



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 709 OF 2009

JOHN JOEL KANYALI.....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

1. The Defendant's Notice of Motion application dated and filed on 13th August 2014 was brought pursuant to the provisions of Section 63 (d) of the Civil Procedure Act, Order 52 Rule 1 and Order 41 Rule 1 of the Civil Procedure Rules. Prayer No (1) was spent. It sought the following prayers:-
 1. **Spent.**
 2. **THAT the Honourable Court be pleased to appoint Mr Ismail Mawji as Receiver and Manager of the Defendant's (sic)/Respondent's business in respect of the suit property known as L.R. No Kwale/Diani Beach/603 with power to take immediate possession and collection of rent until the suit is heard and determined or until further orders of this Honourable Court.**
 3. **THAT the Honourable Court be pleased to fix the amount to be paid as remuneration for the service of the Receiver.**
 4. **THAT the costs of this Application and of the suit be borne by the Plaintiff/Respondent.**

DEFENDANT'S CASE

2. The Defendant's application was supported by the affidavit of Stella Mbuli that was sworn on 13th August 2014. Its case was premised on the ground that the Plaintiff who was enjoying regular rental income from the subject property was presently enjoying orders that were issued by the Court of Appeal restraining it from realising the suit premises in exercise of its statutory power of sale.
3. It stated that contrary to an agreement it had entered into with the Plaintiff before the said order, the latter had only been depositing erratic and insignificant sums. As a result of the said default, the outstanding debt had escalated and continues to escalate which amounts may have exceeded the value of the subject property making it difficult to realise any meaningful recovery hence the necessity to appoint the aforesaid Receiver who had accepted such appointment.
4. Its written submissions were dated 30th October 2014 and filed on 31st October 2014.

PLAINTIFF'S CASE

5. In opposing the application, on 16th September 2014, the Plaintiff filed Grounds of Opposition that were dated 8th September 2014. The grounds were as follows:-
 - a. **THAT this Honourable Court had no jurisdiction to grant the orders sought as that would amount to varying the orders that were issued by the Court of Appeal and that if the Defendant was dissatisfied with the said order, it ought to have applied to the Court of Appeal for the variation or discharge of the said order.**
 - b. **THAT the application was an attempt to defeat the injunction orders that were granted by the Court of Appeal.**
 - c. **THAT the application was an abuse of the court process as a similar application that had been filed by the Defendant in HC Mic 8 of 2014- Mombasa had since been dismissed.**
6. The Plaintiff reiterated his Grounds of Opposition in his written submissions were dated and filed on 30th October 2014.

LEGAL ANALYSIS

7. The Plaintiff referred the court to the case of **Fina Bank Limited vs Spares & Industries Limited [2000] eKLR** where the Court of Appeal observed that the appointment of Receivers and Managers did not necessarily improve the financial position of business and ordered that the Receivers and Managers who had been appointed therein vacate the Respondent's premises.
8. It was therefore erroneous for the Defendant herein to have contended that the Court of Appeal reinstated the Receivers in similar circumstances such as in this case. Its submission on the reinstatement of Receivers and Managers was totally misleading to the court and being misplaced, this court will attach no importance to the same and disregard the same.
9. The Defendant was categorical that the present application was not an abuse of the court process as had been alleged by the Plaintiff as the ruling dated 3rd April 2014 by Kasango J in the case of **HC Mic 8 of 2014- Mombasa** was based on a technicality and not on merit for the reason that the suit herein was filed before the one that was filed in Mombasa. In that case, the Defendant had sought the following orders:-

“THAT this Honourable Court be pleased to issue orders compelling the Defendant, his tenants, agents and assignees to deposit rents collected from Plot Number KWALE/ DIANI BEACH/BLOCK/603 to the Plaintiff's/Receiver's escrow account pending the hearing and determination of this application.”

10. The learned judge Kasango declined to deal with the application therein on the basis of Section 6 of the Civil Procedure Act. She stated thus:-

“The Milimani case was filed prior to this action. The Respondent in that case on failing to obtain an interlocutory injunction to restrain the Applicant from realizing its security filed an appeal. The Court of Appeal rendered itself in its Ruling as set out hereinabove. The loan facility which is the subject of the Milimani and Court of Appeal cases are the same as the ones which are the subject of this action. In my view this action cannot proceed to hearing in view of the provisions of Section 6 of the Civil Procedure Act.”

