



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCC 79 OF 2012

JANE WAITHERAPLAINTIFF

VERSUS

JOSEPH KARIUKI MBUTHIA1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

GICHURU WA KAMUTHO.....3RD DEFENDANT

KARIUKI NGIGE.....4TH DEFENDANT

RULING

1. The plaintiff Jane Waitthera filed this suit against the Defendants Joseph Kariuki Mbuthia, National Bank of Kenya, Gichuruwa Kamotho and Kariuki Ngige on 12th March, 2012. The key prayer in the plaint is for an order of permanent injunction against the Defendants.

2. Contemporaneous the plaint, the plaintiff filed an application under certificate of urgency for temporary injunction pending the determination of the application. The said application was served upon the defendants.

3. An amended application seeking similar orders was filed on 14th March, 2012 and a temporary injunction granted *ex parte*. The application was set down for inter parties hearing on 23rd March 2012.

4. Inter parties hearing did not proceed on 23rd March 2012 and interim orders were extended. The said orders were further extended on 15th May 2012, 21st June 2012, 3rd October 2012, 30th October 2012 and 23rd November 2012.

5. When the application came up for hearing On 9th May, 2013 Mr Gathenji acting for the 1st and 4th defendants was ready to proceed with the application he had been served with i.e. the application dated 12th March, 2013. Mr Nyamwange holding brief for Mr Ikua stated that the application coming up for hearing was the one dated 14th March, 2013.

6. Directions were taken by consent that the Application dated 12th March, 2013 be disposed of by way of written submissions. A date for highlighting was given as 22nd July, 2013.

7. When I retired to chambers, I took the liberty to peruse the court proceedings. I noted that indeed an

amended Notice of Motion dated 14th March, 2013 had been filed, heard *ex parte* and a temporary injunction granted on the same date.

8. A Notice was issued to the parties and directions changed. Written submissions would now be filed for the application dated 14th March, 2013. By this time the 1st, 2nd and 4th Defendants had filed their written submissions for the Application dated 12th March, 2013. They still had not been served with the application dated 14th March, 2012. The Court again directed that the defendants be served with the application. To date the defendants are yet to be served with the said application and yet the plaintiff continues enjoying the interim orders. I am convinced that the counsel for the applicant is not serious about this application.

Order 40 Rule 4 (3) provides:

In any case where the court grants an *ex parte* injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.

9. Order 40 (3) is couched in mandatory terms. The orders enjoyed by the applicant ought to have lapsed long ago for failure to serve the pleadings. This did not happen but the court should not allow an injustice to continue. 10. In the interest of justice, I discharge the orders for injunction granted on 14th March 2012 and dismiss the amended application dated 14th March, 2012 under sections 1A 1B and 3A of the Civil Procedure Act.

11. Parties are directed to comply with Order 11 within 60 days and take a mention date in the registry.

Dated, signed and delivered in open court this 20th day of December 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Murithi holding brief for Mr Kiburi Kamonjo for 2nd Defendant

Mr Otieno holding brief for the plaintiff

N/A for 1st & 4th Defendants

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE