REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 194 OF 2008

PROF. MAURI ONYALO YAMBO.....…...1ST PLAINTIFF

JOAN AKINYI YAMBO.....2ND PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY OF KENYA

LIMITED.....1ST DEFENDANT

OTINDI INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated **7 July 2016** was filed herein on **8 July 2016** by the 2nd Defendant/Applicant under **Order 40 Rules 6 and 7** of the **Civil Procedure Rules, 2010**, for the following orders:

[a] (spent)

[b] That a declaration that the Orders dated **24 March 2009** have lapsed.

[c] That without prejudice to Prayer [b] above, the Court do discharge, vary and/or set aside its temporary injunctive orders in respect of the property known as **Maisonette Number 4** on **LR 3734/904** dated **24 March 2009**;

[d] That the Plaintiff/Respondents be ordered to pay the 2nd Defendant/Applicant **Kshs. 17,000,000** being the loss suffered by the Applicant as a result of the Respondents' continued holding of the said property for the past 7 years;

[e] That in the alternative to Prayer [d] above, the Respondents do deposit security for costs of **Kshs. 200,000** within 14 days of a favourable order;

[f] That the costs of this application be provided for.

[2] The Applicant's cause for complaint, as set out in the Supporting Affidavit, is that vide a Sale

Agreement dated **25 January 2008**, it bought **Land Reference No. 3734/904** from the 1st Defendant, Housing Finance Company of Kenya at a purchase price of **Kshs. 9,000,000**. The property was disposed of in exercise of the 1st Defendant's statutory power of sale following the default by the Respondents in paying the sums due in respect of the facilities for which the suit property was charged. Upon the filing of this suit, the Respondents obtained temporary injunctive orders dated **24 March 2009**, and have continued in possession of the suit property since, without any attempts at prosecuting this case. The Applicant therefore urged the Court to have the orders lifted and/or discharged to enable him move in and take possession of the suit property, which he bought for value.

[3] In opposing the application, the Respondents relied on the Replying Affidavit sworn by the 1st Respondent on **19 July 2016**, in which he deponed that the injunction order that was granted by **Kimaru, J** on **24 March 2009** was issued on the basis of sound and well established legal principles, and was therefore in the interest of justice herein; and that the conditions and circumstances that led to the issuance of the injunction order are still well in existence. It was reiterated in the Replying Affidavit that the Respondents have a *prima facie* case against the Applicants which, cannot adequately be remedied by an award of damages.

[4] Flagging up the salient aspects of the Ruling of the Court dated **24 March 2009**, the 1st Respondent deponed that the upshot thereof was that the sale of the suit property by the 1st Defendant by private treaty was done in such a manner as to conceal the sale from the knowledge of the Respondents; and that the validity of the Statutory Notice of Sale was challengeable on the ground that it contained a redemption amount that had been calculated on the basis of wrong interest rates. Accordingly, it was the contention of the Respondents that the germane issues for determination have not been addressed and therefore that it is of paramount importance that those issues be canvassed first before the status quo can be disrupted.

[5] It was futher the Respondent's contention that there is no basis for the Applicant's prayer for **Kshs. 17,000,000**, there being no landlord-tenant relationship between them; and that it is unlawful and in absolute bad faith for the Applicant to purport to make such a prayer in the face of the subsisting order of injunction. In the same vein, the Respondents urged the Court to dismiss the Applicant's prayer for security for costs, contending that the threshold for the issuance of such an order had not been met by the Applicant. According to the Respondents, the Applicant had not satisfied the Court or tendered evidence to show that they will not be able to pay the Applicant's costs herein in the event their suit is dismissed.

[6] It is common ground that the Respondents did apply for and were granted an injunctive order on the **24 March 2009** by the Court. The order was couched in the following terms:

> **"In the premises therefore, I do hold that the plaintiffs have established a prima facie case to entitle this court grant them the interlocutory injunction sought. Damages will not be an adequate remedy in the circumstances because, if injunction is not granted, the Plaintiffs will be dispossessed of their matrimonial home. The balance of convenience tilts in favour of the plaintiffs who are in possession of the suit premises. The 2nd defendant either by itself, its servants or agents is restrained, by means of a temporary injunction from transferring to third parties, alienating or otherwise howsoever interfering with the plaintiff's possession of the suit property i.e LR No. 3734/904, Lavington, Nairobi pending the hearing and determination of this suit..."**

[7] A perusal of the court record confirms that hearing of the main suit herein is yet to commence; though the Court has had occasion to hear and dispose of a couple of applications, the last one of which was determined on **18 September 2014**. In the said Ruling, the Court made an order in the following terms:

> **"The parties are hereby directed to take such necessary steps as soon as is practically possible with a view to having this matter heard and determined without any further delay."**

Thus, although the case has been certified ready for hearing in accordance with the Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court at Nairobi,

Gazette Notice No. 5179 dated **25 July 2014,** hearing is yet to commence.

[8] Against that backdrop, **Order 40 Rule 6 of the Civil Procedure Rules** provides that:

> **"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."**

Accordingly, although the Respondents posited that they stand to suffer substantial and irreparable loss should the injunction be discharged, there is no doubt that that they have ran afoul of the aforestated peremptory provision of the law; and therefore, the only issue to consider is whether there is any sufficient reason for the Court to sustain the aforesaid order.

[9] In the case of **Mobil Kitale Service Station vs Mobil Oil Kenya Limited & Another [2004] eKLR** the Court (Warsame, J as he then was) had occasion to consider a similar application, and had the following to say in respect thereof:

> **"An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person's conduct with respect to the matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose - to shield the party against violation of the legal rights of the person seeking it."**

[10] Whereas there is no gainsaying that there has been delay in the prosecution of this suit, the indolence is not entirely attributable to the Respondents. The record shows that a default judgment was recorded herein on **3 March 2010** against the Applicant, which precipitated an application for setting aside judgment. That application was not disposed of until **5 November 2012**. Thereafter, the Respondents filed an application dated **13 August 2013** for the striking out of the Applicant's Defence which was ruled on by the Court on **18 September 2014.** As matters stand, the suit has been certified ready for hearing. Thus, it cannot be said that the Respondents have been using the injunctive orders to oppress the Applicant.

[11] It is noteworthy that in its written submissions, the Applicant argued that the Respondents had not shown sufficient cause why they were deserving of the orders of injunction; and that they did not meet the threshold laid down in the case of **Giella vs. Cassman Brown & Co. Ltd [1997] EA 358.** Needless to say that before granting the interim injunction, the Court was satisfied that the orders were deserved and would serve the interests of justice in the matter, pending the hearing and determination of the suit. Accordingly, I have no hesitation in rejecting this argument and would be of the same mind as **Munyao Sila J** in terms of his viewpoint in **Filista Chamaiyo Sosten vs Samson Mutai [2012] eKLR,** that:

> **"...the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing an injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place..."**

[12] It is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, are but not limited to:

> **a) proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;**
>
> **b) a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;**

c) proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;

d) proof that the sustenance of the injunction would cause an injustice.

[13] It is not alleged herein that the injunction was obtained by concealment of facts or that a radical change in circumstances of this suit has since occurred such that it is no longer necessary to have the injunction. In the same vein, it is not the Applicant's case that the general conduct of the Respondent's since the order was made is such that the court is impelled to discharge the injunction. Thus the only feasible ground that can be gleaned from the application is that the sustenance of the injunction would cause an injustice, granted the contention of the Applicant that he bought the property for value and that 8 years down the line, he is yet to be given possession. Accordingly, while I have no hesitation in holding that the injunction was granted for good reason and that no justification has been given for me to discharge or vary the same as sought by the Applicant, I appreciate need to fast-track the case for the reasons urged by the Applicant.

[14] With regard to the Applicant's prayer that the Respondents be ordered to pay it **Kshs. 17,000,000** being the loss suffered by the Applicant as a result of the Respondents' continued holding of the said property for the past 8 years, I note that this is therefore a prayer for a mandatory injunction. It is the law that such an order can only be made in the clearest of cases. This principle was well articulated by **Megarry J** in **Shepherd Homes Ltd vs. Shadahu [1971] 1 Ch34** thus:

"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation."

[15] The same posturing was expressed in **Locabail International Finance Ltd vs. Agroexport and Others [1986] 1 All ER 901** thus:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction."

[16] The foregoing English decisions have found approval in local cases, such as the Court of Appeal case of **Kenya Breweries Ltd & 2 Others vs. Washington Okeyo [2002] eKLR** as well as the cases of **Kenya Airport Authority vs Paul Njogu and 2 Others [1997] eKLR** and **RafiqueEbrahim vs William Ochanda T/A Ochanda& Co. Advocates [2013] eKLR,** that were relied on by the Applicant. I would therefore agree with the Respondents that not only has no basis been laid for the payment of the sum of **Kshs. 17,000,000** aforementioned to the Applicant, the effect of such an order would be to finally resolve some of the issues in controversy herein without the benefit of a hearing on the merits. Accordingly, Prayer 4 of the Applicant's Notice of Motion dated **7 July 2016** is also untenable.

[17] Lastly, the Applicant prayed that the Respondents be required to deposit security for costs in the sum of **Kshs. 200,000** within 14 days of a favourable order. This prayer was pleaded as an alternative prayer to prayer 4 aforestated. I note that the enabling provision was not stated, and so I would presume that this prayer was hinged on **Order 26Rules 1 and 5(1) of the Civil Procedure Rules**, which provide that:

"In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party to be given by any other party; ... If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit."

[18] This being an order in the discretion of the Court, there are settled principles to guide such exercise of discretion, which principles were well articulated by the Court of Appeal in **Messina & Another vs. Stallion Insurance Co. Ltd [2005] 264**as hereunder:

[a] the Court has a complete discretion whether to order security, and accordingly, it will act in the light of all the relevant circumstances;

[b] the possibility or probability that the Plaintiff Company will be **deterred** from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security;

[c] The Court must carry out **a balancing exercise**. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim;

[d] In considering all the circumstances, the Court will have regard to the Plaintiff company's**prospects of success**. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure;

[e] The Court in considering **the amount** of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount;

[f] Before the Court refuses to order security on the ground that it would **unfairly stifle** a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled;

[g]The **lateness** of the application for security is a circumstance which can properly be taken into account.

[19] It has neither been propounded herein that if no security is furnished, the Applicant might find himself unable to recover its costs from the Respondents, should their claim be dismissed by the Court; nor is the Applicant's case that prospects of the Respondent's case succeeding are dim. To the contrary, there is on record a finding of the Court that the Respondents have a prima facie case. Indeed in the case of **Shah vs Shah [1982] KLR 95**, the Court observed thus:

"The test is not whether the Plaintiff has established a prima facie case, but whether the Defendant has shown a bona fide defence. The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has discretion to be exercised reasonably and judicially, to refuse to order that security be given."

[20] Additionally, whereas it is not the Applicant's contention that the order, if granted would have the effect of stifling a valid claim, it is disconcerting that the Applicant has waited until now to seek for an order for security for costs in a matter that has been pending in court for 8 years. The Applicant has not proffered an explanation as to why such security has become a requisite now. Thus, I would take the view that the Applicant has fallen short of making a justification for an order for security for costs as prayed in paragraph 5 of its application.

[21] In the result, and for the foregoing reasons, I would dismiss the Notice of Motion dated **7 July 2016**

with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE