



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**HCCC CASE NO. 828 OF 2010**

**HARRISHCHANDRA BHOVANBHAI JOBANPUTRA.....1<sup>ST</sup> PLAINTIFF**

**BHAVNA HARISHCHANNRA JOBANPUNTRA .....2<sup>ND</sup> PLAINTIFF**

**Versus**

**PARAMOUNT UNIVERSAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SHREE KRISHAN HARDWARE & PAINTS**

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

**SURESH GHEDIA .....3<sup>RD</sup> DEFENDANT**

**RAJESH GHEDIA .....4<sup>TH</sup> DEFENDANT**

**RULING**

**Discharge of injunction**

[1] I have been asked, by the Motion dated 25<sup>th</sup> April, 2013, to discharge the injunction issued herein and allow the 1<sup>st</sup> Defendant to sell the charged property. The injunction sought to be discharged restrained the 1<sup>st</sup> defendant, its officers, employees, servants, and/or agents or whomever from however enforcing the plaintiffs/applicants personal guarantees dated 8<sup>th</sup> November, 2006 and or selling, alienating and/or exercising it powers under the charge dated 8<sup>th</sup> November, 2006 and or selling, alienating and/or exercising its power under the charge dated 8<sup>th</sup> November, 2006 upon the property known as Land Reference No. 209/4300/77. The said Motion is expressed to be brought under Order 40 Rule 7 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act. The jurisdiction of the court to set aside an order of injunction is set out under Order 40 Rule 7 Civil Procedure Rules which provides as follows:

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

Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction. In this matter, the Applicant anchors its arguments on the statutory lapse of the injunction under Order 40 Rule 6 of the CPR. The discretion under that rule will also be discussed and determined. This is the test I will apply here. Let me examine the circumstances of this case and the arguments of the parties within the said test.

[2] The Applicant argues that, since the injunction was issued on 8<sup>th</sup> April, 2011, the plaintiffs have failed and/or neglected to take any step to prosecute this suit and over two years have passed by. The debt owed by the plaintiff's to the 1<sup>st</sup> Defendant continues to increase on a daily basis. And as illustrated and held in **Reef Building Systems Limited vs. Nairobi City Council**, an order of injunction may be set aside if it is seen to be unjust to maintain it in force or it is otherwise unjust and inequitable to let the order remain. The 2 year inertia created by the plaintiffs has and continues to cause hefty interests accumulating on the debt owed by the plaintiffs. The delay is solely attributed to the plaintiffs who have had every opportunity to have their matter heard but deliberately declined to do so. The 1<sup>st</sup> defendant has on various occasions invited the plaintiffs to have the matter fixed for hearing as shown by the exhibits annexed to the application. See the case of **George Muraya Kirira vs. Zadock Enane**, where the court held that it is the duty of all parties in a suit to ensure that a matter is fixed for hearing. The 1<sup>st</sup> defendant has attempted and made every effort to comply with their obligation.

[3] It is also the 1<sup>st</sup> defendant's argument that there is a change of circumstance; the Plaintiffs, were granted the injunction in order to be heard or rather prosecute their case but they have failed to do so. On that basis, the court has the right to discharge such injunction. This was held in **Magnate Ventures Limited & another Vs City Council of Nairobi & 2 others**. See also **George Muraya Kirira v Zadock Enane**, that the court must be keen to ascertain whether there has been a change of circumstances that would defeat the ends of justice. In our case, the continuous daily interests accruing as a result of the debt owed against the 1<sup>st</sup> defendant creates such continuous injustice and financial harm that can only be repaired if the 1<sup>st</sup> defendant is allowed to exercise its statutory power of sale. The 1<sup>st</sup> defendant suffers and continues to suffer serious and substantial loss. The 1<sup>st</sup> defendant undertakes to abide by the procedural requirements in conducting sale by public auction of the charged property as required by the Land Registration Act, 2012 and the Auctioneers Act Chapter 526 Laws of Kenya. For those reasons, the Applicant should be allowed to exercise its power of sale by setting aside the injunction issued on 8<sup>th</sup> April, 2011.

