



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 199 OF 2015

MAWAKO SHIPPING AGENCIES LIMITED.....1ST PLAINTIFF

PETER OSEKO MATANGI.....2ND PLAINTIFF

VERSUS

GUARANTY TRUST BANK (KENYA) LIMITED.....DEFENDANT

(FORMERLY FINA BANK LIMITED)

RULING

1. By an application dated 29th May 2017 and filed herein on 5th June 2017, the Plaintiffs pray for orders:-

4. That the Honourable Court be pleased to stay the execution of the Order granted on 28th April 2017 pending the hearing and determination of the Application;

5. That the Honourable Court be pleased to vary and/or set aside the Order granted on 28th April 2017 and reinstate the Orders of the Hon Mr. Justice O.A. Angote pursuant to the Ruling of 16th September 2016; and

6. That (the) costs of this application be provided for.

2. The application is supported by the annexed affidavit of Peter Oseko Matangi, the 2nd Plaintiff herein and is based on grounds set out on the body thereof as follows:

i. That the Court delivered its Ruling to the Defendant's application dated 12/01/2017 on 24/4/2017.

ii. That in the said ruling, the Court allowed the Defendant's application as prayed in that the injunctive order restraining the Defendant Bank from exercising its statutory right of sale to subsist upto and until a fresh compliant valuation of property known as Kilifi/Kawala 'A' Kadzonzo/313 (herein referred to as the "suit property") has been undertaken by the Defendant Bank.

iii. That by allowing the said application as prayed, the Court has granted the Defendant room to exercise its statutory power of sale upon undertaking a forced sale valuation of the suit property before the hearing and determination of the main suit as the temporary injunction will cease to subsist once the Defendant obtains a fresh and compliant valuation of the suit property.

iv. That prior to the instant order contemplated herein, Hon Mr. Justice O.A Angote in his Ruling of 16th September 2016 granted the then Plaintiffs/Applicants injunctive Orders pending the hearing and determination of the suit.

v. That this action could inevitably lead to the loss of the suit property which is the basis of the main suit which is yet to go to full hearing and determination.

vi. That the Court ought to have granted audience to the Plaintiffs herein before granting such orders which would lead to the loss of the suit property which is the basis of the main suit and has condemned the Plaintiffs unheard.

vii. That in view of the foregoing, it is only just and fair that the Honourable Court's order be varied to the extent that the

temporary order of injunction be made to subsist up and until the full hearing and determination of the main suit.

3. In response to the said application, the Defendant Bank through its Recoveries Manager Charles Andoyi Amanga swore a Replied Affidavit filed herein on 11th July 2017 objecting to the application as being fatally defective and deserving to be struck out.
4. The Defendants further averred that contrary to the Plaintiff's contention, the Plaintiffs were properly served through their former advocates with the application dated 12th January 2017 and they were aware when that application came to Court but elected not to defend the same.
5. It is further the Defendant's case that the Plaintiff's suit herein is premised on the fact that the Defendant had not carried out a Compliant Valuation of the suit property and one of the main reliefs sought is that the Defendant be restrained from exercising its right of sale until it undertakes a Compliant Valuation. It is therefore the Defendant's case that once they have conducted a Compliant Valuation, they ought not to be prevented from exercising their Statutory Power of Sale as a Chargee.
6. I have considered the application and the response thereto. I have equally considered the submissions made before me by the Learned Advocates for the parties.
7. It is instructive that the application is premised on the allegation that the Plaintiff's advocates were not served with the Defendant's application dated 12th January 2017 and that the impugned Order if not stayed will result in the loss of the suit property and thus amount to condemning the Plaintiff unheard.
8. From the record herein, there was however reason to believe that the Plaintiff's were served with the Defendant's application. From an Affidavit of Service sworn by Vincent Juma Advocate for the Defendant and filed herein on 13th March 2017, it is clearly indicated that the Law Firm, Mose Nyambega & Company Advocates who were then acting for the Plaintiff were indeed served with the Hearing Notice bearing the hearing date of the application on 25th January 2017.
9. That indeed there was service is confirmed by the fact that on 13th March 2017 when the matter came for hearing before me, the said Mose Nyambega & Company Advocates, were represented in Court and applied for more time to file a reply to the Defendant's application. This Court granted their request and rescheduled the matter for hearing on 24th April 2017. On the date for hearing, the Plaintiffs were yet to file any pleading in opposition to the Defendant's application and it is on that basis that the Court proceeded to grant the Orders the Plaintiff now seeks to vary.
10. As it were, the Plaintiff now contends that the Orders so granted if not stayed may result to the loss of the suit property which constitutes the substratum of the suit. I think those are the issues that the Plaintiff ought to have raised in their response to the application. Having failed to do so even after being granted extension of time to do so, they cannot be heard complaining that they were condemned unheard.
11. At any rate I am in agreement with the Defendant that the application before me is not helpful to the Plaintiff. As it is, the application does not seek to set aside the ex-parte proceedings that resulted in the issuance of the Orders. Nor does it contain any prayer to have the Defendant's impugned application heard inter-partes before a determination. Indeed the Plaintiff has not even annexed any would-be proposed response to enable this Court consider whether or not they had a proper and/or reasonable response and/or defence to the said application.
12. At it were, a Court of law must exercise its discretion judiciously and not on the basis of whims or caprice. As Mutungi J observed in *Michael Lekakeny Ole Kisasy –vs- Jackson Seriani & 3 Others (2016) eKLR:-*

“A party who seeks the exercise of the Court's discretion.....must place before the Court such material and information that would enable the Court to exercise its discretion rationally. A Court cannot exercise its discretion through intention, feelings and/or conjecture. A basis has to be laid before the Court can be called upon to exercise its discretion in favour of a party. The discretion of the Court has to be exercised judiciously on the basis of the attendant facts and circumstances of each case.”
13. In the matter before me, the Plaintiffs have failed to put facts before me to justify why the Court should exercise its discretion in their favour. Accordingly, I find no merit in the application dated 29th May 2017.
14. The same is dismissed with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE