IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.56 OF 2006

HENRY KIPKORIR KIMUTAI (Suing as Personal Representative of the Estate of JEREMIAH CHERUIYOT KIMUTAI)…….....PLAINTIFF/APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LTD…..DEFENDANT/RESPONDENT

RULING

1. The Notice of motion is dated 26th June, 2014 and is brought under the provisions of **Order 40 Rules 1(a), 2, 2(a)** and **3, Order 53 Rules 1** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3A** and **63** of the **Civil Procedure Act** and all other enabling provisions of the law.
2. The applicant seeks the following orders:

i. That a temporary order of injunction do issue restraining the Defendant by itself, its agents, servants, employees or persons acting on its instructions from advertising for sale, selling, alienating, wasting, dealing or in any other way interfering with the property known as number title NAKURU MUNICIPALITY BLOCK 11/125 pending the hearing inter-partes of this application.
ii. That the orders granted by Honourable Lady Justice R. P. V. Wendoh on 27th July, 2012 be reinstated and a temporary order of injunction do issue restraining the Defendant by itself, its agents, servants, employees or persons acting on its instructions from advertising for sale, selling, alienating, wasting, dealing or in any other way interfering with the property number title NAKURU MUNICIPALITY BLOCK 11/125 pending the hearing and determination of this suit or until further orders of this honourable Court.
iii. That the Hobnourable court be pleased to exercise its inherent powers under **Section 1A** and **3A** of the **Civil Procedure Act 2010** and make an order directing the firm of Weda & Company Advocates to comply with the order of the court made on 27th July, 2012 within such period as the court may deem fit.
iv. That costs of the application be provided for.

3. The Applicant relied on the grounds on the face of the application and on the supporting affidavit of HENRY KIPKORIR KIMUTAI made on the 26th June, 2014.

APPLICANTS SUBMISSIONS

4. The Applicant is an administrator of the Estate of JEREMIAH CHERUIYOT KIMUTAI (Deceased)
5. On 22nd July, 2012, Lady Justice Wendoh granted an order restraining the sale of the suit property on condition that a sum of Kshs.4,000,000/= (Kshs, Four million) be deposited in a joint interest

earning account in the joint names of the advocates acting for the Applicant and the Respondent.

6. The Applicant was to comply with the said order within thirty (30) days. Being unable to comply with the order within the stipulated time, the Applicant applied for extension of time vide Notice of Motion dated 25th April, 2012 and sought more time and a period of 90 days was granted.
7. The Applicant contends to having paid the monies to his former advocates namely Weda & Company Advocates and attributes the failure to open the joint account to his former Advocates and urges the court to have them summoned to explain the reason for non-compliance on their part.
8. The Respondent has now proceeded to advertise the suit property for sale, which sale is scheduled for the 17th July 2014.
9. The applicant submits that the Notification for Sale is irregular. Further that the orders for the interim injunction have not yet lapsed and Directions ought to have been sought before the property was advertised to find out the reasons for non-compliance.
10. That Applicant prayed that the orders sought be granted as the application had merit.

RESPONDENT'S SUBMISSIONS:

11. The application was opposed and the Respondent relied upon the Replying Affidavit and Grounds of Opposition dated 8th July, 2014.
12. It was submitted that the application was *Res-judicata* as an injunction had been granted by the Hon. Lady Justice Wendoh on the 24th March, 2013.
13. The injunction was conditional to depositing the of Kshs.4,000,000/= which order had not been complied with.
14. The court had further exercised its discretion and granted the Applicant a further ninety (90) days.
15. After the period of ninety (90) days, the orders were to lapse automatically and the orders were not available for extension or reinstatement.
16. The Respondent wondered what the Applicant had been doing for two years that is from 2012 to 2014. It was only after the suit property had been advertised for sale that the Applicant now sought to find out whether the monies had been deposited.
17. That no explanation has been tendered by the former Advocates for the Applicant on the issue of the money. Nevertheless, the Respondent submitted that the Applicant's remedy against his advocate lies in **Section 52** of the **Advocates Act.**
18. The Applicant had also failed to tender evidence to demonstrate that monies had indeed been paid to Advocates, whether in full or partial compliance.
19. That the Notification for Sale was served upon the Applicant on the 5th May, 2014 and Applicant came to court on 27th June, 2014 and no explanation has been given for the delay.
20. It was the Respondent's contention that the Valuation Report was not a ground for seeking injunctive orders and the issue of the Auctioneer being a tenant in the suit premises was a non-issue.
21. In conclusion, the Respondent submitted that the Applicant had no valid grounds for the orders sought. That the application was misconceived and an abuse of the court process and it ought to be dismissed with costs to the Respondents.

ISSUES FOR DETERMINATION:

22. After hearing the submissions of both counsel for the respective parties, this court finds the following issues for determination:

i. Whether to re-instate and extend the orders granted on 27/7/2012
ii. Costs

ANALYSIS

23. This court has had occasion to peruse the order made by Hon. Wendoh, J on the 27th July, 2012 when granting a further extension of ninety (90) days and the crucial part reads as follows:

"Therefore this court does exercise its discretion and will allow the Applicant 90 days from today's date, within which to deposit the sum of Kshs.4million in a joint interest earning account of both counsel for the Applicant and Respondent and Respondent. In default the orders do lapse automatically……..."

24. It is this court's view that prayer (1) of the application is an attempt by the Applicant to seek fresh orders on a matter that has already been determined and such action is tantamount to an abuse of due process.
25. Under prayer No.(2) of the application, the Applicant prays for the reinstatement of the lapsed orders and the court has been called upon to invoke its inherent powers under the provisions of **Section 3**A of the **Civil Procedure Rules.**
26. It is trite law that a court of law must exercise its discretion judicially and not whimsically and that sufficient material must be placed before the court so that it may exercise such discretion.
27. The question that needs to be addressed is whether the Applicant has placed sufficient material and shown sufficient cause and reason and after taking these into consideration this court can therefore proceed to exercise this discretion and re-instate the lapsed orders.
28. The factor that I will take into consideration is that the failure or errors of Counsel should not be visited upon the litigant.
29. It was disclosed to this court that the firm of advocates that acted for the Applicant when the orders were granted, was in the process of dissolution. The previous advocate admits having received the monies but due to the attendant issues arising from dissolution of the firm, failed to act accordingly.
30. Summoning the advocate as prayed for by the Applicant to explain whether or not he acted will only delay the matter further.
31. It is also noteworthy to note that the Respondent has also changed advocates and therefore the current advocates on record for both parties are not the ones who were on record when the order for opening of a joint account was made.
32. I therefore find that the Applicant partially complied with the court's order and the act of failing to open the joint account cannot be visited upon the Applicant. Refer to **Banyama** V. **Zaver** (200) of E.A. 325.
33. Both parties are found to be also guilty of indolence. The Applicant is directed to have the main suit fixed for hearing within six (6) months from the date hereof.
34. This court shall not belabour itself on the issue of the validity of the Valuation Report.

FINDINGS:

35. This court finds that the Applicant's failure to fully comply with the court's order is excusable and this court further finds that in the interest of justice, that this is a suitable case for it to exercise its inherent powers of discretion to reinstate and extend the lapsed orders.

DETERMINATION

36. For the reasons stated above, this court grants the following orders:

a) The application is hereby allowed.

b) The order granted on 27th July, 2012 is hereby re-instated and extended for a period of thirty (30) days upon the following conditions.

c) The Applicant shall deposit the sum of Kshs.4 million with his Counsel who shall proceed to open a joint interest earning account in the joint names of Counsels for the Applicant and Respondent.

d) The sum of Kshs.360,000/= deposited in court to be held in court pending hearing and determination of this case as security for costs and damages.

e) The Respondent shall have costs of this application assessed at Kshs.15,000/=.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 15th day of September, 2014.

A. MSHILA

JUDGE

Coram:

Hon. A. Mshila, Judge

Mwangi, court clerk

Bundotich for Applicant

N/A by Konosi for Respondent's

Application allowed