



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 117 OF 2006

SHUWEKA SULEIMAN ALI.....PLAINITFF

VERSUS

1. NATIONAL BANK OF KENYA LIMITED

2. ROAD SAFETY NETWORK

3. HEMED MOHAMED HEMED.....DEFENDANTS

RULING

1. In an application brought by way of Notice of motion dated 20th December, 2016, the plaintiff/applicant Shuwekha Suleiman Ali seeks the following orders:-

i. Spent;

ii. That the honourable court be pleased to set aside its *ex parte* orders dated the 29th day of September, 2015 which dismissed the applicant's application dated 7th day of May, 2013 and reinstate the same for hearing on merits;

iii. Spent;

iv. That the honourable court be pleased to grant a temporary order of injunction to the plaintiff/applicant herein, restraining the defendants/respondents and the intended 4th defendant/respondent by themselves, their agents, employees, servants, attorneys or any other person acting on their behalf from selling, or further reselling alienating, wasting or interfering with LR Number 4238/30 Kilifi, CR 13811, measuring about 96.0 acres, registered in the name of the plaintiff but now purported to be registered in the name of the intended 4th defendant herein, pending the hearing and determination of the suit herein;

v. That leave be granted by the court to enjoin Wanje Holdings Limited as the 4th defendant herein;

vi. That the purported sale be declared null and void; and

vii. That costs be provided for.

2. The application is supported by the affidavit of Shuwekha Suleiman Ali sworn on 20th December,

2016. The 1st defendant filed a replying affidavit on 23rd January, 2017 opposing the application. This was followed by the applicant's supplementary affidavit filed on 22nd February, 2017. Counsel for the applicant also filed written submissions on the said date. Counsel for the 1st defendant filed his on 27th February, 2017.

3. Counsel for the parties on record were to attend court on 9th May, 2017 to highlight their submissions. Although Counsel for the applicant highlighted his, Mr. Opolu who held brief for Mr. Onyango for the 1st defendant sought adoption of their written submission. Mr. Manyara, Learned Counsel for the applicant prayed for reinstatement of an earlier application dated 7th May, 2013 for hearing, after it was dismissed for want of prosecution. He added that the said application sought to have the suit reinstated. In making reference to the supporting affidavit, Counsel stated that the said affidavit shows the effort made to have the application of 7th May, 2013 fixed for hearing. He urged this court to exercise its discretion to vary and set aside the orders dismissing the application. He relied on the case of the **Republic vs Truth and Justice Reconciliation Commission & Another ex parte Beth Wambui Mugo** [2016] eKLR.

4. Counsel further submitted that the suit involves land and it is therefore important to protect the subject land thus the injunctive orders they seek in prayers 2 and 3 of their application. He relied on the case of **John Nahashon Mwangi vs Kenya Finance Bank Ltd** (in liquidation) [2015] eKLR where an injunction was issued after a Judge had reinstated the suit. He also relied on the other authorities he had cited in the written submissions in support of his application.

5. Counsel for the 1st defendant in his written submissions stated that the applicant's case was dismissed on 28th August, 2012 for want of prosecution. The said Counsel further explained that the applicant was never interested in prosecuting the suit and she and her Counsel failed to attend court on dates that had been fixed by mutual consent. It is further indicated that the applicant's application seeking reinstatement of the suit was filed on 7th May, 2013 and dismissed for want of prosecution on 29th September, 2015.

6. The 1st defendant's written submissions indicate that there exists no suit upon which the application filed on 20th December, 2016 can be prosecuted since the application seeking reinstatement of the suit was dismissed on 29th September, 2015 for want of prosecution. Further, the applicant has given an explanation for the two year delay. Submissions further state that a party cannot be enjoined or injunctive orders granted in a non-existent suit. It was further argued that the suit property had been sold and transferred to Wanje Holdings, thus the 1st defendant has no interest in the suit property. The court was urged to dismiss the application.

7. It is apparent that the present application has been filed on a misapprehension of the facts on the record and the orders of Hon. P.J. Otieno Judge of 29th September, 2015. On the said date, Judge Otieno stated thus:-

“There is a court order by a ruling dated 28th August, 2015 (sic) dismissing the suit for want of prosecution. It stands dismissed. Let the court file be closed.”

8. A perusal of the court proceedings reveals that no suit was dismissed on 29th September, 2015. On the said date Judge P.J Otieno reaffirmed that the suit stood dismissed for want of prosecution as per the orders of 28th August, 2015. The ruling of Mwera J., however shows that the suit was dismissed on 28th August, 2012. Following the said dismissal Counsel for the applicant filed an application on 7th May, 2013 seeking stay of execution of the orders of 28th August, 2012 and for the setting aside of the orders of the said date dismissing the plaintiff's suit for want of prosecution. Consequently, the respondent filed a replying affidavit on 24th May, 2013 opposing the said application. The applicant's Counsel filed written submissions on 25th June, 2013 in support of the said application. A perusal of the court file shows that this was pursuant to the directions issued by Muya J., on 7th May, 2013 for the application to proceed by way of written submissions. The application was scheduled for mention on 21st June, 2013. Come that day, none of the parties attended court. It was thus stood over generally. On 21st January, 2014, Counsel for the applicant listed the matter for mention on 11th February, 2014 for the purpose of

obtaining a ruling of the application dated 7th May, 2013. On 11th February, 2014 Counsel for the respondent attended court before Judge Kasango who adjourned the matter.

9. On 12th February, 2014 Counsel for the applicant listed the application for hearing on 28th April, 2014 but nothing is recorded in the court file as having transpired on the said date.

10. On 5th May, 2014 Counsel for the applicant listed the application for hearing on 30th June, 2014. The matter was however taken out of the hearing list for 30th June, 2014 as Judge Kasango was not sitting on the said date. Counsel for the applicant fixed the application dated 7th May, 2013 for hearing on 21st July, 2014. On 17th July, 2014 it was taken out of the hearing list by Judge Kasango.

11. The suit was listed for dismissal on 15th July, 2015 before Nyakundi J, who noted that the matter was last in court on 21st July, 2014 and he therefore directed the Deputy Registrar to fix the matter for mention on 29th September, 2015 for a Judge to issue further orders. This led to the matter being placed before Judge P.J. Otieno on 29th September, 2015. On the said date Counsel for the applicant did not attend court, which as explained in the applicant's affidavit was due to failure by the court to serve her Counsel with a mention notice. Mr. Aziz Advocate, held brief for Mr. Rachuonyo for the 1st defendant but he did not inform the court about the pending application.

12. As a result of the foregoing facts, it is my finding that the application dated 20th December, 2016 is misconceived and not grounded on the true state of facts as borne by the chronology of court proceedings which I have outlined in the preceding paragraphs. Secondly if the application dated 7th May, 2013 was dismissed, this court would have no jurisdiction to grant any of the orders sought in paragraphs 3, 4, 5 and 6 of the said application as such orders cannot be granted in a vacuum, in the absence of a main suit. The applicant is at liberty to list the application dated 7th May, 2013 for hearing. Thirdly, this court cannot issue the orders sought in paragraphs (iv), (v) and (vi) of the present application in the absence of a main suit.

13. Having found that the applicant's application is misconceived, I dismiss it in its entirety. The 1st defendant expended time and energy in defending the application dated 20th December, 2016. It is therefore entitled to costs which I hereby award.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of October, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff/applicant

No appearance for the 1st defendant/respondent

No appearance for the 2nd and 3rd defendants/respondents

Mr. Oliver Musundi - Court Assistant