



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 597 of 2009**

**PRAMAN LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS  
ASHNA RAIKUNDALIA**

**T/A RAIKUNDALIA & CO. ADVOCATES.....DEFENDANT/RESPONDENT**

**RULING**

This is an application filed by the Plaintiff/Applicant dated 9/12/2011 brought under Order 40 Rule 7 and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks orders that this Court be pleased to reinstate the suit and to discharge the orders issued on 16/12/2009 and lodged in the Land Registry on 12/1/2010 against the property known as L.R No. 21688/5 (I.R No. 84968/4) Nairobi.

The application is premised on the grounds that the Applicant is the registered proprietor of that parcel of land known as L.R No. 21688/5 (I.R No. 84968/4) (*hereinafter referred to as the suit property*). That the Applicant on 24/11/2009 filed an application seeking injunctive orders against the Respondent which order was issued by the Court on 16/12/2009 when after the order was lodged and registered on 12/1/2010 against the suit property. The Defendant against whom the order was issued cannot be traced as confirmed by the Law Society of Kenya and that there is a possibility that she could have left the jurisdiction of this Court. Consequently, the injunctive order issued on 16/12/2009 has since overtaken by events. Further that the Applicant withdrew the entire suit against the Respondent on 26/1/2011. However, the Applicant is unable to deal with the suit property since there is an order registered against the title of the said property. It is just and equitable that the caveat registered against the suit property be lifted.

The Application is supported by an affidavit sworn on 9/12/2011 by Pravin S. Patel who deposed that he is the Director of Praman Limited. He deposed that Applicant is the registered proprietor of suit property and that the Respondent was at all material times the advocate acting for the Applicant in a transaction leading to the purchase of the suit property. It was his disposition that filed suit for an injunction to compel the Respondent to return the title deed to the suit property which he has forwarded to her to complete a land transaction. He deposed that he obtained an injunctive order restraining the advocate from selling the said property pending the hearing and determination of the suit, which was lodged and registered against the title. However the Respondent could not be traced having taken out her last practicing certificate in 2007 as confirmed by the Law Society of Kenya and has never renewed the same since. Consequently, he instructed his advocate to withdraw the suit against the Respondent but he is now unable to deal with the suit property with the caveat in place.

In the circumstances, the deponent stated that he wished to have the suit reinstated and to have the orders

and caveat against the said title lifted. He deposed that the Respondent would not be prejudiced in any way should the suit be reinstated. He also stated that the caveat lodged no longer served any purpose.

This application was served upon the Respondent by substituted service through a newspaper advertisement in The Standard Friday, 7<sup>th</sup> December 2012 at Pg. 74 on being granted leave to effect substituted service by this Court on 28/9/2012. Despite such service, the Respondent has not filed a pleading in response to this application. Consequently, the application proceeded *ex-parte*.

### ***Reinstatement of Suit***

The Applicant filed a Notice of Withdrawal of Suit under Order 25 Rule of the Civil Procedure Rules. This notice was filed after the Applicant obtained temporary injunctive orders against the Respondent restraining her from selling, transferring or in any way alienating the Applicant's property known as L.R. No. 21688/5 pending the hearing and determination of the suit. It should be noted that these orders were granted *ex-parte* for reasons that despite the application having been served to the Respondent's office, the Respondent failed to enter appearance and/or file a response to the the said application.

Order 25 Rule 1 of the Civil Procedure rules permits the withdrawal of a suit. However, there is no provision for reinstatement in Order 25. The Plaintiff has however brought this application under inter-alia Section 3A of the Civil Procedure Act which is the saving section of the inherent powers of the Court. This section is usually invoked when no other provision caters for that particular situation. See Nambuye J. (*as she then was now JA.*) in **David Manyara Njuki v Afraha Educational Society & 3 Others [2000] eKLR**. Section 3A reads,

*“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court.”*

This matter has proceeded *ex-parte* despite service being effected upon the Respondent. Essentially, there can be no prejudice occasioned to the Respondent if this suit were reinstated. The nature of the suit is that there is an order lodged and registered in the Lands Registry with respect to the Applicant's property known as L.R No. 21688/5 (I.R No. 84968/4) Nairobi. This order emanated from the actions of the Respondent of failing to return the original title documents of to the said parcel belonging to the Respondent. As stated earlier, the Respondent failed to enter appearance to respond to the Plaintiff's allegations. In exercising the inherent powers given to this Court pursuant to Section 3A and in the interest of justice I make a finding that this suit ought to be reinstated.

### ***Discharge of an Injunctive Order***

Order 40 Rule 7 of the Civil Procedure Rules Order gives the Court the discretion discharge, vary or set aside an order of injunction where a party dissatisfied with such order makes an application to that effect. *“In such an application, the Applicant has to show reasons for being dissatisfied. Such an Applicant must show, inter-alia, that the conditions prevailing at the time of making the order have changed or are different from those prevailing now”*. Mabeya J. in **Bell Atlantic Communications Ltd & Another V Standard Chartered Bank Kenya Ltd [2012] eKLR**

The orders sought to be discharged were obtained by the same party who wants them discharged – the Applicant. At the time of the application for injunction orders, the Applicant averred that the Respondent was in possession of original title documents of the Applicant Company's property and had declined to return the same to the Applicant despite several demands. Further the Applicant stated that it was apprehensive that the Respondent was likely to dispose off the said property, being in possession of the original title documents without its knowledge and consent. On that basis this Court (Sitati, J.) issued a temporary injunctive order restraining the Respondent. These orders, according to the Applicant, was lodged and registered against the Title at the Lands Registry.

The basis for the injunction has not changed. What has since transpired is that the Respondent has no interest in responding to the allegations made by the Applicant. Whilst the injunction order is protecting

the suit property from any likelihood of it being alienated in manner by the Respondent, according to the Applicant, it is now impeding it from dealing with the said property. That is the dissatisfaction the Applicant has by the injunction order issued by this Court. It is my view that the Applicant has made sufficient case for the discharge of the injunction granted on 16/12/2009.

According, I allow the Applicant's application dated 9/12/2011 in terms of Prayers 1 and 2 of the said application. Costs of this application shall be in the cause.

**Dated, Signed and Delivered this 20<sup>th</sup> day of March 2013**

**L.N. GACHERU**

**JUDGE**

**In the Presence of:-**

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

..... Court Clerk