



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 122 OF 2013

MARY WAMBUI KAMAU1ST PLAINTIFF

CATHERINE NJERI.....2ND PLAINTIFF

SYLVIA GATHONI T/A MARY HAPPY SCHOOL DAY NURSERY SCHOOL & THE MARY

HAPPY SCHOOL3RD PLAINTIFF

VERSUS

RICHARD KIRIMI KINOTI.....DEFENDANT

RULING

By a Notice of Motion dated 8th September 2015 and filed in court on 11th September 2015, the 1st plaintiffs Mary Wambui Kamau, Catherine Njeri and Sylvia Gathoni T/A Mary Happy School Day Nursery School and the Mary Happy School seeks from this court orders that the court do extend the temporary injunctive orders issued on 22nd September 2014 by this court by a further 12 months; and that costs of this application be provided for.

The application is predicated on the grounds that the court did on 22nd September 2015 issue injunctive orders restraining the defendant from alienating, using the log books as security or collateral for loans, transferring or interfering with the ownership and or possession of motor vehicles registration No. KAU 834Y, KAE 200F, KAC 827M, KBJ 710P, KAX 106L, KBH 248L, and Ex GK F 162; the defendant/respondent is restrained from entering upon or interfering with the running of the Mary Happy School and Mary Happy Day and Nursery School and their assets pending the hearing and determination of the suit and from interfering with the plaintiff's peace.

The injunctive orders above were to be in force for a period of 12 months from the date of delivery of the ruling. That thereafter the defendant filed an appeal challenging the above orders, to the Court of Appeal and sought a stay thereof and the application was heard. The same is pending ruling this term; that the orders issued by the court on 22nd September 2014 will lapse by operation of law on 22nd September 2015; That the plaintiffs have complied with all the pretrial requirements under Order 11 of the Civil Procedure Rule; that if the orders are not extended, the plaintiff stands to be greatly prejudiced as the defendant may dispose of the motor vehicles and interfere with the operations of the schools; and that it is in the interest of justice that the defendants continue to be restrained from, in any way dealing with the assets of the schools or entering into and interfering with the running of the schools so as to preserve the substratum of the case. The said application is further supported by the affidavit

sworn by Mary Wambui Kamau the 1st plaintiff/applicant, restating the grounds stated above, and which I need not reproduce repetitively. She annexes copies of the order of 22nd September 2014, pleadings in the Court of Appeal and the statement of issues and pretrial questionnaire filed pursuant to Order 11 of the Civil Procedure Rules.

The defendant/respondent opposed the application by the 1st plaintiff and filed grounds of objection/opposition dated 17th September 2015 and filed on 21st September 2015 contending that the application lacks merit and is an abuse of the court process; that no sufficient reasons have been shown why the injunctive orders ought to be extended, the plaintiff's application is mischievous and is only bent on depriving the defendant his rights as a partner of the school and an owner of where the subject school stands; the subject matter in dispute being the school is being single handedly managed by the 1st plaintiff hence leaving no one to safeguard the interests of the defendant as partner and owner; and that the 1st, 2nd and 3rd plaintiffs have been benefiting to the exclusion of the defendant hence he continues to suffer irreparable loss and damage if the injunctive orders are further extended.

The parties' advocates canvassed the application orally on 21st September 2015 and owing to the fact that the orders whose extension was being sought are lapsing on 22nd September 2015, this court had no option but to remain dedicated to delivering expeditious justice to prevent the ends of justice to be defeated, taking into account all the matters canvassed in the application, grounds affidavit and annexures and grounds of opposition filed by the defendant/respondent.

The applicant represented by Mr Anzala advocate submitted, reiterating the contents of the application, grounds and relying on the supporting affidavit of the applicant, urging this court to exercise its discretion in favour of the applicant and extend the orders of injunction granted on 22nd September 2014 by a further one year.

In his view, the court already found that the plaintiff had made out a prima facie case against the defendant, with a probability of success and that the delay in having this suit heard and determined within the said 1 year from 22nd September 2014 was not occasioned by the plaintiffs who complied with pretrial requirements and that the defendant had not complied with the said requirements under Order 11 of the Civil Procedure Rule, besides filing an appeal to the Court of Appeal which matter is pending a ruling.

Mr Anzala also submitted that the applicant did seek leave and was granted leave to amend the plaint after which the defendant also amended the defence and filed a counterclaim, with the plaintiff filing reply to defence and defence to counterclaim on 20th July 2015 hence, the plaintiff cannot be faulted for not having the suit disposed of within 12 months as no hearing date could be obtained before 22.9.2015. He stated that his clients were not seeking to relitigate issues that were canvassed before Ougo J giving rise to the ruling of 22nd September 2014, but were following the procedures laid down and were amenable to any conditions that this court may give in the exercise of its discretionary power.

In opposition to the application, M/S Machio counsel for the defendant/respondent submitted, relying on the grounds of opposition filed on behalf of her client contending that the provisions of Order 40 Rule 6 of the Civil Procedure Rules are couched in mandatory terms and that it follows that this court cannot extend an order of injunction beyond one year since it lapses. counsel maintained that the subject matter of the dispute being a school, the defendant has been and will be prejudiced if the orders of injunction are extended since he is not benefitting from thereon and neither is he allowed to manage the affairs of a school which he co-owns with the 1st applicant.

M/S Machio contended that the defendant had complied with the pretrial requirements by filing witness statements and documents hence failure to file pretrial questionnaire or issues for determination was immaterial. She maintained that this application was only brought upon realization that the injunctive orders were about to lapse, with the intention of making the defendant suffer

irreparable loss since the 1st plaintiff continues to control the property of the school. M/s Machio urged the court to discharge the injunction since the plaintiff had ample time to ensure that the suit is heard within 12 months or seek an early extension of orders of injunction.

I have carefully considered the application herein, the grounds of opposition and able submissions by Learned Counsels for the respective parties.

None of the parties' advocates referred this court to any precedents.

Nonetheless, this court is deemed to know the law and precedents if any are available and applicable to a particular issue in dispute.

The only issue for determination is whether the plaintiff has proffered to this court sufficient reasons why the injunctive orders issued on 22nd September 2014 should be extended as contemplated in Order 40 Rule 6 of the Civil Procedure Rule which provides:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

This court observes that albeit the said rule is couched in mandatory terms, the words “unless for any sufficient reason the court orders otherwise” confers the court with discretion to order for extension of injunction orders if there are sufficient reasons advanced by a party applying for such extension or variation.

The plaintiff has argued and the court record bears her witness that after the said injunctive orders were issued by Hon Ougo J, the applicant had to apply to court for amendment of her pleadings and subsequent to that leave to amend, the defendant too amended his pleadings and introduced a counter claim on 9th July 2015.

The plaintiff has also demonstrated that she has fully complied with the pre-trial requirements pursuant to Order 11 of the Civil Procedure Rules. No doubt, the plaintiff, and indeed, no party to the suit could have been expected to comply with pre-trial requirements fully before pleadings close and in this case, the pleadings must have closed sometime in August 2015 upon which pursuant to Order 11 Rule 3(1) of the Civil Procedure Rules, a case conference would then be convened a month after the pleadings close.

Although the defendant opposed this application for extension of the injunctive orders, he did not rebut the above position which is apparent from the court record. The mere objection to extension on the ground that there had been delay to frustrate the defendant or that the plaintiff waited until the orders were about to lapse before seeking for their extension is not sufficient. There was no material advanced before this court to suggest that the conduct of the plaintiff was deplorable and that it therefore disentitled her from seeking the orders herein. Order 50 Rule 6 of the Civil Procedure Rules on enlargement of time allows such application for enlargement even after the time prescribed has expired. In this case, the application was timeously brought before such expiry of the 12 months.

Injunctive relief is indeed an equitable relief/remedy based on equitable principles and the conduct of the parties are usually considered in extending the orders. It has not been shown in this case that the plaintiff, upon obtaining the injunctive relief, went to slumber or that she had not taken any proactive steps to set down the suit for hearing.

The plaintiff moved the court as appropriate, for leave to amend her pleadings and that action prompted the defendant too to amend his pleadings and introduce a counterclaim which is a suit within a suit. And as I have stated above, pleadings only closed in August 2015. It cannot, therefore, in the view of this court, be true that there was any inordinate delay and or inexcusable conduct by the plaintiff.

The plaintiff has also submitted that if the orders sought are not granted maintaining status quo, then the substratum of this suit, which the injunctive orders were preserving would be lost.

The Court of Appeal in the case of **George Orango Orago v George Liewa Jagalo & 3 Others (2010) e KLR** stated that the purpose of an injunction is to conserve or preserve the subject matter/property pending determination of a suit concerning the property. The defendant filed a counterclaim and it was equally incumbent upon him to expeditiously move the court, where he felt there was delay, to have the suit determined as espoused under Section 1A and 1 B of the Civil Procedure Rules, that the duty to ensure that suits are expedited is imposed on all the actors in a suit.

In addition, no pre-trial questionnaire and or issues had been filed by the parties as required by Order 11 of the Civil Procedure Rule.

The court further notes that the issues in contest are highly contentious and the defendant even challenged the decision by Ougo J granting the impugned injunction and sought a remedy before the Court of Appeal.

As was held in Ougo & another V Otieno (1987eKLR 364, where there is a serious conflict of facts, status quo should be maintained until the dispute has been decided at the trial.

This is not to say that the suit herein must remain archived in perpetuity for public policy demands that justice must be administered without undue delay. See Article 159(2) (b) of the Constitution and that the business of the courts should be conducted with expedition (see **Fitz Patrick V Batger & Company Ltd (1967) 2 ALL ER 657**, since it has not been demonstrated that the plaintiff has no interest in prosecuting the suit herein; and as no application was ever made by the defendant to have the injunction granted herein discharged under Order 40 Rule 7 of the Civil Procedure Rules for inaction or misconduct, I find sufficient reasons have been advanced why the injunctive orders granted by Ougo J on 22nd September 2014 should be extended, thereby protecting or preserving the substratum of the suit herein pending the determination of this suit.

I am in total agreement that this suit ought to be heard and determined expeditiously.

Accordingly, I grant the prayers sought by the 1st plaintiff in her Notice of Motion dated 8th September 2015 taking into account the provisions of Sections 1A, 1B,3A and 63(e) of the Civil Procedure Act and Order 40 Rule 6 of the Civil Procedure Rules for the ends of justice to be met, and order that;

- a. The interim injunction orders issued by this court, Ougo J on 23rd September 2014 be and are hereby extended for another 12 months from this date.
- b. Both the plaintiffs and defendants shall comply with all the pre-trial requirements within 45 days from the date hereof.
- c. The suit herein shall be mentioned on 4th November 2015 for pre-trial conference to confirm compliance with the order (b) above upon which a certificate shall issue and a hearing date fixed on priority basis.
- d. Each party shall bear the costs of this Notice of Motion.

Dated, signed and delivered in open court at Nairobi this 22nd day of September 2015.

R.E. ABURILI

JUDGE