



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 276 OF 2007

BEKYA FLORICULTURE LIMITED.....PLAINTIFF

-VERSUS-

GIMALU ESTATES LIMITED.....DEFENDANT

RULING

1. The Application before the Court is the Plaintiff's Notice of Motion dated **17th April, 2014** and filed on even date. The same was brought pursuant to the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Section 5** of the **Judicature Act** as well as **Order 52 Rule 3** of the Rules of the Supreme Court of England.

2. The application seeks for the following orders:-

a) **THAT the Court do find the Defendant/Respondent in contempt of court for disobedience of the orders of this Court issued on 12th October, 2011.**

b) **THAT upon the grant of prayer (a) above, the Court do issue an Order that the Defendant/Respondent's Director, Joan Njoki Ndungi, be committed to Civil Jail for a period of 6 months or for such other period as this Honourable Court may deem fit and just.**

c) **THAT upon grant of prayer (a) above, the Court do impose the penalty of a fine of Kenya Shillings Ten Million (KES 10,000,000/-) against the Defendant/Respondent and in default of payment of such fine within 14 days of the Order hereto, all movable and immovable assets of the Defendant/Respondent be attached and sold in execution of this order to satisfy the penalty for contempt.**

d) **THAT the Defendant/Respondent do deposit in Court forthwith and in any event within (5) days of the Order hereto the Original title document to Land Reference Number 167/9 (Original Number 167/3/15) South East of Limuru Township pending full hearing and determination of the suit.**

e) **THAT the Court do issue an order permitting the Plaintiff/applicant, at its expense, to put**

up signboards on the suit property indicating that the said property was not for sale pending the full hearing and determination of this suit.

f) THAT the Defendant/Respondent do meet the costs of this application.

3. The Plaintiff's application is supported by the affidavit of YAACOV MAIMON sworn on **17th April, 2014** as well as his further affidavit sworn on **16th April, 2015**.

4. The background to the application is that on **12th October, 2011**, at the instance of the Plaintiff/Applicant, the Court issued an order in terms of section 52 of the Transfer Property Act, staying any transfer or other dealing by the Defendant in any manner whatsoever with regard to the suit property pending the hearing and determination of the suit by the Court.

5. It is the Plaintiff's case that in breach of the court order aforementioned, on **28th March, 2014** recent activity on the suit property in the form of erection of fresh beacons had been observed by its Director, confirming that the process of sub-division had occurred. The Plaintiff attached photographic documentation of the aforesaid fresh beacons to its application herein.

6. The Plaintiff thus urged the Court that it was in the interest of justice to grant the orders prayed for herein in order to uphold the dignity and honour of the Court.

7. The Defendant's case, on the other hand, is that the ex parte orders of 12th October, 2011 were not served upon them within three (3) days as envisaged under the provisions of Order 40 Rule 4 (3) of the Civil Procedure Rules. It is also the Defendant's contention that the ex parte orders had not been extended after the initial period of 14 days, and that no service of orders was effected upon their directors.

8. The two applications were canvassed by way of written submissions. Thus, the Plaintiff filed its written submissions dated **16th April, 2015** on even date while the Defendant filed its skeletal submissions dated **27th November, 2015** on **30th November, 2015**.

9. I have considered the pleadings herein as well as the written submissions by Counsel in support and opposition to the application. The Defendant's objection is that the injunction orders of 12th October, 2011 lapsed, having not been served upon the Defendant within three (3) days as envisaged under **Order 40 Rule 4 (3)** of the **Civil Procedure Rules**. In response to the Defendant's objection, it was the Plaintiff's contention that the orders given by this Court under the hand of Justice Mutava on **12th October, 2011** were never vacated or set aside. The Plaintiff averred that the orders (order No. 3 and 4) requiring the Defendant to produce its Statement of accounts and prohibiting the transfer or any dealing howsoever with the suit property pending the hearing of the suit, were only stayed until the *inter partes* hearing of the Defendant's application dated **19th October, 2011**.

10. That when the said application came up for inter-partes hearing on 25th October, 2011, Counsel for the Defendant informed the Court that he had opted to prosecute his application filed on 11th August, 2011, which application sought to have the Plaintiff's entire suit dismissed for want of prosecution. The Court then fixed the said application for hearing on 21st November, 2011 without making any mention of the order of 19th October 2011. It is therefore the Plaintiff's contentio that the Court's order staying Orders No. 3 and 4 was in force only up to 25th October, 2011.

11. The Plaintiff further averred that official search conducted at the Lands Office as well as communication from the National Land Commission confirmed that the Court Order staying any transfer or other dealings in connection with the suit property was still registered against the title as at April 2015.

12. With regard to the Defendant's contention that the *ex parte* order of 12th October, 2011 was not served upon them within the three days stipulated by law and therefore was ineffectual, it is evident from the

Court record, that the said Order was issued under the seal of the Court, on 13th October, 2011 and was served upon the Defendant on 17th October, 2011. In essence the *ex parte* order was served upon the Defendant on the fourth (4th) day and not within three (3) days as envisaged under **Order 40 Rule 4 (3)** of the **Civil Procedure Rules**, which stipulates that :

“In any case where the court grants an *ex parte* injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

13. The above provision is couched in peremptory terms yet it is clear that there was no compliance therewith on the part of the Plaintiff/Applicant. Nevertheless, the court record shows that the court thereafter stayed orders No. 3 and 4 of the *ex parte* Orders issued on 12th October, 2011 pending *inter partes* hearing of the Defendant’s application dated 19th October, 2011. It appears then, the fact that the *ex parte* orders had not been served upon the Defendant within three (3) days had not been brought to the attention of the Court. The Defendant itself filed an application on 19th October, 2011 seeking to stay the said *ex parte* orders, an acknowledgement that it was valid and subsisting as at 19th October 2011. Accordingly, I agree with the submissions made by the Plaintiff’s Counsel that it would be absurd to ignore the supervening court orders, which orders have not been set aside as being invalid. Moreover, there is no evidence that the Defendant promptly took issue with the late service of the *ex parte* orders. More importantly, no demonstrable prejudice has been visited on the Defendant. In the circumstances foregoing, this Court is far from persuaded to the viewpoint that the *ex parte* orders of 12th October, 2011 automatically lapsed by virtue of late service.

14. It was further the Defendant’s posturing that the *ex parte* orders, having not been extended after the initial period of 14 days, automatically lapsed by operation of the law in accordance with the provisions of **Order 40 rule 4 (2)** of the **Civil Procedure Rules**. Again, the proceedings show that the Defendant came to Court under certificate of urgency on 19th October, 2011 seeking to stay the *ex parte* orders issued on 12th October, 2011 and in particular Orders No. 3 and 4. The Court stayed the aforesaid orders until the *inter partes* hearing of the Plaintiff’s application scheduled for 25th October, 2011. The Defendant’s application did not proceed for hearing on the said 25th October, 2011. Thereafter, on 11th November, 2011 the Court extended the interim orders in place until 16th December, 2011 when the matter was to be mentioned. On the mention date, the matter was set down for hearing.

15. It is apparent therefore, that the parties, by mutual consent, did away with the *inter partes* hearing of the Plaintiff’s application dated 12th October, 2011 and set down the matter for hearing, on the understanding that the interim *ex parte* orders of 12th October, 2011 and issued on 12th October, 2011 were still in place.

16. It is the law that where a period has been given under the Civil Procedure Rules, the Court has the discretion to extend such period upon such terms (if any) as the justice of the case may require. (See **Order 50 rule 6** of the **Civil Procedure Rules**).

17. In view of the foregoing, I take the view that the *ex parte* injunction orders are still in place and therefore the same ought to be obeyed as valid Court Orders until set aside or discharged.

18. The second aspect of the application raises the issue as to whether or not the Defendant is in contempt of the aforesaid orders granted by this Court on 12th October, 2011. The law of contempt in Kenya is provided for under **Section 5 of the Judicature Act Cap. 8 of the Laws of Kenya** as invoked by the Plaintiff. It provides as follows:-

“5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate

courts.

(2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court.”

19. The power to punish for contempt of Court possessed by the High Court in England and applicable to Kenya as envisaged above is to be found in the provisions of the **Contempt of Court Act of 1981 of England** and **PART 81 of the Civil Procedure (Amendment No. 2) Rules, 2012.**

20. The Plaintiff’s case is that the Defendant is in contempt of the Court orders granted on 12th October, 2011 by affixing fresh beacons on the suit property and causing a sub-division of the said suit property. The Plaintiff further submitted that the Defendant had advertised and offered portions of the suit property for sale.

21. On the other hand, the Defendant’s case is that they are not in contempt of the orders issued by this Court on 12th October, 2011 as the same automatically lapsed by operation of law. The Court has already addressed this issue at length and concluded that the said ex parte orders are still in place. This ground is therefore untenable.

22. The Defendant further argued that no service of the orders was effected upon them or their Directors. This ground is similarly untenable for the reason that the Defendant, in its submissions with regard to the current application and prior pleadings on record, admitted that the ex parte orders herein were served upon its Advocates on 17th October, 2011. Service having been effected upon their Advocates, it is deemed proper services on the Defendant's Directors for purposes of contempt proceedings. In the case of **Basil Criticos Vs Attorney General & 8 Others [2012] eKLR** the Court stated as follows:-

“...the law has changed and it stands today knowledge supersedes personal service...where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary.”

23. The Court of Appeal in the case of **Shimmers Plaza Ltd vs National Bank of Kenya Limited [2015] eKLR** cited with approval the above High Court Case. The Court of Appeal in the said case held that knowledge of the judgment or order by the advocate of the alleged contemnor sufficed for the purposes of contempt proceedings, particularly where the advocate was present in court representing the client when the order was given. In this case the Court record bears witness that the Defendant’s Advocate as well as the Defendant’s director were aware of the ex parte order and therefore lack of personal service upon the Directors of the Plaintiff cannot render the contempt proceedings herein a nullity.

24. With regard to the disobedience of the Court Orders of 12th October, 2011, the Plaintiff claims that on 28th March, 2014 its Director observed fresh beacons affixed on the suit property which according to them indicated that the process of sub-division had occurred. The Plaintiff went ahead and attached photos of the fresh beacons in its application. There is however no evidence to show that indeed a sub division occurred in disobedience of the Court orders.

25. The Plaintiff has also admitted in its further affidavit and submissions that no registrations or transfers have been processed on the suit property in spite of the Defendant having lodged the same. The Plaintiff referred to a letter from the National Land Commission dated 8th April, 2015 in which the Commission wrote to confirm that it could not process the sub division proposal from the Town Clerk of Limuru Municipal Council because of the Court orders herein issued on 13th October, 2011. In the said letter, the Commission also confirmed that the suit property (Parcel No. 167/9) according to their records was intact.

26. In the premises, there is nothing before the Court to show that the Defendant successfully subdivided the suit property, hence, there is no basis for this Court to hold the Defendant or its Directors in contempt

of the Court orders granted on 12th October, 2011.

27. As it stands the suit property has been preserved pending the hearing and determination of the suit. However, having established that there was an attempt to sub-divide the suit property by virtue of the letter from the Commission, this Court is inclined to grant prayer (d) of the present application to the effect that the Defendant deposits in Court the original title document to the suit property pending the hearing and determination of the suit.

28. In view of the foregoing, the Plaintiff's application is hereby allowed only in terms of prayers (d), and (e). Prayer (d) to be complied with within five days of service of this order upon the Defendant. The Defendant shall bear the costs of the application.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MARCH 2016

OLGA SEWE

JUDGE