



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL SUIT NO. 3 OF 2017

KGRAM LIMITED.....PLAINTIFF/APPLICANT/RESPONDENT

VERSUS

PETER NGIGI NGUNJE.....DEFENDANT/RESPONDENT

AND

KIBOKONI PROPERTIES LIMITED.....INTERESTED PARTY/APPLICANT

RULING

[The Plaintiff's Notice of Motion dated 7/2/2017 and the Interested Party's Notice of Motion dated 10/3/2017]

1. This ruling addresses two applications. The first one is the Notice of Motion dated 7th February 2017 by Kgram Limited (the Plaintiff). In the application, Peter Ngigi Ngunje (the Defendant) is named as the Respondent. The application is brought under the Judicature Act, The High Court Practice and Procedure Rules (Part 1 Rule 3), sections 1A, 1B & 3A of the Civil Procedure Rules and all other enabling rules.
2. In the application, the Plaintiff/Applicant prays for orders as follows:-

“1. THAT this application be certified urgent and the same be heard ex-parte on priority basis and service be dispensed with in the first instance for reasons of urgency.

2. THAT pending the hearing of this Application, this Honourable Court be pleased to grant a temporary injunction against the Defendant by himself, his agents, his co-directors, servants, employees and/or other person(s) whomsoever acting on his behalf, be restrained from interfering, disposing off and/or selling the parcel of land known as L.R. NO. KILIFI/CHEMBE/KIBABAMSHE/404 (the Suit Property) within that area commonly known as Kilifi within Malindi County pending the hearing and the final determination of the application filed herein.

3. THAT pending the hearing of this Application, this Honourable Court be pleased to grant a temporary injunction against the Defendant by himself, his agents, his co-directors, servants, employees and/or other person(s) whomsoever acting on his behalf, be restrained from interfering, disposing off and/or selling the parcel of land known as L.R. NO. KILIFI/CHEMBE/KIBABAMSHE/404 (the Suit Property) within that area commonly known as Kilifi within Malindi County pending the hearing and final determination of the suit filed herein.

4. THAT costs of this Application be provided for.”

The application is supported by grounds on its face and an affidavit sworn by a Director of the Applicant, Elijah Wachira.

3. When the matter came up for hearing before Chitembwe, J on 8th February, 2017, he declined to certify the application urgent noting that the Plaintiff had not clearly shown the relationship between L. R. No. Kilifi/Chembe/Kibabamshe/404 and the Defendant. He directed the Plaintiff to serve the application and take a hearing date at the Court Registry.

4. The matter was then fixed for hearing on 1st March, 2017 when the Plaintiff's counsel informed the Court that the Defendant had been served. On that day Prayer 2 of the application was granted.

5. Prayers No. 1 and 2 of the Plaintiff's Notice of Motion have therefore been dispensed with, leaving Prayer No. 3 as the only important prayer for consideration by this court.

6. For record purposes, it is noted that when the application came up for hearing on 6th June, 2017, Mr Okuto for the Defendant informed the Court that he had not filed any response to the application.

7. That is enough introduction to the Plaintiff's Notice of Motion.

8. On 10th March, 2017 the Interested Party, Kibokoni Properties Limited, filed a Notice of Motion dated the same date seeking orders as follows:-

“1. THAT this Application be and is hereby certified urgent and the same be heard ex-parte in the first instance.

2. THAT the Interested Party/Applicant be enjoined in this Suit as being directly affected by the Prayers sought in the Suit.

3. THAT the Orders granted herein on 01/03/17 be and are hereby Discharged and/or Vacated forthwith.

4. THAT this Honourable Court do grant such further Orders and/or directions in relation to all further proceedings in this matter including any amendments thereto or such further Orders as may be necessary.

5. THAT the Costs of this Application be provided for and paid by the Plaintiff in any event.”

9. The application which is brought under Order 1 Rule 10, Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Article 40 of the Constitution is supported by the grounds on its face and an affidavit sworn on 8th March, 2017 by Passaglia Giuseppe the Principal Director and Shareholder of the Interested Party.

10. The Plaintiff who is named as the Respondent in the Interested Party's application opposed it through a replying affidavit sworn by its Director, Elijah Wachira on 31st May, 2017.

11. On 13th March, 2017, Chitembwe, J certified the Interested Party's application urgent and directed the Court Registry to list it for hearing on priority basis. When the application came up for hearing on 30th March, 2017 the Interested Party's prayer to be enjoined in the proceedings was, by consent of the parties, allowed.

12. Prayers 1 and 2 of the Interested Party's Notice of Motion have thus been dispensed with leaving Prayers 3, 4 and 5 for the consideration of this Court.

13. A perusal of the Plaintiff's and the Interested Party's applications will show that the central issue is whether the Plaintiff's application for an injunction restraining any dealings in the suit property, pending the hearing and the determination of the suit, should be allowed.

14. The facts of this case as can be discerned from the pleadings and the submissions of the parties are that the Plaintiff advanced Kshs. 7 million to the Defendant who defaulted payment. The Plaintiff's attempts to dispose L. R. No. Kilifi/Mavueni Block 3"A"/352 which had been provided as security was frustrated as the title was encumbered with squatters.

15. The Plaintiff later discovered that the Defendant has a huge monetary interest due to him by virtue of a judgement delivered by the Environment and Land Court at Malindi in ELC Civil Suit No. 38 of 2012 Said Adam Kazungu v Kibokoni Properties Limited. The Plaintiff's position is that the Defendant had a beneficiary interest in Kibokoni Properties Limited (the Interested Party) which was due to benefit from disposal of a piece of land for Kshs. 120 million. The Plaintiff therefore moved this court seeking an order stopping the disposal of the Interested Party's property as a means of protecting its claim against the Defendant.

16. Mr. Kopere for the Interested Party put forward three points as to why the Plaintiff's prayer for an injunction should not be granted. Firstly, that the learned Judge had at the ex-parte stage observed that the Plaintiff's entire pleadings did not show any nexus between the Interested Party and the Defendant. Mr. Kopere told this court that from the exhibits of the Interested Party, it is clear that the Defendant is neither a director nor a shareholder in the Interested Party company or its sister companies.

17. Secondly, the Interested Party challenged the foundation of the Plaintiff's application to the effect that the Defendant was to benefit from a windfall of Kshs. 120 million upon the disposal of the Interested Party's property as a result of the judgement in Malindi E&LC Civil Case No. 38 of 2012. The Interested Party exhibited an order dated 24th March, 2015 dismissing the Plaintiff's suit therein for failure to comply with an order directing the Plaintiff to deposit Kshs. 800,000 in court as security for the Defendant's costs in that matter. The Interested Party therefore contends that there is no judgement in favour of the Interested Party upon which the Interested Party was to receive Kshs. 120 million for the sale of its land.

18. Thirdly, the Interested Party exhibited a decree dated 14th August, 2013 in Malindi CMCC No. 459 of 2010 Kibokoni Properties Limited v Said Adam Kazungu & Municipal Council of Malindi showing that judgement for Kshs. 347,500 plus interest and costs had been entered in favour of the Interested Party, the Plaintiff in that case, against the defendants therein. It is the Interested Party's case that this only goes to show that the Defendant has no interest at all in the Interested Party or its properties.

19. Turning to the Plaintiff's replying affidavit to its application, the Interested Party contends that the same is a fishing net. It is the Interested Party's submission that although the Plaintiff's Director avers that he has attached a certificate of official search to the affidavit, he has not done so, opting instead to blame the Land Registrar, Kilifi for not giving them a certificate of search.

20. It is the Interested Party's case that the Plaintiff does not stop at eyeing its property but instead proceeds to provide another list of properties allegedly belonging to the Defendant. This, in the Interested Party's opinion, confirms that the Plaintiff is on a fishing expedition.

21. Mr. Kopere wraps up the Interested Party's case by pointing out that the application that stopped the Interested Party from dealing with its property was in the first place not served on the Interested Party.

22. Mr. Okuto for the Defendant supported the Interested Party's position.

23. Mr. Maina for the Plaintiff opposed the application to discharge the orders issued to his client and instead urged the Court to confirm the same pending the hearing and determination of the substantive claim. He begins by pointing out that the Interested Party is casually attempting to have the orders set aside by placing reliance on copies of leases which have not been certified as true copies of the originals.

24. The Plaintiff's counsel points out that the documents exhibited by the Interested Party to show its shareholding were prepared by the Interested Party and there is nothing from the Registrar of Companies to confirm the correctness of the information contained in those documents.

25. According to the Plaintiff's counsel, unless the Interested Party produce concrete documents distancing it from the Defendant, the connection between the Defendant and the Interested Party cannot be severed.

26. It is the Plaintiff's counsel assertion that it was the Defendant who disclosed its connection with the Interested Party and even disclosed the suit property otherwise the Plaintiff would not have known about the existence of the Interested Party and the suit property.

27. On the Plaintiff's application for injunctive orders, Mr. Maina submitted that other than the statements from the bar by the Interested Party's counsel, the Defendant and the Interested Party have not opposed the application.

28. The Plaintiff urges that if any costs are to be awarded, they should be met by the Defendant.

29. In reply, Mr. Kopere submitted that it was the Plaintiff's responsibility to establish that the Defendant had an interest in the Interested Party and consequently its properties.

30. Mr. Kopere asserted that the Interested Party has opposed the Plaintiff's application because it has interest in the suit property and the Defendant has not opposed the application because he has no interest in the property that the Plaintiff seeks to preserve pending the hearing and determination of the main suit.

31. The principles governing the grant of injunctions are found in **Giella v Cassman Brown & Co. Ltd [1973] E.A.358**. For an applicant to succeed, there is need to establish a *prima facie* case with a probability of success at the trial; likelihood of irreparable injury being suffered which cannot be adequately compensated by damages; and if the court is in doubt it decides the application on a balance of convenience.

32. Some of the circumstances in which a temporary injunction may be granted are found in Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states:-

“1. Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

33. Having briefly stated the applicable law, I will now apply that law to the facts of this case. I am perplexed as to why the Plaintiff in support of his application for injunctive orders introduced the ruling delivered by O. A. Angote, J on 20th February, 2015 in Malindi E&LC Civil Case No. 38 of 2012 Said Adam Kazungu v Kibokoni Properties Ltd. That ruling simply orders the Plaintiff to deposit Kshs. 800,000 in court as security for the Defendant's costs in respect of that matter. Nowhere in that ruling did the Court determine that L.R. No. Kilifi/Chembe/Kibabamshe/404 belonged to the Defendant or the Plaintiff in that matter. The Plaintiff's claim that the said ruling shows that the Interested Party who was the Defendant in that matter is about to sell the suit property for Kshs. 120 million is not supported by the ruling. One of the pillars in support of the Plaintiff's application for an injunction, namely that the

Interested Party is about to dispose of the suit property, therefore collapses.

34. The Plaintiff in his application named the Defendant as the Respondent. The Plaintiff did not however exhibit any evidence that the property it wanted preserved belonged to the Defendant. The Interested Party has now placed before this court evidence showing that the suit property belongs to it. That evidence is even supported by the ruling in Malindi E&LC Civil Suit No. 38 of 2012 exhibited by the Plaintiff. That ruling clearly shows that one Said Adam Kazungu was challenging the ownership of the property by the Interested Party. The Interested Party exhibited an order showing that Said Adam Kazungu's claim was dismissed after he failed to comply with the order directing him to deposit security in court to cover the Defendant's costs in that matter. The Plaintiff did not produce an iota of evidence to show that the Defendant has an interest in the suit property.

35. Everything in this case points to the fact that the Plaintiff has not even met the basic requirements for issuance of orders preserving the suit property.

36. The end result is that Prayer No. 3 of the Interested Party's Notice of Motion dated 10th March, 2017 succeeds and the orders issued on 1st March, 2017 are discharged. The meaning of this is that the Plaintiff's Notice of Motion dated 7th February, 2017 is dismissed.

37. The Interested Party's property was made a subject of litigation by the Plaintiff and I do not deem it necessary to issue any orders as prayed in Prayer No. 4 of the Interested Party's application. The Interested Party will determine the course of action that it deems best for its interests.

38. As for costs, I note that it is the Plaintiff that introduced the Interested Party's property into this matter. The Defendant cannot therefore be asked to meet the costs for setting aside the order that had preserved the Interested Party's property. For that reason I find that the Plaintiff is the one to meet the Interested Party's costs.

39. The Interested Party did not file any reply to the Plaintiff's Notice of Motion although that was the most advisable step to take. Instead, the Interested Party opted to file an application. It cannot therefore have costs in respect of the two applications that were the subject of this ruling. In the circumstances the Interested Party will only have costs from the Plaintiff in respect to the Notice of Motion application dated 10th March, 2017.

40. Those are the orders of the court.

Dated, signed and delivered at Malindi this 24th day of July, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT