



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1314 OF 2016

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

WARDPA HOLDINGS LIMITED.....1 ST DEFENDANT

EDWARD NJUGUNA KANG'ETHE.....2 ND DEFENDANT

GLADYS NJERI KANG'ETHE.....3 RD DEFENDANT

GEORGE JAMES KIRERU KANG'ETHE.....4TH DEFENDANT

PATRICK KANG'ETHE NJUGUNA.....5 TH DEFENDANT

MARGARET WAMBUI KANG'ETHE.....6 TH DEFENDANT

CHIEF LAND REGISTRAR.....7 TH DEFENDANT

RULING

Introduction

1. This ruling is in respect of two applications. The first application is the 5th defendant's notice of motion dated 13/12/2016. The said application sought an order setting aside the order of this court issued on 9/11/2016 directing that, pending the hearing and determination of this suit, the proceeds of Land Reference Number 36/VII/499, then held by the firm of Moses N Siagi & Company Advocates, be deposited with the plaintiff in an interest earning account in the joint names of Moses N Siagi & Company Advocates and M/s Mohamed Madhani & Company Advocates. Secondly, the motion sought an order striking from the court record the supplementary affidavit sworn by Mr James Rimui Advocate on 8/11/2016.

2. The second application is the notice of motion dated 7/2/2017 brought by the plaintiff seeking contempt orders against Moses N Siagi. I will first outline brief facts of this case. I will thereafter outline the parties' respective positions in relation to the two applications. I will conclude by giving my determination on the two applications sequentially in the above order.

Background Facts

3. At the request of the 1st to 4th defendants, the plaintiff agreed to advance to the 1st defendant a term loan facility of Kshs. 30,000,000 to partially finance the purchase of Land Reference Number 36/VIII/499, Eastleigh, Nairobi. A mortgage dated 7/1/2011 was executed and allegedly registered on 4/12/2011. A counterpart of an indenture dated 31/12/2010 was submitted to the plaintiff and remains in the plaintiff's custody to date. The sum of Kshs 30,000,000 was subsequently released to the 1st defendant.

4. The plaintiff and the 1st defendant executed a further mortgage dated 21/9/2011 to secure an overdraft facility of Kshs 76,000,000 against the same title. In 2014, the 1st defendant defaulted and the suit property was put up for auction. The defendants approached the plaintiff with a settlement proposal and the sale was put off. The proposal was not honoured, leading to a re-advertisement of the sale. The defendants once more approached the plaintiff with a proposal to sell the suit property through a private treaty and the plaintiff acceded to the request on condition that the defendants would execute undertakings to the effect that they would remit the proceeds to the plaintiff. Without reverting to the plaintiff for release of the security instruments, the defendants proceeded to sell the suit property. The plaintiff alleges that at that point, it discovered that the defendants had fraudulently procured a parallel title to the suit property and the fraudulent parallel title is the one which the defendants had used as security for the loan facilities. The plaintiff further discovered that there was no record in the Lands

Registry Presentation Book of any charge between the plaintiff and the 1st defendant. Further, the plaintiff realized that the suit property was registered in the names of the 5th and 6th defendants as opposed to the name of the 1st defendant. Consequently, the plaintiff brought this suit seeking the following orders:

- a) A permanent injunction restraining the defendants whether by themselves, servants, agents and or anyone acting at their behest or otherwise howsoever from disposing, selling, alienating transferring or otherwise dealing in any manner with the suit property known as Land Reference Number 36/VII/449 together with all the developments therein.*
- b) An order compelling the 7th defendant to register the securities held by the 1st defendant against the title to the suit property.*
- c) In the alternative to prayer a) hereinabove, the proceeds of the sale of Land Reference Number 36/VII/449 be deposited with the plaintiff by the 1st to 6th defendants.*
- d) The costs of this suit together with interest thereon at court rates from the date of filing suit until payment in full.*
- e) Such other and further relief that this honourable court may deem just and fit to grant.*

5. Together with the plaint, the plaintiff brought a notice of motion dated 24/10/2016. The impugned order which sought to preserve proceeds of the sale was issued in the said application.

5th Defendant's Application dated 13/12/2016

6. The application dated 13/12/2016 was brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 19 rule 2 of the Civil Procedure Rules, 2010. It sought six prayers. Prayers 1 and 2 are spent. Prayer 4 sought cross-examination of the process server and was abandoned on 23/1/2019 during the hearing of the application. What remain to be substantively disposed are prayers 3 and 5 which relate to setting aside of the order of 9/11/2016 and striking out of Mr James Rimui's affidavit sworn on 8/11/2016. Prayer 6 relates to costs of the application.

7. The application dated 13/12/2016 was premised on the grounds set out on the face of the application and was supported by the affidavit of Patrick Kang'ethe Njuguna, sworn on 13/12/2016. The case of the applicant was that the 5th defendant (applicant) was never served with relevant court papers and that the orders of 9/11/2016 were irregularly procured by the plaintiff through deceit and/or fraud. Secondly, the 5th defendant contended that the affidavit sworn by Mr Rimui raised contentious matters of fact and ought to have been sworn by a proper witness. He added that reliance on the said affidavit in granting the impugned orders was irregular. He urged the court to set aside the order of 9/11/2016 and strike off the court record the affidavit of Mr Rimui.

8. The application dated 13/12/2016 was opposed by the plaintiff through a replying affidavit sworn by Lwanga Mwangi on 11/1/2017 and another affidavit sworn by Donald Okonda (process server) on 5/1/2017. The plaintiff denied allegations of deceit/fraud and contended that it was the 5th defendant who was attempting to use fraud to illegally obtain proceeds of sale which did not rightfully belong to him. The plaintiff further contended that prior to admitting the affidavit of Mr Rimui, the court had perused the affidavit and noted that there was material information for the honourable court to consider and had properly admitted the affidavit and proceeded to issue the order.

9. In his affidavit sworn on 5/1/2017 and filed on 6/1/2017, Mr Donald Okonda (process server) denied perjury and contended that he had properly served the court documents. He further contended that from the subsequent court papers, it was apparent that the parties who received summons on their own behalf and on behalf of their relatives and Co-defendants were the 2nd and 4th defendants.

Plaintiff's Application dated 7/2/2017

10. The plaintiff's application dated 7/2/2017 was brought under Sections 23, 25 and 27 of the Contempt of Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 40 rule 3 of the Civil Procedure Rules. It was supported by the affidavit of Lwanga Mwangi sworn on 7/2/2017. The applicant's case was that on 9/11/2016, this court issued an order preserving proceeds of sale of Land Reference Number 36/VII/499, then held by the firm of Moses N Siagi & Company Advocates. Personal service of the order was attempted on 10/11/2016 but it was not effected because Mr Moses Siagi was not in his office. Consequently, on the same day, 10/11/2016, at 5.11 pm, out of caution, the plaintiff's advocates notified Mr Siagi through email about the court order. Subsequently, Mr Siagi was personally served with the order on 11/11/2016 at 12.30 pm. Despite having knowledge of the order, Mr Siagi failed to abide by the order and proceeded to release the sale proceeds.

11. Mr Moses Siagi opposed the application through an affidavit sworn on 28/2/2017. He stated that his email mosesnsiagi@yahoo.com was not functional from September 2016 to the time of swearing the affidavit. He added that his office was served with the order two hours after he had transferred the sale proceeds to the joint names of the 5th and 6th defendants. He denied disobeying the court order and blamed the plaintiff for not effecting service promptly.

Submissions

12. The two applications were canvassed orally in open court on 23/1/2019. Mr Kabebe, counsel for the 5th defendant, submitted that the 5th defendant was never served with the pleadings and application and the court was misled into believing that he had been served. He relied on copies of the 5th defendant's passport which contained ineligible immigration entries. He argued that the affidavit of service was false because the 5th defendant was out of the Country on 1/11/2016 when the process server purportedly served him. He added that the process server had since changed his position and was now contending that he served the 2nd and 4th defendants on behalf of the other defendants. Counsel argued that service ought to have been personal and that substituted service would be allowed only with leave of the court. Counsel

argued that the 5th defendant was denied a chance to present his case in court.

13. Counsel for the 5th defendant further argued that the affidavit of Mr Rimui ought to be struck out because it was filed without leave of the court. Lastly, he submitted that once the court finds that the orders were obtained through deceit and vacates them, the issue of contempt would not arise.

14. Mr Shah, counsel for the plaintiff submitted that there was no clear evidence on when the 5th defendant departed from the Country. He argued that the evidence before court merely indicated that the 5th defendant arrived in New Delhi on 25/11/2016 and departed from New Delhi on 30/11/2016 but does not indicate when he departed from Kenya. He further submitted that the process server's contention that he served the 5th defendant was based on the misleading information given to the process server by the 2nd and 4th defendants. Regarding Mr Rimui's affidavit, Mr Shah submitted that the court allowed Mr Rimui's affidavit because it contained material facts.

15. With regard to the application for contempt orders, counsel submitted that Mr Siagi was duly served by email on 10/11/2016 at 5.11 pm and personal service was subsequently effected on 11/11/2016 at 12.30 pm. He added that evidence from Co-operative Bank showed that the Account was debited on 11/11/2016.

16. In response to the application dated 7/2/2017, Mr Moses Siagi submitted that the email address to which the order was sent was not functional. He stated that he did not receive the email. He further submitted that he transferred the money on 11/11/2016 at 10.19 before he was served with the court order. He faulted the plaintiff for not reaching him on phone. He argued that he was not aware of the order.

Determination

17. I have considered the two applications together with the respective rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. Two issues fall for determination in relation to the 5th defendant's application dated 13/12/2016. The first issue is whether the order of 9/11/2016 should be set aside on account of lack of personal service upon the 5th defendant. The second issue is whether the affidavit of James Rimui should be struck out on account of inadmissibility. The plaintiff's application dated 7/2/2019 raises a single issue; whether Moses Siagi acted in contempt of the order of this court when he transferred the sale proceeds of Kshs 38,500,000 to the 5th and 6th defendants herein. I will make pronouncements on the three issues in that sequence.

