



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1489 OF 2013

WANGUI KARIUKI.....1ST PLAINTIFF/APPLICANT

NJERI KARIUKI.....2ND PLAINTIFF/APPLICANT

VERSUS

THE STATUTORY MANAGER BLUE SHILED

INSURANCE COMPANY LTDDEFENDANT/RESPONDENT

RULING

The application before the court is a Notice of Motion dated 5th December 2013 brought by the Plaintiffs under Order 40 Rules 1, 2 and 3 of the civil Procedure Rules and section 3A of the Civil Procedure Act.

The Plaintiffs seek an order restraining the Defendant by itself, its servants, workers and or agents or anyone claiming through it from selling and or transferring flats no. 11 and 12 situate on LR No. 209/354/18(herein after referred to as the suit properties) pending the hearing and determination of the case.

The application is supported on the grounds listed on the face of the application which are detailed in the 1st Plaintiff's affidavit sworn on 5th December 2013. The gist of the Plaintiffs' case is that they are the children of the late Obadiah Kariuki Kamau who together with their mother namely Alice W. Kariuki, bought the suit properties in the year 2006 for Kshs 2,300,000,000/- each. The Plaintiffs have attached as evidence a copy of a sale agreement dated 8th May 2006 and have contended that at the time, their mother who worked in the Defendant company secured some facility while their father financed the difference of the purchase price.

It is the Plaintiff's averment that the Defendant had sued their mother and her financier, I & M Bank in HCCC No. 33 of 2009 and further, that the suit resulted in a decree and negotiations of how arrears of Kshs 400,000/- were to be settled. The Plaintiffs have averred that whereas the market value of the suit properties is a minimum of Kshs 20,000,000/-, the Defendant wants to sell the properties at a throw away price which will occasion irreparable loss and damage to the dependents of their father's estate.

The Defendant filed a replying affidavit sworn on 8th May 2014 by its statutory manager, Mr. Eliud Muriithi. The Defendant has contended that the application before court seeks to stop execution by way of

sale of the suit properties which execution is as a consequence of a consent judgement entered into by the parties in Nairobi HCCC No. 33 and 34 of 2009.

The Defendant has annexed a copy of a decree issued in Nairobi HCCC No. 33 of 2009 and the Defendant has averred that HCCC No. 33 and 34 of 2009 were instituted to recover loans advanced to Alice Kariuki who is the Plaintiffs' mother. It is the Defendant's case that the two suits culminated in a consent decree to the effect that Alice Kariuki would make monthly payments of Kshs 100,000/- until a suitable buyer would be found to offset a loan amount which then stood at over Kshs 10,000,000/-

The Defendant has contended that upon being placed under statutory management on 16th September 2011, all advocates acting for it were required to seek fresh mandate from the statutory manager. It is contended that the advocate on record proceeded with HCCC No. 33 and 34 of 2009 without seeking appropriate instructions and further, that the execution and auction were carried out by an entity unknown to the statutory manager without his knowledge and authority. According to the Defendant, the application before the court is misconceived as it was instituted against the wrong entity.

The Defendant has contended that since the Plaintiffs are not privy to the contract between the judgement holder and the decree holder in HCCC No. 33 and 34 of 2009, they should not be allowed to interfere with execution of the decree issued in the said suit. It is the Defendant's contention that that the judgement and decree issued in HCCC No. 33 and 34 of 2009 which the application seeks to set aside is a product of a consent entered without any coercion, fraud, undue influence or misrepresentation and cannot be set aside through an application filed by parties who are strangers to the contract and the suit that the consent was entered.

While asserting that the judgement debtor in HCCC No. 33 and 34 of 2009 had defaulted from any undertaking she has made to clear the facility advanced to her, the Defendant contended that any orders issued in favour of the Plaintiffs would unjustly deny the decree holder in the suit a fair and valid entitlement. Lastly, the Defendant stated that the Plaintiffs were not entitled to the orders sought having approached the court with unclean hands by concealing information material and relevant to the determination of the application.

Parties were directed to file written submissions. The Plaintiffs did not file their submissions. The Defendant in submissions dated 29th September 2014 argued that the import of the application before the court is that it seeks to restrain and/or object to the sale of the suit properties on the basis that the Plaintiffs are beneficiaries of the estate of Obadiah Kamau Kariuki whom the Plaintiffs claimed also owned the property.

It was submitted that under Order 22 Rule 51 of the Civil procedure Rules, objections are to be filed in the same proceedings where the order directing execution was issued. Counsel for the Defendant submitted that in disregard of the law and procedure, the Plaintiffs filed a new suit seeking similar orders as objector proceedings which has the effect of denying all parties involved in HCCC No 33 and 34 of 2009 any opportunity to respond to the objection.

In further submission, Counsel for the Defendant stated that conditions for grant of injunctions were set out in the case of **Giella -vs- Cassman Brown (1973) EA 358**. Reliance was also placed on the case of **Jared Sagini Keegwe -vs- Walter Onchwari & anor (2014) eKLR** and **American Cyanamid -vs- Ethicon Ltd (1975) AC 396** where a prima facie case was defined. It was submitted that the Plaintiffs had not demonstrated to the court that there was a serious question to be investigated or that there exists a right that had been infringed. Counsel averred that the Plaintiffs had not denied that Alice Kariuki acquired a loan facility from the Defendant which she had failed to pay and further, that the suit properties had been pledged as security for the payment of the loan.

It was also submitted that the Plaintiffs had not demonstrated that the consent entered in HCCC No. 33 and 34 of 2009 had been set aside or appealed against. While submitting that the loan was outstanding and that the suit properties were being sold in execution of a lawful decree, Counsel argued that no prejudice would be suffered by the Plaintiffs.

The Defendant relied on the case of **Francis J. K. Ichatha -vs- Housing Finance of Kenya Ltd Civil Application No. 108 of 2005** as cited in **Daniel Kamau Mugambi -vs- Housing Finance of Kenya Ltd Nairobi HCCC no. 261 of 2006** to argue that the Plaintiffs could not benefit from the protection of the court for having failed to do equity. The Defendant contended that granting an order for injunction would amount to denying the decree holder in HCCC No. 33 and 34 of 2009 the fruits of its judgement.

In further submission, Counsel for the Defendant argued that the Plaintiffs had not demonstrated that they would suffer if the property pledged by Alice Kariuki as security for the loan was sold. The Defendant averred that the Plaintiffs did not own the property and were not in possession of the same and further, that the properties had actually been sold. While submitting that it was the Defendant who would suffer irreparably if the orders were issued, Counsel contended that the loan advanced which had not been repaid continued to accrue interest.

The court was referred to the case of **Cayne -vs- Global Natural Resources PLC(1984)1AllER 225** and the case of **Francome -vs- Mirro Group Newspapers (1984)1WLR 892** for the submission that the balance of convenience involves the striking of a balance of the risk of doing an injustice. The Defendant submitted that the suit properties had actually been sold by a different entity and that since the new owners had taken possession, the court would be acting in vain by granting the orders sought.

Lastly, it was submitted that the Plaintiffs were not deserving of the equitable remedies sought having failed to appear in court on several occasions and for failing to comply with the court directions to file their submissions.

The issue for determination is whether the Plaintiffs are entitled to the orders sought.

The Plaintiff's contended that they were beneficiaries of the estate of the late Obadiah Kamau Kariuki who together with their mother jointly acquired the suit properties. However, the certificate of confirmation of grant dated 16th June 2010 attached to the Plaint does not list the suit properties as forming part of the estate of the deceased. Their interest in the suit properties has not been sufficiently established and therefore no prima facie case has been demonstrated.

There exists Nairobi **HCCC No. 33 and 34 of 2009** where a decree issued on 16th January 2012 directed that properties known as flat numbers 11 and 12 comprised in title **LR. No 209/354/18** shall be sold. There is no evidence that the said decree has been set aside. In my view, instituting a fresh suit in respect to a suit property subject to execution proceedings arising from a valid decree issued in a different suit amounts to an abuse of the court process. There is a likelihood and danger of conflicting decrees on the same subject matter arising from parallel proceedings. The court has held in the case of **Peter Ng'ang'a Muiruri -vs- F.M. Gikanga (t/a Expeditious General Merchants) & another Nairobi HCCA NO. 27 of 2012** that it is undesirable to have parallel proceedings at the High Court over the same subject-matter because of the attendant risk of conflicting decisions. The referred to suits **HCCC NO. 33 of 2009 and 34 of 2009** quite definitely dealt with the same subject matter in respect of which the plaintiffs seek an injunction to restrain the sale and transfer. The court under the consent judgment/decreed entered into by the parties in Nairobi **HCCC NO. 33 of 2009** under orders 3 to 6 specifically indicated that the two apartments/ flats were to be sold and provided how the proceeds of sale were to be applied. This court cannot properly entertain this matter and make orders which potentially would be in conflict with what appears to have been final orders in the said earlier suits. If indeed the Applicants were aggrieved by the judgment in **HCCC NO. 33 of 2009** and **HCCC NO. 34 OF 2009** the proper cause would have been to apply to set aside and/or to review the judgment entered therein and apply to be enjoined perhaps as parties and or interested parties in those suits and not to file a fresh suit as they did in the instant matter.

I earnestly find no basis for the present suit which I have held to have been filed in abuse of the court process. I would find no justification to sustain the suit as I do not consider that the same could even be salvaged by any amendment. While I hold that the plaintiffs application for dismissal since no prima facie case has been established and/or demonstrated I equally I am of the view that the suit ought to be struck out in its entirety. Under sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act this court is enjoined to foster the overriding objective of the Act and

the Rules and Environment and Land Court ACT which is to facilitate the just, expeditious proportionate and accessible resolution of disputes at affordable cost to the parties. To allow what I have found and held was a suit filed in abuse of the court process to continue would run counter to the expressed overriding objective to render substantive and expeditious justice to the parties by exposing them to lengthy litigation whose outcome is virtually clear, which is, that this court will not overrule a decision of a court having concurrent jurisdiction as the applicant through this suit is inviting this court to do.

The upshot is that I decline to grant the injunction sought and the interim order of injunction is hereby vacated. I also order the plaintiff's suit struck out as it is unmerited and is an abuse of the court process.

The costs of the application and the suit are awarded to the Defendant.

Ruling dated, signed and delivered this...6th.....day of.....November.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

N/A..... for the Plaintiff

Wangai for Wanjau..... for the Defendants