11. The court therefore agrees with the Defendant that the matter was not heard on merit and it can therefore proceed to make a determination of the same.
12. In the case of **Kenya Pipeline Company Limited vs Stanley Githunguri [2011] eKLR** which the Plaintiff also placed reliance on, the Court of Appeal adopted a balancing act and invoked the principle of proportionality. It considered the size of the claim, importance of the claim which had a substantial public interest element, the complexity of the issues and the financial position of each party and held that whereas the Respondent therein had a claim, the same was not anywhere near the value of the project.
13. The Defendant submitted that the appointment of a Receiver in this matter was a pre-emptive remedy as the court would be placing the subject property in *custodia legis* as the debt was

- spiraling out of control. It pointed out that the Receiver was an officer of the court and under its control and the court would therefore be exercising judicial discretion in matter which it had jurisdiction to do.
14. As was aptly put by the Defendant, the court has jurisdiction and power to appoint a Receiver under Section 63 (d) of the Civil Procedure Act and Order 41 Rule 1 of the Civil Procedure Rules, 2010. In this regard, the court does not take any different view from the holding that was made in the case of **Uhuru Highway Development vs Central Bank of Kenya & 3 Others [1998] eKLR** that was relied upon by the Defendant to support its argument.
 15. However, the question that arises herein is whether or not this court can grant the orders sought by the Defendant against the backdrop of the order of the Court of Appeal which granted the Plaintiff herein injunctive orders pending the hearing and determination of the suit herein and the fact that this matter is scheduled for full trial on 18th December 2014.
 16. In its ruling dated 28th March 2012, the Court of Appeal stated as follows:-

“Having put the rival arguments in the scales, it is clear to us that as at June 2009, the respondent who has not specifically controverted the allegations against it, has not shown on a *prima facie* basis that the applicant was in default and if so to what extent....Whether or not the applicant was in default, is therefore an arguable issue...since it is common ground that the applicant is servicing the loans and this has not been controverted by affidavit evidence, the scales of justice tilt heavily in favour of granting an injunction...we decline to grant a stay of the High Court proceedings because in our view, a full and speedy determination of the case including the taking of accounts could resolve this matter...”

17. Bearing in mind the said ruling, this court is of the considered opinion that the Defendant's application would not succeed.
18. Firstly, the Court of Appeal granted the Plaintiff herein an unconditional injunctive order. Parties were required to proceed to full hearing with a view to determining the matters in dispute. Evidently, there was no clause to address default on the part of the Plaintiff. The court would be making assumption on what the intention of the Court of Appeal was. Indeed, granting the orders sought would have the effect of varying the order that was issued by the Court of Appeal.
19. This court is therefore in agreement with the Plaintiff that it had no jurisdiction or power to vary the terms under which the said injunctive order was granted. As he also correctly pointed out, the Defendant ought to have moved the Court of Appeal to set aside, vary and/or vacate its orders on the basis of default of the Plaintiff and/or to advance its argument of putting the subject property in *custodia legis* pending the hearing and determination of the suit herein.
20. Secondly, even if this court has jurisdiction and power to appoint a receiver and manager, the Defendant did not demonstrate that this was a fit case for it to grant such orders in view of the fact that the present application was filed about four (4) months before the scheduled hearing of 18th December 2014. It did not provide any plausible explanation why there was inordinate delay in filing the said application.
21. The court wishes to point out that interlocutory applications filed so close to hearing dates have the potential of scuttling hearing schedules and must be discouraged at all costs, unless of course, they are absolutely necessary which was not the case herein.
22. Accordingly, having considered the pleadings by the parties, the affidavit evidence, written submissions and the case relied upon by the parties, the court was not persuaded that the Defendant was entitled to the orders that it had sought herein.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's ruling is that the Defendant's Notice of Motion application dated and filed on 13th August 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff. Ground Nos (1) and (2) of the Plaintiff's Notice of Preliminary Objection dated 8th September 2014 and filed on 16th September 2014 are hereby upheld.
24. However, Ground No (3) of the said Notice of Preliminary Objection was not upheld as the

Defendant's Notice of Motion application dated 22nd April 2014 in **HC Misc 8 of 2014 Mombasa** was not heard on merit and Kasango J did not observe that the same was an abuse of the process of the court as had been alleged by the Plaintiff.

25.It is so ordered.

DATED and DELIVERED at NAIROBI this 2nd day of December 2014

J. KAMAU

JUDGE