



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NO. 337 OF 2010**

**NGUGI GITHURE NJOROGE.....PLAINTIFF**

**VERSUS**

**LOISE GATHONI NGUGI.....1<sup>ST</sup> DEFENDANT**

**EQUITY BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling relates to a Notice of Motion dated 29th October 2014 and filed on 29th October 2014 in which the Applicant seeks an order for an extension of the injunction issued by the court on 16th October 2012, and that the court do give a hearing date for the suit. The Application was supported by the Affidavit of Githui John Esq. Advocate sworn on 24th October 2014 and the grounds on the face thereof. It was however opposed by the Replying Affidavit of Muturi Kamande Esq. Advocate sworn on 11th November 2014 and filed on 12th November 2014. It was urged before me on 17th November 2014.

2. Mr. Githui, counsel for the Applicant argued that the Application is brought under Order 44, rule 6 of the Civil Procedure Rules, 2010, and Sections 1A, 1B and 3A of the Civil Procedure Act (*Cap. 21, Laws of Kenya*).

3. The Applicant's case is that the First Respondent obtained Title to the Applicant's land and charged it to the Second Respondent, and proceeded not pay for the loan. The Second Respondent, (Bank) advertised the property for sale. The court granted an injunction which was allowed to lapse without the case being heard and determined. The Applicant therefore seeks the reinstatement and extension of the injunctive orders pending the hearing and determination of the suit.

4. The Applicant cites two principal reasons for failure to have the case fixed for hearing. **Firstly** counsel submitted that the Defendant failed to comply with the requirements of Orders 11 and 14 relating to pre-trial conferences, filing of witness statements and production of documents. Counsel submitted that despite several mentions and reminders to the Respondents to file their witness statements, pre-trial conference, and production of documents as no hearing date will be granted by the court without compliance with the requirements of those orders. Consequently counsel argued, the Applicants are entitled to an extension of the injunctive orders under Order 40 rule (6) of the Civil Procedure Rules.

5. Counsel submitted that rule (6) is a regulatory derivative of Section 63(c) of the Civil Procedure Act. Its purpose is to prevent the ends of justice from being defeated. Since the Respondent allowed the orders of injunction to lapse without complying with the requirements of the Rules, the injunctive orders should be granted.

6. Though Counsel acknowledged that the Witness Statement was filed on 1st July 2014, after directions of the court on three separate occasions, simultaneous with the filing, of the statements, the Second Respondent issued instructions to the auctioneers to advertise the property for sale.

7. **Secondly** Counsel argued, though not in point but by parity of reasoning, it would defeat the ends of justice if the property were sold when the suit is pending. In this regard Counsel relied on the decisions of the court in **BONDE VS STEYN & ANOTHER [2013]1 EA 16** in which the court held inter alia -

1. *The main consideration in the grant of a temporary injunction or any interlocutory orders is the need to prevent the ends of justice from being defeated. Order XL (40) of the Civil Procedure Rules must be interpreted in a way that is consistent with Section 63 of the Civil Procedure Act, (Sardar Mohammed vs. Gluran Singh Nand Sing & Another [1959] EA 793 (applied)).*

2. *Although whether or not the applicant has applied for a permanent injunction is a factor in an application for temporary injunction, it is not the sole factor. Section 63 aims at ensuring that the ends of justice are not defeated (Kihara Barclays Bank (K) Ltd, [2001]2 E.A. (distinguished)).*”

8. **Thirdly**, though neither reproduced under the Registered Land Act (*Cap. 300, Laws of Kenya – now repealed*), nor the Land Act 2012, (*No. 6 of 2012*), Section 52 of the Indian Transfer of Property 1882 (*Group 8 Act of our Laws*), provides for a statutory injunction *lis pendens* -

**“S. 55. During the prosecution in any court having authority ..... of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto, under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”**

9. Lastly counsel contended that the case could not be fixed for hearing on account of the Respondent's own delays. The Second Defendant should therefore not be allowed to benefit from its and the First Respondent's inequity, and that the court should give a date for hearing of the suit, or an order that it be fixed for hearing on priority basis.

10. Mr. Kahiga, Counsel for the Second Respondent argued to the contrary. **Firstly**, he submitted, it is not correct that no hearing date can be granted if there are no witness statements by the Defendant.

11. **Secondly, Order 40 rule (6)** provides that injunctive orders are only valid for twelve months. The Second Defendant had now complied. Counsel submitted that a suit cannot be stopped from hearing by virtue of non-compliance with Order II, particularly as in this case, where the First Respondent has done nothing to fix the case for hearing. The Applicant guaranteed the First Respondent (*his daughter*), a loan from the Second Respondent and that they are acting in concert, and that the application is an abuse of the court's process and should be dismissed with costs.

12. Mr. Waiganjo, learned counsel for the First Respondent weighed in with the submission that this was a case with special circumstances The First Respondent obtained title and proceeded to charge the property while knowing that the title was not obtained from the Applicant, and that pressure was put upon the First Respondent who did not get a cent from the Second Respondent, and while regretting delay in prosecuting the case, submitted that there was a case for contending, fraud and the duty for fixing a case for hearing is reciprocal. Counsel invited the court to look at the totality of the circumstances, and grant the orders sought to preserve the property, the subject matter of the suit.

## **OPINION**

13. I have considered the rival arguments. The question is whether or not the lapsed injunctive orders should be reinstated and extended for another twelve months, and if so on what terms. However before I

consider those issues, I wish to touch upon Sections 1A(1) and 1B(1) of the Civil Procedure Act, the so-called overriding objects or oxygen provisions of that Act.

14. Section A1(1) aforesaid declares that the overriding object of the Act and the rules thereunder is to facilitate *“the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”*

15. And Section 1A(2) enjoins the court in the exercise of its powers under the Act, or the interpretation of any of its provisions, to seek to give effect to the overriding objectives specified in subsection (1). Subsection (3) declares that a party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objectives of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court.

16. On its part Section 1B (1) obliges the court in furthering the overriding objectives specified in Section 1A to handle all matters presented before it for the purpose of attaining the following aims -

- (a) the just determination of proceedings,
- (b) efficient disposal of the business of the court,
- (c) the efficient use of the available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties,

- (e) the use of suitable technology.

17. Order 40 rule (6) of the Civil Procedure Rules provides that -

***“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.”***

18. The injunctive orders in this matter were granted on 20.07.2012. The period of twelve months lapsed on 19.06.2013. The application herein was made on 24.10.2014 more than twenty-four months after the injunctive orders were granted, or more than fourteen months since the injunctive orders lapsed under rule 6 of Order 40. It is therefore the Second Defendant's argument that the delay in determining the matter does not accord either with overriding objectives under Section 1A (1) and 1B (1) of the Civil Procedure Act, or the duty of the Applicant and its Advocate to assist the court in achieving the said overriding objectives.

19. The Applicant's argument is the exact opposite. The Defendant/Respondents and in particular the Second Respondent has made no attempt to comply with the rules of procedure, and in particular Order II, so as to assist the Plaintiff/Applicant to realise the overriding objectives of the Act. Despite repeated reminders, the Second Respondent has not complied with the requirements of Order 3 rule 2 (*relating to a list of witnesses, and witness statements, and documents to be relied upon*), and matters to be settled at a pre-trial conference under Order II rule (3)(1). The Second Defendant managed to comply with the requirements of Order 11 only on 1.07.2014, nearly two years from the date the injunctive orders were granted. In the circumstances, the Applicant contends and invokes Sections 3A and 63(e) of the Civil Procedure Act, and calls the court to exercise its inherent power (S.3A) and discretion, (Section 63(e)) and reinstate the lapsed injunctive orders so as to meet the ends of justice.

20. For the First Respondent, Counsel submitted that the entire transaction of charging the Applicant's property may have been fraught with fraud and it was necessary to preserve the property pending the determination of the suit on its merits.

21. In a series of cases, **GITIHA VS. FAMILY FINANCE BUILDING SOCIETY & OTHERS, [2013] 1 E.A. 75, KENYA COMMERCIAL BANK LTD VS. KENYA PLANTERS CO-OPERATIVE UNION [2013] 1 E.A. 136, ONDITI VS. KENYA COMMERCIAL FINANCE COMPANY LIMITED [2013] 1 E.A. 340**, the Court of Appeal has stated that the courts are enjoined to give effect to the overriding objective in the exercise of their powers under the Act or in the interpretation of any of its provisions. One of the aims of the said objective is need to ensure equality of arms, the principle of proportionality and need to treat all parties coming to court on equal footing. Such power and discretion must however be exercised judiciously that is to say, for sound reasons.

22. At this point in time, the grounds upon which the interlocutory injunction was initially granted have not changed. The only question is whether the lapsed injunctive order should be reinstated. Considering the positions of the Applicant (*father*), and First Respondent (*daughter*), and the Second Respondent (*lender*), though there is delay in determining the equities between them is particularly complicated (*I think*) by the relationship of the Applicant and the First Respondent, and in which the Second Respondent could be a victim, the ends of justice dictate that the suit be determined on its merits after hearing all the parties, (*unless they opt for mediation and recording settlement on terms*).

23. In the circumstances therefore, I allow the application dated 24th October 2014, and filed on 29th October 2014 in terms of prayer 2 thereof and direct that costs herein shall be in the cause.

**Dated, signed and delivered at Nakuru this 28<sup>th</sup> day of November, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**