



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 534 OF 2018

KAYSER INVESTMENT LIMITED.....PLAINTIFF

- VERSUS -

BAMBURI SPECIAL PRODUCTS LIMITED.....1ST DEFEDANT

STEPHEN KIMANI KARUU

T/A KIRIIYU MERCHANTS AUCTIONEERS.....2ND DEFENDANT

STEPHEN GIKERA & PUNIT VADGAMA

T/A GIKERA & VADGAMA ADVOCATES.....3RD DEFENDANT

RULING

1. There are three pending applications. There is the plaintiff's notice of motion dated 13th December 2018 and the preliminary objection dated 18th April 2019. The plaintiff's notice of motion dated 16th September 2019 and the defendant's notice of motion dated 3rd December 2019. On the 30th January 2020, the court with the consent of the parties directed parties to file and exchange written submissions in respect of the pending applications.

2. The Notice of Motion dated 13th December 2018 is brought under Article 40 and 159(2) (d) of the Constitution, Section 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules.

1. Spent.

2. Spent.

3. Pending the hearing and determination of the suit herein an order of injunction do issue restraining the defendants by themselves, their agents, servants or whomsoever from in any manner trespassing, entering upon, wasting, alienating, threatening to attach and or sell, attaching and or selling, disposing or in any manner interfering with the suit property being LR NO. 1/299 (origin No. 1/42/6) situated along Argwings Kodhek Road in Nairobi

4. Cost of this application be borne by the defendants on a full indemnity basis.

5. Any other and further order that the court may deem fit and just to grant to preserve the suit property.

3. The grounds are on the face of the application and are set out in paragraphs (1) to (20).

4. The application is supported by the affidavit sworn by Kevin Ayodi, a representative of the plaintiff/applicant sworn on the 13th December 2018 and a supplementary affidavit sworn on the 1st July 2019.

5. In response to this application the defendants/respondents filed a preliminary objection dated 18th April 2019. They raise six (6) grounds namely.

a. That the application and entire suit has flouted all the rules of procedure for all intents and purposes in that it is sub judice and, if heard, will interfere with other matters which are currently pending before another court in the Commercial Division.

b. That this application is grounded more specifically on matters that are pending before the High Court (HCCC Number 431 and 432 of 2014; Bamburi Special Limited vs Remax Construction Limited and Bamburi Special Products Limited vs Paragon Holdings Limited respectively) which are active and pending determination of execution proceedings.

c. That the recommended procedure of filing an objection in the existing suits has not been adhered to therefore the application and entire suit and incompetent, an abuse of the court process and waste of justice resource.

d. That the plaintiff's/applicant's deponent does not have authority under seal to swear and execute affidavit on behalf of the plaintiff/applicant as required by order 4 rule 1(4) the Civil Procedure Rules and false purports to have the authority going as far as referring to an annexure that does not exist.

e. That the application and entire suit are malicious, frivolous, vexatious and an abuse of the court process since it is evident that the applicant is forum shopping and has in actual fact brought this application as an afterthought to defeat execution in the matters pending before the commercial court.

f. That in the premises, the application and entire suit herein is, ill-founded and lacking in merit and we thus pray the application and entire suit be dismissed with lack to the respondent.

6. There is a replying affidavit sworn by Betty Kanyagia, Company Secretary of the 1st defendant/respondent on the 23rd April 2019. There is also a replying affidavit sworn by David Gitonga an employee of the 2nd defendant, on the 23rd April 2019.

7. Before the notice of motion dated 13th December 2018 was heard and determined. The plaintiff/applicant filed another notice motion dated 16th September 2019. It is brought under order 10 rule 3 of the Civil Procedure Rules, 2010, Article 40 and 159(2)(d) of the Constitution, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

8. It seeks orders:-

1. The 1st 2nd and 3rd defendant's defence dated and filed on 18th April 2019 be struck out.

2. The plaintiff's suit proceed as an undefended suit.

3. Costs of this application be borne by the 1st, 2nd and 3rd defendants.

9. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

10. It is supported by the affidavit sworn by Kevin Ayodi a representative of the plaintiff/applicant sworn on the 16th September 2019.

11. The application is opposed. There is a replying affidavit sworn by Betty Kanyagia, Company Secretary of the 1st defendant/respondent on the 4th December 2019.

12. There is also the defendants' notice of motion dated 3rd December 2019 brought under section 3A of the Civil Procedure Act, order 10 rule 11 of the Civil procedure Rules, 2010, article 159(2) (d) of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

13. It seeks orders:-

i. Spent..

ii. That the honourable court be pleased to grant leave to the defendants herein to file their joint statement of defence out of time..

iii. That the joint statement of defence filed on 18th April 2019 and served upon the plaintiff on 23rd April 2019 be deemed as properly on record.

iv. That cost of this application be provided for.

