REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 83 OF 2012

DR. JANE WAMBUI WERU.....PLAINTIFF

VERSUS

OVERSEAS PRIVATE INVESTMENT CORPORATION....1ST DEFENDANT

HARVEEN GADHOKE.....2ND DEFENDANT

DANIEL MUTISYA NDONYE.....3RD DEFENDANT

JOHN PAUL NJOROGE.....4TH DEFENDANT

JOPA VILLAS LLC.....5TH DEFENDANT

RULING

On 10th February 2012, Ms. Dawai appeared before me in respect of the application dated 10th February, 2012. The orders sought in the said application are as follows:

1) That this application be certified as urgent and be admitted to be heard ex-parte in the first instance.

2) That service of this application be dispensed with in the first instance as the object of this application and the suit will be defeated should the suit property be sold.

3) That the 2nd and 3rd defendants be restrained whether by themselves, their agents and or servants or otherwise howsoever from acting or purporting to act as receivers and/or managers of the suit property and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of the suit property, pending the hearing and determination of this application.

4) That an order for injunction be issued restraining the defendants by themselves, servants or any of them or otherwise from intermeddling in any way whatsoever with the suit property either by selling, advertising for sale and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the land known as L.R. No. 27253/42 pending the hearing and determination of this application.

5) That an order for injunction be issued restraining the defendants by themselves, servants or any of them or otherwise from intermeddling in any way whatsoever with the suit property either by selling, advertising for sale and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the land known as L.R. No. 27253/42 pending the hearing and determination of this suit.

After hearing her and perusing the certificate of urgency, application and the supporting affidavit, I was satisfied that the application was urgent and in the exercise of the powers conferred upon the Court under the provisions of Order 40 rule 4(1) of the Civil Procedure Rules, I directed that the matter be heard *ex parte* after which I granted temporary orders of injunction as prayed in prayer 3 of the said Motion. As is usually the case which such orders and pursuant to the provisions of Order 40 rule 4(2) I directed that the said application be served for hearing inter partes on 29th February 2012.

On 29th February 2012, Mr. Gatheru appeared on behalf of the plaintiffs while Mrs Opiyo appeared on behalf of the 1st, 2nd and 3rd defendants. Mr. Gatheru informed the court that he had been instructed in the matter 2 days before and having perused the documents on record was of the opinion that an amendment was necessary. He also informed the Court that he had had the courtesy of calling Mr. Ojiambo, a senior counsel who is also a senior partner in the firm of Kaplan & Stratton, the firm appearing for the 1st to the 3rd defendants herein and floated some proposals but was informed by Mr. Ojiambo that the later would consult his client and come back to him. However, by the time of coming to court he had not heard from Mr. Ojiambo. Learned counsel, in the circumstances applied for a mention date within 21 days. In the alternative he applied for a two-week adjournment.

The application was strenuously opposed by Mrs. Opiyo who informed the court that she was unaware of any negotiations in the offing and that though the *ex parte* order was served on the receiver, no other documents were served with the said Order and hence the injunctive orders had lapsed and that this was just an attempt to extend the *ex parte* orders. She further submitted that her client was unwilling to entertain any further negotiations as similar suits had in the past been filed and dismissed. In conclusion, she submitted that although she was amenable to an adjournment, she was not prepared to accede to the extension of the interim orders.

Mr. John Njoroge, the 4th defendant appeared in person on that date applied for time to enable him seek legal representation. He, however, had no objection to the extension of the interim orders.

After considering the submissions I acceded to the application for adjournment and directed that the application be heard *inter partes* on 29th March 2012. Leave was also granted to the plaintiff to file a further affidavit together with written submissions within 10 days while the defendants were to respond thereto within 14 days of service thereof.

With respect to the extension of interim orders, I was of the opinion that since there was no evidence that the provisions of Order 40 rule 4(3) of the Civil Procedure Rules were

complied with, there were no orders capable of being extended. I accordingly, made no orders with respect to extension of the same.

The court is unaware of what became of the said negotiations. However, on 7th March 2012, Mr. Gatheru appeared before me in the afternoon under certificate of urgency with a fresh application dated the same day. The said application sought the following orders:

1. That this application be certified as urgent and be heard ex-parte in the first instance.

2. That an order for injunction do issue restraining the defendants by themselves, their agents or any one of them from interfering or meddling in any way with the suit property L.R. No. 71497 with a title No. 59854 Registered I. R. No. 3456/45 either by sale, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the application herein.

3. That this Application be consolidated and heard together with the Plaintiff's application dated 10th February, 2012.

4. That an order for injunction do issue restraining the Defendants by themselves, their servants, agents or any one of them from interfering or meddling in any way with the suit property L.R. No 71497 with a title No. L.R. 59854 Registered I.R. No. 3456/45 either by sale, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the suit herein.

