



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 18 OF 2017

JOHN LOPEZ LUTUKA KIBWENGE.....PLAINTIFF

VERSUS

MWANACHI CREDIT LTD1ST DEFENDANT

MARY RITA WANJIKU & CHARLES MUTINDA MUTUA

T/A MISTAN AUCTIONEERS2ND DEFENDANT

RULING

1. John Lopez Lutuka Kibwenge (the “Plaintiff”) launched this suit by way of a Complaint filed in Court on 17/07/2017. The Plaintiff sought certain injunctive orders and damages against Mwananchi Credit Ltd (the “1st Defendant”) and Mary Rita Wanjiku & Charles Mutinda Mutua – both Trading As Mistan Auctioneers – improperly jointly named as “2nd Defendant.” I will retain that terminology for ease of reference since it does not cause too much damage to the identity of the parties.
2. The dispute between the parties arose out of a loan facility the Plaintiff took from the 1st Defendant. The Plaintiff freely admits that he took out the loan facility for a sum of Kshs. 11,800,000/- in December, 2014. He renewed the facility and took out another facility for Kshs. 148,550,000/- in April, 2016. Both facilities were secured by a charge registered over land parcel No. Kiambu/Municipality Block 111/231 (“Suit Property”).
3. In the Complaint, the Plaintiff made several allegations against the 1st Defendant - including fraud for inflating the amounts owed under the two facilities and unprocedurally advertising the Suit Property for auction under the 1st Defendant’s Statutory right of sale. By the time the Plaintiff approached the Court, the 1st Defendant had served on him the statutory notices and an auction was advertised.
4. The Plaintiff sought a permanent injunction to prevent the Defendants from selling off the property as well as unspecified damages for what he termed “wrongful advertisement for sale of [his] property.”
5. The Plaintiff filed a Notice of Motion Application simultaneously with the Complaint seeking interim reliefs. Since the Application was filed under Certificate of Urgency, the Plaintiff’s then counsel appeared before the Court ex parte on 14/07/2017. The matter was certified urgent and the Plaintiff ordered to serve the Defendants and return to Court for inter partes hearing of the Application on 20/07/2017.
6. When the parties’ counsels appeared on 20/07/2017, they agreed by consent to the interim orders until 31/07/2017 when the hearing of the Application was to be heard.
7. On 31/07/2017, the parties’ counsels again appeared before the Court. They had a consent to record. They produced a consent letter signed by advocates for both parties dated 26/07/2017. The Court approved the proposed consent and recorded it as the order of the Court. It read as follows:

“THAT BY CONSENT: This matter is settled in the following terms:

- i. The Plaintiff is indebted to the 1st Defendant in the tune of Kshs. 60,000,000/-.
- ii. The Plaintiff shall liquidate the debt owing to the 1st Defendant in monthly instalments of Kshs. 10,000,000/- commencing the 31st August, 2017.
- iii. In default, execution by way of sale of the charged property – Kiambu Municipality Block 111/231 to proceed.”

8. Ordinarily, this should have settled matters. Not so this time. On 25/08/2017, one Hadija Shee Abu (hereinafter, "Intended Interested Party") approached the Court vide a Notice of Motion of even date essentially seeking two substantive orders: that she be enjoined in the suit as an Interested Party and that the Court be pleased to review the consent order recorded in Court "to the extent that the execution should not be by the sale of the parcel of land No. Kiambu Municipality Block 111/231." In the interim, the Intended Interested Party sought interim relief.
9. The basis of the Intended Interested Party's Application is that she claims to be the lawfully wedded wife of the Plaintiff who has an interest in the Suit Property. Her argument is that as the wife, by virtue of the provisions of the Land Act, she had to consent to the loan facilities and charges which the Plaintiff entered into with the 1st Defendant since the Suit Property is matrimonial property. Since she did not consent to the loan facilities and charges, the charge is null and void. In her Application, she claims that the 1st Defendant acted fraudulently by not obtaining her consent or informing her of the charge yet she was a wife to the Plaintiff.
10. Since the Intended Interested Party's Application was filed during the Court Recess, the file was placed before the duty judge in Milimani Civil Division. The Learned Judge certified the matter urgent and gave interim orders staying execution in the manner contemplated in the consent order. He ordered the Intended Interested Party to serve the Application and return to this Court for inter partes hearing.
11. When the matter finally came up for inter partes hearing, the 1st Defendant had filed a vigorous affidavit in opposition to the Application. In addition, it had filed a Notice of Preliminary Objection. Finally, it had filed an Application of its own. The Replying Affidavit charged the Plaintiff of colluding with the Intended Interested Party to bring the present Application to defeat his legal obligations. Further, it charged that the Intended Interested Party's Application is based on fraud: that the alleged marriage between the Intended Interested Party and the Plaintiff does not, in fact, exist but is based on a forged marriage certificate. Ultimately, the 1st Defendant filed documents to show that the Directorate of Criminal Investigations had determined the alleged marriage certificate to be fake and both the Intended Interested Party and the Plaintiff are now facing criminal charges based on the forgery.
12. The 1st Defendant's Application was to request the Court to review the ex parte orders obtained by the Intended Interested Party (staying execution) on the grounds that the orders were founded on fraud: the alleged marriage certificate which, the 1st Defendant insists, is a forgery over which the Intended Interested Party and the Plaintiff are facing criminal charges.
13. The Preliminary Objection is based on the argument that this Court is functus officio in the matter on account of the consent order which was adopted by the Court.
14. The Plaintiff's new lawyers filed Grounds of Opposition to the 1st Defendant's Application in essence arguing that the consent order is "impugned".
15. Eventually, the advocates for the Intended Interested Party and the 1st Defendant appeared before me and argued their respective Applications orally. I have considered their representations and the various documents filed in Court.
16. The case at hand is fairly straightforward and equally easy to determine. The Plaintiff was the party that launched this suit. He framed the suit as being against the two defendants: the first for alleged fraud and intending to improperly sell the Suit Property, and the second for acting on behalf of the 1st Defendant in the sale. The Plaintiff equally approached this Court with a consent order which the Court approved and recorded as the order of the Court compromising the suit he had brought wholly. As at 31/07/2017, the suit was compromised. There was nothing more to determine in that suit.
17. What then is the fate of the Intended Interested Party's Application to be enjoined to this suit? It is, logically, of no avail. It may be that the Intended Interested Party has a valid and legitimate claim against the Plaintiff and the 1st Defendant. But that claim does not belong in the present suit – which is between the Plaintiff and the Defendants – and which has been compromised. That claim by the Intended Interested Party will have to be ventilated and determined in a separate suit. If the Intended Interested Party truly believes that the Plaintiff and the 1st Defendant have trampled on her rights as a lawful wife, she must bring a suit against them properly outlining that allegations and offering the proof. That claim cannot, however, be properly foisted on the present suit which has been compromised. Allowing the Intended Interested Party to re-open the suit so that she can prove her separate claim which is un-related to the compromised suit will serve no useful purpose rather than to delay justice and embarrass and confound the parties' claims and positions.
18. It is important to clarify that the Court has not taken any position on the strong allegations and tentative evidence tendered by the 1st Defendant that the marriage certificate relied on by the Intended Interested Party to establish her claim is a forgery. It was unnecessary for me to come to a determination on that question. The resolution of this case is based purely on the fact that the Intended Interested Party's claim ought to be litigated in a different suit. If and when, she brings that suit, the 1st Defendant will be at liberty to confront her with the forgery allegations.
19. The upshot, then, is that the Intended Interested Party's Application dated 24/08/2017 is dismissed with costs. As this determination means that the interim orders granted by the Court on 29/08/2018 fall by the wayside, there is no need to determine the 1st Defendant's Application.
20. Those, then, are the orders of the Court.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE