



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ENVIRONMENT AND LAND 181 OF 2017

HANNAH WAMBUI.....1ST PLAINTIFF

EAST AFRICA CARGO LOGISTICS LTD.....2ND PLAINTIFF

-VERSUS-

EQUITY BANK LIMITED.....DEFENDANT

RULING

PLAINTIFFS' APPLICATION DATED 28/3/2018

1. By a Notice of Motion dated 18th March 2018, the Plaintiffs seek the following orders inter alia:

1. Spent

2. That pending the inter-partes hearing and determination of this application the court do reiterate that PLOT NO. MN/1/6032 situated in Shanzu, Mombasa shall not be sold by the Defendant in a public auction scheduled to be on 29th March, 2018.

3. That pending the hearing and disposal of this application, Mr. James Mwangi, who is the Managing Director of Equity Bank Kenya Limited, and Mr. Waweru, who is the Managing Director of Antique Auctions Agencies, be ordered to attend court at the earliest possible date show cause why they should not be cited for contempt.

4. That Mr. James Mwangi, who is the Managing Director of Equity Bank Kenya Limited, and Mr. R. Waweru, who is the Managing of Antique Auctions Agencies, be cited for contempt of the orders given on 21st March, 2018 and be punished for the same.

5. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the motion, namely:

i. That on 21st March, 2018 the court clearly directed that the Defendant was at liberty to sale the plaintiff's property known as plot NO.KILIFI/KAWALA "A"/KADZONZO/36 but in the same breath the court was categorical that the Defendant was not at liberty to sale the property known as PLOT NO.MN/1/6032 situated in Shanzu, Mombasa

ii. That the Defendant took part in the said proceedings and are fully aware of the order that was made 21st March 2018. Indeed, the said ruling was read in the presence of the following: -

a. Gikandi Ngibuini – Advocate for the Plaintiff.

b. Mr. Obiju – Advocate for the Defendant

iii. That furthermore, the Plaintiff's advocate duly notified the Defendant and 2nd affected party through a letter dated 21st March, 2018, whereby a copy of the ruling was annexed. Moreover, physical delivery of the ruling and the letter was done on 27th March 2018.

iv. That since 23rd March, 2018 the Defendant has placed handbills of the intended sale of the property known as PLOT NO.MN/1/6032 situated in Shanzu, Mombasa in strategic areas around Serena area in Mombasa and has indeed advertised in the daily nation that he shall sale the aforesaid property on 29th March, 2018 notwithstanding the said court order.

v. That it is plain that the defendant is an artificial legal persons who conduct its business and who are headed by the 1st Affected Party, Mr. James Mwangi, has absolutely no regard for court orders. Similarly, the 2nd Affected Party, Mr. R. Waweru, who as the court auctioneer knows the need the obey court orders has no regard for court orders as clearly evidenced from their aforesaid conduct.

vi. That unless this Honourable court intervenes and takes action against the 1st and 2nd Interested Parties, the dignity of the court will be lost as orders of the court will be made in vain.

vii. That in the circumstances, the orders prayed for herein are well merited and should be granted.

3. The application is further supported by the affidavit of Hannah Wambui sworn on 28th March, 2018 reiterating the above grounds.

4. In response to the Application, the Defendant filed a replying affidavit sworn by Kariuki Kingori on 4th April 2018 in which it states inter alia, that the plaintiff is guilty of material non-disclosure and active concealment of facts and therefore undeserving of the orders sought in the application. The defendant contends that the court issued the order of injunction on 21st March, 2018 with a caveat that the same shall subsist for as long as the Respondent/Defendant has not conducted such valuation in accordance with the Land Act and the Auctioneers Rules. The defendant further contends that upon conducting a valuation pursuant to the provisions of Section 97 of the Land Act and the Auctioneers Rules, the injunction automatically ceased to subsist. The defendant avers that it duly conducted a valuation over all that property known as LR MN/1/6032 pursuant to the order of the court and in effect the injunction in place automatically ceased to subsist. A valuation report dated 26th March 2018 is attached.

DEFENDANT'S APPLICAIOTN DATED 19TH APRIL 2018

5. By a Notice of Motion dated 19th April, 2018, the Defendant is seeking two main orders, to wit; that this court issues a declaration that the orders issued on 21st March 2018 automatically lapsed once the Defendant duly conducted valuation dated 26th March 2018 pursuant to Section 97 of the Land Act, and an order restraining the Plaintiffs, their servants, agents, employees or Advocates from in any ways whatsoever interfering with any scheduled auction of the suit properties. The application is based on the grounds on the face of the motion and supported by the affidavit of Kariuki Kingori sworn on 19th April, 2018. It is the defendant's case that in the application dated 24th May 2017, the Plaintiff's argument with respect to the property known as LR MN/1/6032 was wholly founded on the apparent lack of a current valuation over the property contrary to the provisions of Section 97 of the Land Act and the Auctioneers Rules. That in determining the Plaintiff's application dated 24th May 2017, the court in a ruling delivered on 21st March 2018 directed inter alia, that a temporary injunction be issued restraining the sale of the property known as LR. MN/I/6032 and that injunction was to subsist for as long as the defendant had not carried out a valuation as required under the provisions of Section 97 of the Land Act and the Auctioneer Rules. The defendant states state in full compliance with the orders of this court, it duly conducted a valuation over the property known as LR MN/1/6032, and in effect the injunction in place automatically ceased to subsist. The defendant avers that despite being duly served with the valuation conducted in accordance with the order by the court and the provisions of the Land Act, the Plaintiff's counsel accompanied by several goons proceeded to attack, intimidate and harass the auctioneers at the venue of the auction conducted on 29th March, 2018. The defendant avers that it is in the interests of equity and justice that the orders sought in the application herein are granted.