18. The process server conceded that indeed he did not serve the 5th defendant personally. His position is that one of the two defendants whom he personally served identified himself as the 5th defendant but he (the process server) has since realized the identification was deliberately misleading. He conceded that he served the 2nd and 4th defendants but not the 5th defendant. It does therefore emerge that indeed, the 5th defendant was not personally served.

19. I would have set aside the order of 9/11/2016 outrightly on account of failure to serve the 5th defendant. I will however not so do. I have taken this view because of the serious allegation of fraud disclosed in this this suit. It is alleged that a section of the defendants procured a fraudulent title and used the fraudulent title to procure credit facilities of more than Kshs 100,000,000 from the plaintiff. It is further alleged that a section of the same defendants have sold the very property using a parallel title and are in the process of disbursing the sale proceeds to the detriment of the plaintiff who advanced the 1st defendant credit facilities on account of the suit property. In my view, it is in the interest of justice that the court does not grant an order which may open up an avenue or justification for the advancement of the alleged criminal scheme. Secondly, the 1st defendant is a family company in which the defendants appear to have interest. The sale proceeds which is sought to be preserved was remitted to the 5th and 6th defendants under unclear circumstances. It is therefore in the interest of justice that the preservatory order remains in force and the court focuses on prompt disposal of the main suit.

20. The second issue is whether the affidavit of Mr Rimui should be struck off the court record. Mr Rimui is the plaintiff's counsel. It is trite law that where there is contestation about facts, counsel should not be the one swearing affidavits. I have perused the impugned affidavit. The affidavit basically placed before the court the following documents: (i) letter dated 7/9/2016 from M/s Moses N Siagi & Co Advocates to M/s Mohammed Madhani & Company Advocates; (ii) copy of the Order issued by this court on 26/10/2016 restraining the defendants; (iii) copy of letter dated 25/10/2016 from the 6th defendant to M/s Moses N Siagi & Co Advocates (iv) copy of letter dated 25/10/2016 from the 6th defendant to M/s Moses N Siagi & Co Advocates, and (v) copy of letter dated 1/11/2016 from the 6th defendant to M/s Moses N Siagi Advocates. The parties to the said correspondence participated in the proceedings of this court during hearing of the two applications. None of them contested the contents of the impugned affidavit. Similarly, the 5th defendant does not contest any of the depositions made in Mr Rimui's affidavit. In my view, Mr Rimui's affidavit would stand to be struck out if it raised contested facts. In the absence of any form of contestation, there is no proper basis for striking out the affidavit. It is therefore my finding that the impugned affidavit does not depose to contested facts and is therefore not liable to be struck out.

21. I now turn to the only issue in the plaintiff's application dated 7/2/2019. This is the issue as to whether or not Moses Siagi acted in contempt of this court when he released the sale proceeds to the 5th and 6th defendants on 11/11/2016. The application under consideration was brought before the High Court (Mwita J) annulled the Contempt of Court Act.

22. The criteria upon which our courts exercise jurisdiction to punish for contempt was reiterated by the Court of Appeal in **Michael Sistu Mwaura Kamau v Director of Public Prosecution & 4 others (2018)eKLR** as follows:

It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by Section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v Ahmad Abolfathi Mohammed and another (Supra). Secondly as this court emphasized in Jihan Freighters Limited v Hardware and General Stores Limited and in A B and Another v R B [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.

23. The Court of Appeal in **Shimmers Plaza Limited v NBK (2015) eKLR** endorsed the view of Lenaola J (as he then was) in **Basil Criticos v Attorney General & 8 others (2012)eKLR** that knowledge of a court order suffices and personal service is not necessary where a party is aware of the court order.

24. In the application under consideration, Mr Moses N Siagi was not a party to the court proceedings at the time the court order was issued. Secondly, there is no conclusive evidence that he had seen the email sent to mosesnsiagi@yahoo.com on 10/11/2016 at 5.11 pm at the time he released the money to the 5th & 6th defendants. His position is that the email was not functional at the time. Personal service was allegedly effected on him after he had released the money on 11/11/2016. A contempt order is a serious indictment. I would not hand it down unless I am convinced that the alleged contemnor was fully aware of the order. In view of the inconclusive evidence presented to this court regarding Mr Siagi's knowledge of existence of the court order, I will give him the benefit of doubt. The finding of the court on the plaintiff's application dated 7/2/2017 therefore is that there is no sufficient proof of contempt on part of Mr Moses Siagi and therefore the contempt orders will not issue.

25. The net result is that both the 5th defendant's application dated 13/12/2006 and the plaintiff's application dated 7/2/2017 are declined. Parties shall bear their respective costs of the two applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Apolot holding brief for Mr Gikandi for the plaintiff

Mr Moses N Siagi - Acting in person

June Nafula - Court Clerk