



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 135 OF 2014

SUNRISE RESORT APARTMENTS &

SPA LIMITED.....PLAINTIFF

VERSUS

ECOBANK KENYA LIMITED.....DEFENDANT

R U L I N G

1. This court did on the 24/9/2015 grant to the plaintiff a conditional order of temporary injunction on terms that the plaintiff deposits into a joint interest bearing account in the names of the advocates for the parties the sum of Kshs.13,000,000 within 90 days from the date of the order.
2. It then transpired that the deposit was never effected in time hence on the 29/2/2016 the parties attended court and recorded a consent whose effect was to enlarge time for the deposit by a period of 7 days from the said 29/2/2016. A default clause was then imposed that in default, to so effect the deposit the orders of 24/9/2015 would stand discharged.
3. Once again there was never compliance and on the 13/9/2016 the plaintiff did file another application dated the same day now seeking that fresh orders if injunction be issued, the earlier order having been discharged by operation of the default clause.
4. For full effect, the application dated 13/9/2016 prayed for Orders that:-

1. This matter be certified as urgent and heard ex-parte in the first instance.

2. The Honourable court be pleased to grant a fresh injunction directed at the Respondent restraining it from re-advertising, offering for sale and/or in any manner divesting of the property rights of ownership of the Applicant in LR NO. 10776/MN/1 and developments thereon pending the hearing and determination of this Application inter-parties.

3. The Honourable court be pleased to grant a fresh injunction directed at the Respondent restraining it from re-advertising, offering for sale and/or in any manner divesting of the property rights of ownership of the Applicant in LR NO. 10776/MN/1 and developments thereon pending the hearing and determination of this suit.

4. The Honourable court do stay the second(2nd) Notice to sale dated the 27th July, 2016 pending the hearing and determination of this suit and/or the same (Notice to sell) be struck

out.

5. In the alternative and to meet the ends of justice the Honourable court do enlarge time for thirty(30) days within which all the stakeholders put their documentation in place for compliance.

6. The Honourable court may grant any other orders that will do justice in the circumstances of the case.

7. The costs of this Application be in the cause.

5. Although the application has the foregoing several prayers, the substantive prayer seem to be the one seeking an injunction to stop the sale of the suit property and the other nebulous prayer that the parties be granted a period of 30 days to put their documentation in place for compliance.

6. The foundation of the application is alleged to have been the delay by both the bank and the Respondent's advocate in availing required documents to open the escrow account and that the sum of Kshs.13,000,000 was actually availed to the plaintiff's advocate on the 9/3/2016. A RTGS advise has been exhibited to that effect.

7. When the application was placed before court under Certificate of Urgency the court made the following *ex parte* interim orders:-

“Just for the purposes of mitigating the costs by advertisement, I grant an interim order in terms of prayer 2 of the Notice of Motion dated 13/9/2016 without tinkering with the orders of 29/2/2016 and on terms that:-

(i) The deposit of Kshs.13,000,000, is made if not in an escrow account, into the account of the plaintiff operated with the defendant. The deposit be made within 10 days from today.

(ii) The application be served forthwith and not later than midday on 14/9/2016.

(iii) A hearing date is taken at the Registry before service is effected.

(iv) The order is limited for a period of 14 days and subject to fulfilment of the set conditions.”

8. After that order the matter was then adjourned on two occasions, both occasioned by the Respondent filing Replying affidavit and submissions late.

9. The Replying affidavit by the Respondent resists the application on the grounds that the Applicant is not keen to take court orders with the seriousness they deserve and therefore underserving of the courts discretion to grant the orders sought. The Applicant is equally faulted for failure to act in good time in that the Advocate having received the funds in March 2016 there was never any communication from the bank till July 2016.

10. Having filed the written submissions, the parties attended court on the 29/3/2017 and due to workload and time constraints by court and counsel, parties were not able to highlight the submissions hence it was agreed that the court considers the submission and renders its ruling on the application. On that day the counsel agreed that there were only three issues for determination namely:-

i) Whether there has been placed before the court sufficient material to extend time to avail the security ordered in the sum of Kshs.13,000,000.00

ii) Whether the applicant should be granted an order of injunction.

iii) What orders should be made regarding costs.

Extension of time to deposit the ordered

sum of Kshs.13,000,000

11. It is not in dispute that Section 95 and Order 50 Civil Procedure Act permit the extension of time set by the law or by a court order. However that is a discretionary jurisdiction granted to court to do justice and not intended to reward apathy, recalcitrance or just bad faith and design to derail and obstruct justice.

12. In this matter judge Kasango on the 24/9/2015 gave to the plaintiff a period of 90 days to deposit the Kshs.13,000,000, it did not comply with the order.

13. On 29/2/2016, the parties by consent extended the period for compliance by a period of 7 days, again no compliance was made. For the third time, on the 13/9/2016, the court when considering the current application *ex parte* granted to the applicant interim orders on terms that it deposits the sum, if not into the joint account, in its account operated with the defendant. From the submissions filed, it appears that this is yet to be done.

14. It should not take any sage to get the feeling that the plaintiff would want, the conceit to keep issuing orders for the sake of it. One may be forgiven to say that the plaintiff is at a comfort zone provided interim orders are granted. Such are the litigants who may be said to come to court and expect court to only give orders that are suitable in their estimation and would at will ignore court orders they consider unsuitable with abandon. The plaintiff also fall in the category of litigants who do not regard their obligation to court under section 1A(3) Civil Procedure to be worth any compliance. Such is the kind of litigants who would care least whether there is rule of law or not provided they get what they want, at the time they want it and in their own fashion.

15. Such parties must be told in no uncertain terms that is not what would be considered justice and further that one not prepared to obey court orders and directions have no reason to expect compassion or any leniency for the court.

16. I would say that the conduct of the plaintiff and the advocate are totally underserving of courts discretion to extend there. However, there is evidence that the party, plaintiff, has indeed availed the money to his advocate but there has been failure to avail that money as ordered by the court on the three occasions. It is only on this note that I would consider the plaintiff to have complied with court orders and to remember that the creation and operationalization of the joint account was not in its hands but on the hands of the advocates.

17. For that reason and only after giving to the plaintiff the credit that it did avail the money some fourteen (14), or so, months ago, that I do extend time and extend the interim *ex parte* orders issued on 13/9/2016 but not without conditions.

18. I extend time to deposit the summon in an interest bearing account in the joint names of the advocates for the parties within 7 days from today but in all events not later than midday on 13/6/2017. I also extend the orders given on 13/9/2016 and last extended on the 26/10/2016 to the 13/6/2017. If there shall have been compliance the orders shall continue to subsist pending the determination of the suit.

19. However, if these shall be a default, the orders shall lapse on the said midday on 13/6/2017 and the defendant will be at liberty to exercise its power of sale, as the law permits.

20. In the event that there shall be compliance, the parties are hereby given a period of 21 days after the 13/6/2017 to file all outstanding documents including but not limited to witness statements and bundles of documents as each shall desire. Time shall be of essence. Any party that shall not have complied with this condition by the 5/7/2017 will have no right to rely on any documents filed after that date.

21. This matter will be mention in court on the 6.7.2017 to confirm compliance, for case conference and for further directions.

Dated and delivered at Mombasa this 06th day of June 2017.

HON. P.J.O. OTIENO

JUDGE