6. In response to the defendants' application, the plaintiffs filed a replying affidavit sworn by Hannah Wambui on 24th September, 2018 in which it is denied that a valuation exercise was carried out on PLOT LR.NO.MN/1/6032 on 23rd march 2018 either by Accurate Valuers Limited or any other valuer. That the property is properly fenced and guarded on a 24 hour basis, as such it is not possible for anybody to access it unless permitted by the plaintiffs.

7. The applications were canvassed by way of written submissions which were duly filed by the advocates for both parties. I have considered the applications, the affidavits in support and against and the rival submissions as well as the authorities cited. The main issues for determination is whether the 1st and 2nd Affected Parties should be cited for contempt of the orders given by the court on 21st March, 2018 and be punished for the same, or whether the orders issued on 21st March 2018 automatically lapsed once the defendant conducted the valuation dated 26th March 2018. Whereas the the Plaintiffs' contention is that no valuation was conducted prior to issuance of the Auctioneers Notice of Sale by auction, the defendant contends otherwise.

8. In this court's ruling delivered on 21st March, 2018, I stated in paragraph 10 thereof as follows:

10. Accordingly, I find merit in the application and grant an order for temporary injunction to restrain the sale of the property known as LR. MN/1/6032. Such an injunction will however subsist for as long as the Respondent has not carried out a forced valuation as required under Section 97 of the Land Act and the Auctioneers Rules. The Respondent is however at liberty to proceed with the auction sale of the property known as PLOT NO.KILIFI/KAWALA "A"/KADZONZO/36. Each party to bear own costs.

9. A plain reading of the above order is that upon conducting a valuation pursuant to the provisions of Section 97 of the Land Act and the Auctioneers Rules, the injunction in place automatically ceased to subsist. As already stated, whereas the defendant insists that it conducted a valuation over the property known as LR MN/1/6032 pursuant to the said order of the court, the plaintiffs maintain that no such valuation was carried out. The defendant have in support of their contention attached a copy of a valuation report dated 26th March 2018 which indicates that the property known as LR MN/1/6032 was inspected for valuation on 23rd March, 2018. In their foreward, the valuer states that

they were denied access into the subject property by the registered owner and therefore relied on a copy of a previous report.

10. In the affidavit of Hannah Wambui sworn on 24th September 2018, it is deponed that indeed the property is well fenced and that it is not possible for anybody to access the property unless permitted by the plaintiffs to do so. It is further stated that Accurate Valuers Limited have never requested for permission to access the property. I note however, that in the letter dated 21st March 2018 marked annexure HW-1" in the affidavit of Hannah Wambui sworn on 28th March 2018, the Plaintiffs' Advocates state in paragraph 3 thereof as follows:

"However, it is noted that in the last few days, you have been sending a valuer to our clients' property in Shanzu, for reasons that are unknown to our client. We are under strict instructions to demand, as we hereby do, as this matter is pending in court, you have no right to send a valuer to our clients' property in Shanzu. Any further unauthorized visits to our clients' said property will be reported to the police for necessary action....."

11. From the foregoing, it is abundantly clear the defendant made attempts to conduct a valuation on the suit property but the plaintiff and/or his counsel frustrated the process. It is apparent that a proper valuation was not conducted by the defendant due to the Plaintiffs' male fides actions. The valuer who was instructed to conduct the valuation could not inspect the property because they were denied access by the Plaintiffs, hence relied on a previous valuation report. The defendant cannot be faulted for this as the plaintiffs are the ones who caused such course of action to be taken. The plaintiffs in my view, cannot be heard complaining that no valuation was conducted yet they are the ones who frustrated the same from being conducted.

12. In an application for contempt, we are dealing with the liberty of a person and such an order ought to be granted in clearest of circumstances. In the plaintiffs' application, I am unconvinced that the allegation of contempt of court has been proved to the required standard. It is therefore my finding that the Affected Parties are not in contempt of court and the Notice of Motion dated 28th March 2018 is hereby dismissed.

13. From the facts that have emerged, it is my finding that the valuation report dated 26th March 2018 was not properly conducted. This was wholly due to the plaintiffs' malafides actions. In the circumstances, I order that a fresh valuation be conducted in accordance with the law. The plaintiffs' are hereby ordered to allow the defendant access to the property known as LR MN/1/6032 to allow the defendant properly discharge the orders of this court issued on 21st March, 2018.

14. Upon hearing the two applications herein, and arising from all the above reasons, the final orders of this court are follows:

a. The notice of motion dated 28th March 2018 is dismissed

b. The notice of motion dated 29th April 2018 is allowed in terms of prayer 4 thereof but to the extent that the restraining orders are in respect of the scheduled inspection for valuation purposes.

c. The plaintiffs to bear costs to both applications.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Gitonga holding Gikandi for Plaintiff/Applicant

Kahura holding brief for Okello for Defendants/Respondents

Yumna Court Assistant

C.K. YANO

JUDGE