



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 181 OF 2017

HANNAH WAMBUI.....1ST PLAINTIFF

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

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. The application for determination is the notice of motion dated 7th October 2019 by the Plaintiffs brought under Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act 1B, and 3A of the Civil Procedure Act and the inherent jurisdiction of the court. The Application seeks an order that pending the hearing and determination of the suit, an interim injunction be issued against the defendant by itself, its servants and/or agents namely Robert Waweru Maina t/a Antique Auctions Agencies from proceeding with the intended public auction sale of the Plaintiffs' properties known as PLOT NO. CR NO.MN/I/6032 (CR.19937) Shanzu Area, Mombasa County and LR. NO. KILIFI/KAWALA 'A'/KADZONZO/36 in Kilifi County.

2. The application is based on the grounds set out thereon and supported by the affidavit of Hannah Wambui sworn on 7th October, 2010. The plaintiffs aver that the defendant issued a forty five (45) days Redemption Notice dated 25th September, 2019 through Robert Waweru Maina t/a Antique Auctions Agencies giving notice that the plaintiffs' said properties will be sold on 28th November, 2019 at 9 a.m. That on 18th September 2019 the court issued an order that the said properties required to firstly be valued which valuation exercise has not taken place making the said redemption notice null and void. The plaintiffs aver that no valuation exercise for the property known as LR. NO. MN/I/6032 (CR 19937) has ever been carried out since the commencement of this case while the valuation exercise that was carried out on 15th January 2017 with regard to the property known as LR NO. KILIFI/KAWALA 'A'/Kadzonzoz/36 means that the valuation exercise is more than two(2) years old. Consequently, that there are no existing current valuation reports for the two properties.

3. Mr. Gikandi learned counsel for the plaintiffs submitted that the intended sale is premised on an illegality and argued that the defendant can only exercise its statutory power of sale after adhering to the law and should not abuse the process. Counsel submitted that proper valuation should be done on the two properties before the sale takes place.

4. In opposing the application, the defendant filed grounds of opposition dated 1st November 2019 and a replying affidavit sworn by James Mbuthia on 1st November, 2019. The defendant's case is that it is clear from the proceedings of the court and the ruling delivered on 18th September 2019 that the plaintiffs were restrained from interfering with any scheduled valuation by the plaintiffs have frustrated the valuers instructed but the defendant from conducting the valuation until formal communication is made. The defendant states that it sent a formal communication vide a letter dated 11th October 2019 and an advance copy by email asking the plaintiffs to make arrangements to collect the original letter from the branch. The defendant avers that in full compliance with the orders of the court, they duly conducted a valuation over the property known as LR/MN/I/6032 and denies the plaintiffs assertion that the valuation of the suit property was done more than two years ago. A copy of the valuation dated 30th October, 2019 is attached. It is therefore the defendant's contention that the 45 days Redemption Notice issued by Robert Waweru Maina t/a Antique Auction Agencies to the applicants was lawfully and regularly issued. The defendant states that despite the aforesaid court order the plaintiffs made attempts to prevent the valuation from taking place through threats.

5. Ms. Mbogo, learned counsel for the defendant submitted that whereas the defendant issued the 45 days redemption notice, the defendant is yet to make any public advertisement for sale and is still in the process of conducting a current valuation pursuant to the directions of the court. It is therefore the defendant's submission that the application is apprehensive in nature, adding that the plaintiffs are abusing the process and that the application is unmerited and res judicata. The defendant urged the court to dismiss the application with costs.

6. I have considered the application. The plaintiffs' contention is that the suit properties have been advertised for sale without complying with the law and specifically without current valuations.

7. In this court's ruling delivered on 21st March 2019, 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. NO.MN/I/6032. Such an injunction will however subsist for as long as the respondent had 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”

8. By a notice of motion dated 28th March 2018, the plaintiffs sought an order that PLOT NO. MN/I/6032 should not be sold by the defendant in a public auction which was scheduled for 29th March 2018. The plaintiffs also wanted the defendant's Managing Director and the auctioneer cited for contempt and punished for violating the court's orders issued on 21st March 2018. In the ruling delivered on 18th September, 2019, this court dismissed the said application dated 28th March, 2018. The court further noted that the defendant made attempts to conduct a valuation on the suit property but the plaintiff and/or his counsel frustrated the process. The court further ordered that a fresh valuation be conducted in accordance with the law and directed the plaintiffs to allow the defendant access to the property known as LR. NMN/I/6032 to allow the defendant properly discharge the orders of this court issued on 21st March, 2018. In the replying affidavit herein it is deposed that the defendant issued instructions to Acumen Valuers on 23rd September, 2019 but still the plaintiffs frustrated the valuers from conducting valuation and demanded formal communication before they could allow the valuer to conduct valuation. The defendant has attached a letter dated 11th October 2019 written by the defendant to the plaintiffs informing the plaintiffs of the defendant's intention to conduct a valuation on the property and that they had instructed Acumen Valuers Ltd to conduct the valuation on 14th October 2019 at 10 a.m. The defendant expected the plaintiffs to allow the valuer access to the said property. In the valuation report filed it is indicated that the property was inspected on 29th October, 2019. The court has also noted that in the forward to that report, the valuer has indicated that they were denied access by the plaintiffs into the subject property to undertake the inspection. The valuer however, indicated that they managed to do a road side inspection of the property from the access road and further relied on a copy of a previous valuation report. In my view, the defendant's agent did the best action it could take in the circumstance if the plaintiffs were unwilling to allow them access as directed by the court. The plaintiffs cannot now turn around and allege the property was not inspected when they are the ones who denied the valuer access.

9. Having looked at the evidence on record, this court finds that the plaintiffs have clearly not made out a prima facie case. It is apparent that the plaintiffs have been out to derail the whole process involving the sale of the suit properties, including failure to comply with orders previously issued by this court. In the circumstances, this court cannot exercise its discretion in favour of the plaintiffs. In my view, an order of injunction cannot be issued again in favour of the plaintiffs. The plaintiffs cannot be seeking the discretion of the court and at the same time fail to comply with the orders of the court or derail their compliance. That in my view is an abuse of the court process.

10. For the foregoing reasons, this court finds that the plaintiffs' notice of motion dated 7th October 2019 is not merited and the same is hereby dismissed with costs to the defendant. It is so ordered.

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

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Muyaa holding brief for Gikandi for plaintiffs

Ojwang holding brief for Mbogoh for defendants/respondents

Esther Court Assistant

C.K. YANO

JUDGE