



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

LAND CASE NO. 97 OF 2013

REINDER HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

JOSHUA OMINO.....1ST DEFENDANT/RESPONDENT

SUSAN WITHIRA NGUGI.....2ND DEFENDANT/RESPONDENT

CAPE EQUITORIAL TRADING

COMPANY LIMITED.....3RD DEFENDANT/RESPONDENT

ELIJAH OSIRO.....4TH DEFENDANT/RESPONDENT

VICTORIA COMMERCIAL BANK LTD..... 5TH DEFENDANT/RESPONDENT

RULING

Introduction

1. The Application before me is the one dated 12th June 2013 and filed by the Plaintiff. The Application is filed pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules seeking for the following reliefs:
 - a. **That the Honourable court be pleased to grant orders of temporary injunction to restrict/restrain the Respondent and particularly the 5th Defendant whether by themselves, their servants, and/or agents or howsoever otherwise from purporting to exercise its alleged statutory power of sale or disposition of, alienating, transferring or otherwise in any way dealing with the property known as Land Reference Number 20696 Malindi (hereinafter referred to as the suit property), pending inter partes hearing of this suit.**
 - b. **THAT in the alternative and without prejudice to the forgoing the suit property be preserved and all dealing in the making of entries in the register relating to the said property be forbidden/stopped until the hearing and final determination of this suit or until further orders of this Honourable Court.**
2. The Application is premised on grounds that the Defendants jointly and severally unlawfully acquired the title documents to the suit property from the Plaintiff without their knowledge and

charged it in exchange of a facility granted by the 5th Respondent to the 3rd Respondent to the tune of Kshs. 15,000,000 without the Plaintiff's knowledge.

3. The Application was opposed by the 5th Defendant

The Plaintiff's/Applicant's case:

4. According to the Affidavit in support of the Application sworn by the Plaintiff's Managing Director on 12th June 2013, the Plaintiff is the lawful proprietor of land known as L. R. No.209696 Malindi (the suit property).
5. The Plaintiff's Managing Director has deponed that when the Plaintiff conducted a search in June 2006, it was discovered that the 5th Defendant had purportedly registered a charge dated 7th March 1995 over the suit property allegedly created by the Plaintiff to secure unspecified advances; that the deed file did not have a copy of the said charge and that after conducting further searches at the company's registry, it was discovered that the charge was duly registered and a certificate of registration was issued.
6. The Plaintiff's Managing Director further deponed that to his knowledge, him, together with his co-directors have never applied for any facility of financial accommodation from the 5th Defendant and that they have never issued the suit property for security; that they have never signed any documentation in the presence of the 4th Defendant whose signature and stamp appears on the charge document and that the Plaintiff has never passed any resolution sanctioning the alleged borrowing or the affixing of its common seal on the charge as required by law and the Plaintiff's Article of Association.
7. It is the Plaintiff's Managing Director's deposition that the Plaintiff's title document to the suit property was stolen from the Plaintiff's premises and used as security without the Plaintiff's knowledge, actions which the Plaintiff holds the 1st and 2nd Defendants wholly liable; that the 3rd Defendant who was the borrower benefited unlawfully pursuant to the illegal actions of its directors and that all the Defendants must have been complicit in the fraud.
8. The Plaintiff's director finally deponed that the 5th Respondent should not have charged the Plaintiff's title without conducting a search on the directors of the company and consequently, the 5th Defendant in cahoots with the other four Defendants, maliciously and unlawfully defrauded the Applicant of its property.

The 5th Respondent's case

9. The 5th Respondent filed its Replying Affidavit on 27th June 2013.
10. According to the 5th Respondent's Legal Officer, the current Application is sub-judice because there is pending before the Court of Appeal Civil Appeal number 7 of 2011 between the Appellant and the 5th Respondent; that the said Appeal seeks to set aside the decision of Koome J, as she then was, in Nairobi HCCC No. 565 of 2006 and for an order reinstating the Appellant's suit in the High Court.
11. The 5th Respondent's representative further stated that the current application is *res judicata* because the Applicant had filed an application dated 19th July 2006 seeking similar orders as those sought in the present application.
12. It is the 5th Respondent's case that it has already exercised its statutory power of sale contained in the charge dated 7th March 1995 over the suit property after going through the motions of selling land by way of public auction; According to the 5th Defendant, the public auction was conducted on 27th May 2011 and one Rasik D. Shah was the highest bidder for the property at Kshs.23,800,000 and that the property was duly sold to him.
13. Consequently, it was deponed, the Applicant's equity of redemption was extinguished at the fall of the hammer in the said auction and the Applicant no longer has any interest over the suit property; that the Applicant has since May 2011 known that the property had been sold to the 5th Respondent and that the Applicant has been indolent in filing this Application.
14. The 1st to 4th Respondents did not any pleading in respect to the Application.

15. The learned counsel for the Plaintiff and the 5th Defendant appeared before me on 5th November 2013 and made oral submissions which I have considered. I have also considered the authorities which were relied on by the parties.

Analysis and findings:

16. The 5th Respondent submitted that the Application before me is both *sub-judice* and *res judicata*.
17. The Applicant has denied in its further affidavit filed on 18th July 2013 knowledge of the appeal that emanated from the decision of Koome J, as she was then, in Nairobi HCCC No.565 of 2006 and which was filed by its then Advocates, Mutuli Apopo. According to the Applicant, he has since withdrawn the said Appeal.
18. I have perused the Memorandum of Appeal in Civil Appeal Number 7 of 2011 between the Plaintiff herein and the Defendant. The said appeal was in respect of the Order of Koome J, as she was then. The said Appeal was withdrawn by the Appellant's current counsel vide his Notice of withdrawal dated 10th July 2013 and filed on 17th July 2013 after the issue was raised by the 5th Respondent in its Replying Affidavit.
19. Although the Applicant has denied that it gave its previous advocate instructions to file the Appeal, it is not in dispute that by the time the current suit was filed, Civil Appeal Number 7 of 2011 was pending. In view of the fact that the said Appeal has since been withdrawn, the suit before me cannot be said to be *sub judice*.
20. It is not in dispute that the Plaintiff/Applicant filed Nairobi HCCC No. 565 of 2006 (formally HCCC No. 789 of 2006) claiming for a permanent injunction against the 5th Respondent in respect to the suit property. The Plaintiff simultaneously with the Plaintiff in the said suit filed an Application dated 19th July 2006 for injunctive orders.
21. According to the Applicant's Affidavit which was filed in Civil Appeal (Application) No.121 of 2011 dated 17th June 2011 and which has been annexed on the 5th Defendant's Replying Affidavit as annexure CW 7, Kihara J, as he was then, allowed his Application for injunction pending the hearing and determination of the suit in HCCC No. 565 of 2006.
22. Before the suit could be heard, the 5th Respondent filed an Application in HCCC No. 565 of 2006 to have the entire suit dismissed for want of prosecution. The Application for dismissal of the suit for want of prosecution was heard *inter partes* by Koome J, as she was then and was allowed by the court. The Applicant was aggrieved by the decision of Koome J dismissing its suit and filed Civil Appeal No. 7 of 2011 which has since been withdrawn.
23. Although the Applicant has stated that he did not instruct his advocates to file the Appeal, the Affidavit dated 17th June 2011 sworn by the deponent of the current Application in Civil Appeal (Application) No. 121 of 2011 shows the contrary.
24. The Affidavit filed by the Applicant's Managing Director, in the Court of Appeal, in support of an Application for an injunction and stay of execution sworn on 17th May, 2011 clearly shows that the Applicant was aware of the orders of Koome J dismissing the suit in the High Court and the Appeal that was subsequently filed by his then advocate.
25. At paragraph 11 of the said Affidavit, Applicant's Managing Director deponed as follows:

“THAT the Applicant was aggrieved by the said decision [the decision of Koome J] and filed a Notice of Appeal on the 5th July, 2010 which was within 14 days and applied for certified copies of proceedings. Produced at pages 192 to 194 of EXHIBIT “SK” is a copy of the said Notice of Appeal.”

26. The Applicant's Managing Director swore another Affidavit on 9th June, 2011 which was filed in the Court of Appeal in Civil Application No.144 of 2011 and deponed at paragraphs 11 and 12 as follows:

“THAT the Applicant was aggrieved by the said decision and filed a Notice of Appeal on the 5th day of July, 2010 which was within 14 days and applied for certified copies of proceedings.

THAT the Applicant subsequently filed the Appeal on the 14th day of January, 2011 and served the same on the 1st Respondent on 18th January, 2011. Produced and marked as EXHIBIT “SK 9” is a copy of the Memorandum of Appeal.”

27. The Applicant’s Managing Director has not denied that he swore the said Affidavits which were duly filed in the Court of Appeal. In the circumstances, and considering that the issues which were before the High Court in HCCC No. 565 of 2006 were and are the same issues before this court, and in view of the fact that the Applicant herein had filed an Application for injunctive orders in HCCC No. 565 of 2006 which was allowed before the entire suit was dismissed by Koome J, I am of the view that the current application, if not the entire suit, is *res judicata* and an abuse of the court process.
28. No reason has been given by the Applicant as to why it did not pursue the Appeal it had filed with a view of setting aside the decision of Koome J dismissing its suit in Nairobi HCCC No. 565 of 2006 instead of filing a similar suit in this court. On that ground alone, I disallow the Plaintiff’s Application for injunction.
29. Even if I was wrong on that ground, I would still not have allowed the Application for non-failure to join the current registered owner of the suit property in the suit.
30. The 5th Respondent has deponed that the suit property was sold to Rasik D Shah in May 2011. The 5th Respondent has annexed on its Affidavit the letter dated 21st March, 2011 advising the Applicant of the intended sale, the advertisement in the *Star* and *Standard* newspapers of the intended sale of the suit property by way of public auction on 27th May, 2011, the Memorandum of Sale of the property in favour of R. D. Shah for Kshs. 23,800,000 dated 27th May, 2011, the Certificate of Sale in favour of R. D. Shah for Kshs. 23,800,000 and the copies of the cheques showing the payments that were made by the said R. D. Shah.
31. The fact of the sale of the suit property by way of public auction was known to the Applicant by 17th June 2011 when he filed an affidavit in the Court of Appeal. In his Affidavit sworn on 9th June, 2011 and filed in the Court of Appeal in Civil Application No. 144 of 2011 in which R.D. Shah was the 2nd Respondent, the Applicant’s Managing Director deponed at paragraphs 19 as follows:

“THAT the 1st Respondent nevertheless went ahead and sold the suit property to the 2nd Respondent in purported exercise of a statutory power of sale, which power was the subject of controversy in the Superior Court, in a bid to defeat the Applicant’s case on Appeal and interests in the suit property.”

32. The Plaintiff was therefore aware that the suit property had been sold to a third party and his rights in respect to the suit property were likely to be affected by this suit. Nothing would have been easier than the Applicant conducting a search to ascertain the registered owner of the suit property before filing the current suit. The order of injunction, even if it was to be issued, would be in vain considering that there is no evidence that the suit property is registered in favour of the 5th Defendant. The court does not issue orders in vain.
33. For the reasons I have given above, I find and hold that the Applicant has not established a prima facie case with chances of success. I therefore dismiss the Plaintiff’s Application dated 12th June 2013 with costs to the 5th Defendant.

Dated and Delivered in Malindi this 19th Day of December 2013

O. A. Angote

Judge