



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Environmental & Land Case 564 of 2012

JOHN NDUNG’U THIONGO.....PLAINTIFF

VERSUS

MICHAEL KARIUKI MWANGI.....1ST DEFENDANT

VERONICAH WAKONYO CHEGE.....2ND DEFENDANT/APPLICANT

RULING

The 2nd Defendant/Applicant filed an application dated 19/10/2012 seeking an order that the Court be pleased to discharge, vacate or set aside its orders issued on 6/9/2012. The application is premised on the grounds that the injunctive orders are adversely affecting the Applicant since construction on her property has been halted. The Applicant applied to be joined to the suit which application was allowed. Further that the Respondent was on 25/9/2012 ordered to serve the Defendants with the pleadings in the suit within 14 days of that date but that the 14 days have since lapsed and the Respondent has not served any papers. It would only be fair and just that the ex-parte injunctive order is lifted as the Respondent does not seem keen on expeditiously prosecuting his case.

The application is supported by an affidavit sworn by the Applicant on 19/10/2012. She deposes that this Court issued an ex-parte injunctive order against the 1st Defendant on 6/12/2012 which order was affixed against her plot known as Plot No. H110 Huruma Estate (Kia-Maiko) Infill, where she has been undertaking construction of residential houses. That the said order restricts any encroachment or any dealings from being undertaken on her plot which (Plot No. H110) is not the subject matter of this suit. She deposed further that her application to be joined in the suit was allowed and the Respondent ordered to amend his pleadings accordingly and serve her within 14 days which order has not been complied with. It is her disposition that the order issued on 26/9/2012 is adversely affecting her as the construction has been halted and she is suffering loss and damage. Finally that it is apparent that the Respondent is not diligent in prosecuting his application and it is only fair and just that the order issued herein be discharged.

Interestingly, the Plaintiff did not file a Replying Affidavit in response to the application but instead filed an application on 30/10/2012 dated 20/10/2012 seeking orders that the Applicant’s application and that of the Plaintiff be heard together and further that the Court be pleased to enlarge the time within which the Plaintiff may file its amended Plaintiff and accompanying documents. The Plaintiff then filed an affidavit titled, ‘*Affidavit in Support of Notice of Motion and in Reply to Veronica Wakonyo Chege’s Sworn on 19/10/2012.*’ In essence the Plaintiff filed one affidavit to serve two purposes, to respond to his application and at the same time respond to the application filed by the 2nd Defendant/Applicant herein. The said affidavit is dated 20/10/2012 and is sworn by Franklin I. Omino who is the counsel of the

Plaintiff seized of the conduct of the suit. It his disposition that on 25/9/2012 he consented with the Defendants that he does file and serve the Plaintiff's amended Plaint within 14 days. He deposed that on 30/9/2012 he lost his half- sister and had to proceed to Kisumu County for burial preparation which was conducted on 14/10/2012 and in the circumstances he was unable to abide by the terms of the consent within the premised period. He deposed that the Defendants would not be prejudiced if the application for enlargement of time is granted. In respect of the 2nd Defendant's application, Counsel deposed that the substratum of the orders recorded on 26/10/2012 does not provide for discharge, vacation or setting aside of the orders as the orders issued were not injunctive in nature but merely maintenance of the status quo. Furthr that the orders recorded were by consent and cannot therefore be overturned by the means of proposed by the 2nd Defendant.

The 2nd Defendant's application was argued orally in Court. Counsel for the 2nd Defendant submitted that the 2nd Defendant is the registered proprietor of H110 Huruma Estate (Kia Maiko Infill) where she has commenced construction of residential houses and she does not in any way claim ownership, knowledge or has any interest in Plot No. X38 Huruma. Therefore the orders issued against the property of the 2nd Defendant are adverse to her, which resulted to her filing an application to be joined in the suit which was allowed and by consent of all the parties recorded it was agreed that the Plaintiff shall file the suit within 14 days. Counsel submitted that 14 days lapsed thus the Plaintiff failed to comply with the consent order.

It was counsel's submission that the 2nd Defendant's application is not opposed by the Plaintiff. Counsel referred to the affidavit sworn by the Plaintiff's counsel on 20/10/2012 as an Affidavit in Support of the Plaintiff's application for enlargement of time within which to file an amended Plaint and not a Replying Affidavit in response to the 2nd Defendant's application. Counsel submitted that an application can be responded to either through a Replying Affidavit, Preliminary Objection or Grounds of Opposition. Counsel submitted that an affidavit in support to an application and that in response to an application are two distinct affidavits.

Counsel submitted further that there was no reason advanced as to why the Plaintiff failed to file the amended Plaint within the requisite time. It was his submission that the Plaintiff's application was a reaction to the 2nd Defendant's application. Further that the Plaintiff is indolent by virtue of the status quo order and also the injunctive order issued on 6/10/2012 which are in his favour. It was counsel's submission that there is a stop to the development by the Plaintiff at the expense of the 2nd Defendant who does not lay claim to the suit property which is Plot No. X38. Counsel urged the Court, in line with Order 40 Rule 7 of the Civil Procedure Rules, to discharge the orders issued on 6/9/2012.

In response, Counsel for the Plaintiff defended his affidavit stating that it served both supporting his application and replying to the 2nd Defendant's application. It was his submission that there was nothing irregular or unlawful about the said affidavit. It was counsel's submission that the orders issued on 6/9/2011 were not granted *ex-parte* as there was an appearance by the Defendant and further that the order ceased to be operative on 25/9/2012 when in the presence of all the parties a consent order was recorded. Further that content of the consent order was that the status quo be maintained. Therefore, the order that is in operation as from 25/9/2012 is in the nature of status quo which is distinct and different from those of an injunction.

Counsel submitted that Order 40 in its entirety and in particular Rule 7 is with respect to injunctions and not status quo. It was his submission that there is no order capable of being discharged dated 6/9/2012 as the same was replaced by an order of status quo dated 25/9/2012. Counsel reiterated that the status quo order was by consent of all parties and it is therefore incorrect to state the same is in favor of the Plaintiff. Counsel stated further that the status quo order was not conditional as it did not make a provision of how and/or when the said order could lapse or be varied.

Counsel also submitted that the 2nd Defendant sought to be enjoined in this suit yet she states that she has no claim or interest in Plot No. X38 and that she is the registered owner of Plot No. 110 whereas the Plaintiff in his pleadings is with respect to Plot No. X38. The question that needed to be answered is what interest the 2nd Defendant has in the suit.

In response to these submissions, Counsel for the 2nd Defendant reiterated that their application dated 19/10/2012 is unopposed as the affidavit filed was in support of the application for enlargement of time and not a Replying Affidavit in response to this application.

On the issue of the 2nd Defendant's having no interest on Plot No. X38, Counsel stated order issued on 6/9/2012 was issued against Plot No. H110 and that the status quo order dated 25/10/2012 was issued to

extend the restraining order issued on 6/9/2012. Counsel urged the Court to discharge the order issued on 6/9/2012 as the Court has discretion to do so. Counsel also submitted that the Plaintiff's application was filed long after the 2nd Defendant filed this application. The issues for determination are whether this application is opposed in view of the affidavit sworn by the Plaintiff/Respondent, and secondly whether the Applicant has established sufficient grounds to discharge the injunction order issued on 6/9/2012.

Affidavit sworn by the Plaintiff/Respondent's counsel on 20/10/2012

As stated earlier, this affidavit is titled '*Affidavit in Support of Notice of Motion and in Reply to Veronica Wakonyo Chege's*' and according to the Plaintiff's counsel, the said affidavit serves two purposes; support the Plaintiff's application for enlargement of time within which to file and serve an amended Plaintiff, and in response to the application filed by the Applicant.

Order 51 rule 14(1) of the Civil Procedure Rules provides for the documents which a respondent to an application may file. It states;

"14. (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents -

(a) a notice of preliminary objection: and/or; Court.

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;"

The rule provides that such a respondent can file one or a combination of either of the aforementioned documents. It is my view that a combination does not mean that either of the two documents can be drawn as a one document. Furthermore, there is no mention of a supporting affidavit being part of either of the documents to be filed by such a respondent in such an instance.

The Court is also alive to the provisions of Order 19 Rule 7 of the Civil Procedure Rules which is to the effect an irregularity in the form of an affidavit should not be a basis for striking out an affidavit. It reads;

"The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."

The affidavit in question has no issue with its form, the parties have been correctly identified and its title has been properly described to be of this suit. The content, however, is what is in issue. The Plaintiff's advocate has supported one application and responded to another in one document. This in my view is a defect not of form but of substance and in that regard the provision of Rule 7 of Order 19 cannot be used to salvage this affidavit. I therefore find that this application is unopposed.

Whether Applicant has established sufficient grounds to discharge injunction orders

The 2nd Defendant/Applicant's contention is that the injunction orders were issued on 6/9/2012 and that the said orders were affixed on to her plot. Her submission is that the injunctive order is in respect of Plot No. X38 which she does not claim ownership nor has any interest over. However, that the said order was affixed on her Plot which is Plot No. H110 which is distinct from the one the injunction order is in respect of. This application, however, is for discharging the injunctive orders on the basis that the Plaintiff/Respondent failed to comply with the terms of the consent recorded in court on 25/9/2012, to wit; file and serve an amended Plaintiff within 14 days from the said date. It is important to note that from the date of the consent (25/9/2012), 14 days within which the Plaintiff was meant to file and serve the amended Plaintiff lapsed on 10/10/2012. The Plaintiff filed an application for enlargement of time within which to file the Amended Plaintiff on 30/10/2012 after this application was filed on 23/10/2012. Suffice to say, the Plaintiff was jolted into action by the filing of this application. This Court made a finding earlier in this ruling that the affidavit sworn by the Plaintiff's advocate was

incurably defective. In essence, this application stands unopposed. Even though this application is not opposed, the law requires that I satisfy myself that the Applicant has established sufficient grounds to discharge the injunction orders. In doing so, it is imperative to note the circumstances that led to the granting of the injunctive orders. From perusing the Court record, I note that this Court granted the temporary injunctive order on 6/9/2012 in respect of Plot No. X38 Huruma until 25/9/2012 which order was extended by way of a status quo order entered into by consent of all the parties. Subsequent to issuing the temporary injunction order, the 2nd Defendant/Applicant filed an application for joinder to the suit on the basis that the injunction order, though in respect of Plot No. X38 Huruma, was affixed onto her property which is known as Plot No. H110 thus stopping her from dealing with her property. Notably, these plots are in the same area, Huruma situate in Kia-Maiko. On 25/9/2012 when the application of joinder was scheduled for hearing, all the parties recorded a consent allowing the 2nd Defendant/Applicant be joined, the Plaintiff to amend his pleadings according, the Defendants given corresponding leave to respond and in the meantime, status quo be maintained. In seeking temporary injunction orders, the Plaintiff annexed documents including letter of allotment and agreement for lease to show that he is the lessee of the said Plot No. X38 from the City Council of Nairobi, and on the strength of these documents, the Court issued temporary injunctive orders. I note that the Applicant has not supplied any title documents to show the existence and ownership of Plot No. H110. Furthermore, the Applicant has not exhibited the order that allegedly affixed on her property by the Plaintiff. Notably, the exhibit annexed to the Applicant's affidavit sworn on 19/10/2012 marked "VWC1" is an order dated 31/8/2012 marking a suit in the Chief Magistrate's Court (CMCC No. 4399/2012) withdrawn, and not the temporary injunction order issued in this suit. There is also the question of how an order in respect of one plot can affect another plot allegedly distinct from the one the order is issued against. Could there be a possibility that these plots though described differently are in fact the same plot? Obviously, the Court cannot make a finding on this aspect at this stage. There needs to be evidence adduced, which can only be done at trial, to enable the Court to make a proper finding. The purpose of a status quo is to preserve the subject matter of the suit pending determination. In order for the Court not to make a finding in futility, it is my considered view that the status quo entered into by consent of all the parties on 25/9/2012 and recorded as an order of the Court does remain in force pending the hearing of the suit. This was the finding of the Court in the case of **Rosebella Ndumi Mbithi V Jonathan Mbithi Nthuka & 3 Others [2012] eKLR**

"The main purpose of a preliminary injunction is to protect the plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful, in considering applications for preliminary injunctions, not to determine any controverted right. The aim is to prevent a threatened wrong or the doing, by one of the parties to a litigation, an act which might threaten or endanger the rights of the plaintiff."

It is my finding that the Applicant has not established sufficient grounds for this Court to discharge the temporary injunction order issued on 6/9/2012. In that regard, I hereby dismiss the Applicant's application dated 19/10/2012. In respect of costs, since this application was prompted by the slackness on the part of the Plaintiff's advocate, I order that the costs of this application shall be borne by the Plaintiff's advocate.

Moving forward and for purposes of expediency, I hereby direct the Plaintiff to file and serve the Amended Plaint within 7 days from the date of this ruling. The Defendants shall have corresponding leave to file Amended Defence or Defence (*as the case may be*) within 14 days of receipt of the Amended Plaint. The Plaintiff should then set down the suit for hearing as soon as possible, thereafter.

Orders accordingly.

Dated, signed and delivered this **20th** day of **March** 2013

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff/Respondent

.....For the 1st Defendant

.....For the 2nd Defendant/Applicant

.....Court Clerk