



Ethics and Anti-Corruption Commission v Sosik Limited & 2 others (Environment and Land Case Civil Suit 84 of 2018) [2023] KEELC 16848 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 84 OF 2018
SO OKONG'O, J
APRIL 18, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

SOSIK LIMITED 1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA 2ND DEFENDANT

HENRY NJOROGE KARANJA 3RD DEFENDANT

JUDGMENT

Background

- 1 The Plaintiff filed this suit against the Defendants on February 28, 2018 seeking several reliefs relating to all that parcel of land known as LR No 25435 Grant No IR 86611(hereinafter referred to as 'the suit property') registered in the name of the 3rd Defendant. The Plaintiff averred that the suit property was created illegally and fraudulently from Ngong Road Forest by the 2nd Defendant who was then occupying the office of the Commissioner of Lands. The Plaintiff averred that the 2nd Defendant thereafter allocated the suit property to the 1st Defendant in which he was one of the directors. The Plaintiff averred that after being allocated the suit property, the 1st Defendant sold the same to the 3rd Defendant. The Plaintiff averred that the 2nd Defendant acted illegally and in excess of his powers and authority when he purported to allocate a portion of a gazetted public forest reserve to a company in which he had an interest. The Plaintiff averred that the purported allocation of the suit property by the 2nd Defendant to the 1st Defendant and the subsequent sale and transfer of the same to the 3rd Defendant were fraudulent, illegal null and void and did not pass a good title in the suit property to either the 1st Defendant or the 3rd Defendant. The Plaintiff sought judgment against the Defendants jointly and severally for among others, a declaration that the allotment of the suit property to the 1st Defendant and the subsequent issuance of a title in respect thereof to the 3rd Defendant were illegal, null and void.



- The Plaintiff also sought the cancellation of the title of the suit property and vacant possession of the suit property from the 3rd Defendant. The Plaintiff also sought a permanent injunction restraining the 3rd Defendant from dealing with the suit property in any manner whatsoever save for surrendering the same to the Government of Kenya.
- 2 Together with the plaint, the Plaintiff filed a Notice of Motion application dated February 27, 2008 seeking a temporary injunction restraining the 3rd Defendant from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing or in any other way dealing with the suit property pending the hearing and determination of the suit. The Plaintiff's application that was brought under a certificate of urgency came up for directions ex parte on February 28, 2018 when the court directed that the same be served for hearing inter partes on April 5, 2018. For the purposes of preserving the suit property, the court issued an order of inhibition inhibiting the registration of any other or further dealings with the suit property pending the hearing of the application or further orders by the court. When the application came up for hearing inter partes on April 5, 2018, the Plaintiff's advocate informed the court that the Plaintiff was unable to trace the Defendant to enable personal service to be effected upon them. The said advocate informed the court that they had effected service upon the Defendants through their last known postal addresses. The Plaintiff's advocate who had filed an affidavit of attempted service applied for leave to serve the Defendants with the Summons to Enter Appearance and the injunction application by way of substituted service. The court granted leave to the Plaintiff to serve Summons to Enter Appearance and the Notice of Motion application dated February 27, 2018 upon the Defendants through advertisement in the Daily Nation Newspaper or the Standard Newspaper. The Defendants were granted 15 days to enter appearance from the date of the advertisement and the Notice of Motion application for injunction was fixed for hearing on September 27, 2018.
 - 3 The Plaintiff served the Defendants as ordered by the court through an advertisement in the Daily Nation Newspaper of May 23, 2018. When the application came up for hearing on September 27, 2018, there was no appearance for the 3rd Defendant. The 1st and 2nd Defendants who had already engaged an advocate to act for them in the matter asked for time to respond to the application. The court gave the 1st and 2nd Defendants time to respond to the application and adjourned the hearing of the same to April 30, 2019. When the matter came up on April 30, 2019, there was still no appearance by the 3rd Defendant and the 1st and 2nd Defendants who had asked for time to respond to the application had not done so. Since the application was not opposed, the court allowed the same with costs to be in the cause.
 - 4 The suit was thereafter mentioned before the Deputy Registrar and this court on several occasions to confirm compliance with Order 11 of the *Civil Procedure Rules*. During one of those many mentions, it was brought to the attention of the court that there was a related matter namely, ELC No 332 of 2014 that was being handled by Komingoi J and that it could be necessary to consolidate the two matters. When the matter came up for directions before the court on November 25, 2020, the advocate who was on record for the 1st and 2nd Defendants informed the court that he had also been instructed by the 3rd Defendant to act for him in the matter. He applied for leave to file a defence on behalf of the 1st and 3rd Defendants which leave was granted by the court as the same was not opposed by the Plaintiff. The 3rd Defendant entered appearance and filed his statement of defence on December 9, 2020. When the parties appeared before the court on June 8, 2021, the advocate for the Defendants informed the court that the 3rd Defendant had filed an application dated December 15, 2020 in respect of which he wanted a hearing date. The advocate for the Plaintiff on the other hand informed the court that ELC No 332 of 2014 which the 3rd Defendant wanted to be consolidated with this suit was part heard and that the same was scheduled to come up for further hearing on June 24, 2021.



