



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 49 OF 2006

PETER ADAMS LUDAVAPLAINTIFF

V E R S U S

HOUSING FINANCE COMPANY OF KENYA (LTD)..... DEFENDANT

RULING

1. Plaintiff filed this case on 5th April 2006. He seeks by this action a permanent injunction to restrain the Defendant's Bank from auctioning his property **MOMBASA MAINLAND SOUTH/BLOCK 1/526**; a declaration that he has paid the loan granted to him by Defendant; and an order for Defendant to release to him the title documents.

2. By Chamber Summons dated 4th April 2006 Plaintiff sought an interlocutory injunction to restrain Defendant from selling by auction his charged property. When he filed that application Defendant had already issued to him Statutory Notice of Sale by public auction dated 29th September 2005. This Court by its Ruling delivered on 29th September 2006 granted Plaintiff interlocutory injunction pending the hearing and determination of this suit.

3. On 7th June 2009 the case was part heard when Plaintiff gave evidence in chief. It was adjourned for further hearing but from that date the case has not been heard further.

4. Plaintiff filed another application by Notice of Motion dated 31st January 2012. Plaintiff by that Notice of Motion sought an interlocutory injunction to restrain Defendant from selling by public auction the charged property pending the hearing and determination of this suit. The application was based on the following grounds-

(i) On 29th September 2006 the Plaintiff obtained an order of injunction restraining the Defendant from selling the Plaintiff's property pending the hearing and determination of this suit.

(ii) The suit is now part heard and is listed for further hearing on the 26th March 2012.

(iii) On 8th December 2011 the Plaintiff was served with a notification of sale of his property in spite of the order of injunction issued herein.

(iv) On 30th January 2012 the Defendant, through Garam Investments, advertised the sale of the Plaintiff's property indicating that the same would be conducted on 6th

February 2012 by public auction.

(v) The Defendant intends, unless restrained by this Honourable Court from doing so, to sell the Plaintiff's property consequent upon which the Plaintiff shall suffer irreparable loss and damage.

(vi) It is in the interest of justice that the order sought herein be granted.

5. This Court by its Ruling dated 3rd February 2012 made the following orders-

(1) The Plaintiff's Notice of Motion dated 31st January, 2012 is hereby struck out for being res-judicata with costs being awarded to the Defendant.

(2) The sale of Mombasa Mainland South/Block 1/526 (charge property) scheduled on 6th February 2012 is hereby cancelled for being in breach of the injunction order of 29th September, 2006.

(3) The Defendant is awarded half of the cost of the Preliminary Objection dated 2nd February 2012.

(4) The Defendant shall forward to the Plaintiff's counsel invoices relating to the now cancelled sale for settlement by the Plaintiff within 30 days from today's date.

6. What informed the granting of Order No. 2 above was the Court's finding that although Plaintiff had by the Ruling of 29th September 2006 obtained an injunction to stop the sale of the charged property pending the hearing and determination of this suit, that injunction was affected by the provisions of Order 40 Rule 6 of the Civil Procedure Rules. That Rule provides-

"6. 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."

This is what the Court stated in respect to that Rule-

"I am of the view that the Defendant was correct in its submission in respect of the effect of that rule to the injunction issued on 29th September 2006. Although, the injunction was ordered to subsist until the determination of the suit, that ruling was overridden by the provisions of the law in Order 40 Rule 6. Again I am in agreement with the submissions of the defence counsel that the period before the effective date of the Civil Procedure rules 2010 was insulated from the provisions of Order 40 Rule 6. The period of one year would begin to run from 17th December 2010. That means that the year within which the injunction subsisted was between 17th December 2010 and 16th December 2011. In that regard, I am in total agreement with the defence argument. It is admitted however, by the defence that the Plaintiff was served on 8th December, 2011 with the notification of sale as per the Auctioneer's Rules, 1997, 2nd Schedule. The service of the notification of sale is as provided under Rule 5 and 11 of the Auctioneer's Rules. What that means is that the service of the notification of sale is one process towards the final sale of the charged property which is now due on 6th February, 2012. It means that the Defendant began the process of sale of the charged property before the one year provided under Order 40 Rule 6. This is because the Plaintiff was served with the notification of sale on 8th December, 2011. The process which culminates with the proposed auction on 6th February, 2012 was within the period when the injunction issued on 29th September, 2006 was subsisting. That injunction lapsed on 16th December, 2011. That is one year after the Civil Procedure Rules 2010 came into effect. The act of serving the Plaintiff with the notification of sale when the injunction was still

subsisting was in breach of that injunction. That breach tainted the sale now fixed for 6th February 2012. That sale having been tainted by that breach cannot be allowed to proceed.”

7. Plaintiff filed another Notice of Motion dated 9th February 2012 seeking an order to **“reinstate and extend the order of injunction granted on 29th September 2006 pending the hearing and determination of the suit.”** Plaintiff's ground for seeking that order was based on his apprehension that the Defendant, in view of the Ruling of 3rd February 2012, would proceed to sell the charged property.

8. This Court by its Ruling of 29th May 2012 made the following orders-

(i) The scheduled sale of 6th February, 2012 having been cancelled because it was in breach of the injunction order of 29th June, 2006 that should be the status quo to hold. Parties should set down for further hearing of this suit as soon as possible.

(ii) If the costs/charges of that cancelled sale have not been paid as Kasango, J directed, the Plaintiff should do so in the next fifteen (15) days.

(iii) And for the Plaintiff to enjoy the property in question until the final determination of this suit, he shall deposit in Court Kshs. 1 million within the next thirty (30) days in default of which the order of status quo will lapse. This sum will be accordingly treated when the outcome of this suit is known.

9. Plaintiff has now brought Notice of Motion dated 27th March 2014 for consideration and which is the subject of this Ruling. He seeks the following order-

“That an order do issue restraining the Defendant, whether by itself, its servants, employees, agents and or servants from selling or offering for sale by way of public auction or otherwise or any way dealing or interfering with the Plaintiff's parcel of land known as MOMBASA/MAINLAND SOUTH/BLOCK 1/526 pending the hearing and final determination of the suit or further orders of the Court.”

It is based on the following grounds-

(a) The Defendant has served a Statutory Notice to the Plaintiff dated 12th November 2013 contrary to the stay orders granted on 29th June 2012.

(b) That unless restrained by this Honourable Court, the Defendant shall proceed with the sale of the suit land rendering this application and suit nugatory.

(c) That an order to maintain status quo herein was granted by this Honourable Court on 29th June 2012.

(d) That the suit is part heard and if the sale proceeds the suit shall be rendered nugatory.

(e) That if the sale proceeds, the Plaintiff stands to loose his property.

10. As it will be expected Defendant has objected to the application on the ground that it is res judicata.

11. The chronology of this matter as summarised above makes it very clear that the application of 27th March 2014 is res judicata. The same prayers in that application have been directly and substantially in issue in this matter, in previous interlocutory applications, between the same parties and which has been heard and finally decided by this Court. See Section 7 of the Civil Procedure

Act. Moreover the Ruling of this Court of 3rd February 2012 on the injunction application by the Plaintiff dated 31st January 2012 found the application dated 31st January 2012 to be res judicata in view of the Chamber Summons dated 4th April 2006. The Court of Appeal in the case **UHURU HIGHWAY DEVELOPMENT LTD -VS- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APPEAL NO. 36 OF 1996** did indeed find that the doctrine of res judicata equally applies to applications as it does to full hearing as follows-

“What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?”

... There is no doubt at all that provisions of Section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of res judicata.

... There is not one case cited to show that an application in a suit once decided by Courts of competent jurisdictions can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to application of similar nature; that is to say further, wider principles of res judicata apply to applications with the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was.”

It follows that Notice of Motion dated 27th March 2014 will be dismissed on that ground.

12. The Plaintiff is also not a party deserving in exercise of this Court's orders in equity. The maxim of equity **“he who seeks equity must do equity”** applies to the Plaintiff because of Plaintiff's failure to obey the orders of this Court. By the Ruling of 3rd February 2012 the Plaintiff was ordered to pay the auctioneers fees of the cancelled sale. Defendant has submitted that to date those fees have not been paid by Plaintiff. Additionally the Court by its ruling of 29th May 2012 as a condition of ordering that status quo be maintained ordered the Plaintiff to pay to the Defendant Kshs. 1 million within thirty (3) days. It is also submitted that Plaintiff has not paid that amount. Granted that there is an application to review that order which is pending for hearing but Plaintiff having not obtained an order staying the requirement to pay Kshs. 1 million ought to have obeyed the same. Plaintiff's actions brings to mind the decision of the Court of Appeal in the case **BENJOH AMALGAMATED LIMITED & ANOTHER -Vs- KENYA COMEMRCIAL BANK LIMITED [2014]eKLR-**

“The Respondents took five years before bringing the application. During that period they were busy filing frivolous suits to ward off the Appellant, one of which was filed as far a field as Nyeri, quite obviously to exasperate the appellant and drive it to despair. A litigant with that kind of track record is not entitled to any equitable remedy. The Judge should have taken that into account. He did not, and in failing to do so, he was clearly wrong. There can be no doubt about that.”

13. What is a concern to this court is that Plaintiff on his own admission

in his affidavit filed in this Court dated 4th April 2006 stated that he last repaid his loan in April 1996. That means that Defendant has been kept from receiving the loan repayments now for over 18 years. Yet the Plaintiff as is obvious from the Court record has not been keen to proceed with the trial of this case. Justice has to be balanced. This was stated by Court of Appeal in the case **BENJOH AMALGAMATED LIMITED & ANOTHER -Vs- KENYA COMMERCIAL BANK LIMITED** (supra) thus-

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of

law, to ensure the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or Statute.”

14. In the end the orders of the Court are-

(a) The Notice of Motion dated 27th March 2014 is dismissed for being res judicata with costs to Defendant.

(b) For the reasons stated in this Ruling, the interim orders of 28th March 2014 are hereby vacated.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE