



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 570 OF 2014

KARANGI COFTEA LTD.PLAINTIFF

VERSUS

PHILOMENA NDANGA1ST DEFENDANT

NDANGA HOTEL LTD. 2ND DEFENDANT

R U L I N G

1. In this matter there were several Applications before the Court between December 2014 and January 2015.

2. The first Application before the Court by the Plaintiff seeks orders that:

1. The this application be certified urgent and be heard exparte in the 1st instance.

2. An injunction do issue restraining the defendants by themselves, their agents, servants and or employees from offering for sale, selling, offering for lease, leasing, charging or otherwise alienating and or appropriating in any manner whatsoever the premises and all the fixtures and fittings on Land Reference Ruiru Town/137 commonly known as Ndanga Hotel and or any other assets owned by the Plaintiff and or interfering with the Plaintiff possession and use of the said premises pending the hearing and determination of this application on merits.

3. An injunction do issue restraining the defendants by themselves, their agents, servants and or employees from offering for sale, selling, offering for lease, leasing, charging or otherwise alienating and or appropriating in any manner whatsoever the premises and all the fixtures and fittings on Land Reference Ruiru Town/137 commonly known as Ndanga Hotel and or any other assets owned by the Plaintiff and or interfering with the Plaintiff possession and use of the said premises pending the hearing and determination of this suit.

4. Costs be borne by the 1st Defendant.

3. In the second Application made by the First Defendant seeks orders that:

1. The instant application be certified as urgent and heard exparte in the first instance during

the current High Court vacation.

2. An order of committal to prison be made against LAWRENCE KIBE KARANJA, THOMAS KIARIE KARANJA and EDWARD KAMAU MAINA the contemnors herein for such period as this Honourable Court may deem fit and just in that the said contemnors are in contempt of the order made by this Honourable Court on 17th December 2014 inter alia restraining the plaintiff from interfering with the 1st Defendant's possession and use of the suit premises LR No. Ruiru Town/137 (DANGA HOTEL).

3. The contemnors do meet the costs of this application.

4. In the Third Application dated 31st December 2014 the Plaintiff seeks order that:

1. This application be certified urgent and be heard exparte in the 1st instance during the current court vacation.

2. That the orders number 2, 3 and 4 issued exparte on 24th December 2014 be stayed pending the hearing and determination of this application.

3. That orders number 2, 3 and 4 issued exparte on 24th December 2014 be reviewed vacated and or set aside.

4. In the alternative to prayer 3 the orders number 2, 3 and 4 issued exparte on 24th December 2014 be stayed pending the hearing and determination of the 1st Defendant application dated 23rd December 2014.

5. The costs be borne by the 1st Defendant.

5. In the Amended Grounds of Opposition Notice of Preliminary Objection were filed by the Defendants on 14th January 2015 for the Hearing fixed for 15th January 2015 states:

1. That the High Court Commercial Division lacks the jurisdiction to deal with the subject matter which relates to use of land and the filing of the subject matter before the High Court Commercial Division offends the Provisions of S.13 of the Environmental and Land Act, No. 19 of 2012 as read together with Article 162 (2) (b) of the Constitution of Kenya (2010).

2. That the suit by the Plaintiff is brought unprocedurally and without the required board resolution and/or approval of the majority of the plaintiff's directors/shareholders and the same is therefore bad in law and ought to be struck off with costs.

3. That the 1st Defendant is a director and majority shareholder of the plaintiff company and the sit and/or orders sought against her and which amounts to injuncting her from performing her duties as a director and shareholder of the plaintiff company are legally misplaced, bad in law, untenable and the suit out be struck off with costs being borne by M/s. Njuguna & Partners Advocates and/or the instructing individuals.

4. That non of the allegations leveled against the Defendants has been substantiated and/or proved and neither has the plaintiff/applicant established that they have any prima facie case as to be entitled to the injunctive orders sought and the orders ought be refused.

5. That it has not been proved that the 1st defendant has acted in anyway injurious to the plaintiff's interests and nor has it been established that 1st defendant's conduct will occasion the plaintiff company any irreparable loss and the orders sought be refused.

6. That the 1st defendant has for years been in control, management and use of the suit property (NDANGA HOTEL) thus the balance of convenience tilts in her favour and mitigate against granting of the injunctive orders sought which would otherwise deny her the control possession and use of the suit property.

7. That the instant suit is an abuse of the court process as there exists another suit relating to the suit property Nairobi ELC No. 1411/14 PHILOMENA NDANGA KARANJA & 2 OTHERS VS. EDWARD KAMAU MAINA) and in which all the issues raised in the pleadings herein by the plaintiff have been raised and the instant suit ought be stayed, struck off and/or consolidated with the aforesaid suit and which suit was lodged prior to the suit herein.

8. That the minority plaintiff's directors at the instigation of whom the instant suit has been filed have not come to court with clean hands as they are guilty of a host of issues injurious to the plaintiff's interest. They have not come to court with clean hands and are therefore not entitled to the equitable reliefs sought.

9. That the application has no merits and ought to be dismissed with costs.

10. The Plaintiff's Notice of Preliminary Objection filed on 30th December 2014 were:

1. No orders were issued on 17th December 2014 in favour of the 1st Defendant which were capable of being breached.

2. The application is incurably defective as no leave was sought and or granted prior to filing of the said application.

3. The application offends mandatory provisions of the law in regard to law of contempt.

4. No orders were issued and served against the alleged contemnors which were capable of being breached.

5. The application is an abuse of court process.

11. On 15th January 2015 I made the following Orders:

ORDER:

1. THAT matter be listed for Hearing of all outstanding Applications on 22nd January 2015.

FUTHER ORDERS:

2. THAT Defendant to ensure a copy of its Notice of Motion dated 12th January 2015 and filed on the same day is placed on the court file.

3. THAT in relation to the Defendants application dated 24th December 2014 the Plaintiff be and is hereby granted leave to file and serve Replying Affidavit by 20th January 2015.

4. THAT in relation to the Defendants Notice of Objection the Plaintiff is given leave to file and serve their response by 21st January 2015.

5. THAT Interim Order of this Court made on 24th December 2014 be and is hereby discharged and the matter will be re-considered inter partes on 22nd January 2015 if the court holds it does have jurisdiction. CPR Order 40 rule 4 (2) applies.

6. THAT the Defendants are hereby granted leave to file and serve a Replying Affidavit in reply to the Plaintiffs application dated 5th December 2014 by Friday 16th January 2015.

7. THAT costs are reserved.

12. As a consequence of the Order of 15th January 2015 **ALL THE** Applications were to come before me on 22nd January 2015. As the Defendants raised a point of jurisdiction, in their grounds of Opposition that was to be heard first. The Plaintiff's Application was to be heard next. Ms. Wambua holding brief for Mr. Njenga attended for the Hearing of her own Application but failed for return for the remainder of the hearing after the lunch adjournment. I was agreed at 9.00 a.m. that the two matters would proceed together and time was allocated.

13. The terms of Defendant's Preliminary Objection are set out above. A preliminary objection should be based on questions of pure law and should dispose of the matter finally (**Mukisa Biscuits Manufacturing Co. vs. West End Distributors 1969 EALR 696 at 700 D – F**):

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

14. Therefore looking objectively at the Defendant's **Grounds of Opposition/Notice of Preliminary Objection**, paragraphs 2, 3, 4, 5, 6 and 8 are all questions of evidence only Ground 1 raises a question of Law. The Parties Advocates agreed to that approach and it was argued on that basis.

15. In relation to Ground 7, the Defendant inadequately set out what issue arises. If indeed there are matters that are or have been before the Court, this raises questions of res judicata and/or estoppels and/or consolidation. Again, those would required an investigation of the previous or associated proceedings. In other words it would require consideration of the evidence in order to resolve the issue.

16. I note that the Defendant's Advocates declined to provide the Court with the Pleadings and Affidavits. These documents were filed by the Plaintiff's Advocates.

17. In the circumstances, that leaves only part of Ground 1, the questions of jurisdiction. The submissions by Miss Wambua relies on Article 162 (2) of the Constitution of Kenya 2010. The relevant parts states:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(b) the environment and the use and occupation of, and title to, land”.

18. Ms. Wambua informed the Court that “jurisdiction is the authority that the Court has to hear matters”. She was unable to direct the Court to any authority for that proposition. She goes on to say that in the **Plaint**, the Prayers that the Plaintiff Karangi Coftea is seeking against the Defendant in paragraph (a) namely:

“An Order of injunction restraining the Defendants from, appropriating, offering for sale, selling, leasing, offering to lease or otherwise alienating and or dealing with the Plaintiff properties and assets”.

19. Ms. Wambua also relies on **Section 13 of the Land and Environmental Act** as referred to in **Petition No. 22 of 2012**. She says **Section 13** states: “It shall have jurisdiction” to hear and determine

20. Ms. Wambua then turned her argument to the powers of the Courts and submits that the ELC has

power to order Injunction.

21. The Environment and Land Court was actually established by **Section 4** of the **Environment and Land Court Act No. 19 of 2011**. It has jurisdiction to hear any dispute relating to environment and land. The jurisdiction of the court is provided under **Section 13** of that Act. The court shall have original and appellate jurisdiction.

22. When Ms. Wambua was asked if there was any challenge to the fact of the company being the owner of the property and the land, she accepted that the company was the registered owner of the land and that was not being challenged.

23. In the circumstances the land is in the uncontested ownership of a Limited Company. The matters in dispute therefore relate to the occupation and interference with assets of the Company. Additional arguments as to the Shareholding and direction of the Company best placed here.

24. The jurisdiction of the Commercial Division of the High Court extends to the following matters set out in Practice Directions since 1997. It shall be deemed to be Commercial matters, suitable for trial by the Commercial Division of the High Court situated in New Milimani Commercial Courts, Upper Hill Nairobi.

1. **All proceedings in which an injunction including winding-up, excluding cases in which a Company is suing or is being sued as an entity.**
2. **All Company matters and applications including winding-up, excluding cases in which a Company is suing or is being sued as an entity.**
3. **All Bankruptcy matters.**
4. **All matters relating to arbitration other than enforcement of awards, excluding any matter relating to land affected by the Land Control Board.**
5. **All intellectual property matters.**
6. **All claims for the recovery of unsecured debts (but including claims against guarantors) due to a bank or other financial institution in which a Defence is filed. On the filing of the Defence the matter to be automatically transferred to the Commercial Court.**
7. **Such matters as are certified by a Judge of the Commercial Court as being suitable for determination in the Commercial Court having regard to the amount involved, the need for a speedy hearing and the nature of the case. It was felt that in considering the nature of the case the Judge could be guided by wording similar to the definition of a commercial action in the English Order 72 Rule 1 (1), namely: “arising out of the ordinary transactions of merchants and traders and without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking mercantile agency and mercantile usage”.**

25. Despite being invited to do so by the Court Miss Wambua was not able to point out any limits on the jurisdiction. I also asked Miss Wambua to address the court on how the matter should proceed where two courts had concurrent jurisdiction. She argued for transfer.

26. In the circumstances and for reasons set out above, I consider that this is an appropriate matter for the Commercial Division and that it has jurisdiction. I also consider that as the underlying dispute involves members of one family, it is preferably and desirable that it is dealt with quickly and efficiently to avoid further deterioration in that relationship. For that additional reason the Commercial Division is the preferred venue.

27. In the circumstances, I dismiss the Defendants Preliminary Objection as to Ground 1 of the Grounds of Objection/Preliminary Objection, with costs.

28. In relation to the Plaintiffs objection to the Defendants (2) Applications of 24th December 2014, I heard from Plaintiffs Advocate as the Defendants' Advocate failed to return after lunch. That objection is therefore unchallenged.

29. However, after hearing arguments and after consideration of the evidence, I am satisfied that the Defendants Applications are bound to fail for the following reasons:

1. The Application for Committal for contempt is fatally flawed as the alleged contemnors were not parties to or the subject of any order of the Court as at 24th December 2014.
2. The Application for an injunction went beyond material non-disclosure but in fact put forward a set of facts that was untrue, in particular the date when the First Defendant left the property in question was 2013 and not 2014 as stated in the Supporting Affidavit.

30. In the circumstances, I grant the Preliminary Objection by the Plaintiff dated 30th December 2014 and dismiss the Defendant's Notice of Motion dated 24th December 2014 with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2015.

FARAH S. M. AMIN

JUDGE

In the presence of:

Mr. Mbiu court clerk.

Mr. Njuguna for Plaintiff.

Ms. Wambua for Defendant.