The application before the court:

- 5 What is now before the court is the 3rd Defendant's application brought by way of Chamber Summons dated December 15, 2020 seeking the following orders;
1. That this Honourable Court be pleased to stay, vary and /or vacate proceedings in the instant case and discharge the orders issued ex parte on the April 30, 2019 against the 3rd Defendant and all consequential orders pending the hearing of the suit.
 2. That subject to prayer (1), ELC NO 84 of 2018 be stayed pending the hearing and determination of ELC NO 332 of 2014 filed by the Plaintiff and seeking similar orders against the owner of LR No 25433 excised from the property known as LR No 14748.
 3. That in the alternative, ELC 84 of 2018 be mentioned on the May 21, 2021 together with ELC NO 332 of 2014 for consolidation and /or selection of a test suit.
 4. That the cost of the application and the suit be granted to the 3rd Defendant.
- 6 The 3rd Defendant's application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the 3rd Defendant on November 24, 2020. In summary, the 3rd Defendant averred that he suffered a stroke in 2018 and was still recovering. The 3rd Defendant averred that he had established that this suit was filed against him in 2018. The 3rd Defendant averred that he was not served personally with Summons to Enter Appearance and with the Plaintiff's application for injunction dated February 27, 2018. The 3rd Defendant averred that he learnt that the Plaintiff obtained ex parte injunctive orders against him on April 30, 2019 on the said application dated February 27, 2018. The 3rd Defendant averred that the said orders were arbitrary and punitive. The 3rd Defendant averred that the said orders were issued without affording him an opportunity to be heard. The 3rd Defendant averred that the said orders were irregular and deprived him of his right to ownership of the suit property unless the same were set aside. The 3rd Defendant averred that he was sick and recuperating out of Nairobi when the Summons to Enter Appearance and the said application for injunction were served upon him through a Newspaper advertisement. The 3rd Defendant averred that he had limited access to newspapers during the period and as such could not have seen the advert.
- 7 The 3rd Defendant averred that he had also established from his neighbors within Forest Edge View Estate that there was another suit against one of his neighbors namely, Elc No 332 Of 2014, Ethics And Anti-corruption Commission V Justus Ogutu Arodi & Sammy Silas Komen Mwaita (hereinafter referred to only as 'ELC No 332 of 2014') which was scheduled for hearing on May 12, 2021. The 3rd Defendant averred that the facts giving rise to ELC No 332 of 2014 are the same as those giving rise to the present suit against the 3rd Defendant as the properties the subject of the two suits had the same root namely, LR NO 14748. The 3rd Defendant averred that it would be fair and would save the court's precious time if the two suits were consolidated and heard together since the same witnesses would testify in both cases. The 3rd Defendant averred that it was in the interest of justice and fairness that his application be allowed.
- 8 In his affidavit in support of the application, the 3rd Defendant stated that he worked as a civil servant until June 2018 when he fell ill. The 3rd Defendant stated that he was on sick leave until his retirement in June 2020. The 3rd Defendant annexed to his affidavit a bundle of medical records relating to his illness. The 3rd Defendant stated that he had been away from Nairobi and that it was in September 2020 when he asked his son, John Njoroge to check on the suit property that he learnt of the present suit from the neighbours. The 3rd Defendant reiterated that he was not served with the Summons to



Enter Appearance and the Plaintiff's injunction application and that even if the same had been served, he would not have been in a position to participate in the hearing of the said application. The 3rd Defendant stated that his said son learnt of the ex parte orders of April 30, 2019 from the advocate who was acting for the 1st and 2nd Defendants in the matter. The 3rd Defendant reiterated that the said orders were irregular, oppressive, and should be set aside. The 3rd Defendant averred that no prejudice would be occasioned to the Plaintiff if the application was allowed.

- 9 The 3rd Defendant's application was opposed by the Plaintiff through a replying affidavit sworn by Pius Nyange Maithya on May 4, 2021. The Plaintiff averred that it did not have an objection to the consolidation of this suit with ELC No 332 of 2014. The Plaintiff averred that it brought this suit to recover public property belonging to the Government of Kenya pursuant to the provisions of section 11 of the *Ethics and Anti-Corruption Commission Act* No 22 of 2011 ('EACCA') and other written laws. The Plaintiff averred that together with the plaint, the Plaintiff filed an application under certificate of urgency seeking orders restraining the 3rd Defendant from dealing in any way with the suit property. The Plaintiff averred that on April 5, 2018, the Plaintiff was granted leave to effect service upon the Defendants by way of substituted service as they could not be traced. The Plaintiff averred that on May 23, 2018, it effected service of the Summons to Enter Appearance and the injunction application upon the Defendants by way of advertisement in the Daily Nation Newspaper.
- 10 The Plaintiff averred that when the application came up for hearing on April 30, 2019, the application was allowed as prayed as it was not opposed by the Defendants who had not filed any response thereto. The Plaintiff averred that the court issued the orders of April 30, 2019 after satisfying itself that the Plaintiff had a prima facie case against the Defendants with a probability of success. The Plaintiff averred that the Plaintiff was reasonably apprehensive that if the orders sought were granted, the 3rd Defendant would dispose of or transfer all or part of the suit property in order to frustrate any decree that may be passed against him.
- 11 The Plaintiff averred that the 3rd Defendant had not met the threshold for the grant of the orders sought. The Plaintiff averred that under section 11 of the EACCA and section 56 of the *Anti-Corruption and Economic Crimes Act*, 2003 (ACECA), the Plaintiff had the mandate to undertake investigations into allegations of corruption or economic crimes and in an appropriate case, to institute civil proceedings against any person for the recovery of assets acquired as a result of corrupt conduct.
- 12 The Plaintiff averred that pursuant to its said mandate, it investigated allegations that land that was gazetted as a forest along Ngong Road within the City of Nairobi had been illegally alienated by the 2nd Defendant who was a Commissioner of Lands to a number of companies and individuals. The Plaintiff averred that among the beneficiaries of the illegal allocation was the 1st Defendant which acquired the suit property that it subsequently transferred to the 3rd Defendant. The Plaintiff averred that at all material times, the 2nd Defendant was one of the directors of the 1st Defendant.
- 13 The Plaintiff averred that its investigations revealed that the parcel of land that was purportedly allocated to the 1st Defendant and which it transferred to the 3rd Defendant was a public forest reserve and part of Ngong Road Forest Reserve. The Plaintiff averred that the purported allocation was illegal since the parcel of land was not available for alienation for private use. The Plaintiff averred that the Defendants acted in concert to convert a portion of land alienated as a public forest reserve to the exclusive ownership and use by the 3rd Defendant. The Plaintiff averred that the 3rd Defendant's application was frivolous and vexatious. The Plaintiff averred that the Plaintiff acted in good faith in carrying out its investigations and thereafter instituted this recovery suit pursuant to its mandate. The Plaintiff urged the court to disallow the application. The Plaintiff averred that it was necessary that the 3rd Defendant, his agents, servants and/or any other persons be prohibited from transferring or



disposing of or otherwise dealing with the suit property pending the hearing and determination of this suit.

Analysis and Determination:

14 When the 3rd Defendant's application came up for hearing, the parties relied on their affidavits in support of and in opposition to the application and left the matter to the court for determination. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the Plaintiff in opposition to the application. The application was brought principally under Orders 40 Rule 7 and Order 11 Rule 3 (1)(h) and (i) of the Civil Procedure Rules. Order 40 Rule 7 of the Civil Procedure Rules provides as follows:

7. 'Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.'

