Court may determine fit pursuant to powers conferred on the Court under Section 104 and 105 as read together with Section 90 of the Land Act, 202.

b. That in the alternative to prayer 3 above, the Defendant/Respondent's statutory powers of sale be suspended and/or postponed for a period of twenty four (24) months or for such other period as the Court may determine to enable the Plaintiffs/applicants redeem property commonly known as Marionette No. 6 erected on that parcel of land known L.R. No. 1870/VI/52.

c. That in the alternative to prayer 3 and 4 above, the this Honourable Court be pleased to extend its orders of 5th February 2018 granting a temporary stay of any sale or howsoever interfering with the ownership or quiet possession over that property commonly known as Maissonette No. 6 for such other period as the Court may determine to enable the Plaintiffs/applicants to prosecute Civil Application No. 2 of 2018 in the Court of Appeal.

BACKGROUND

2. The Plaintiff when filing their Complaint simultaneously filed an application dated 29th June 2015 where they sought injunction amongst other prayers. That application was heard and a Ruling was delivered on 21st December 2015. By that Ruling the Court dismissed the Plaintiffs' application. The Plaintiffs appealed that dismissal and the Court of Appeal by its Judgment dated 19th January 2018 dismissed the Appeal. It is in that background that the prayers in the application are made.

THE APPLICATION

3. The application is supported by an affidavit of Javaid Iqbal Khan the 1st Plaintiff.

4. As he had previously in the previous applications the 1st Plaintiff deponed that L.R. No. 1870/VI/52, the property charged to the 2nd Defendant is his matrimonial home. That the facility which was secured by the charged property was liquidated in March 2009 when the amount of Kshs. 68,426,096 was paid to the 2nd Defendant. The 2nd Defendant on 8th October 2012 issued the Plaintiff with statutory Notice and demanded Kshs. 12 million. That it is that statutory Notice which led the Plaintiffs to file this present suit.

5. The Plaintiffs deponed that following the dismissal of the Plaintiffs' interlocutory application in the Court of Appeal the Plaintiffs filed an Appeal in the Supreme Court. The Plaintiffs are apprehensive that the 2nd Defendant will dispose the suit property which they say will

render the Appeal nugatory.

6. The Defendant stated that the bank statements supplied by the 2nd Defendant were fraudulent and fictitious. That accordingly the bank statements are computer generated.

7. The Deponent attached copies of titles which he said his son would use obtain finance to pay the amount found due to the 2nd Defendant.

8. The application was opposed by the 2nd Defendant through the affidavit of Esther Gathoni Kariuki-Kiriba, an employee of the 2nd Defendant's Advocates. The Deponent referred to earlier affidavits filed on behalf of the 2nd Defendant. Further the Deponent stated that the 2nd Defendant is yet to serve statutory Notice under Section 96 of the Land Act (the Act). The Deponent also stated that the Plaintiffs filed, in the Court of Appeal, an application seeking leave to lodge an Appeal at the Supreme Court but that on 23rd February 2018 the Court of Appeal declined to grant such leave. Further that the 2nd Defendant's Advocates have not been served with a Notice of Appeal against the Judgment of the Court of Appeal.

ANALYSIS

9. I have considered the affidavit evidence and the parties written submissions.

10. Let me mention it here that the Plaintiff's Advocate was served with a hearing Notice of the Plaintiffs' application on 11th June 2019. The hearing Notice was received by the Plaintiffs' Advocate under protest on the ground that the Notice was short. Since both parties had filed their written submissions to the application and in the absence of the Plaintiffs' Advocate, without sufficient reason the Ruling of the application was reserved and is now being delivered today.

11. The issue of the Plaintiffs' accounts, raised in this application is res judicata having been in issue before the judge who heard the application dated 29th June 2015. They cannot be reconsidered.

12. The Plaintiffs have not provided evidence that there is a pending appeal before the Supreme Court. As rightly submitted by the 2nd Defendant such an Appeal under Rule 31 of the Supreme Court Rules required the Plaintiffs to file a Notice of Appeal before the Supreme Court within fourteen days from the date of Judgment of the Court of Appeal. There is no evidence of such a Notice being served on the 2nd Defendant. There is therefore no pending appeal before the Supreme Court.

13. The Plaintiffs erred to rely on Section 104 of the Land Act because that Section only permits the Court to grant remedies and reliefs where a receiver is being appointed.

14. The Plaintiffs also seek the Court to invoke Sections 103 and 105 of the Land Act. Section 103 provides for the chargor to seek relief from the Court against the exercise of chargee's rights. Section 105 provides power to the Court to reopen certain charges.

15. The Plaintiffs in invoking those Section stated that the charged property is their matrimonial home. There is however no evidence before Court that it is a matrimonial home. Even if it was the Plaintiffs have acknowledged default in settling some of the amount due to the 2nd Defendant, save that they state the accounts are fraudulent and fictitious. The reason the Plaintiffs so describe the account without further evidence cannot be a basis for the orders sought.

16. **In my view the Plaintiffs' application dated 9th February 2018 is without merit and is dismissed with costs to the 2nd Defendant.**

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....**COURT ASSISTANT**

.....**FOR THE 1ST PLAINTIFF**

.....**FOR THE 2ND PLAINTIFF**

.....**FOR THE 1ST DEFENDANT**

.....**FOR THE 2ND DEFENDANT**