REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1095 of 2002

ANDREW WASHINGTON NJENGA................................ PLAINTIFF

VERSUS

CO-OPERATIVE MERCHANT BANK LTD................. DEFENDANT

Coram: J. W. Mwera J.

Wohoro for Plaintiff/Applicant Ohaga for Defendant/Respondent

RULING

The plaintiff filed the application now under consideration on 25.9.2002 under Order 39 rules 1(9), 5, 9 Civil Procedure Rules and Section 3A Civil Procedure Act for orders that the defendant be restrained from selling or interfering with his land ref. LR No. 209/522/2 Upper Hill Nairobi until this suit is finally disposed off.

The grounds which Mr. Wohoro argued were supported by the plaintiff's own affidavit sworn on 24.9.2002 together with the various annextures thereto. There was also a supplementary affidavit filed here on 28.10.2002 following the defendant's replying affidavit by one Kennedy Abuga filed here on 16.14.2002. Both these affidavits had **annexures to them and both counsel referred to all the foregoing, back and forth.**

At this stage the court is not trying the suit and thus it is not analysing the principal pleadings and evidence (by affidavits) as if to head for a final determination thereof. The court also avoids to remark on the conduct of litigants much more than it is necessary particularly in adverse light. But it was apparent from both sides that the transaction in question was not conducted in the neatest and tidiest of the ways, and without elements of conflict of interests.

In the main Mr. Wohoro told the court there was an arrangement for the plaintiff, was a partner in a firm called Gwama Enterprises with one John Mwaniki Muchemi, a firm they both bought from one Ephraim Mundia, that the plaintiff put up his (subject)

property for a loan of sh. 10m with the defendant. And on 13.6.2001i they gave instructions as follows as regards the disbursement of that loan:

i) US$ 30,000 to be paid to one El Keradly Mehat of Arab

Bank PLC, by cheque

ii) Sh. 4.2m to the plaintiff.

iii) Sh. 400,000/= cheque to Commerz International Consultants.

The court heard that the whole scheme was meant to syndicate investment funds from outside Kenya and that time was of essence. That sh. 4.2m was paid via A/C No. 01611078500 which the plaintiff opened and he withdrew the money. However the court was being told that the money ought to have been channeled through Gwama A/C No. 01201-101034/00. Anyway that the defendant did not go by the instructions of 13.6.2001 and it did not disburse the loan money in order for the plaintiff (and his partner) to benefit from it. That sh. 10m (loan) did not go to that firm's account. That without availing sh. 10m which the charge secured, the defendant could not move to sell the security. So when the defendant created this state of things the plaintiff wrote to, met staff of, and did all he could to get the situation clarified but the defendant neither responded nor in any way explained what was going on - hence this suit.

That the statutory notice of sale of 27.11.2001 was uncalled for because the money sh. 10m was never disbursed and/or that it was defective for stating that it would take effect from the date it was drafted - 27.11.2001. That this fell foul of Section 69 (1) ITPA.

There was also an attack on the postal address used when the so called purported statutory notice of sale was dispatched by prepaid postage. The postal addresses were: P.O. Box 48425 Nairobi as in the charge and P,0. Box 44752 Nairobi for Gwana Enterprises. That because the notice was sent to the former it never reached the plaintiff. That he only got its copy when he visited the defendant's offices.

Mr. Ohaga had a contrary view. He began by saying that the validity of the charge was not in question. That it was executed to secure sh. 10m for the benefit of the plaintiff and his partner John Mwaniki after they acquired Gwama Enterprises together. That the letter of 13,6.2002 these too signed was followed in full when it came to disburse sh. 10m. That the plaintiff got sh. 4.2m via the account he opened separate from that of their firm. Then $ 30,000 was transferred to El Kerady Mehat and sh. 400,000/= was sent to Commerz International Consultants. The plaintiff's own AWN 11 swift transfer message attested to the last two disbursements. That all this came to approximately 7m (@ sh. 80/= per dollar rate). That besides, when Ephraim Mundia sold Gwama Enterprises to the plaintiff and Muchemi, they took over a loan of sh. 3m which was outstanding with the defendant (AWN 2 of 6.6.2001). And that by that a total of sh. 10m was disbursed. He thought the plaintiff was being less than candid to the court on this point. That he also claimed and this could not be true, that the defendant gave him the sh. 4.2 "gratuitously" (see paragraph 11 of the plaintiffs affidavit in support) - a thing Mr. Ohaga could not imagine that banks do. That in fact all went on since June 2001, the plaintiff with his partner in Gwama having received/enjoyed the loan of sh. 10m but never servicing it, only until with the risk of selling the subject property in 2002, did the plaintiff wake up and begin to run around about it,(Bundle of letters annexture AWN 9). The interest has also been accruing hence the debt of sh. 15.7m (AWN 10) in the statutory notice.

The court was told that with all this, the bank was entitled to issue the said statutory notice to sell:

"...... after the expiry of Three (3) Months from the date of this notice......... "

The notice was dated 27.11.2001 and sent to the plaintiff by pre-paid post at the address as per the charge document. That to date, that notice has not been returned

Having heard both sides this court is of the view that the orders sought should not issue particularly on the basis that the plaintiff has not been candid, honest and forthright in seeking them. He made it appear to the court by his annextures (see AWN 9) that the bank was trying to defraud him and this Mr Wohoro repeated by arguing that sh. 10m was never disbursed to the plaintiff. It has turned out that not only did the defendant execute the plaintiffs (with his partner's) instructions of 13.6.2002, but that the bank also cleared the liability of Sh. 3m. Gwama Enterprises had with it, before the plaintiff and Muchemi bought it. The court was satisfied that the whole sh. 10m was disbursed and for a whole year the borrowers repaid nothing. With such default the lender was bound to move to realise its security. That security was the land of the plaintiff which he charged and validly so.

Further it was not true on the part of the plaintiff to make it to appear before this court that the defendant sent to him a statutory notice via a postal address he abandoned long ago. The fact is that the defendant addressed the notice through the plaintiff's postal address as per the charge document he executed, while now he is falling on the Gwama address as his. That letter has never been returned to the defendant as unclaimed. It was therefore received and the plaintiff cannot say otherwise here. With this kind of character the equitable remedy of injunction cannot issue. As to the validity of the notice itself as a ground to grant an injunction, the plaintiff deponed in his affidavit in support (para 16) that it contravened Section 69 (1) ITPA and Mr. Wohoro said that its date of effect made it invalid. No more was added.

Perusing that section, lengthy as it is sets out the powers of sale that a mortgagor should exercise so long as it has arisen and the court should not intervene, after the mortgage money becomes due. The mortgagor is mandated to sell the property wholly or in part and to concur with others to do so by private contract or public auction etc, So the court is unable to say between what was deponed to and what was argued, which point to follow. Section 69 (1) does not say about the length of the notice and in any case that is not what the plaintiff deponed to and desired to be considered here. He only termed the exercise of the power of sale as being wrongful, illegal and unlawful because the monies were not advanced on the charge, which this court does not agree with, and that the plaintiff and Muchemi did not execute (personal) guarantees thereto.

In the light of the foregoing this court is unable to agree that the statutory notice itself was invalid in any way.

In sum this application is dismissed with costs. Orders delivered on 21.11.2002.

J.W. MWERA JUDGE

CIVIL SUIT NO. 1095 OF 2002

ANDREW W. NJENGA.. PLAINTIFF

VERSUSCO-OPERATIVE MERCHANT BANK LTD..... DEFENDANT

RULING

The Plaintiff obtained an interlocutory judgment against the Defendant. Bank on 27th February, 2003 by reason of its default in filing a defence, The Interlocutory judgment was entered by the Deputy Registrar on the Plaintiff's application. The Defendant then filed the present application to set aside the Interlocutory judgment under the provisions of Order 9A, Rules 10 and 11 of the Civil Procedure Rules.
The Defendant/Applicant gives the following grounds for the application to set aside the Interlocutory judgment: -
(i) That the Interlocutory judgment entered by the Deputy Registrar on 27 February, 2003 is irregular;
(ii) that the Deputy Registrar had no jurisdiction to enter the said interlocutory judgment and the same is accordingly null and void ab initio;
(iii) that Order 9A Rules 3,4,5,6 and 9 of the Civil Procedure Rules are not available to the Plaintiff having regard to the prayers in the Plaint,

(iv) that the Defendant has a good defence to the plaintiff's claim as evidenced by the fact that the Plaintiffs application for a temporary injunction was dismissed on 21st November, 2002. (v) That the Plaint does not contain any claim for liquidated amount.
(vi) The Defendant is entitled to have the judgment set aside ex debito justitiae.
(vii) The Plaintiff has in any event made no attempt whatsoever to set this suit down for hearing.
The Defendant contends that the Deputy Registrar could not in law enter interlocutory judgment in this case and it was at liberty to file its defence at any time before final judgment. That the Defendant entered appearance and the Plaintiffs application for injunction was argued and dismissed by this court. That Orders 9A Rule 3,4, and 5 are not available to the Plaintiff. The Defendant wants this court to set aside the interlocutory judgment as a matter of right and to have unconditional leave to defend this suit.
The application is opposed by the Plaintiff. The Plaintiff wonders why the Defendant does not give any reasons for the failure to file the defence within the required period and the delay of 128 days from the time of filing its appearance, That the period for entering appearance and filing defence was known to the Defendant. That the Defendant has not annexed a draft defence to support the allegations that it has a defence to the action. That dismissal of the injunction application is not a good ground for setting aside of the interlocutory judgment.
The Deputy Registrar entered the Interlocutory judgment on 27th February, 2003 upon receiving the request for judgment by the Plaintiff on 18th February, 2003. The request was made under Order IXA, rule 3,4,5,6 and 9 of the Civil Procedure Rules. For a proper consideration of this application it is necessary to look at the prayers sought in the plaint. The prayers are as follows:-
a) A permanent Injunction to restrain the defendant by itself, its servants, agents and whomsoever from alienating, disposing or selling the Plaintiffs property L.R. No. 209/522/2.

b) A declaratory order that the defendant do forthwith discharge the charge on L.R. No. 209/522/2 unconditionally
c) General Damages
d) Costs of this suit.
The Deputy Registrar entered interlocutory judgment in terms of prayers b and c of the plaint, but did not state under what specific provision of Order DXA he entered the said judgment. Interlocutory judgment or otherwise can only be entered in accordance with one of the Rules i.e. 3,4,5,6 or 9 and not under several or in the alternative.
In the premises, it is left for this court to sift and determine whether the interlocutory judgment could be entered under any of the aforesaid rules.
Order IXA, Rules 3 and 4 clearly apply to liquidated demands. I am of the view that the Plaintiffs claims in prayers b (a declaratory order) and c (general damages) were inappropriate ones for entry of interlocutory judgment under Rules 3 and 4. Judgments in respect of liquidated demands are usually of a final nature. What of Order IXA, Rule 5" This rule read:-
" Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No 26 of Appendix C, enter Interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the valve of the goods and damages as the case may be. " (emphasis mine).

The court must construe this rule and the words therein in its/their plain, ordinary and natural meaning. The rule is applicable to and contemplates a plaint with either of the following 2 claims :-
- a claim for pecuniary damages only or
- a claim for detention of goods with or without a claim for pecuniary damages.

If a defendant who is served does not appear in either case and Plaintiff requests in the prescribed form, then the court shall and must enter interlocutory judgment against such a defendant. In the plaint in this suit, I am of the view and I do hold that indeed there is a claim for pecuniary damages. I think that a claim for general damages is in the nature of pecuniary damages, so is that of special damages. General damages upon assessment is usually translated in money terms or given monetary value. However, in this case the Plaintiff did not make a claim for pecuniary damages only; he had 2 other claims:-
- A Permanent Injunction prayer (a) and A declaratory Order in prayer (b)
I do not think that the claim of costs can be treated as a substantive claim and as this aspect is always consequential in litigation and follows the even.. It is incidental and is not the raison d'etre for the suit.
I therefore find and hold that this plaint herein is not a plaint drawn with a claim for pecuniary damages only. Having added or included the aforesaid 2 other or extra claims, the Plaintiff took the plaint out of the possible purview of this limb of Rule 5. Equally, without any argument, it is certain that the plaint drawn is not for -detention of goods with or without a claim for pecuniary damages. It follows that the second or alternative limb under Rule 5 does not apply. Rule 5 contemplates a situation where the defendant does not appear. However, the said provisions do apply where the defendant has failed to file a defence by virtue of the provisions of Rule 9 of Order IXA.
I therefore hold that the Interlocutory judgment herein could not properly or regularly be entered under the provisions of rule 9. Similarly, the provisions of Rule 6 do-not

apply here as it contemplates a situation similar to rule 5 but where there are several Defendants.
The interlocutory judgment entered herein by the Deputy Registrar was irregular and I so hold. The provisions of Order 1XA rules 3, 4, 5, 6 and 9 were not available to the Plaintiff in the context of the plaint herein.

The Plaintiff/Respondents counsel submitted that the Defendants have not explained why the court should exercise its discretion in favour of the Defendant to set aside the interlocutory judgment and that it has not explained the delay in filing the defence for 128 days.
In response, the Defendant's counsel cited the Court of Appeal case of Magon -vs- Ottoman Bank (1968) E.A. 156 in which at p. 158, J.A. Duffus stated: -
"..... The learned judge was therefore, in my view, correct in finding that the appellant received this letter on March, 16, 1967 and that therefore the time for filing his defence had not expired, and that accordingly the ex parte judgment was irregularly entered.

This being so the appellant was entitled, as the judge states, to have the judgment set aside ex debito justitiate. Rule 10, by virtue of which the judgment has been set aside, does give the court a discretion to set aside the judgment upon such terms as may be just, but in a case like this where the obtaining of the judgment was irregular and not in accordance with the law and practice as laid down in our civil procedure rules, the appellant is clearly entitled as of right to have the judgment set aside < without any conditions imposed.... "

I wholly agree with the said principle and do apply it here. There is no justification for the Defendant to give any explanation or reasons for any supposed delay as the interlocutory judgment herein was in violation of the law. On the same basis, the exercise of the court's discretion would only come into play if the judgment was regular. In this case it was not and the Applicant is not obliged to fall to its knees and plead for any indulgence. Perhaps it is for this reason that the Applicant did not file any supporting affidavit and relied on the provisions of the law only.
In the light of the foregoing, I do hereby set aside the interlocutory judgment against the Defendant ex debito justitiae.
The Plaintiff would now be entitled to set down the hearing of this suit under order 1XB, Rule 1. However, the Defendant has shown a clear intention of defending the suit. As it is entitled to file a defence under O.IX Rule 1 , I do 1 hereby direct that the Defendanf files and serves its defence within the next 14 days from ;the date hereof. Costs of this application will be in the cause.

DATED and DELIVERED at Nairobi this 16th day of January, 2004.

MOHAMMED IBRAHIM JUDGE

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