



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO.98 OF 2014**

**ORION EAST AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**ONESMAS MACHARIA T/A**

**WATTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. There are two applications before this Court for consideration. The first application is the 1<sup>st</sup> Defendant's Notice of Motion dated **16<sup>th</sup> August 2016** and filed on **8<sup>th</sup> September 2016**. The application is expressed to have been filed pursuant to **Section 90 (3) (e) of the Land Act No. 6 of 2012 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**. The 1<sup>st</sup> Defendant moved the Court for the following orders;-

**1. Spent**

**2. THAT this Honourable Court be pleased to restrain the Plaintiff/Respondent, its agents and/or servants from denying and/or preventing the 1<sup>st</sup> Defendant/Applicant, its agents, servants and prospective purchasers from entering into and inspecting and/or viewing property L.R Nos. Nairobi/Block 82/2039 and Nairobi/Block 82/2042, together with the developments made thereon.**

**3. THAT this Honourable Court be pleased to restrain the Plaintiff/Respondent, its agents and/or servants from interfering with the 1<sup>st</sup> Defendant's Statutory power of sale over property L.R Nos. Nairobi/Block 82/2039 and Nairobi/Block 82/2042.**

**4. THAT the Officer Commanding Embakasi Police Station be directed to enforce this Order;**

**5. THAT the costs of this Application to be borne by the Plaintiff/Respondent.**

2. The application was supported by the affidavits of **Elizabeth Wanjiku Hinga, Samuel Mutahi**

**Gathogo** and **Joseph Mungai Gikonyo**, all sworn on **16<sup>th</sup> August 2016**, in which the said deponents reiterated and reinforced the grounds upon which the application was based. The application was based on the grounds that the Plaintiff had prevented the 1<sup>st</sup> Defendant from exercising its statutory power of sale by denying it access to properties **L.R Nos. Nairobi/Block 82/2039** and **Nairobi/Block 82/2042** (herein the suit properties). The 1<sup>st</sup> Defendant further averred that the Plaintiff's initial attempt to use the Court to prevent it from exercising its statutory power of sale failed when the Court dismissed the Plaintiff's application for temporary injunction and upon appeal the Court of appeal upheld the High Court's Ruling. The 1<sup>st</sup> Defendant then re-issued notices and enlisted the services of Valley Auctioneers on **11<sup>th</sup> June, 2015** to sell the properties by way of public auction. However, the attempts by the said auctioneers to sell the properties failed as the Plaintiff denied the 1<sup>st</sup> Defendant and the prospective purchasers, access to the suit properties.

3. It was further averred that on **18<sup>th</sup> January, 2016** the 1<sup>st</sup> Defendant enlisted the services of **Garam Auctioneers** to sell the properties; but even this attempt failed for the same reasons that had been cited by Valley Auctioneers. It is therefore the 1<sup>st</sup> Defendant's contention that the continued resistance and failure by the Plaintiff to provide ingress to prospective purchasers and agents of the 1<sup>st</sup> Defendant amounts to interference with its statutory power of sale. The 1<sup>st</sup> Defendant also averred that it had employed all options under its disposal to realize the security but had not succeeded hence its recourse to the Court.

4. The Plaintiff's response to the application was by way of the Replying Affidavit sworn on **27<sup>th</sup> September 2016** by its Managing Director, **Ruo Maina**. The Plaintiff denied the allegations by the 1<sup>st</sup> Defendant that it had obstructed the realization of its statutory power of sale over the suit properties. It was pointed out that the 1<sup>st</sup> Defendant had instructed a valuer to undertake a valuation of the suit properties, which was done and a detailed valuation report of the said property was available in confirmation of the fact. It was the Plaintiff's posturing that it would have been impossible to carry out such a valuation if access to the premises was denied as alleged. The deponent averred that when the 1<sup>st</sup> Defendant put up an advertisement seeking potential purchasers for the suit property, the Plaintiff's business on the suit property ceased. In view of the foregoing, it is the Plaintiff's case that they cannot be blamed for the 1<sup>st</sup> Defendant's inability to realize the security.

5. I have considered the application, the affidavit filed in support and the response made thereto by the Plaintiff, as well as the written submissions filed by learned Counsel. A look at the valuation report attached to the 1<sup>st</sup> Defendant's application confirms that physical inspection was done on **9<sup>th</sup> June 2015** for valuation purposes. I would therefore agree with the Plaintiff that, up to that point in time, it cannot be said that access was denied to the 1<sup>st</sup> Defendant. However, it is noteworthy that the advertisements for the envisaged public auctions were done after the physical inspection and auction. Whereas there is no evidence before this Court to demonstrate that access was thereafter denied, the Court is of the view that the fact that the said suit premises have not been sold after more than one attempt, is prima facie corroborative of the 1<sup>st</sup> Defendant's stance that access had been denied; and that prospective purchasers have not been able to access the land for inspection. There is no doubt that the prospective purchasers need to inspect the property in order to submit their bids. It is also highly unlikely that the 1<sup>st</sup> Defendant would be seeking the aid of this Court to access the suit properties yet it has already sold the said properties as alleged by the Plaintiff.

