



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 238 OF 2012

REGINA PACIS UNIVERSITY COLLEGE *suing thro'*

***the* BOARD OF TRUSTEES.....1ST PLAINTIFF**

ASSUMPTION SISTERS OF NAIROBI

REGISTERED TRUSTEES.....2ND PLAINTIFF

VERSUS

WILLIAM CHARLES FRYDA.....DEFENDANT

RULING

1. In the Notice of Motion dated and filed on **10th December, 2012** brought under **Order 40 Rule 7** of the Civil Procedure Rules, the applicant (*defendant*) seeks to discharge the orders made on **11th September, 2012** by **Hon. H.A. Omondi J**, together with costs of application.

2. Before embarking on the application it is pertinent to lay down facts leading to this application. The dispute between the parties herein is in regard to ownership and use of the parcels of land known as **L.R. NO. 27228** (*originally known as L.R. NO. 18590*), **27229** (*originally known as L.R. NO. 18591*), **9361/10** both situated in Lang'ata Nairobi, **Kiine/Rukanga/2846** situated in Sagana and **L.R. NO. 9361** situated in Nakuru (*hereafter referred to as the suit properties*).

3. **William Charles Fryda**, (*the defendant/applicant*) alleges that he purchased these suit properties for purposes of building hospitals to cater for the poor in the regions where they are situated. His intention was to have these parcels of land transferred to and registered in the name of a third party and elected **St. Mary's Mission Hospital**. However as this body had not been registered at the time the suit properties were acquired, the defendant agreed to register them in the name of **The Assumption Sisters of Nairobi Registered Trustees** (*hereinafter referred to as the 2nd plaintiff*) on the understanding that the suit properties would eventually be transferred to St. Mary's Mission Hospital upon its registration. The defendant then proceeded to carry out substantial developments on these properties by building hospitals worth about **Ksh.918,000,000**.

4. Sometime in **August, 2009** the 2nd plaintiff's new management started claiming ownership of the said properties and the developments thereon. It then purported to take over the management and running of the hospitals without the defendant's consent.

5. These actions prompted the defendant to file a suit in the High Court at Nakuru, **HCCC NO. 224 OF 2010** against the 2nd plaintiff and St. Mary's Mission Hospital, seeking to restrain them from remaining on or otherwise interfering with his use and enjoyment of the suit properties. He also sought a declaration that St. Mary's Mission Hospital is registered as proprietor of these parcels of land in trust for him and that this trust be terminated and the suit properties be transferred back to the defendant or his nominee(s).

6. In response, the defendants in that suit filed a counterclaim, alleging that ownership of the suit properties was vested in the 2nd plaintiff. They accused the respondent of unlawfully interfering with the operations of the hospitals and an Education Centre known as **Regina Pacis University College**. Consequently in their counterclaim, they sought various injunctive orders restraining the defendant from interfering with the use and operations of the businesses and from collecting, expending and keeping any funds belonging to St. Mary's Mission Hospital.

7. Simultaneous with their pleadings, the rival parties filed separate applications seeking to restrain the other from interfering with the operations of the suit properties pending the hearing and determination of the suit. In his ruling made on **4th March, 2011** the **Hon. M. J. Anyara Emukule J**, considered both applications and in allowing the defendant's application, gave orders restraining the defendants from entering, remaining or in any other manner interfering with his use of the suit properties.

8. While the ruling was pending for delivery, the 2nd plaintiff together with Regina Pacis University College (*1st plaintiff*) filed a second suit in the High Court of Nairobi, **HCCC NO. 9 of 2011**. Their grievance was particularly in regard to the parcel of land known as **L.R. NO. 27229 I.R. NO. 113472**, which the 2nd plaintiff claimed ownership. They primarily accused the defendant of unlawfully interfering with the running of the University College set up by the 1st plaintiff on the suit property. For this reason, they sought a declaration that the plaintiffs and their constituent organs are entitled to the exclusive possession, control and management of the University College situated on L.R. NO. 27229 I.R. 113472 and a permanent injunction restraining the defendant from interrupting their services.

9. The plaintiffs also filed an application for injunction restraining the defendant from encroaching on this parcel of land which was allowed as prayed by **Hon. Mwera J, (as he then was)** on **23rd February, 2011**. Following an application for review of its orders by the defendant, the court clarified on **23rd March, 2011** that the said orders were only in regard to **L.R. NO. 27229** and that its orders were only in favour of the University (*1st plaintiff*) in regard to its activities on L.R. NO. 27229. The court also noted that this plaintiff was not a party to the Nakuru Case and that the 1st plaintiff had only requested to use these parcels for its clinical and practical studies and not as owner of the suit properties.

10. Thereafter, the plaintiffs filed an application in **Nairobi HCCC NO. 9 of 2011** seeking, *inter alia*, to have the suit in Nakuru transferred to Nairobi and the orders issued therein discharged or vacated. By her order issued on **20th December, 2011** **Hon. Nambuye J, (as she then was)** declined to set aside any of the orders issued in both files and stated that, that was a matter to be determined after consolidation of the suits.

11. Pursuant to these orders, **Nairobi HCCC NO. 9 of 2011** was given a new number **HCCC 62 "B" of 2011**. By the application dated **26th March, 2012** the plaintiffs asked the court to review or extend the orders of **Hon. Mwera J, (as then was)** issued on **23rd February, 2011**. In her ruling made on **11th September, 2012** **Hon. Omondi J**, ordered that the *status quo* pertaining at the time of the ruling be maintained pending the hearing and determination of the suit. The court also directed that the matter be placed alongside Nakuru HCCC NO. 224 of 2010 before the Resident Judge for directions.

12. It is these orders that are the source of the defendant's grievance and which he now seeks to discharge. He alleges that as a result of the ruling of **11th September, 2012** it is not clear what the status quo to be maintained is. He further alleged that the 1st plaintiff does not claim any ownership rights over the suit properties and had even relocated to another site. He believed that the orders of **4th March, 2011** which

were subsequently extended on **11th September, 2012** by **Hon. Emukule J**, should prevail as they were still in force at the time **Hon. H. A. Omondi J**, issued her orders. Therefore the defendant should be allowed to regain full control over and permission to run the institutions; that the defendant has not effected any adverse changes on the properties. He believes that the existence of the order of status quo as at **11th September, 2012** will cause more confusion because the pleadings are clear and the individual claims well sorted out if dealt with separately.

13. In the replying affidavit sworn on **22nd March, 2013** it was contended that **Hon. Omondi J**, took into account the existence of the conflicting orders arising out of the multiple suits. They were of the view that the application though seeking for discharge of the orders, actually amounted to an appeal against the orders issued on **11th September, 2012**. The plaintiffs maintained that they claimed ownership and right to use the properties. In response to the allegation of confusion arising from the orders, it was contended that there had been no adverse activities on the property which was the status the court intended to maintain when it issued the orders.

SUBMISSIONS

14. The applicants relied on the submissions filed on their behalf on **9th January, 2014**. Their submission was that the effect of the orders complained of was to revive the already lapsed orders of **Hon. Mwera J**, (*as he then was*) in the Nairobi case on **23rd March, 2011**. The plaintiffs were accused of abusing the court process and causing the current confusion by filing another suit while well aware of the Nakuru Case. It was also contended that the status quo pertaining as at the time when the orders of **11th September, 2012** were made was that the orders of **4th March, 2011** were still in force.

15. He argued that the order of **Hon. Nambuye J**, (*as she then was*) relocating the file to Nakuru had not been fully complied with as the Resident Judge had not given directions; that the order complained of arose out of an application to revive the orders of **Hon. Mwera, J** (*as he then was*) issued on **23rd February, 2011**.

16. The respondent submitted that the discretion of the court under **Order 40 Rule 7**, by which it may discharge an injunction, must be exercised judicially and cited the decision in **Juma Muchemi & Partners Limited vs Barclays Bank of Kenya & Another [2012] eKLR** to support his contention.

17. He argued that the orders to maintain status quo were issued in order to avoid any further adverse action being undertaken by either party, particularly to prevent the termination of the contracts of the plaintiffs' employees. Counsel urged the court to take judicial notice of the fact that the plaintiffs play an immense role in the society by providing Medical and Education services. Therefore, if the defendant was allowed to evict the plaintiffs from the suit properties, which would be the ultimate effect of the orders sought, the society will be occasioned great injustice at the expense of an individual which action would be contrary to the utilitarian principles. In this regard, the court was referred to the decision of the Court of Appeal in **National Union of Water & Sewerage Employees & 3 Others vs Nairobi City Water & Sewerage Co. Ltd & 3 Others [2013] eKLR**, that-

“We think in the particular circumstances of this case, if we allow the application the consequences of our orders would harm the greatest number of people. In this instance we would recall the advocates of utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an actions we should be primarily concerned with the consequences of action, and if we are comparing the ethical equality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness to the greatest number of people and produces the most goods though we are not dealing with ethical issues.”

DETERMINATION

18. I have considered the application and the submissions of Counsels. The only issue for determination is

whether the defendant has advanced sufficient grounds to warrant the discharge of the order issued on **11th September, 2012**.

19. **Order 40 Rule 7** provides for setting aside, discharge or variation of an interlocutory injunction. It states:

“Any order for injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

20. Interpreting this provision, **Hon. A. Mabeya** held as follows-

“From the reading of that rule, the jurisdiction is discretionary and like in all other discretions, I believe that the same must be exercised judiciously. Some of the things I believe the court will look at is if the circumstances have changed from the time the injunctive order sought to be varied was made, the position of the parties vis a vis compliance with the order and generally the justice of the case. There are no firm rules of law or practice and I do not intend to pretend to set any here. The fact is, that discretion is perfectly clear.”

21. On the face of his application, the defendant cited four grounds upon which he relied in support of his application. Firstly, he argued that there was, at the time of making the order, already in existence another order over the same subject matter made against the plaintiffs. Secondly, the orders by **Hon. Mwera J**, (as he then was) were made on the basis that the 1st plaintiff who was not a party in the Nakuru Case No. 224 of 2010, had an independent cause of action and that the parcel of land No. 27229 was not among the properties in dispute in the Nakuru case. Finally, he argued that the 1st plaintiff was only using one of the buildings in the premises on a temporary basis before relocating to its permanent campus elsewhere.

22. The first and second issues were also argued before **Hon. Omondi J**. Further the court was also informed that the injunctive orders in HCCC 224 OF 2010 had since lapsed and could not therefore be extended and the Order of **Hon. Nambuye J** (as she then was) that upon consolidation of both files, the matter be placed before the Resident Judge for consideration. It is with all these in mind that the court held as follows-

(a) that status quo that currently exists be maintained as this is the only way the suit property will be preserved; especially in view of the speed in which the Respondent is acting to effect changes which are adverse to the applicants;

(b) the Orders of Nambuye, J require that this file be placed alongside HCCC NO. 224 OF 2010, so as to give appropriate directions as had been contemplated by the judge- this should be done on 9th September 2012;

23. I note that at the time of delivery of this ruling, pending for determination was an application for extension of the orders issued on **4th March, 2011** in Nakuru HCCC No. 224 of 2010, restraining the plaintiffs from interfering with the defendant's use of the properties which were subsequently extended on **5th October, 2012** after the Orders of **Hon. Omondi J**, had been issued.

24. Nonetheless, it is my view that at the time of making her ruling, the **Hon. Omondi J**, was well aware of the existence of that order of **4th March, 2011** whose substance was not changed by the latter ruling of **5th October, 2012**. The Learned Judge considered the fact of the existence of the various conflicting injunctive orders and the chaos that had resulted as well as the claims of user rights by the rival parties. She also noted that the conflicting orders had existed concurrently for some time and it was only after one lapsed that the other party (*defendant*) acted adversely. Thus, the Judge was of the view that justice would only be served if the *status quo* that existed at the time of the ruling, wherein both parties were allowed to use and manage the properties as per the Orders of **Hon. Mwera, J** (as he then was) and **Hon. Emukule J**, was maintained pending the hearing and determination of the suit.

26. From the foregoing, it is apparent that all the issues raised in this application were considered. The applicant has not demonstrated that the circumstances at the time of the making of the orders have changed particularly which have resulted to undue hardship or prejudice in the continued existence of these orders. Consequently this court, being one of concurrent jurisdiction cannot purport to consider an application that has already been determined on the same grounds that were argued.

26. For clarity purposes, the adverse parties shall continue to use the properties as they did during the subsistence of the conflicting interlocutory injunction issued in **HCCC NO. 224 of 2010** and **HCCC NO. 9 OF 2011**.

27. The upshot of the above, is that the application dated **10th December, 2012** seeking to discharge the orders of **11th September, 2012** is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 24th day of October 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Karanja Mbugua holding brief for Mr Kihara for the Plaintiffs.

Mr Okeke for the Defendant/Respondents

Emmanuel Juma: Court Assistant.

L N WAITHAKA

JUDGE