



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL SUIT NO. 159 OF 2016

1. CATHERINE KANINI KIOKO

2. SWABIHA ALAMIN.....PLAINTIFS/RESPONENTS

=VERSUS=

1. RUWEYA ALI MWINYI

2. GARAM INVESTMENTS.....DEFENDANTS

AND

CO-OPERATIVE BANK OF

KENYA LIMITED.....NECESSARY PARTY/APPLICANT

RULING

1. In the application dated 18th July 2026, the necessary party herein after referred to as the 3rd Defendant sought the following orders;

1. Spent

2. Spent

3. The injunctive orders granted on 28th June 2016 be set aside in their entirety

4. The honourable court be pleased to strike out the plaintiffs' suit against the 2nd defendant and the 3rd defendant for not disclosing a reasonable cause of action, being frivolous and an abuse of court process.

5. Costs of the application and the suit be borne by the plaintiffs.

2. The application is supported by several grounds listed on its face inter alia that the plaintiff obtained the orders by failing to disclose material facts and generally failing to discharge their duty of candour towards the court. That the advertisement presented to court was of a date already past (being 11th June 2012). Further that if the court interrogated the merits of the application then it would not have granted the orders for one, the plaintiff lacked locus to stop a chargee from exercising its power of sale.

Secondly, that the continuance of the injunction is prejudicial to the applicant.

3. On striking out, the applicant stated that the sale between the plaintiff and 1st defendant was never completed. Further the plaintiffs have no registered interest in the property unlike the 3rd defendant/applicant and therefore the injunction order cannot be used to defeat the registered interest of the applicant. Lastly, that the suit is barred by statute of limitations.

4. The application is opposed by a replying affidavit sworn by the 1st plaintiff. She deposed that the application is omnibus for seeking many unrelated orders thus it is incompetent and bad in law. She deposed the applicant cannot seek to strike out the suit since court it does not own the suit. She denied the allegation put forth that the plaintiffs concealed material facts from the court. According to the plaintiffs, it is the applicant who did not do due diligence while securing the charge because it is the plaintiffs development which exist on the plot.

5. On the prayer for striking out, Ms Catherine deposed that their case discloses a very strong cause of action i.e. fraud. Secondly the charges were registered after the sale of the plots to them. That the applicant is at liberty to file suit against the 1st defendant to recover the debt since the suit property was unlawfully charged. Lastly that discharging the injunction will destroy the substratum of the suit and defeat justice rendering this suit null and void. The plaintiffs urged the court to dismiss the application.

6. Both parties filed detailed written submissions which I have read and considered while reaching my determination. The principles to be considered for setting aside orders are well settled in the cases of **Shah vs Mbogo (1968) EA 93 and Patel vs E.A Cargo Handling Services Limited (1974) E A 75**. First, that whether to grant or not the orders of setting aside is a principle left to the discretion of the Court. Secondly that the application has been brought without undue delay and that it is not intended to obstruct the cause of justice and or delay the matter.

7. While in the case of *Chemwolo & Another vs Kubendes (1986) KLR 492*, the court held that where there has been an irregular judgement the same would be set aside ex debito justitia, because the party against whom it is entered has been condemned unheard without notice of allegations against him or being given an opportunity to be heard in response to those allegations.

8. When the plaintiffs came to court, they had only sued two defendants i.e. **Ruweya Ali Mwinyi and Garam Investments**. The 3rd defendant applied to be joined later. The plaintiffs obtained ex parte orders on 15th June 2016. These orders were confirmed on 28th June 2016 because none of the 1st or 2nd defendants had filed any documents to oppose the motion. The order that was issued in terms of prayer (c) of the motion read thus;

“That an injunction do issue restraining the defendants by themselves or their servants agents from selling, evicting or in any other manner whatsoever interfering with plot nos.9071/11/MN and 9086/11/MN pending the hearing and determination of the suit.”

9. In ground 5 of the plaintiffs’ motion, they pleaded that the 1st defendant fraudulently and without their permissions secured loans with Co-operative bank Limited of Kshs.5,000,000 each and used the suit premises as security thereof vide a charge dated 21. 1. 2010. Further that the 2nd defendant has advertised both the suit premises for sale.

10. It means therefore that from the onset of filing of this suit, the plaintiffs were aware of the 3rd defendant’s interest in the suit property but they chose not to enjoin them as parties. In the advertisement annexed as CKK 6A to the 1st plaintiff’s affidavit the 2nd defendant clearly stated that they were acting on ***“instructions received from the chargees’ advocates to sell the suit properties by public auction.”*** The failure to sue the 3rd defendants as pointed out by the applicant amounts to material non-disclosure.

11. The plaintiffs therefore knowing the applicant as the chargee also new that the orders sought were

going to affect the Bank. The plaintiffs were obligated in law and seeking equitable reliefs should have joined the 3rd defendant to defend its interest in and during the hearing of the application for injunction and the main suit. It is obvious in the circumstances that the applicant could only come to this court for setting aside of the orders and not appeal against the ruling as it was not afforded an opportunity to defend itself. Therefore the applicant merits a right of an opportunity to be heard and the orders of injunction earlier issued must be set aside ex debito justitiae.

12. The third issue the 3rd defendant/applicant prayed for is for an order striking out the suit against it and the 2nd defendant for disclosing no cause of action. It is not in dispute that the suit properties were charged to the 3rd defendant on account of monies advanced to the 1st defendant. The applicant pleaded that the 2nd defendant is an agent of a disclosed principal thus no claim lies against him.

13. I have perused the plaint filed on 15th June 2016 and the replying affidavit sworn in opposition to this application and nowhere does the plaintiffs shift any blame on the 2nd defendant other than that they may dispose of the suit properties. The 2nd defendant is an auctioneer who was acting of instructions from the Bank. The bank (the principal) has been brought on board. In the pleadings filed, there is no cause of action disclosed against the 2nd defendant. Consequently, I find no reason why they should be made to incur the expense of defending this suit when no orders can issue against him personally.

14. As regards the suit against the 3rd defendant, the plaintiffs pleaded in paragraph 11 that the 1st defendant's action of charging the property was fraudulent, unlawful and bad in law. They proceeded to plead the particulars of the alleged fraud. In her replying affidavit of 25th Jul^y 2016 Ms Catherine deposed at paragraph 11 that the applicant "**never exercised due diligence while securing the charge.**"

15. Since the 3rd defendant has just been joined through this application it is my view that it is pre-mature to strike out the suit based on the decision of D.T. Dobie vs Muchina (1982) KAR1. The Court of Appeal in this decision held that a suit shall be struck out only where it cannot be cured even by amendment. In this instance, based on a deposition that the 3rd defendant is accused of not being diligent, it would be proper to wait and see what claim the plaintiffs bring against the applicant when they amend their plaint to include them (3rd defendant) as a party pursuant to the order of the court that made them a party. For this reason I hold that the prayer for striking out at this stage is pre-mature.

16. The plaintiffs pleaded that the application was incompetent for being an omnibus. However in my view the orders sought were capable of being defended interdependently as well as determined interdependently. I find no merit in the objection and dismiss it.

17. In conclusion, this application is allowed partially. The prayer 3 of the motion is allowed while prayer 4 is allowed only as it relates against the 2nd defendant. The suit against the 2nd defendant is struck out with costs. The cost of this application is awarded to the 3rd defendant/applicant.

Dated and Delivered at Mombasa this 24th day of Jan 2017

A. OMOLLO

JUDGE