5. That an order be issued for the preservation of the suit property L.R. No. 71497 with a title No. 59854 Registered I.R. No. 3456/45 pending the determination of this suit.

6. That the costs of this application be costs in the cause.

Although the application was meant to be heard *ex parte*, Mrs Opiyo somehow got wind of the application and was present in Court. Mr. Gatheru opposed Mrs. Opiyo's participation in the proceedings on the ground that at that stage the proceedings were *ex parte*.

I must here point out that the general rule is that applications are to be heard *inter partes* unless the court is satisfied under the proviso to Order 51 rule 3 that "**the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief"**. The reason for the requirement for service is premised on the rules of natural justice that a party should not be condemned unheard and that before orders adverse to a party's interests are made, an opportunity must be afforded to the party likely to be affected thereby to be heard. Of course there is a difference between saying that an opportunity be afforded for hearing and that a party must be heard. Accordingly, there is no reason why a party cannot be afforded an opportunity of being heard even in cases where an application is expressed to be *ex parte* at that stage unless there is an express legal provision that such proceedings are *ex parte*. Accordingly, I permitted Mrs. Opiyo to address the court.

Having heard counsel for the parties I directed that, in light of the allegations that on 29th February 2012 the Court was misled in not extending the interim orders, the matter be listed for hearing on 9th March 2012.

On 9th March 2012 Counsel for the parties appeared before me and I expressly directed that since the application dated 10th February 2012 is fixed for hearing on 29th March 2012, parties should restrict themselves to the issue whether the court should reinstate the interim orders, in light of the foregoing allegations.

I must, say with due respect to counsel for the parties that that direction went unheeded and counsel plunged head into the prosecution of both applications including the one listed for hearing on 29th March 2012.

I, however, out of respect and courtesy to counsel listened to their submissions. However, this ruling is limited to the issue whether or not, in the circumstances of this case, I can reinstate the orders which had lapsed by operation of the law.

Firstly, it is to be noted that there is no express prayer in the application dated 7th March 2012 seeking the reinstatement of the said orders. Instead, the prayers sought, as correctly submitted by Mrs. Opiyo, are for fresh injunctive orders. Without withdrawing the application dated 10th February 2012, I hold that the filing of the application dated 7th February 2012 amounts to an abuse of the process of the court. Nothing would have been easier for the plaintiffs than to amend the existing Notice of Motion to reflect the changed circumstances, if any, rather than to bombard the court with a similar application seeking in effect the same orders.

It has been held time and again that it is an abuse of the court process to institute several proceedings in order to challenge the same action and the Court has inherent jurisdiction to prevent such abuse. One only needs to refer to the cases of **BILLY NGONGAH VS. KHAN & ASSOCIATES CIVIL APPEAL NO. 104 OF 2001; RICHARD SAIDI VS. SEMBI MOTORS CIVIL APPEAL NO. 9 OF 1991** and **ARBUTHNOT EXPORT SERVICES LTD. VS. MANCHESTER OUTFITTERS NAIROBI HCCC NO. 2252 OF 1989.**

In the case of **STEPHEN SOMEK TAKWENYI & ANOTHER VS. DAVID MBUTHIA GITHARE & 2 OTHERS NAIROBI (MILIMANI) HCCC NO. 363 OF 2009** Kimaru, J dealing with the issue of abuse of the process of the Court stated as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

It is my view and I so hold that the filing of the application dated 7th March 2012 does not only amount to an abuse of the process of the court but also goes contrary to the spirit of sections 1A and 1B of the Civil Procedure Act and the Court has inherent jurisdiction reserved under section 3A to prevent abuse of its process.

It has been arguable on behalf of the plaintiffs that the Court should invoke the same provisions as well the provisions of Article 159(2)(d) of the Constitution and reinstate the injunctive orders. Whereas, I disagree with Mrs Opiyo's argument that the Court has no discretion in the matter, it is trite that discretion must be exercised on reason and not whimsically or capriciously. In order to enable the Court exercise its discretion in favour of a party, the party's seeking the court's indulgence must place sufficient material before the court to enable it do so. It has to be noted that the rules of the court must be obeyed and where the same are not complied with, it is upon the party not so complying to explain why the said rules were not complied with. In the absence of any explanation, the court simply cannot be expected to exercise its discretion favourably towards the applicant.

The provisions of 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".

The ex parte orders as already stated were granted on 10th February 2012. Under the provisions of Order 50 rule 2 of the Civil Procedure Rules "***where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time***". Again rule 8 of the same Order provides that "***in any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day***". Since 10th February, 2012, was a Friday and since Saturday is not thereby excluded, the last day for service of the said order was 14th February 2012. It follows on 15th February, 2012, unless service had been effected, there were no valid orders in place.