15 Order 11 Rule 3 (1)(h) and (i) of the Civil Procedure Rules on the other hand provide as follows:

(1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—

(a) .;

(b) .;

(c) .;

(d) .;

(e) .;

(f) .;

(g) .;

(h) Consider consolidation of suits;

(i) Identify a test suit and order stay of other suits.'

16 The burden was upon the 3rd Defendant to establish that there exist sufficient grounds to warrant the setting aside of the order of this court made on April 30, 2019 and consolidation of this suit with ELC No 332 of 2014 or stay of this suit pending the hearing of ELC No 332 of 2014. In [*Attorney General v Law Society of Kenya & another \[2017\]eKLR*](#) sufficient cause was defined as follows:

Sufficient cause or good cause in law means:

The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See [*Black's Law Dictionary, 9th Edition*](#), page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.'

17 Order 40 Rule 7 of the Civil Procedure Rules gives the court discretionary power to discharge, vary or set aside an order of injunction while Order 11 Rule 3 (1)(h) and (i) of the Civil Procedure Rules similarly gives the court discretionary power after the close of the pleadings to consider consolidation of suits or stay of other suits.



- 18 The court's discretionary powers must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in *Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR* as follows:

It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.'

- 19 The principles applied by the court in applications for setting aside ex parte judgments were set out in the case of *Shah v Mbogo [1967] EA 116* as follows:

The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.'

- 20 In *Patel v EA Cargo Handling Services Ltd [1974] EA 75*, it was held that:

'There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.'

- 21 In *Richard Nchapi Leiyangu v IEBC & 2 others, Civil Appeal No 18 of 2013*, the court stated that:

'The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality'.

- 22 In *Law Society of Kenya v Center for Human Rights and Democracy and 12 Others [2014] eKLR*, Supreme Court observed that:

'The essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.'

- 23 Applying the foregoing principles to this case, the following is my view on the orders sought by the 3rd Defendant. On the issue of setting aside or varying the order of injunction made on April 30, 2019, I am not satisfied that sufficient reason has been given to warrant the grant of the order. I am satisfied that the 3rd Defendant was properly served with Summons to Enter Appearance and the Notice of Motion application for injunction dated February 27, 2018. Before granting the Plaintiff leave to serve the 3rd Defendant among others with Summons to Enter Appearance and the Notice of Motion application dated February 27, 2018 by way of substituted service, I was satisfied that attempts had been made to serve the 3rd Defendant with the said documents personally but the same were unsuccessful. In my view, the 3rd Defendant had made it difficult for the Plaintiff to effect service upon him in the normal manner. In the affidavit of attempted service sworn by a court process server, Ms Sharon MA Onyango on April 4, 2018 filed in court on the same date, the said process server stated that she called the 3rd Defendant through his mobile telephone number xxxx and informed him that she had court documents to serve



upon him. The said process server stated that the 3rd Defendant who expressed his willingness to accept service of the said documents agreed with the process server that they meet at Oil Libya Petrol Station along Langata Road where the 3rd Defendant was to receive the said documents. The said process server stated that the 3rd Defendant never turned up at the agreed meeting point and switched off his phone. The said process server stated that when the 3rd Defendant failed to turn up at Oil Libya Petrol Station, she went to the 3rd Defendant's house at Rubia Estate, House No 970 where she met the 3rd Defendant's house help who informed her that the 3rd Defendant had just left the house. The said process server stated that she thereafter served the said documents upon the 3rd Defendant by registered post through PO Box 8923 Nairobi. This is the postal address that is indicated in the 3rd Defendant's title for the suit property. It was upon perusing the said affidavit that the court granted the Plaintiff leave to serve the 3rd Defendant by way of advertisement in the newspaper.

24 The 3rd Defendant has not disputed that he has a mobile telephone number xxxx and that the said process server contacted him through that number. The 3rd Defendant has also not disputed that he was residing in house number xxxx in Rubia Estate, Langata at the material time. The 3rd Defendant has also not disputed that the Plaintiff did effect service of the Summons to Enter Appearance and the Notice of Motion application dated February 27, 2018 upon him through advertisement in the Daily Nation newspaper of May 23, 2018. I have found no truth in the 3rd Defendant's claim that when service was effected upon him through newspaper advertisement, he was sick and was staying outside Nairobi and as such had limited access to newspapers. All the medical records produced by the 3rd Defendant in support of his application show that he was being treated in Nairobi. Secondly, the said records show that the 3rd Defendant's sickness started in June 2018. This was after the court documents had been served upon him. There is no evidence on record showing that the 3rd Defendant was sick at any time prior to June 2018. In the circumstances, the said sickness could not have prevented him from taking action on the documents that were lawfully served upon him. In any event, the 3rd Defendant has only himself to blame for his failure to defend the injunction application. As I mentioned earlier, the 3rd Defendant frustrated the attempts that were made to serve him personally with the court documents by dodging the process server. If he had accepted service on March 8, 2018 when the process server approached him with the said documents, this application would not have become necessary. As the court held in *Shah v Mbogo* (supra) the discretion of this court to set aside an order cannot be exercised 'to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.' I have said enough to show that the 3rd Defendant is not deserving the exercise of this court's discretion in his favour in his attempt to set aside or vary the orders made herein on April 30, 2019. The said orders were regularly and properly made after service of the application upon the 3rd Defendant. The issue of the 3rd Defendant having been denied an opportunity to be heard does not therefore arise.

25 I am also not persuaded that the said orders were arbitrary and punitive as claimed by the 3rd Defendant. Upon perusal of the material that was placed before it, the court was convinced that the Plaintiff had established a prima facie case against the Defendants. The Plaintiff had demonstrated that the 2nd Defendant was at all material times the Commissioner of Lands. The Plaintiff had also demonstrated that the 2nd Defendant was a director of the 1st Defendant. The Plaintiff demonstrated that the 2nd Defendant in the exercise of his powers as the Commissioner of Lands allocated the suit property to the 1st Defendant in which he had a personal interest. The Plaintiff also demonstrated that although the letter of allotment in favour of the 1st Defendant was purportedly issued on April 23, 1999, the 1st Defendant was incorporated 2 years later on May 28, 2001. The Plaintiff also demonstrated on a prima facie basis that the suit property was a portion of a gazetted Ngong Road Forest Reserve that was not available for alienation by the Commissioner of Lands. From the foregoing, there is no doubt that the



Plaintiff raised serious issues that required interrogation by the court at a plenary hearing. These issues are; whether the 2nd Defendant abused his powers, how the 1st Defendant was allocated land 2 years before it was incorporated, whether a portion of a gazetted forest that had not been de-gazetted could be lawfully allocated by the Commissioner of Lands and whether the 3rd Defendant could acquire a valid title from an invalid one. To enable the court to examine these issues at a full hearing, it was necessary that the suit property be preserved. That was the purpose of the order that was made by the court on April 30, 2019. I am unable to see how such an order can be said to be arbitrary and punitive to the 3rd Defendant.

26 With regard to the limb of the application seeking consolidation of this suit with ELC No 332 of 2014 or stay of this suit pending the hearing of ELC No 332 of 2014, I am once again unable to exercise my discretion in favour of granting the order ELC No 332 of 2014 is before another judge. ELC No 332 of 2014 is part heard as I mentioned earlier. This court has no idea at what stage the matter has reached. I am of the view that it would be a wrong exercise of discretion for this court to purport to consolidate a matter before it with another matter that is part heard before another judge. I am of the view that the application for consolidation should have been made in ELC No 332 of 2014 which is part heard. The judge seized of the part-heard matter would have been in a better position to determine whether this matter can be consolidated with ELC No 332 of 2014 without causing any inconvenience to the court or the parties. The 3rd Defendant is still at liberty to do that since the Plaintiff has no objection to the consolidation. With regard to the alternative prayer for the stay of this suit pending the hearing of ELC No 332 of 2014, no basis has been laid for the same.

Conclusion:

27 The upshot of the foregoing is that the Chamber Summons application dated December 15, 2020 has no merit. The application is dismissed with costs to the Plaintiff.

DELIVERED AND DATED AT KISUMU ON THIS 18TH DAY OF APRIL 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mbithi for the Plaintiff

Mr. Mengich for the 1st, 2nd and 3rd Defendants

Ms. J. Omondi-Court Assistant

