REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE 252 OF 2009

REGINA MUNYIVA KIOKO……..PLAINTIFF

VERSUS

KENYA TOURIST DEVELOPMENT CORPORATION…....….DEFENDANT

RULING

Waweru,J heard the application dated 19th August, 2009 *interpartes* on 25th May, 2010 and reserved the ruling for 5th November, 2010. Soon thereafter, he left the station on transfer. Apparently, he left with the file for purposes of crafting the ruling. However, this was not to be as sometimes later, the good judge returned the file without the ruling.

On 14th March, 2012 counsel for the plaintiff caused the matter to be mentioned before me for further orders and or directions. Come that day and there was no counsel for the defendant. He was nonetheless of the view that this court takes over the matter from where **Waweru,J** had left, proceed to craft and deliver the ruling. However, I could not issue such directions in the absence of counsel for the defendant. Consequently, I ==[[[directed that the matter be mentioned before me again on 18th May, 2012 for such directions.

On that day, plaintiff's counsel faithfully appeared. However, the defendant and or its counsel were again absent though served. That being the case, I acceded to the request by counsel for the plaintiff and ordered that the application proceeds from where **Waweru,J** had left. In effect this meant that I would act on the respective written submissions on record, craft and deliver the ruling.

The background to this saga is as follows; the plaintiff filed a suit contemporaneously with the application, the subject of this ruling. In the application, she sought injunctive orders to prevent the defendant from exercising its statutory power of sale in respect of all that piece or parcel of land known as Machakos/Matuu/4341, hereinafter "*the suit premises*". The basis of the suit and the application was that on 23rd September, 1993, the plaintiff agreed to and charged the suit premises for Kshs. 2,900,000/= to secure a loan advanced to her by the defendant. Having repaid the loan to the tune of Kshs. 900,000/= or more, she asked the defendant to supply her with statements of account to ascertain the balance due after her business went down to enable her to organize repayment through other sources. However, the defendant was reluctant to do so and up to the time of filing the suit, the plaintiff was not aware of the amount outstanding on the loan account. Despite the foregoing, the defendant apparently served on her the statutory notice to exercise its power of sale and the 45 days notice by the auctioneers. The contention of the plaintiff is that such service, if at all was not proper or legal. In the premises, any attempt by the defendant to auction the suit premises was null and void for want of proper service and on account, that she disputes the actual amount outstanding if at all. Otherwise she was ready and willing to redeem the suit premises once the actual amount due was established and she should be accorded that opportunity.

The *exparte* application came before **Lenaola,** J on 26th August, 2009 and a temporary injunction was issued. It is this temporary injunction that the plaintiff is now seeking to confirm to last until the hearing and determination of the suit.

Served with the application, the defendant responded by filing a replying affidavit. Where pertinent, it deponed through its legal officer, **Carey Francis,** that the defendant advanced to the plaintiff at her request a loan of Kshs. 2,900,000/=during the years 1993 to 1994. By May, 1994 however, the plaintiff had already began defaulting in the repayment schedule of the loan. Following demand and statutory notice, the suit premises were advertised for sale in 1995 and 1996 but the bids for the purchase were deemed low. Following service of yet another statutory notice in March, 1997 the plaintiff filed suit and obtained interim orders of injunction preventing the sale. The injunction was however, subsequently discharged. The plaintiff continued to default in the with repayment of the loan. When the defendant again took steps to realize its security by issuing another statutory notice, the plaintiff sued for Bankruptcy in Cause No. 26 of 2007. In the petition she swore that her outstanding loan account to the defendant stood at Kshs.13,000,000/=. Sometimes in June, 2008, by way of a Civil Suit No. 621 of 2008 filed in the Chief Magistrate's Court Machakos, the plaintiff again sought and obtained injunctive orders against the auctioneers without reference to the plaintiff but in respect of the suit premises and on the loan account of the loan. Based on the foregoing, the defendant took the view that the application was a blatant abuse of court process, underlined with non-disclosure and deliberate attempts to misled the court. Otherwise the plaintiff was updated with regard to changes in interest on her loan account. The plaintiff was well aware of her indebtedness to the defendant and had in the past made numerous payment proposals to no avail. The defendant had followed all prescribed steps in realizing its security and issued a valid demand and statutory notice, in a bid to recover the outstanding balance owed, and receipt of the same had been acknowledged by the plaintiff. The plaintiff's lawyers acknowledged that the last payments made by the plaintiff towards settling the loan were in 1996, some 13 years ago. Therefore the plaintiff's claim that she had been repaying the loan together with interest was clearly false and an attempt to misled the court. In the circumstances, the plaintiff had not come to court with clean hands as required of her in equity. No *prima facie* case in the circumstances had been made. Further, damages would be an adequate remedy and it had not been suggested that the defendant cannot pay the damages should it become necessary. The defendant finally denied any allegations made regarding interest rates and maintained that the interest on the loan accrued as a result of the plaintiff's default in payment of the loan despite several demands by the defendant. Further, the plaintiff resisted the defendant's attempts to recover the amount owing at the earliest opportunity, through protracted court proceedings and false promises to the defendant that were never honoured.

From the outset, I must say that the plaintiff's application for the equitable relief of injunction is clearly without merit. I have no doubt in my mind that the plaintiff has engaged herself in unforgivable abuse of the court process. Her conduct clearly demonstrates that she has come to court without clean hands and guilty of material non-disclosure. An injunction being both equitable and discretionary remedy will be denied to a party who comes to court with dirty hands and guilty of non-disclosure of material facts.

The record is clear and it is common ground that the plaintiff has previously filed 2 suits in respect of the suit premises seeking injunctive orders whose overall effect has been to stall, the defendant's right to exercise the statutory power of sale. There is no evidence that those suits have been concluded. At least, the plaintiff has not said so in her supplementary affidavit and or written submissions. She is merely contend with stating that the issues raised in those suits were different as were the parties. I do not think that the plaintiff is being honest with that assertion. She had not annexed copies of those pleadings to show how the causes of action and parties were different. Nor has she claimed that the said suits have been concluded. In civil proceedings a party who asserts must prove. Having asserted that those cases involved different parties and causes of action, it was upto her to support that assertion. It was a matter specifically within her personal knowledge. Accordingly, it would not have been difficult to prove. I can only take the aforesaid assertion with a pinch of salt. If the first suit involved the plaintiff, defendant and related to the suit premises and it has not been concluded, or even assuming it was concluded can the plaintiff maintain this suit again? I do not think. The doctrine of subjudice and *res judicata* will automatically come into play. Yes, the 2nd suit may have involved the plaintiff and Gallant Auctioneers only. However, in the suit she sought to stop the sale by public auction, the very suit premises. A scrutiny

of the certificate of official search, dated 30th June, 2008 shows that the suit premises was at the time charged to the defendant. Gallant Auctioneers could only have been acting on behalf of the defendant. Further, and as correctly submitted by counsel for the defendant, it is self evident that not content with such misdeeds, the plaintiff had also voluntarily initiated bankruptcy proceedings against herself when the sale of the suit premises was imminent, only to later withdraw the same when it suited her. It is therefore clear that the plaintiff was using a duplicitous array of proceedings in the High Court, Chief Magistrate's Court and Bankruptcy Court with the sole aim of preventing the defendant from exercising its legal rights.

The plaintiff did not disclose all these facts to the court in the suit as well as the affidavit in support of the application. She even misleading averred had the temerity to aver in the plaint in paragraphs 12 that:-

"…***the plaintiff avers that there is no (sic) proceedings concluded or pending before any court touching on the same parties on*** *(sic)* ***this cause of action"***

The plaintiff knew in her mind that this assertion was not correct. She followed it up with a verifying affidavit in which she again deposed:-

"***That I further aver that there is no other court proceedings conducted or pending touching on the same parties on the subject matter of this suit…"***

This is clearly perjury. I am certain that had **Lenaola, J** been made aware by the plaintiff of the previous proceedings aforesaid, he would have most likely declined to issue the temporary injunction order. The plaintiff having been guilty of material non-disclosure no order of an injunction can issue in her favour. On this aspect of the matter **Bosire, J** (as he then was) delivered himself thus in **Fluid & Power Systems Limited vs Kalsi [1991]KLR 586-**

"The second aspect is with regard to the bona fides of the instant application. A party who comes to court and obtains ex parte orders either on the basis of a false affidavit, or having withheld from the court certain material facts disentitles himself to the orders sought. It is a power inherent in the court to decline to grant the orders if only for its own protection and to obviate the abuse of its process (see Rex v the General Commissioners for the Purposes of The Income Tax Acts for the District of Kensington Ex-parte Pricness Edmond De Polignac [1977] IKB 486). This is principle of equity and may only be invoked where the Court upon the examination of the evidence is convinced that material facts were withheld from it, or that the applicant relied on the false statement and by doing so misled the Court. That is the position here."

I am in total agreement with **Bosire,J** in his elucidation of the law aforesaid.

In countering this, the plaintiff has submitted that even in situations where the court finds that a litigant has come to court with unclean hands and there has been failure to disclose material facts, the court can still exercise its discretion to ensure justice is done to the parties and that no party is prejudiced. That the imminent danger may cause a litigant to rush to court and inadvertently fail to disclose certain facts. The party alleging that another came to court with unclean hands is under the burden to prove that the non-disclosure was intentional and the court would have reached a different decision if the facts were put before it. In support of this submissions, counsel for the plaintiff has relied on the case of **Augustine Wang'ombe Wambugu vs National Bank of Kenya Ltd & Others [2006] eKLR** in which **Okwengu,J** held that although the applicant had not come to court with clean hands, it was nonetheless appropriate to exercise its discretion to preserve the suit premises which was the substratum of the suit. On my part, I am not persuaded to go this route. First and foremost, this decision is not binding on me. Secondly, I am not persuaded by the judge's reasoning. Lastly, the facts in that case are not the same as in this case. Nonetheless, I am persuaded to go the Bosire way.

