



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 294 OF 2012**

**ERDEMANN PROPERTY LIMITED :::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE KENYA**

**RAILWAYS STAFF RETIREMENT BENEFIT SCHEME ::::: 1ST DEFENDANT**

**KENYA RAILWAYS CORPORATION ::::::::::::::::::::::: 2ND DEFENDANT**

**R U L I N G**

1. The **Notice of Motion** application before the court is dated **26th**

**September 2014** and filed by the 1<sup>st</sup> Defendant under Order 40 Rules 6 & 7, Order 51 Rules 1 & 3 of the Civil Procedure Rules, Section 1A, 1B and 3A & 63 (e) of the Civil Procedure Act.

2. The application seeks the following orders:-

4. *That Order number (C) (ii) & (iii) as granted in the Ruling of this court delivered on 12th September 2014 be and is hereby discharged.*
5. *That in the alternative, Order number (C) of the orders granted in the Ruling of this Court delivered on 12th September 2014 be and is hereby varied to the effect that the injunction issued against the 1st Defendant's properties, LR No. 209/6829, Makongeni Estate Nairobi and LR No. 1/437, Kindaruma road, Nairobi be and is hereby discharged.*
6. *That in the further alternative Order number (C) of the orders granted in the Ruling of this Court delivered on 12th September 2014 be and is hereby varied to the effect that the injunction issued against the 1st Defendant's properties, LR No. 209/6829, Makongeni Estate Nairobi and LR No. 1/437, Kindaruma road, Nairobi be and is hereby discharged and be substituted and or replaced with all that 1st Defendant's property known as LR No. 1/420, Kindaruma Road, Nairobi.*
7. *That Order number (d) of the orders granted in the Ruling of this court delivered on 12th September 2014 be and is hereby varied and set aside as against the 1st Defendant.*
8. *That the orders of injunction granted on 1st September 2014 do remain in force for a period of 12 months in compliance with Order 40 Rule 6 of the Civil Procedure Rules.*
9. *That the costs of this application be in the cause.*

3. The application is premised on the grounds stated therein and is supported by an affidavit of

**James I. Olubayi** dated **26<sup>th</sup> September 2014** with its many annexures. The application seeks a review of the Order number (c) and (d) of this court on **12<sup>th</sup> September 2014**. The said orders (c) and (d) were as follows:-

- c. ***A temporary injunction pending the hearing and disposal of the suit restraining the 1<sup>st</sup> Defendant whether by themselves, their agents, servants, Trustees or employees from selling, transferring, alienating, charging or pledging or in any other manner disposing off the following properties:-***
    - i. ***L.R No.209/11953 – Nairobi Railways Club.***
    - ii. ***L.R. No.209/6829 – Makongeni Estate Nairobi.***
    - iii. ***L.R. No. 1/437– Kindaruma Road, Nairobi. (Properties mentioned in (ii) and (iii) above are in replacement of the tender property L.R No. 209/8760 which the 1<sup>st</sup> Defendant has already sold.)***
  - d. ***The costs of this application is hereby assessed at 60% and given to the Plaintiff applicant against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.***
4. The application is opposed by the Plaintiff who filed a Notice of Preliminary Objection on **6<sup>th</sup> October 2014** and a Replying Affidavit sworn by **Ze Yun Yang** on **13<sup>th</sup> October 2014**. In its Notice of Preliminary Objection the Plaintiff/Respondent states that:-
1. ***That the issues that the Applicant has raised are res judicata.***
  2. ***That the application is incompetent, misconceived and a non-starter.***
3. ***That the application is an abuse of the process of the court and should be dismissed with costs.***
5. There are far too many applications and Rulings in the suit subject matter, which have provided the background of the matters herein and so I will not go into the details of the history of the application, save that I will proceed from the Ruling of this court on **12<sup>th</sup> September 2014**.
6. This application seeks to vary the orders (c) and (d) of the Ruling of **12<sup>th</sup> September 2014**. Before I go deep into the matter I do note, as I had said earlier in the said Ruling, that the **1<sup>st</sup> Defendant/Applicant** has made it its business in making one application after another, in this matter notwithstanding that those applications can be consolidated and made together. Before this court rendered the Ruling aforesaid on **12<sup>th</sup> September 2014** the **1<sup>st</sup> Defendant/Applicant** was aware which of its properties were free and which were already engaged to be sold to third parties.

The **1<sup>st</sup> Defendant/Applicant** never made any submissions to the court to inform the court of these facts. The properties now alleged to be engaged to be sold to third parties have been so engaged for a period of over one year now. The **1<sup>st</sup> Defendant/Applicant** now seeks to have some of the attached properties substituted with others. However, the Applicant has not attached a valuation report to show that the properties sought to be substituted for the attached ones are of same or common or approximate value. This court, in the absence of any valuation report, has no way of knowing the value or worth of those properties now sought to be substituted. It has also not escaped the attention of this court that the attached properties LR 209/11953; LR 209/6829 and LR 1/437 are properties of unique character, peculiar location and are next to the city centre and their value cannot be equated with the value of LR 1/420 which is said to be a property in a different location. In the Ruling of this court of **12<sup>th</sup> September 2014**, the court observed that:-

***“ . . . The Plaintiff’s claim is a large sum of over 26 billion. No entity can claim to have this kind of money on the ready. The claim distinguishes itself from other claims. The court must be in a position to understand the Plaintiff’s fears which include the fact that although the claim is quantified, unless preservative injunctive orders are given to preserve the existing property of the Defendants, it may be impossible for the Defendants, after the hearing process of the suit to satisfy a decree in favour of the Plaintiff . . . ”***

That principle must still guide the court.

7. I have also noted that upon filing of this suit, the Honourable Justice Mabeya issued an injunction restraining the 1st Defendant from disposing several of its properties which include LR. No. 209/6829 and LR No. 1/437. The 1st Defendant made an application for review of the said order on 5th October 2012 and by a Ruling dated 3rd December 2012, the Honourable justice Mabeya reviewed his orders and stated.

***“Accordingly, I allow the application and order that order number 3 of the orders granted by this court on 23rd May 2012 is varied to the effect that the injunction issued against all the 1st Defendant property listed their are discharged save for LR No. 209/6829 Makongeni Estate Nairobi, 209/6502 Muthruwa Estate (Save for the portion being purchased by the Ministry of Local Government) 1/437 Kindaruma Road Nairobi and 209/11953 Nairobi Railways club, Nairobi . . .”***

This order was in force as at the time the 1st Defendant purported to enter into the sale of the very same properties the court had enjoined it from selling and the 1st Defendant acted in contempt of court when it entered into the sale arrangements, one month after an express order restraining the said exercise. Indeed, in realisation of the fact that there was a valid order of the court, which had been registered against the said properties, the Defendant applied for the discharge of the said orders and removal of the caveat registered against the said properties by its application dated 29th April 2013. This shows in the least, that the current application is not made in good faith.

8. The impression created by the 1<sup>st</sup> Defendant/Applicant is that it is becoming a vexatious litigant who has to date filed five (5) applications in a span of two (2) years, and this trend is not good and can easily amount to an abuse of the process of court.
9. It is important that the 1<sup>st</sup> Defendant/Applicant appreciates that the Plaintiff has a case which this court has stated raises a *prima facie* case capable of succeeding, and that the Plaintiff's interest must also be secured. The 1<sup>st</sup> Defendant/Applicant appears to be rapidly disposing off all its assets under the reasons that it is settling its pensioner's dues. One is left wondering what will happen when all the properties are sold. I think the record of this court from the inception of this suit shows that the court has been very lenient to the 1<sup>st</sup> Defendant/Applicant by at least in two occasions varying the given orders to favour the 1<sup>st</sup> Defendant/Applicant. Instead of appreciating the same the 1<sup>st</sup> Defendant/Applicant now appears to be abusing the process of this court. A review must be based on grounds known in law, including the availability of new facts or evidence previously unknown to the Applicant, and those facts or evidence, when they became known, the Applicant diligently proceeded to court to ask for a review. None of those grounds apply in this matter. All the facts allegedly necessitating the review have been in full knowledge of the Applicant at least for one year, and part of the request has been made in previous proceedings including in the Notice of Motion dated 5<sup>th</sup> October 2012.
10. The other issue is whether the injunction should be discharged on account of agreements with third parties? The Defendant has requested the court to discharge the injunction over LR No. 209/6829 Makongeni Estate and LR No. 1/437 Kindaruma Road on account that the properties had been disposed off before the court had imposed an injunction over them. In reply, the Plaintiff raised there issues. One, that the 1st Defendant has not adduced any form of document that supports its assertion that LR No. 209/11953 and LR No. 209/6829 have been subject of any transaction with third parties either before or after the imposition of the injunction by the court. Two, the documents annexed to the supporting affidavit of James Olubya at pages 9 – 43 relate only to the Advertisement to Tender for the sale of LR 1/437. Prominently missing from the same bundle is any proof of award of the tender or proof of receipt of any monies from “Flexus Limited”. The Plaintiff submitted that there is therefore no evidence to show that the 1st Defendant has entered into any form of binding agreement with third parties for the disposal of the subject properties to support its assertion. Three, in respect to LR 1/437, the Plaintiff submitted that the 1st Defendant has alleged that at the time of entering into sale agreement with Flexus Estates Limited, the said property was not under any injunction. The Plaintiff submitted that the

same is not true, and is meant to mislead the court. The Plaintiff stated that it was granted an injunction order (*ex-parte*) on 23rd May 2012. This order was later varied by a Ruling on 3rd December 2012. The varied injunction order was to the effect that the properties would be preserved until the determination of the suit. Therefore, the orders were still in force at the time it advertised the tender for the sale of LR 1/437. The Defendant's assertions are therefore merely misleading and ought not be entertained, submitted the Plaintiff.

11. I have considered the Plaintiff's above response which make greater sense to me. But assuming that indeed the LR No. 6829 and LR No. 1/437 are subject of impending sale, this court notes that those sales have not gone through, and the rights of the said third parties have not crystallised in a manner to defeat the rights of attachment. The 1<sup>st</sup> Defendant/Applicant cannot escape legal consequences which arise from its transactions with parties it engages. Those parties include the Plaintiff herein and the said third parties. The attachment orders given to the Plaintiff against the said properties have registered first in time, and the alleged third party rights cannot be deemed to supersede a right given by this court before the alleged third party rights crystallised. It is my considered view that this application to the extent that it seeks to review the orders of this court of 12<sup>th</sup> September 2014 is an abuse of the process of this court, is *res judicata* in various particulars, and paints the Applicant as a vexatious litigant. In that regard, I uphold the Notice of Preliminary Objection by the Plaintiff/Respondent to the extent that the Preliminary Objection seeks to stop the review of the attachment orders issued on 12th September 2014.
12. The other issue was on the duration of the injunction. This court stated that the injunction shall be in place pending the hearing and the determination of the suit. The 1<sup>st</sup> Defendant/Applicant now seeks to restrict that duration to the 12 months as provided under Order 40 Rule 6. Order 40 Rule 6 states 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.”***

The Court of Appeal has in the case of **Geroge Orango Orago – Vs – George Liewa Jagalo & 3 Others, [2010] eKLR** stated that the purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property. Further in the case of **Mwafa Court Limited – Vs – Kenya National Highways Authority & 5 others [2014] eKLR**, Justice Nyamweya noted the court's discretion in granting injunctions which span of periods longer than twelve months.

13. The last prayer by the Applicant was that I release the Applicant from the order to pay costs of the application whose Ruling was delivered on 12<sup>th</sup> September 2014. I found this prayer out of step. The general rule is that the costs of an application or suit follows the event. The winner of an application is entitled to costs as a matter of right unless for good reason the court orders otherwise. In that application, the court had assessed the entire costs at 60% to be paid by both Defendants equally. This means that the Applicant can only pay 30% of the said costs. This court has not been convinced that the said order is unreasonable or oppressive, or that the Applicant is a pauper who needs financial assistance. Instead, this court has been treated to transactions involving billions of Kenya shillings, in which the Applicant is engaged. If the Applicant seeks to be declared a pauper so as not to pay due costs, that should be a subject of a different application. I am not satisfied that any good reasons have been advanced to convince the court to spare the Applicant from paying costs of the application.
14. Pursuant to the foregoing, the only order open to this court to make is that one which dismisses the Notice of Motion application dated 26<sup>th</sup> September 2012 with costs to the Plaintiff/Respondent. It is so ordered.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Miri for the Plaintiff

Millimo and Bundi for the Defendant

Teresia – Court Clerk