



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 4496 OF 1994

GITAMAIYU TRADING COMPANY LTD.....PLAINTIFF

=VERSUS=

NYAKINYUA MUGUMO KIAMBAA CO. L.....1ST DEFENDANT

WARIARA NJENGA.....2ND DEFENDANT

MUMBI GICHURU.....3RD DEFENDANT

JAMES NJENGA KARUME.....4TH DEFENDANT

J.R. NJENGA.....5TH DEFENDANT

COMMISSIONER OF LANDS.....6TH DEFENDANT

ATTORNEY GENERAL.....7TH DEFENDANT

RULING

The 1st, 3rd and 4th Defendants/Applicants brought this application dated 29/8/2012 under Order 40 Rule 7 of the Civil Procedure Rules and sought orders that the court be pleased to set aside its order made on 20/2/1995 and secondly, the costs of the application be borne by the Plaintiff. The application is premised on grounds that the suit was concluded on 13/2/2012 when Judgment was entered in favour of the Defendants. Further that the 1st Defendant wishes to deal freely with L.R Nos. 89/4 – 9, 89/11 – 20 which are the subject matter of this suit.

Mary Kihuu, the Director of the 1st Defendant swore an affidavit on 29/8/2012 in support of the application. The deponent stated that the 1st Defendant is the registered proprietor of the parcels of land aforementioned. The deponent referred the Court to an Order dated 20/2/1995 marked 'MK1' and deposed that the Court entered this order restraining the Defendants from dealing with the aforementioned parcels of land. However, the deponent stated, the suit was heard and Judgment delivered in favour of the Defendants on 13/2/2012 and subsequently a decree was issued. The deponent stated that there is no

justification in law as to why the order should continue to remain in force and further that 1st Defendant now wishes to enjoy the fruits of the Judgment.

Response

The application was opposed by Billy Amendi, Advocate for the Plaintiff who swore a Replying Affidavit on 31/5/2013. Counsel deposed that his firm took over the matter from the firm of Kilonzo & Company Advocates. Subsequently, the Appellant lodged a Notice of Appeal with the intention to appeal against the entire Judgment by Hon. Muchelule. Counsel deposed further that the Appellant filed an application dated 29/11/2012 seeking an extension of injunction orders against the Defendants which application is pending before court. It was counsel's deposition that his firm applied and obtained certified copies of proceedings when after they filed an appeal Civil Appeal No. 84/2013. Counsel stated that the record of appeal, which has high chances of success, has been served upon the Defendants. Counsel deposed that the Defendants have not come to court with clean hands as they variously violated and acted in defiance of the court orders by dealing with the suit property.

Counsel stated further that since Judgment was delivered over 10 years ago, the Court has always maintained the status quo, and therefore no prejudice will be occasioned to the Defendants is the status quo continues to prevail. Counsel maintains that the claim is now over Ksh. 500 Million and if the application is allowed, the Defendants will swiftly proceed to demarcate and dispose of the properties to third parties which will make it impossible to recover the suit properties or monies from the Applicants. Consequently, if the appeal succeeds, the Appellant will not reap the benefits of their appeal and therefore if the application is allowed, its effect will be to render the appeal nugatory and inconsequential. Counsel maintained that it is only fair that the Appellant's interest in the suit properties be preserved by extending the orders granted on 20/2/1995 and thereby to disallow the application dated 29/8/2012.

Applicants' Response

Mary Kihui, the Director of the 1st Defendant swore a Further Affidavit on 6/5/2013 wherein she deposed that the pleadings filed by the firm of Billy Amendi Advocates are improperly before Court as the said firm of advocates did not obtain the mandatory leave to replace the firm of Kilonzo & Co. Advocates. The deponent stated further that the Plaintiff had made no effort to obtain a stay of execution of the Judgment delivered on 13/2/2012. Thus, the Plaintiff having not acted in accordance with the law, the order issued against the 1st Defendant, which has been in force for over 18 years should be vacated. The deponent also refuted the claim that the 1st Defendant had defied the Court order as alleged.

Submissions

This application was disposed of by way of written submissions. Mwaura Shairi & Company Advocates for the 1st, 3rd and 4th Defendants filed submissions dated 20/9/2013. Counsel reiterated the contentions of the application and affidavits in support that the Plaintiff had not taken any steps to obtain an order for stay of execution. It was counsel's submission that even if Notice of Appeal had been filed, by virtue of the provision of Rule 5(2) (b) of the Court of Appeal rules; such notice does not in law operate as stay of execution. Counsel also reiterated that the Plaintiff's advocates currently on record failed to obtain leave of court to act for the Plaintiff after Judgment has been entered contrary to the provision of **Order 9 Rule 9 of the Civil Procedure Rules**. Counsel submitted that this being a provision couched in mandatory terms, failure to comply renders subsequent proceedings void. In support of the submission, counsel cited the case of **Daniel Ng'ang'a Mugo & Another Vs. Willy Wanyoike Macharia & 7 Others HCCC No. 656/2001** where the Court found that an advocate who had not complied with the provisions of Order III Rule 9A has no capacity to file an application subsequent to a Judgment.

Billy Amedi counsel for the Plaintiff filed submissions dated 6/12/2013 wherein counsel submitted that the Defendant's application is an abuse of the Court process as it was filed after receipt of service of the Plaintiff's application dated 29/2/2012 which sought an order that the injunction orders dated 20/2/1995 be in force. Counsel submitted that the Defendants were required to respond either by filing a replying

affidavit or grounds of opposition but not to lodge a subsequent application. Counsel submitted that during the pendency of this application, an application filed at the Court of Appeal to preserve the status quo was heard on 11/11/2013 and awaits a ruling. Thus, counsel submitted, legally prudent to have the status quo maintained as parties await the ruling of the Court of Appeal. Therefore, allowing the Defendant's application will render the Plaintiff's appeal an academic exercise.

Determination.

The Defendants seeks an order that this Court sets aside or vacates the order granted by this Court (Pall J.) on 20/2/1995. I have perused the said order attached to the Applicants' Supporting Affidavit. The said order was granted until 2/3/1995 when the matter was scheduled for *inter-partes* hearing. I have perused the voluminous court proceedings and taken note that the said orders were extended from time to time. Temporary or interim injunction orders are granted before the final resolution of a dispute pending the aim of which is to maintain the status quo and ensure that justice is delivered at trial. It follows therefore that after the suit is heard and determined the interim orders are either confirmed or discharged depending on the outcome of the suit. In this instance, this Court (Muchelule J.) delivered Judgment in favour of the Defendants. The said Judge did not expressly indicate that the interim injunction orders had been discharged. In my view, however, failing to do so does not require an application to that effect as it should be as a matter of course that once Judgment is entered then interim injunction orders lapse, unless expressly stated otherwise. The provision of **Order 40 Rule 7 of the Civil Procedure Rules** is, in my view, applicable during the pendency of a suit. In that regard, I find that the Defendant's application is superfluous. Having found that the present application is unnecessary, I will not delve into the provision of **Order 9 Rule 9 of the Civil Procedure Rules**.

I now turn to the Plaintiff's argument that he made an application dated 29/2/2012 seeking orders that the suit properties be maintained pending the hearing and determination of the appeal. The court record reveals that the application was certified urgent and the court directed the Plaintiff to serve. Subsequently, the court directed the parties to file submissions and to return on for highlighting. The Plaintiff avers that the Defendants cannot bring their application in view of the subsistence of his application dated 29/2/2012. This Court has already found that the Defendants' application is unnecessary as an interim injunction granted before the hearing should not be an impediment to their enjoyment of the fruits of a Judgment in their favour. Indeed the Plaintiff's application is yet to be heard. However, Counsel for the Plaintiff in the submissions revealed that the Court of Appeal is now seized of the matter having already heard an application to preserve the suit property pending the appeal. With this development, it is my considered view that these applications have been overtaken by events. Suffice to say, preservation the suit properties pending the outcome of appeal is now a decision of the Court of Appeal. At the risk of determining an application that is not before me, I shall say no more.

The upshot of the foregoing is that the application is dismissed. I make no orders as to costs.

Dated, signed and delivered this 28th day of March 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the 1st, 3rd and 4th Defendants

.....Court Clerk