



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 4232 OF 1991 (O.S)

SCENERIES LIMITED.....APPLICANT/RESPONDENT

VERSUS

NGENGI MUIGAI.....1ST RESPONDENT

KENYA REINSURANCE

CORPORATION.....2ND RESPONDENT/APPLICANT

RULING

1. The Notice of Motion before me and dated 12th September, 2018 has been brought by the 2nd respondent herein. The same stands supported by the grounds laid out on its body and the affidavit sworn by *Jadiah M. Mwarania*. The 2nd respondent is seeking the orders hereunder:

(i) THAT the orders for injunction entered by consent of the applicant and 1st respondent on 19th November, 1997 be discharged, vacated and/or set aside.

(ii) THAT the entire suit as consolidated with Nairobi High Court Civil Case No. 6542 of 1991 be dismissed for want of prosecution.

(ii) THAT the costs of the application be provided for.

2. *Jadiah M. Mwarania* being the Managing Director of the 2nd respondent, asserts that the said respondent was at all material times the registered owner of all the parcel of land known as Land Reference Number 12236/I.R. Number 73976 (*the suit property*), having purchased the same from the applicant sometime in July of 1997 for the sum of Kshs.550,000,000/=.

3. He further asserts that not long after being enjoined to the suit on 13th October, 1997 the 2nd respondent came to discover that the applicant and 1st respondent had entered into a consent on 19th November, 1997 concerning the suit property without its involvement, notwithstanding the fact that it was at all material times the registered proprietor of the suit property.

4. The deponent adds that the consent orders made have since been pending in court for over two (2) decades while the 2nd respondent continues to suffer loss and damage, and that neither the applicant nor the 2nd respondent has set the suit down for hearing since the same was last in court on 27th October, 2003 at which time a ruling in respect to costs of the arbitration was delivered.

5. On behalf of the 2nd respondent, *Jadiah M. Mwarania* avers that the applicant and 1st respondent are in no way keen on prosecuting the suit and hence the same ought to be dismissed together with Nairobi High Court Civil Case No. 6542 of 1991 with which it was consolidated.

6. On its part, the applicant has indicated support to the Motion vide the affidavit sworn by *Samuel Kamau Macharia*, one of the members of its Board of Directors. The said deponent communicates that following the sale of the suit property by the applicant to the 2nd respondent, the prosecution of both the suit in this instance and the consolidated suit became unnecessary.

7. The deponent also clarified that the 1st respondent had previously instituted clandestine proceedings against the applicant with the National Land Commission (NLC) sometime in 2015 essentially challenging the sale of the suit property to the 2nd respondent, following which the applicant took action by seeking to have the said proceedings quashed by way of an application was ultimately allowed.

8. It is the deponent's assertion that subsequently, the 1st respondent filed another complaint to which the applicant has raised an objection. The deponent further reiterated the 2nd respondent's position that the 1st respondent has not been keen on prosecuting the suit.
9. The 1st respondent swore a replying affidavit on 4th October, 2018 stating inter alia, that by way of a consent entered into between him and the applicant, the two (2) suits abovementioned were referred to arbitration, following which the said parties agreed to extend the caveat already in existence in respect to Land Reference Number 216/8 until the hearing of the matter.
10. It is the 1st respondent's averment that while such agreement/consent order was still in place, the applicant sometime in July 1997 transferred the suit property to the 2nd respondent notwithstanding the dispute as to the origin of such property.
11. The 1st respondent then explains that the issue of the transfer was raised before the arbitrators, who consequently made an award that the applicant deposits a security in the sum of Kshs.150,000,000/= to represent a quarter of the 1st respondent's interest in the suit property, pending the arbitration proceedings. It is at this point that the 2nd respondent was enjoined in the proceedings.
12. The 1st respondent adds that despite having been served with the consent order for injunction dated 19th November, 1997 the 2nd respondent has never sought to have the same vacated for 21 years now, which shows that the application now before this court is a mere afterthought.
13. In addition, it is the 1st respondent's position that the 2nd respondent has not demonstrated any loss suffered, claiming that it was not a bona fide purchaser of the suit property since there was a caveat and an injunction prohibiting any further dealings in LR No. 216/8 which constitutes one of the two (2) parcels of land consolidated to form the suit property already in place, neither of which have been lifted.
13. Essentially, the 1st respondent states that the sale of the suit property to the 2nd respondent is fraudulent and illegal. The 1st respondent is also claiming an interest in the suit property by virtue of having previously been a director of the applicant at the time of acquiring LR No. 216/8.
15. The 1st respondent further refuted the assertion made that he has not prosecuted his suit for 14 years, indicating that he has lodged a complaint with the NLC seeking to have the issuance and transfer of the suit property investigated, and on which a ruling is pending. That the parties ought to await the decision before taking any further action, adding that the arbitration proceedings were stayed pending the outcome of HCCC NO. 55 OF 1998 vide a ruling delivered by Honourable Justice R. Kuloba (as he then was) on 30th March, 1998 and extended on 10th June, 1998.
16. The long and short of it is that the 1st respondent urges this court not to grant the prayers sought in the application.
17. The applicant filed the supplementary affidavit of *Samuel Kamau Macharia* on 22nd October, 2018. By and large, the deponent challenged the reply for the reason that the same sought to address the substance of the suit as opposed to the issue at hand which is its dismissal for want of prosecution. The said deponent adds that the 1st respondent is litigating on matters which have already been determined.
18. Also in reply, further and supplementary affidavits were respectively filed by the aforesaid *Jadiah M. Mwarania* for the 2nd respondent on 30th October, 2018 and 1st February, 2019 reiterating his earlier averments save to add that since the date of purchasing the suit property, its value has since shot up and yet the 2nd respondent is hindered from utilizing the same, leading to irreparable loss.
19. The deponent also expresses the 2nd respondent's frustration resulting from the fact that the 1st respondent filed a second complaint with the NLC challenging its ownership of the suit property while there is still an injunction in place, hence resulting in an abuse of the court process. It is also averred that the 2nd respondent is a stranger to the purported encumbrances to LR No. 216/8, emphatically stating that the transaction it was concerned with involved the suit property, which was unencumbered at the time.
20. The supplementary affidavit in particular states that the 2nd respondent had previously sought to vacate/set aside the order of 10th November, 1997 maintaining status quo in respect to the suit property and that the 1st respondent had conceded to the same in writing and cannot therefore be heard to state otherwise.
21. The aforesaid deponent has also revealed that the applicant herein has since instituted judicial review proceedings in relation to the complaint lodged by the 1st respondent with the NLC and its resultant ruling on the same, through *Judicial Review Application No. 80 of 2018* and that the Judicial Review Court inter alia, granted a stay of further proceedings as relates to the suit property as well as the parcels of land known as LR No.216/8 and LR No. 12261.
22. It is noteworthy that the 1st respondent in turn filed a further affidavit to the 2nd respondent's supplementary affidavit fundamentally stating that no consent was reached by the parties, reiterating that he is ready to proceed with the prosecution of his suit.
23. I have considered the grounds set out in the Motion as well as the various affidavits in support of and in opposition thereto. Before I proceed any further, it is important for me to provide a brief background to the matter.
24. In a nutshell, the applicant filed this suit seeking the removal of a caveat over Land Reference 216/8. Subsequently, the 1st respondent filed Nairobi High Court Civil Case No. 6542 of 1991 seeking injunctive orders restraining the applicant or other persons from dealing with

the said Land Reference 216/8.

25. The two (2) suits were then consolidated on 30th September, 1992. Thereafter, the parties on 16th July, 1996 consented inter alia, to having the said suits referred to arbitration.

26. Also incorporated into the consent was a clause to the effect that the caveat lodged by the 1st respondent against the title to suit property LR No. 216/8 Karura and the injunctive orders granted in HCCC NO. 6542 OF 1991 remain in force until the arbitral award is made.

27. From the record, there is no indication that the arbitration proceedings were concluded. Be that as it may, multiple applications have been lodged in the matter. Further to this, the applicant has lodged judicial review proceedings with the Judicial Review Division of the High Court and which proceedings are currently pending in court.

28. Going by the Motion, the issues to be determined are two-fold. I will begin with the issue of the injunction. From my observations, I must acknowledge this is a highly contested matter.

29. Upon studying the record, I am able to confirm that by way of a consent recorded by both the applicant and 1st respondent on 13th October, 1997 the 2nd respondent was enjoined to the proceedings. Thereafter, the matter came up in court a few times.

30. Of interest, however, are the proceedings of 19th November, 1997. The record reveals that on the said date, both the counsels for the applicant and 1st respondent were in court. The 2nd respondent's advocate was notably absent. The court recorded a consent by the applicant and 1st respondent to the effect that the status quo of the suit property be maintained. Though the 2nd respondent was not in court on that day, the mention date of 19th November 1997 was taken in his presence but he did not attend court.

31. I will now turn to the second limb on dismissal of the suit for want of prosecution. In so doing, I will borrow from the principles applied in **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** as follows:

- a) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- b) *Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- c) *Whether the delay is an abuse of the court process;*
- d) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- e) *What prejudice will the dismissal occasion to the plaintiff?*
- f) *Whether the plaintiff has offered a reasonable explanation for the delay;*
- g) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

32. The above principles were reinforced in **Governors Balloon Safaris Ltd v Skyship Company Ltd & another [2013] eKLR** cited by the 2nd respondent.

33. In addressing principles a), b), c) and f), it cannot be ignored that the cases involved are extremely old, having both been lodged in 1991. For one reason or another, the issues arising therefrom are yet to be determined fully. It is therefore my view that there has obviously been a delay. Nonetheless, I am well aware that the suits were referred to arbitration at one point and which arbitration proceedings were later stayed. It is also clear that numerous applications have been filed and complaints made in respect to the suit property and other related properties.

34. I have perused the record and ascertained that the parties appeared before the court last on 16th March, 2010. The 1st respondent has not offered an explanation for the inaction in the matter though I am able to confirm from the file that he lodged a complaint in relation to the suit property with NLC sometime in 2016.

35. To my mind, no sufficient or reasonable explanation has been given for the delay and which delay has largely been caused by the 1st respondent through his actions of filing complaints with the NLC and even the CID thus gravely hindering the progress of the matter and inevitably contributed to its delay.

36. Turning to principles d) and e), this is my view. On the one part, the 2nd respondent, being the purchaser of the suit property from the applicant, is unable to utilize or enjoy it by virtue of the fact that it forms the subject of the disputes before this court. In this sense, it is reasonable to state that the 2nd respondent, having offered consideration for the said property, is prejudiced and continues to be prejudiced by the delay in the proceedings. On the other part, the 1st respondent is claiming an interest in LR NO. 216/8. From this point of view, the 1st respondent equally stands to suffer some degree of prejudice should his suit be dismissed.

37. With respect to the final principle and having already found that there has been a delay in the prosecution of this matter, the question remains whether justice can still be done despite such delay. It is noteworthy that the circumstances surrounding the creation of the suit property and its purported sale have been brought to question.

38. From the foregoing, I am of the considered view that given complexity of the two (2) suits, it would be proper to have all the issues raised determined one and for all. At this stage, it would not do much good to dismiss either of the suits.

39. The upshot is that the Motion is dismissed with costs to the 2nd Respondent.

Dated, signed and delivered at NAIROBI this 25TH day of JULY, 2019

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent