



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.445 OF 2017

SELIAN HOLDINGS COMPANY LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

NIC BANK LIMITED.....DEFENDANT/APPLICANT

RULING

The matter for determination is a ***Notice of Motion*** application dated ***15th November 2017***, brought by the Defendant herein under Order 51 Rule 1, Order 45 Rule 2 of the Civil Procedure Rules 2010 and Sections 80, 1A, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of law. The Defendant/Applicant has sought for the following orders:-

- 1. That the exparte orders issued on 14th November 2017, in this suit and all consequential orders herein be set aside and or reviewed.***
- 2. That costs of this application be in the cause.***

This application is premised upon the grounds stated on the face of the application and the annexed ***Affidavit*** of ***Kenneth Mawira*** the ***Assistant Manager – Legal Services*** of ***the Defendant***. Among these grounds are:-

- i. That the Honourable Court issued an exparte order of injunction on 14th November 2017, pending filing of an appeal by the Respondent, whereas it had no jurisdiction to do so.***
- ii. That the court became functus officio having determined the issue of injunction and dismissed the same with costs pursuant to its ruling delivered on 10th November 2017.***
- iii. That the Court issued a temporary injunction on the 14th November 2017, whereas the court had already dismissed a similar application for temporary injunction on 10th November 2017, rendering the application for injunction filed on 13th November 2017, by the Respondent res judicata.***
- iv. That the Court being functus officio in respect to the application seeking injunction, the only remedy available to the Respondent was to file an application seeking stay pending Appeal pursuant to rule 5(2)(b) of the Court of Appeal Rules.***
- v. That the Court exercised the powers of the Court of Appeal by issuing an order of temporary***

injunction pending filing of the Appeal by the Respondent even without the parties being heard on merit.

vi. That the Orders issued by the Court on 14th November 2017, are prejudicial to the Applicant and it is only fair that the Orders be reviewed and or set aside.

vii. That it is in the interest of justice that this application be allowed.

In his ***Supporting Affidavit, Kenneth Mawira***, the ***Assistant Manager Legal Services*** of the Defendant reiterated the averments made on the grounds in support of the application and further added that the court issued a blanket order of injunction without any conditions and/or provisions of security, which is greatly prejudicial to the Applicant.

The application is ***contested*** and ***Fredrick Kariuki Maina***, a ***Director*** and ***Shareholder*** of the Plaintiff/Respondent, swore a ***Replying Affidavit*** and averred that he has been advised by his advocates on record that the orders issued on ***13th November 2017***, are proper and were duly issued by a competent court of appropriate Jurisdiction following a competent application thereof. Further that the issue of ***Jurisdiction, res judicata, functus officio*** and the ***alleged ambiguity***, raised by the Defendant/Applicant are complex and substantive issues that are not grounds for review as sought but for Appeal, if indeed the Court got them wrong. He also contended that the application herein is tantamount to a disguised Appeal against the Orders of the Court issued on ***13th November 2017***, and this Court has no jurisdiction to sit on Appeal over its own Orders as cleverly sought. Therefore, he contended that the application dated ***15th November 2017*** is ***irregular, unprocedural, unnecessary*** and ***oppressive*** for the Plaintiff/Respondent. He urged the Court to dismiss the instant application.

This application was ***canvassed*** by way of ***written submissions***, which the Court has carefully considered. The parties relied on various decided cases which this Court has also read and considered.

It is not in doubt that on ***10th November 2017***, the Court rendered its Ruling on the Plaintiff's ***Notice of Motion*** application dated ***13th April 2017***, wherein Plaintiff had sought for temporary injunction to restrain or prevent the Defendant from interfering whatsoever with the Plaintiff's parcel of land ***LR.No.21096/87, 88*** and ***89 Kiambu***, and specifically be restrained from exercising its Statutory Power of Sale over the said suit property. This Court after a careful consideration of the rival arguments ***found the said application not merited and dismissed it entirely with costs to the Defendant.***

Subsequent thereto, the Plaintiff filed another ***Notice of Motion*** application dated ***13th November 2017***, and sought for among other prayers the same prayers sought in the ***Notice of Motion*** dated ***13th April 2017***, and also injunction pending the hearing and determination of the Plaintiff's Appeal to the Court of Appeal against the said Ruling and Order of this Court issued on ***10th November 2017***.

When the said ***Notice of Motion*** dated ***13th November 2017*** was placed before me under Certificate of Urgency, I observed that the 1st prayer sought was similar to the prayers that had been sought in the dismissed ***Notice of Motion*** dated ***13th April 2017***. The Court stated in its notes that the said application was a repeat of the ***Notice of Motion*** dated ***13th April 2017***.

Further the Court also noted that a ***Notice of Appeal*** had been attached, it subsequently granted the Plaintiff injunction pending filing of Appeal at the Court of Appeal. The Court had indeed granted injunction pending the filing of the Appeal at the Court of Appeal and not pending the hearing and determination of that Appeal. However, the Court Registry drafted the Court Order including all the notes and points that the Court had jotted down while considering the ***Notice of Motion*** dated ***13th November 2017***. ***By including all the notes and points stated by the Court, the issued Order was therefore ambiguous and not clear.***

The intention of the Court was to grant injunction pending the filing of Appeal at the Court of Appeal,

and that is the reason why the Court gave the timelines of **14 days**. In granting the said injunction pending the filing of an application for injunction or Appeal before the Court of Appeal, the Court had in mind the holding in the case of **Erinford Properties Ltd...Vs...Cheshire County Council (1974) 2 ALL ER 448**, where Megarry J dismissed an application for interlocutory injunction but however proceeded to grant *ex parte* injunction to the Plaintiff pending an Appeal to the Court of Appeal. The Court of Appeal held the same position in the case of **Madhupaper International Ltd...Vs..Kerr (1985) KLR 840**. The purpose of granting such an injunction after dismissing the **Notice of Motion** was to **prevent the Court of Appeal's decision being rendered nugatory**.

In simple terms, the Order that the Court granted on **13th November 2017**, was injunction pending the filing of the Appeal at the Court of Appeal and the said orders were to last for **14 days**. However, a mistake arose with

the drafting of the orders as the drafter of the said orders picked each and every note and point made by the Court, and that picking of every point made the subsequent orders issued not clear and were ambiguous.

The Applicant has sought for an Order of review and/or setting aside of the Orders issued by the Court on **13th November 2017**. This Court has now clarified what orders it intended to issue on the material day.

The application is anchored under Order 45 and Rule 1 thereof grants the Court discretion to review the Order it has issued on account of some mistake or error apparent on the face of record, or for any other sufficient reasons. The Court finds that it is apparent that the person who drafted the Court Order picked all the notes that the Court had made in the file which notes did not form the gist of the intended Order that was issued by the Court. The said picking of each notes and points made by the Court was a mistake or an error and that is sufficient reason to warrant this Court to exercise its discretion of reviewing the said Order issued.

Further, the application is anchored under Section 3A of the Civil Procedure Act, which gives the Court the inherent power to make such orders as may be necessary for the ends of justice and/or to prevent abuse of the court process.

Again Section 63 (e) of the Civil Procedure Act allows the Court to make such other interlocutory orders as may appear to the Court to be just and convenient.

The Court is also guided by Section 1A of the said Act which behoves the Court to observe the overriding objective of the Act which is to facilitate the **just, expeditious, proportionate** and **affordable** resolution of the civil disputes governed by the Act.

Governed by the above overriding objectives, the Court had on **13th November 2017**, observed that for the purpose of decongesting the Registry with numerous interlocutory applications, it was advisable for the Applicant to file its substantive application before the Court of Appeal and that would be in accordance with Rule 5 (2)(b) of the Court of Appeal Rules. The Court further advised the parties to move the file to the next forum which is the Court of Appeal, after it granted injunction and the **Court must clarify that it was an injunction pending the filing of substantive application for injunction or Appeal before the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules.**

For the above reasons, the Court finds that indeed, the **extracted Order** as issued by the Court on **14th November 2017**, was **not clear** and was **ambiguous** as the drafter picked all the notes made by the Court in the Court file and incorporated them into a Court Order. There is therefore an apparent mistake or error on the face of record. The said mistake and/or error has caused ambiguity on the Order issued. The **said ambiguity is sufficient reason to warrant review** of the **Court Order** issued on **14th November 2017**, and the **Court will proceed to review the same and offer clarification**.

Guided by the findings in **Erinford Properties Ltd...Vs...Cheshire** and **Madhupaper International Ltd**

...Vs...Kerr (supra), the Court finds that it has jurisdiction to issue an Order of Injunction even where it has dismissed an application for injunction. The said injunction is issued pending the filing of a substantive application for injunction before the Court of Appeal.

For the above reasons, the ***Court proceeds to issue an injunction in favour of the Plaintiff herein pending the filing of a substantive application for injunction and/or Appeal before the Court of Appeal.*** The said injunction is granted for a period of **14 days** from the date hereof.

Further, as the Court had observed earlier and being guided by Sections 1A and 3A of the Civil Procedure Act, let the Applicant file the intended application for injunction pending Appeal at the Court of Appeal so that we can decongest the Registry of numerous interlocutory applications. For avoidance of doubt, the injunction pending the filing of substantive application for injunction at the Court of Appeal is to remain in force for a period of **14 days** from the date hereof. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 5th day of **December 2017**.

L. GACHERU

JUDGE

In the presence of

Mr. Maweu for Plaintiff/Respondent

Mr. Gachoka for Defendant/Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above states advocates.

L. GACHERU

JUDGE

5/12/2017