[4] The Plaintiffs opposed the application and filed a replying affidavit sworn by the 1<sup>st</sup> plaintiff on 11<sup>th</sup> July, 2013 on his behalf and that of the 2<sup>nd</sup> plaintiff. Since the interim injunction was granted the plaintiffs says they have taken steps to set down the matter for hearing on several occasions; On 16<sup>th</sup> December, 2011, 22<sup>nd</sup> September, 2012 and 16<sup>th</sup> October, 2012 the parties herein endeavoured to fix the matter for hearing but no date was available on the said occasions as the court diary for the year was full. On one occasion, the court file could not be traced. On 23<sup>rd</sup> October, 2012, the parties herein through their respective advocates attended the court registry for purposes of fixing the matter for hearing. Further before being served with the 1<sup>st</sup> Defendant's application dated 25<sup>th</sup> April, 2013 the plaintiff's advocates had prepared a letter dated 23<sup>rd</sup> May, 2013 inviting all the parties herein to attend the court registry on 4<sup>th</sup> June, 2013 for purposes of fixing a hearing date for the suit. The said letter was however, not dispatched as the plaintiffs were subsequently served with the 1<sup>st</sup> Defendant's application. Any delay in prosecuting this suit is as result of no fault on the part of the plaintiffs as it was caused by circumstances beyond the plaintiff's control. If the prayers sought by the 1<sup>st</sup> defendant are granted without the suit being

heard and determined, the plaintiffs will be grossly prejudiced as well as condemned without having been given a chance to ventilate the issues raised in the suit. The plaintiffs have a solid claim against the 1<sup>st</sup> defendant based on serious allegations of fraud in which the plaintiffs intend to prove that the 1<sup>st</sup> defendant was party to fraud perpetrated by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. If the prayers sought by the 1<sup>st</sup> defendant were granted the court would be allowing the sale of the suit property without according the plaintiffs and opportunity to prove the 1<sup>st</sup> defendant's involvement in the said fraud. Consequently, the 1<sup>st</sup> defendant is not entitled to a discharge of the injunction pursuant to the provisions of Order 40 Rule 7 of the Civil Procedure Rules, 2010 ( "the rules")

[5] The Plaintiffs have raised substantive matters of fact and law in opposition to the 1<sup>st</sup> Defendant's application. The injunction order was issued by this Honourable court on 8<sup>th</sup> April, 2011 on the court's understanding that the plaintiff's rights were being violated by the 1<sup>st</sup> defendant herein who was threatening to enforce the plaintiff's personal guarantees dated 8<sup>th</sup> November, 2006 and to dispose of the plaintiffs property known as L.R No. 209/4300/77 by sale in exercise of its statutory power of sale. In the case of **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & Another (2004) eKLR** the Hon. Justice Warsame held:-

***“An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter.***

***The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”***

[6] According to the Plaintiffs, the 1<sup>st</sup> defendant has not alleged that the plaintiff is using the said orders to intimidate it. In the circumstances it would be wrong and unjust to penalize the plaintiffs by discharging the orders of 8<sup>th</sup> April, 2014 as by doing so would amount to exposing the plaintiffs to violation of their rights and/or exposing them to threat of violation of the legal rights they are seeking pending hearing and determination of this suit. In any event, this matter is not ready for hearing as all the parties herein have not complied with Order 3 Rule 2 and 11 of the Civil Procedure Rules. The parties have not even drawn, filed and exchanged witness statements. The 1<sup>st</sup> Defendant is yet to file and serve the plaintiff with its statement of defence. The pleadings have not been closed. Order 11 Rules 6 of Civil Procedure Rules is clear that the question of setting suit down is not preserve for the plaintiffs alone as the 1<sup>st</sup> defendant has a role to play. Further and more notably, the issues raised in the plaintiff's replying affidavit have not been controverted by the 1<sup>st</sup> defendant.

[7] The last point made by the Plaintiffs is that the alleged loss to the 1<sup>st</sup> defendant is economic in nature in that the injunction orders is restraining them from exercising the right of sale. However, the security is intact; if the 1<sup>st</sup> defendant were to succeed in this matter it would be able to recover its financial loss. Indeed, the persons who would suffer excessive prejudice are the plaintiff if the order of injunction is set aside. Therefore, application should be dismissed. The court should order the plaintiff to fix a hearing date of the main on priority basis.

### **The determination**

[8] It is a sad argument to hear being made in such application especially by the plaintiffs that:

***In any event, this matter is not ready for hearing as all the parties herein have not complied with Order 3 Rule 2 and 11 of the Civil Procedure Rules. The said parties***

***have not even drawn, filed and exchanged witness statements. The 1<sup>st</sup> Defendant is yet to file and serve the plaintiff with its statement of defence. The pleadings have not been closed.***

[9] The argument is not made by avowed follower of the overriding objective at all. It is a sharp bite of the statutory obligation on the plaintiff to assist the court to attain an expeditious, proportionate and just resolution of disputes. It is a negation of that duty; it is dishonest and should never be made by a party who wishes to receive or to continue enjoying an equitable remedy such as an injunction. Order 11 of the CPR and the law in general places specific, distinct and non-transferable duties on each party to progress the case. The plaintiffs cannot brag that the suit is not ready for hearing yet they have not filed and exchanged issues and witness statements. Whose duty is it to file and exchange the Plaintiffs' witness statements? Again, on the other hand, is it honest statement, in the circumstance for the Plaintiff to claim: it made efforts to fix the case for hearing? Or that there were no dates for hearing which were available? Or that the diary for the year had been closed? Such matters will ignite a sudden shock in the nervous system of a court of equity and may be treated as a deliberate attempt to provoke a challenge to the discretion of the court. The plaintiffs have not acted in accordance with the overriding objective to progress this suit to hearing. I should also state here that the issuance of an injunction does not mean the suit is successful or compromised or that it cannot be discharged. The Plaintiff must always act in good faith and work towards progression of the case to finality particularly because he has an injunction.

[10] The above is not all. I have perused the entire file and I am not able to find any return of service of summons and plaint which is in law is evidenced by an affidavit of service. There has to be accountability of the summons in accordance with law and that cannot be overemphasized. On this see that case of ABC Ltd vs. Generation Farmers & Co Ltd [2014] eKLR when the court stated that:-

***Order 5 of the Civil Procedure Rules is the supreme code that governs service of court processes in all civil proceedings under the Civil Procedure Act. Here we are concerned with service of summons and plaint. Order 5 of the Civil Procedure Rules is not a code of technicalities; rather, it is the enabler of fair trial, because, service of summons and plaint brings to the attention of the Defendant the kind of case he is faced with and for which he should defend: which is a step or procedure which cannot be supplanted merely because the Defendant had some knowledge or was aware of the existence of the case. It is not impossible that a party learning of proceedings against him may rush to put in an appearance or instruct counsel or even attend Court. An appearance was filed by MUTITO, THIONG'O & CO ADVOCATES. But such filing of appearance alone, unless it is in reply to the summons and plaint served in accordance with Order 5 of the Civil Procedure Rules, does not remove the necessity, and is not proof of service of summons. That is why Rule 15 of Order 5 of the Civil Procedure Rules requires that:***

***15(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.***

***(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.***

***Return of summons served in all cases together with evidence of service is mandatory and should be seen as a tool of accountability of court processes. Except, there is a***

*disturbing practice that has gained root in litigation in defiance of rule 15: no return of summons is made. It is only when occasion such as the one in this case arises, that parties start to appreciate the importance of rule 15 of Order 5 of the Civil Procedure Rules. I insist due deference should be shown to accountability procedures especially on service of court process because it is an important facet of fair trial and source of protection to a party who claims was not served with court process. These things I have said become important when looked at in the context of this case, and the requirement that every summons shall be accompanied by a copy of the plaint. See rule 1(3) of Order 5 of the Civil Procedure Rules. The latter statement throws me back to the necessity of a return of service within the broader sphere of fair trial. The Respondent did not file a return or affidavit of service to show summons and plaint was served in accordance with the law. The basis of default judgment is that a party failed to file appearance or defence within the prescribed period after summons and a copy of the plaint was served. And in the absence of an affidavit of service, the foundation of default judgment either for failure to file appearance or defence is scorched. Towards that end, and I will state it again, entry of appearance, does not remove the necessity of and is not proof of service of summons. I have perused the file, and found no affidavit of service of summons and plaint as required in law. Nothing shows service of summons was done and I have no choice than to agree with the Applicant that summons was not served.*

[11] I am not surprised I find no defence filed by the Defendants. It should be understood that I doubt the propriety of a suit without valid summons or where summons have not been obtained and served as by law required. All the above notwithstanding, is there justification to discharge the injunction herein?

#### **Statutory lapse of injunction**

[12] Little discussion about order 40 rule 6 of the CPR. The court had occasion to consider what this order entails in the case of **David Wambua Ngii vs. ABED SILAS ALEMBAI & 6 OTHERS [2014] eKLR** and rendered itself as follows:

#### **Lapse of injunction**

*It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure. So, a party who applies to have an injunction discharged in the circumstances obtaining in rule 6 is acting in accordance with the statutory obligation to assist the court attain the overriding objective of the law under Article 159 of the Constitution, section 1A and 1B of the Civil Procedure Rules. Except, however, an application under rules 6 of order 40 of the Civil Procedure Rules involves discretion of the court. Towards that end, I am in agreement with the observation of Munyao J in the case of *Filista Chamaiyo Sosten v Samson Mutai (supra)*. I should think factors which should guide the court in the exercise of discretion under Order 40 rule 6 of the CPR include but not limited to; 1) if the injunction was obtained by concealing facts which if were put to the judge in first instance would have affected his judgment in granting the injunction; 2) the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction; 3) the general conduct of the holder of the injunction is such that the court is impelled to discharge the injunction, and here I suggest instances where the injunction is being used to intimidate the Defendant or achieve an altogether different purpose from which the injunction was issued; 4) the sustenance of the injunction will cause an injustice, and here occurrence of substantial*

*loss to the defendant is important, for instance an injunction obtained against a company which completely halts the operations of the company will be serving a different altogether purpose from the intention of law in granting equitable relief. This list is not intended to be exhaustive. What amounts to sufficient cause will really depend on the peculiar circumstances of each case.*

[13] Munyao Sila J in **Filista Chamaiyo Sosten v Samson Mutai (2012) eKLR** stated that:-

*“I think the discretion under order 40 rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction”*

[14] Despite the myriad transgressions by the Plaintiffs, the Defendants did not also act accordingly to move the case forward. They made efforts but in light of the observations above, those attempts were not acts envisaged under order 11 of the CPR because the suit was never ready in the first place to be fixed for hearing. The Defendants also have not complied with the said order 11 of CPR- had they done so, they would be in a messianic position to blame the plaintiff of inertia. For now, there is still the necessity to sustain the injunction given the nature of the case. The economic loss the 1<sup>st</sup> Defendant claims will occur is a reason which would in ordinary cases justify discharge of an injunction especially where the Plaintiff has not been paying the loan on the pretext of the injunction. I should state that a litigant who obtains an injunction to restrain the sale of the suit property especially on the basis that there were some irregularities in or the statutory notices did not comply with the law, and uses the injunction not to repay the loan risks the injunction being discharged. When such conduct is exhibited, I think it is a stealth post-injunction behaviour that should be a ground to discharge an injunction, because it will be an abuse of the purpose for which the injunction was granted and is in the same league with the kind of conduct that Warsame J dealt with in the case of **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & Another (2004) eKLR** when the learned judge stated that:-

*“An interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where is shown that the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter.*

*The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”*

[15] However, this case has different dimensions; it alleges fraud in the procurement of the loan, thus, challenging the legality of the entire loan agreement. For that reason, there may be need to sustain the injunction but it will not be without conditions. Accordingly, I sustain the injunction on these conditions: 1) that the parties will file all the necessary documents, witness statements and issues within 30 days; and 2) the plaintiff will then apply and set down the suit for hearing within 15 days after the first 30 days for compliance in (1) above. If the plaintiffs will default on any of these conditions, the injunction will stand discharged without the necessity to apply in that behalf. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 21<sup>st</sup> day of November, 2014**

---

**F. GIKONYO**

**JUDGE**