In the submissions made on behalf of the plaintiffs it has not been alleged that apart from the order, the other pleadings mentioned herein above were served within the stipulated time. The defendants cannot be expected to produce positive evidence to prove the negative. Apart from denying service, no more was expected from them. No affidavit of service has been filed to prove that the said documents were served and no explanation has been proffered as to why the same were never served in time. In fact I have not been addressed at all on the allegation that the court was misled in not extending the interim orders.

However, the plaintiff have sought refuge under Article 159(2)(d) of the Constitution to the effect that procedural technicalities should not be invoked to defeat the substance of the suit. Whereas I agree, that is the position, in this case, the provisions of Order 40 rule 4 as read together with Order 51 rule 3 aforesaid are not just procedural provisions but are a reflection of the requirements for compliance with the rules of natural justice which is Constitutionally entrenched under Article 50 of the Constitution. The Court of Appeal has had to deal with a provision with similar implication being Rule 76 of the Court of Appeal Rules in M S K VS. S N K CIVIL APPEAL (APPLICATION) NO. 277 OF 2005 in which it expressed itself thus:

"At the outset it is important to restate the object of Rule 76(1) of the Court's Rules. Its object in obliging an appellant to serve copies of the notice of appeal on the parties directly affected by it is that the rights of a party likely to be directly affected by the result of the appeal should not be affected without the party being provided with an opportunity of being heard…The right of hearing is a constitutional right under section 77 of the Constitution and in addition it is the cornerstone of the rules of natural justice. It follows that although Rule 76 is a procedural rule based on the Appellate Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierarchy of fundamental rights, the right of hearing ranks very high. For this reason the failure to serve the notice of appeal renders a notice of appeal incompetent including the record itself. This is because Rule 76(1) is a mandatory requirement and provides that all persons directly affected by the appeal, must be served with a notice of appeal or the Court is requested upon an application by the appellant which may be ex parte, to direct that service need not be effected on any person who took no part in the proceedings in the superior court…In the recent past both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate an overriding objective to regulate civil litigation..However, the invitation for the court to save the notice and the bulky record of appeal by applying the overriding objective "(the double O principle)" would on the contrary violate the principle itself because the cardinal aim of the principle is to enable the Court to act justly and the Court cannot act justly unless it treats all the affected parties with equality right from the beginning of the appeal process up to the end so that they can in turn marshal their arms so as to effectively articulate their rights…It is for this reason that failure to comply with rule 76 would be a violation of the overriding objective since the Court would be acting unjustly against the affected parties. In this regard, the court believes that one of the principal purposes of the "double O" principle is to enable the Court take case management principles to the centre of the Court process in each case coming before it, so as to conduct the proceedings in a manner which makes the attainment of justice, fair, quick and cheap. The court has no doubt that that a process which would result in the exclusion of the directly affected parties, would fly against this timely intervention in the management of the civil justice system in our country. Expressed differently the purpose of the "double O" principle in its application is to facilitate the just quick and cheap resolution of the real issues in the proceedings and the court cannot claim to have before it real issues where affected parties have been excluded…While the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained…With the above objective in view, the Court would obviously be the last one to worship at the altar of technicalities. All the same, having put all the above provisions into account, the court finds itself unable to save both the notice of appeal and the record of appeal because the effect of saving them would firstly be at the expense of excluding the affected parties from effectively articulating their respective positions in the appeal due to failure by the respondent to have served them, and, secondly, the Court's rules provide for dispensation in any deserving cases and there is no proof whatsoever that the respondent did give any thought to apply for dispensation…It is absolutely essential to have all the affected parties before the Court. The corridors of justice should not lock out affected parties. The right to due process is grounded in the Constitution which in turn recognises the attainment of justice as a fundamental principle. In the court's view the overriding objective cannot override fundamental principles of law. For the above reasons rule 76 is not in conflict with the overriding objective but instead it furthers some of its principal aims such as acting justly".

The Court of Appeal proceeded to strike out both Notice and Record of Appeal

Accordingly, I do hold that the provisions of Order 40 rule 4 are not in conflict with the provisions of Article 159(2)(d) in so far as the former upholds application of the rules of natural justice.

With respect to the issue of the doctrine of *Lis Pendens*, it is my considered view, that that is an issue to be argued when the application dated 10th February comes for hearing on 29th March 2011.

In the premises, I decline to reinstate the interim orders of injunction granted herein on 29th February, 2012.

In the exercise of the inherent powers of the court reserved by section 3A of the Civil Procedure Act to prevent abuse of the process of the court, I, hereby order that the application dated 7th March 2012 be and is hereby struck out with costs to the 1st to 3rd defendants.

Ruling read, signed and delivered in court this 12th day of March 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Gatheru for Plaintiffs

Mrs. Opiyo for the 1st, 2nd and 3rd Defendants

Ms. Mwaura for the 4th and 5th defendants