The gravamen of the plaintiff's complaint is that the statutory notice served on her was illegal, null and void on account of interest chargee. It is trite law that an injunction cannot issue to restrain a charge from exercising its statutory power of sale on the grounds that the amount in dispute is excessive or on

account of interest. The plaintiff no doubt is well aware of her indebtedness to the defendant. She has conceded that out of Kshs. 2,900,000/= advanced to her, she has only repaid close to Kshs. 900,000/=. A whole 2,000,000/= has been outstanding and has not been served for the last 13 or so years. The statutory notice, as well as the auctioneer's notice were served on her in good time. This comes out clearly in the annextures to the defendant's replying affidavit which have not been discounted. In any event in her bankruptcy proceedings, she even swore that she owed the defendant Kshs 13,000,000/= which she could not pay. How can she now turn around and claim ignorance of the amount owed she owes the defendant. Further, this claim is hollow since in her own supporting affidavit she has exhibited statements of account. Having and operating such an account I cannot see how the plaintiff could possibly not been able to access the same.

I think that the plaintiff is merely seeking to delay the final day of judgment by alleging disputes in amount owing. It is a mere delaying tactic which courts over time have frowned upon. The Court of Appeal in the case of **John Nduati t/a Johester Merchants vs National Bank of Kenya Ltd [2006] eKLR;** categorically stated-

"***The applicant may well in due course make out a case to challenge the calculations of his indebtedness to the bank. He may or may not be successful. The legal issue however is whether the dispute on the outstanding loan can scuttle the exercise by a charge of its power of sale. On that legal proposition this court has expressed itself before and we need only refer to J.L. Lavuna & Others vs Civil Servants Housing Co. Ltd & Another Civil Appeal No. Nai 14/95 where Kwach J.A stated;-***

I have always understood the law to be that a court should not grant an injunction restraining the mortgagee from exercising its statutory power of a sole solely on the ground that there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in Hasbury's Laws of England, Volume 32, 4th Edition at paragraph 7255."

This is the situation obtaining here:-

I now come back the conditions that a court considers in granting or refusing an injunction. These are long settled. See the case of **Giella vs Cassman brown & Co ltd [1973] E.A. 358**. An injunction is-

- An equitable and discretionary remedy
- Applicant must establish a *prima facie* case with a probability of success.
- Demonstrate that she will suffer irreparable injury if the injunction is not granted and,
- If the court is in doubt about the conditions above the balance of convenience should tilt in favour of the applicant.

In the case of **Kenya Commercial Finance vs Afraha Education Society [2001] 1E.A 86**, the Court of Appeal reasserted those conditions thus-

"The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success of this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt, it will decide the application on a balance of convenience. See Giella vs Cassman Brown and Co. Ltd [1973] E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt then the third condition can be addressed

The learned judge then proceeded to hold that-

Having carefully evaluated the facts of this case, it is clear that the plaintiffs have no basis in law to challenge the defendant's right to exercise of its power of sale as a chargee. The plaintiff's have not

been prevented from redeeming the said suit premises. They have been duly notified as provided by the law. It is up to them to redeem the said property before the same is sold in a public auction by the defendant in exercise of its power of sale. The plaintiffs have therefore not established a prima facie case that will enable this court grant them the order of interlocutory injunctioin sought. The issue of non-payment of terminal dues and the issue of the pending suit in which the 2nd Plaintiff is claiming that he was illegally terminated from employment is neither here nor there. It does not fetter the defendant's right to realize its security as per the charge instrument. It is therefore unnecessary for this court to consider the other principles enunciated in the landmark case of Giella vs Casmman Brown [1973] E.A. 358.

Based on what I have already stated, there is no *prima facie* case with a probability of success demonstrated by the plaintiff. Accordingly, I do not need to consider the other conditions. The plaintiff has not said that she had fully repaid the loan. Rather she is clinging on the exorbitant interest charged. The interest has accrued as a result of her own inability to service the loan for the last 13 or so years. Instead she has engaged the defendant in endless litigation. I do not think that it is within the courts to allow a litigant to benefit from her own mischief by granting the equitable remedy of injunction until the hearing and final determination of the suit. The application is deemed unmentorious and accordingly dismissed with costs to the defendant.

RULING DATED, **SIGNED** and **DELIVERED** at **MACHAKOS,** this **6TH** day of **JULY**, 20**12**.

ASIKE-MAKHANDIA
JUDGE