



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 609A of 2012**

**ELIAKIM WASHINGTON OLWENY.....PLAINTIFF  
=VERSUS=**

**WILSON KIBOR MUTAI.....1ST DEFENDANT**

**ARAP SANG.....2ND DEFENDANT**

**RULING**

***(Application seeking order that injunction has lapsed; injunction pending in excess of twelve months; Order 40 Rule 6; application not opposed by the plaintiff/respondent; no sufficient reason shown on why injunction should remain in force; application allowed; order that injunction has lapsed.)***

The application before me is the Motion dated 14<sup>th</sup> November 2012 filed by the defendant. It is an application brought under the provisions of Section 3 and 3A of the Civil Procedure Act, Order 51 Rules 5, Order 40 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. In this application, the defendant is seeking orders that

- (a) ...
- (b) *That the honourable court be pleased to confirm that the orders of injunction granted on 3/6/2010 have lapsed.*
- (c) *That this Honourable Court be pleased to make any other or further orders as will make the ends of justice meet.*
- (d) *That costs of the application be provided for.*

The application is founded on the grounds that:

- (i) *That the Plaintiff/Respondent obtained injunctive orders on 3/6/2010;*
- (ii) *That the orders of injunction granted herein have lapsed as per the Civil Procedure Rules, 2010;*
- (iii) *That the injunctive orders no longer stand;*
- (iv) *That it is thus fair and just in the circumstances that this Honourable Court do confirm that the injunctive orders granted have lapsed;*
- (v) *That the orders are impacting negatively on the 1st Defendant/Applicant;*

- (vi) That the Plaintiff/Respondent had not come to Court with clean hands and was undeserving on the equitable remedy of injunction,
- (vii) That the Plaintiff/Respondent is abusing the orders and has proceeded to cut down trees on the parcel of land to the detriment of the 1<sup>st</sup> Defendant/applicant;
- (viii) That it is in the interest of justice and the law that the order aforesaid and discharged;
- (ix) That the Plaintiff/Respondent has sat on the orders and failed to move the Court.

The application was served upon the plaintiff's counsel but the plaintiff has filed no response to the said application.

The application was canvassed before me on the 23<sup>rd</sup> January 2013. Only Mr. M.I Buluma, learned counsel for the applicant was present. There was no appearance on the part of the firm of M/s Ogolla H.J & Company Advocates who are on record for the plaintiff. I satisfied myself that service had been properly effected upon the firm of Ogolla H.J & Company Advocates and permitted Mr. Buluma to proceed. Mr. Buluma took me through the application and the supporting affidavit. He argued that on the 3<sup>rd</sup> of June 2010, this Honourable Court (Angawa J.) issued an order of injunction restraining the defendant from interfering with the suit land UASIN GISHU/NGENYILEL SETTLEMENT SCHEME/448 pending the hearing and determination of this suit. He stated that the provisions of Order 40 Rule 6 provide that if the suit is not concluded within one year the injunction shall stand discharged. He argued that the plaintiff has not responded to the subject application to demonstrate why the injunction should not be discharged and urged me to allow the application.

I have considered the application which is unopposed. The provisions of Order 40 Rule 6 provide as follows :-

***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.***

It may be observed that the above provisions are in mandatory terms, i.e the injunction "shall lapse". The court however has discretion to allow the injunction to continue for "any sufficient reason." Although the court is not precluded from perusing the record and determine for itself whether it is just for the injunction to continue, I think it is for the respondent to provide reasons as to why the injunction should continue. No reasons have been provided on why the injunction should continue. I have perused the record and it is apparent that the plaintiff has not moved the court to have this matter heard. I see no reason why an order should not be made that the injunction has lapsed.

I therefore allow the application dated 14<sup>th</sup> November 2012 and order that the injunction issued on 3<sup>rd</sup> June 2010 has lapsed. Costs of this application shall be costs in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JANUARY 2013**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Ruling Delivered in the presence of

Miss. G.W. Nasimiyu of M/s Buluma & Co Advocates for the defendants/respondents.

No Appearance for the firm of M/s Ogolla H.J & Co Advocates for the plaintiff/respondent.