



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 205 of 2008**

CHRISTOPHER KIRUBI.....PLAINTIFF

VERSUS

1. ALI KHAN MUSES.....DEFENDANT

2. FIDELITY COMMERCIAL BANK LTD.....APPLICANT

**Coram:**

Mwera J.

Musangi, Gitonga for Plaintiff/Respondent

Kamuti for 1<sup>st</sup> Defendant

Miss Muyaa for 2<sup>nd</sup> Defendant/Applicant

Court Clerk Furaha

**RULING**

On 13<sup>th</sup> April, 2012 the applicant, Fidelity Commercial Bank Limited, the bank moved this court for orders under sections 1A, 1B, 3A of Civil Procedure Act and Order 1 rule 10, Order 40 rules 7, 10 of Civil Procedure Rules:

- (i) that it be joined in those proceedings as a 2<sup>nd</sup> defendant;
- (ii) that there be a stay of execution of the mandatory injunction order made on 27<sup>th</sup> March, 2012.

In some twelve grounds it was contended that on 27<sup>th</sup> March, 2012 Ibrahim J. ordered that part of the development (a hotel) standing on plot No. GALU/KINONDO/50, plot No. 50, be demolished. That the bank registered a charge over that plot owned by the defendant on 11<sup>th</sup> April, 2008 for a Shs. 50 million. The defendant (Ali Khan Muses) defaulted and a statutory notice to sell issued. The defendant filed HCCC 55/2009 seeking orders to restrain the bank from selling the property. Eventually, the bank got leeway to advertise and sell the charged property. During all this going between the defendant and the bank the former did not disclose to the latter that he had a boundary dispute with the plaintiff. Then on 12<sup>th</sup> April, 2012 the bank learned of the order of 27<sup>th</sup> March, 2012 to demolish part of the development (a built-up hotel) standing on the plaintiff's plot. Such demolition will definitely affect the bank.

*“ix. The bank requires to establish the position on the ground before the mandatory injunction is executed.”*

The bank thus has a substantial interest in the suit premises because of the charge. If demolition goes on, it will suffer substantial loss – hence the prayer to be made a 2<sup>nd</sup> defendant in the suit. A supporting affidavit sworn by Sukesha Dabholkar, the deputy general manager of the bank expanded on the grounds above. By a valuation dated 3<sup>rd</sup> October, 2009 plot No. 50 with developments thereon was worth Shs. 210 million (forced value, shs. 280 million on the open market).

At the time of hearing the present motion Mr. Musangi told the court that the defendant Ali Khan Muses was not participating.

Ms. Muyaa for the bank outlined the history of the case stressing that the bank held a charge over plot No. 50 of the defendant. Building on that plot was in such a manner that it extended onto the plaintiff's plot No. 47. That resulted into the present suit – a boundary dispute between the two land owners.

In the meantime the plaintiff (plot No. 47) got a mandatory injunction on 27<sup>th</sup> March, 2012 for the demolition of the building part that was on his land. And because the bank had lent money to the defendant using plot 50, and now that the two land owners have this boundary dispute, it should join as a necessary party for the proper/final resolution of the dispute in the suit, and particularly the ordered demolition. The loan deal was concluded when there were not fixed boundaries between the two plots except for what was described as “*general boundary survey*”. Damage will not compensate the bank in the event demotion proceeds. The bank did not wish to file a fresh and separate suit but to come in the present and on-going one.

Mr. Musangi's position was that the plaintiff did not need the bank in these proceedings to determine fully and finally the dispute between him and the defendant. He had no claim against the bank and neither did it. If its claim as against the defendant is and should be limited to the loan it gave him, it can only wage its claim against him. The plaintiff had no privity of contract with the bank regarding the loan it gave to the defendant. He got orders to demolish part of the building on plot No. 50 which was on his plot No. 47 and that is it. The plaintiff only wants his plot clear of any unwanted developments which he did not consent to. That Ibrahim J. had correctly found that a trespass had been committed as against his property and that remains the position in absence of a successful appeal or review. And this court is doing neither of the two. Ali Khan, the defendant, who is not even participating in these proceedings, should execute the orders of mandatory injunction. It is not the bank which was directed to do so.

The court heard that the plaintiff had no part to play as regards the boundaries of his plot when the bank and the defendant were concluding their loan deal. It was incumbent on the bank to carry out a research in the land registry and on the ground to know what property it was charging, its location and size on the ground. The balance of convenience tilted in favour of the plaintiff – the unwanted development on his plot ought to be demolished.

The plaintiff's claim as per the suit filed here on 12<sup>th</sup> August, 2008 was based on trespass:

**“5. Sometime in the first half of the year 2008, the defendant, his servants and/or agents encroached onto the plaintiff's property by over 35 meters and erected a wall and other structures.”**

Therefore in the prayers it was stated, *inter alia* that the said trespass be restrained and the defendant be ordered to pull down the structures that encroached on the plaintiff's plot No. 47.

The pleading above was the subject in the chamber application also filed in court on 12<sup>th</sup> August, 2008 where prayers included:

**“4. That a mandatory injunction compelling the defendant to forthwith pull down and remove the wall and such part of the structures as encroach onto and are built by the defendant on the plaintiff's property.....”**

Ibrahim J. heard the application and fully appreciated the affidavits from both sides with their annexures. Besides carefully giving over the other aspects of the material placed before him, including the fact that on encroaching on the plaintiff's plot, the defendant went over a public road between the two plots, the learned Judge concluded:

**“The plaintiff's application dated 11<sup>th</sup> August, 2008 is hereby allowed in terms of prayer 3 and 4 with costs.....”**

And those prayers were to the effect that the defendant be restrained from trespassing on the plaintiff's plot No. 47 and he should pull down and remove all structures he had erected there.

The dispute in this suit is about trespass – going over onto one's land without consent. It is solely and properly between the two property owners – the plaintiff (Plot 47) and the defendant (plot 50). The bank and the defendant are linked by a charge the former registered over the latter's plot No. 50. That has nothing to do with the plaintiff. The plaintiff is not the one seeking to join the bank as a defendant (Order 1 rule 3 Civil Procedure Rules). It was said that the plaintiff is seeking no right to any relief against it. The bank invokes the powers donated by Order 1 rules 1, 10 Civil Procedure Rules (who may be joined as plaintiffs, substitution and addition of parties). This court is unable to see or it was not demonstrated as to the application of these provisions of law as regards the prayer by the bank to join these proceedings as a defendant, neither do rules 7, 10 of Order 40 Civil Procedure Rules. A court may vary or discharge an injunction yes, or give orders to preserve, inspect property. But how does that avail the bank? The injunction orders of 27<sup>th</sup> March, 2012 were not directed to it and neither plot No. 47 nor 50 belongs to it. Its interest in plot 50 is only as far as the charge it holds over it as against the defendant is concerned. Nothing to do with the plaintiff. And should at this point in the interests of justice issue the orders sought as per the inherent powers of this court? Not quite. The circumstances of this case, well-narrated above do not favour the bank. The joinder of the bank cannot assist in any way the court to determine the trespass between the plaintiff and the defendant. The bank can recover the loan/damages from the defendant one way or another. It is the plaintiff who is prejudiced by the defendant's building part of which stands on his plot. So, all in all this application ought to be dismissed. Perhaps the bank could have sought to be joined as an interested party but not a defendant. But if it insists on being made one, let it join at its own cost and expense at every stage. However, the prayer to stay the orders of 27<sup>th</sup> March, 2012 is not granted. There has been no sufficient justification demonstrated. Costs to the plaintiff.

Delivered on 10<sup>th</sup> October, 2012.

**J. W. MWERA**

**JUDGE**