14. The grounds are on the face of the application and are set out in paragraphs (a) to (g).

15. The application is supported by the affidavit of Stephen Kimani Karuu, the 2nd defendant/applicant and the proprietor of M/S Kiriinyu Merchants Auctioneers sworn on the 3rd December 2019.

16. I have considered the notice of motion dated 13th December 2018, the supporting affidavit and the annexures. I have considered the affidavits in reply and the preliminary objection, together with the written submissions filed in respect of the parties. The issue for determination are:-

i. Whether the plaintiffs/applicants application meets the threshold for grant of temporary injunctions.

ii. Whether the preliminary the preliminary objection is merited.

iii. Who should bear costs.

17. The plaintiff/applicant seeks orders of injunction to restrain the defendants by themselves, their agents, servants or whomsoever from in any manner trespassing, entering upon wasting, alienating, threatening to attach and or sell, attaching and on selling disposing or in any manner interfering with the suit property being LR No1/299 (original no.1/42/6) situated along Argwings Kodhek Road in Nairobi.

18. Paragraphs 5, of the supporting affidavit of Kevi Ayodi, sworn on the 13th December 2018 states:-

“That or on about 21/6/2018 I was at the plaintiff’s property LR NO, 1/299 (original No. 1/4216) when two men descended upon the suit property and introduced themselves as M/S Kiriiyu Merchants Auctioneers (the 2nd defendant) under the instructions of M/S Gikera & Vadgama Advocates (the 3rd defendant) I produce at page 3 of the bundle marked KA a business card that one of the men handed to me”.

In paragraph 6 he depones:-

“That the said auctioneers informed that they were under instructions to attach and sell the property being LR NO. 1/299 (original No 1/42/6 by public auction unless they or the 1st defendant were paid a sum of Kshs.8,128,571 being decretal sum purportedly owing to the 1st defendant from the plaintiff in HCCC 431 and 432 of 2014”.

19. From the foregoing averments it is clear that there existed two suits being HCCC 431 and 432 of 2014 in which the 1st defendant was the plaintiff. This was confirmed by the averments of Betty Kanyagia, the company secretary of the 1st defendant/respondent in her affidavit sworn on the 23rd April 2019. The 2nd defendant/respondent has also sworn an affidavit, dated 23rd April 2019 on which he explains his visit to the plaintiff’s suit premises.

In paragraph 10 he depones:

“I never served any document upon the said parties and the only thing I left at the premises was my business card for onward transmission to the owner of the suit property.”

This confirms what Kevin Ayodi, stated in paragraph 5 of his supporting affidavit.

20. There exists HCCC 431 and 432 of 2014 in which judgments were delivered on 3rd May 2018. The copies of judgments are attached to the replying affidavit of Betty Kanyagia Company Secretary of the 1st defendant/respondent. These facts have not been contested by the plaintiff/applicant. I find that the plaintiff’s/applicant’s application does not meet the threshold for grant of temporary injunction as set out on the case of **Giella vs Cassman Brown [1973] EA 358**.

21. The first ground of the preliminary objection is that the application and the entire suit has flouted all rules of procedure for all intents and purposes in that it is *sub judice* and if heard will interfere with the matters pending before the High Court, Commercial Division. The existence of HCCC 431 and 432 of 2014 have not been challenged by the plaintiff/applicant. The 1st defendant is the plaintiff in those two matters. It has obtained judgments which it needs to execute.

22. Another ground of objection is that the recommended procedure of filing objection in the existing suits has not been adhered to hence the application and the entire suit is incompetent. It is the plaintiff’s/applicant’s claim that it was not a party on the two suits before the high court commercial division, that therefore, its suit property ought not to be attached in execution of the decree in the two suits.

23. **Order 22 rule 51** of the Civil Procedure Rules 2010 provides that:-

1. Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

2. Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

3. Such notice of objection and application shall be served within seven days from the date of filing on all the parties. [Order 22, rule 52.] Stay of execution.

Order 52, provides that:-

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part

24. This is the proper procedure that ought to be followed by the plaintiff/applicant instead of instituting a fresh suit. Allowing this suit to proceed could lead to multiplicity of suits. I agree with defendants'/respondents' counsel submissions that objection proceedings cannot be instituted through a fresh suit.

25. For these reasons, I find that the preliminary objection herein has merit. I find that the application dated 13th December 2018 and the entire suit are incompetent and an abuse of the court process. In view of the forgoing, I do not need to go into the merits of the notice of motions dated 16th September 2010 and 3rd December 2019 respectively.

26. The notice of motion dated 13th December 2018 and the entire suit are dismissed with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15th day of October 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ataka for the Plaintiff

Mr. Oweya for the Defendants

Kajuju - Court Assistant