6. To avoid any further back and forth in Court by the Parties, it would be in the interests of justice for the Court to grant the orders sought in the Notice of Motion dated **16 August 2016** and direct that the same be executed, if need be, by the Officer in Charge of Embakasi Police Station as prayed. In any case, the Plaintiff stands to suffer no prejudice, it being of the standpoint as it is, that they have never denied access to the 1<sup>st</sup> Defendant or obstructed them from exercising their statutory power of sale.

7. The **second application** is the Plaintiff's Notice of Motion dated **6<sup>th</sup> September 2016** and filed in Court on even date. The application is expressed to have been filed pursuant to **Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as read with **Order 8 Rules 3, 5 and Order 50 Rule**

**1of the Civil Procedure Rules, 2010.** The Plaintiff moved the Court for orders that it be granted leave to amend its Plaint in terms of the proposed Amended Plaint attached thereto and that costs of the application be in the cause.

8. The application was supported by the affidavit of **Ruo Maina** sworn on **6<sup>th</sup> September 2016** and was based on grounds that the leave to amend was imperative in order to determine the real questions in controversy and that no prejudice would be occasioned on the Defendants if the orders sought were granted. The Plaintiff deposed that since their application seeking interlocutory injunction had been declined, it was only fair that appropriate amendments be made to the pleadings so that all the real questions in controversy could be set out for the Court's determination.

9. The Defendants opposed the application vide their Grounds of Opposition dated **13<sup>th</sup> September 2016** and filed on **14<sup>th</sup> September 2016**. The Defendants deposed that the application was an abuse of the Court process as the 1<sup>st</sup> Defendant had not sold the charged properties as averred to by the Plaintiff in its draft amended Plaint. The Defendants further averred that the application merely sought to pre-empt the right of the 1<sup>st</sup> Defendant in exercising its statutory power of sale.

10. Again, I have considered the application, the affidavits filed in support thereof and the parties' written submissions in connection therewith in the light of the pleadings and the proceedings to date. It is now trite law that courts have the discretion under **Order 8 Rule 3 (1)** of the **Civil procedure Rules** to freely allow amendments of pleadings, provided that this is done on such terms as to costs or otherwise as may be just. This principle was laid down in the case of **Eastern Bakery vs. Castelino [1958] EA 461** thus:

**"...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs..."**

11. The principle was restated by the Court of Appeal in the case of **Central Kenya Limited Vs Trust Bank Limited (2000) 2 EA 365** as follows:

***"...all amendments should be freely allowed at any stage of the Proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated in costs... The overriding considerations were whether the amendments were necessary for the determination of the suit."***

12. The amendments sought by the Plaintiff essentially seek to introduce a claim for damages. The Plaintiff submitted that its remedy would now effectively lie in damages as in the initial Plaint it had sought to challenge the exercise of the 1<sup>st</sup> Defendant's statutory power of sale but the application for a temporary injunction was refused. The 1<sup>st</sup> Defendant's contention, however, is that the amendments the Plaintiff seeks to introduce are an abuse of the Court process as the 1<sup>st</sup> Defendant has not sold the charged properties and that the application merely seeks to pre-empt the right of the 1<sup>st</sup> Defendant to seek the assistance of the Court to exercise its statutory power of sale.

13. Having perused the amended Plaint, it is notable that the amendments sought are not limited to the impending sale of the suit properties. The Plaintiff also seeks special damages for other alleged breaches and negligence with regard to the credit facilities. Accordingly, the proposed amendment is warranted in the circumstances. In any event, the 1<sup>st</sup> Defendant has not demonstrated any prejudice that will be occasioned upon them as a result of the proposed amendments for which an award of costs would not suffice. There is no gainsaying that whether or not the property has been sold is a matter of evidence that can be dealt with at the trial. I would thus be inclined to allow the Plaintiff's application for amendment of its Plaint and would grant orders in respect thereof in terms of Prayers (1), (2) and (3) of the Notice of Motion dated **6 September 2016**. The Amended Plaint be filed and served within 14 days from the date hereof.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2017**

**OLGA SEWE**

**JUDGE**