REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 942 of 2012

FILISTA CHEMAIYO SOSTEN.....PLAINTIFF

VS

SAMSON MUTAI.....DEFENDANT

(Application to vary and/or discharge an order of injunction- Principles to be applied – plaintiff owner of suit land – injunction issued in favour of the plaintiff- defendant seeking to vary and/ or discharge the order of injunction – application dismissed)

R U L I N G

The application before me is the Motion dated 18th June 2012 brought under the provisions of Order 40 Rule 7 of the Civil Procedure Rule and Sections 1A, 1B and 3A of the Civil Procedure Act. It is an application by the defendant seeking an order to vary and/or discharge the orders given on 4th May 2012. The order of 4th May 2012 sought to be varied was issued in the following terms :-

(1) The respondent and or his agents are hereby restrained from dealing and or interfering in anyway with the Applicant's quiet possession, use and or enjoyment of the land known as parcel No. NANDI/BARATON/1646 and are also stopped from ploughing, planting and or doing any acts inconsistent with the Applicant's rights as the registered owner of the said parcel of land pending the hearing and final determination of the suit.

(2) The Applicant shall furnish an undertaking as security for costs and damages. The same shall be furnished and filed in court within the next five (5) days from the date hereof.

(3) The Applicant must move with due diligence and speed to have the main suit listed for hearing within the next six (6) months from the date hereof.

(4) In default the Respondent is at liberty to move this court for the discharging of the order of injunction.

(5) The Applicant shall have the costs of the application.

The grounds upon which this application is based are as follows

(i) This court issued an order of injunction in this suit.

(ii) On the date and prior to the issue of the said order, the plaintiff had planted a crop of maize on the land.

(iii) That the defendant have (sic) taken advantage of the said order and are wantonly destroying the plaintiff's crop.

(iv) The destruction of crops is deplorable and is against public policy.

(v) The court should therefore set aside the orders issued by it and or vary them.

(vi) That the court gave the defendant liberty to apply for the discharge of the orders.

(vii) That is in the interest of justice that the present application be allowed.

(viii) That the court should weigh the scale of justice by directing the maintenance of the status quo.

The application is supported by the affidavit of the defendant. It is her deposition that prior to the issuance of the order of injunction on 4th May 2012, she had planted a crop of maize on the suit land. She has deponed that before the ruling to the application for injunction, the respondent sprayed her crop with roundup and that after the ruling, the plaintiff went to the suit land and cut down the maize that she had planted. She has also deponed that owing to the order, the plaintiff has attacked her workers and caused them to be arrested and arraigned in court in Kapsabet. She has further deponed that it could not be the wish of the court to intend that the order of injunction should be used to destroy the crop.

The application is opposed by the plaintiff who has filed a replying affidavit. The respondent has denied spraying the applicant's crop or destroying the same. She has also stated that the applicant despite the order of injunction has been interfering with her quiet possession of the suit land and it was owing to this interference that she reported the matter to the police and the applicant's agents were arrested. She also stated that the applicant had already filed a notice of appeal to the court of appeal signifying an intention to appeal against the ruling on the application for injunction and therefore ought not to be granted the prayers sought as the same would be akin to sitting on appeal.

The application was canvassed before me on 4/12/12. Mr. Omusundi for the defendant/applicant urged me to allow the application. He took me through the application itself and the affidavit in support. He directed me to provision (4) of the order sought to be varied and stated that the same gave leeway to the defendant to seek a discharge of the order. He stated that the application for injunction was argued without full disclosure of the material facts and of the status of the land. That prior to the orders being issued the defendant had planted a maize crop and after the order of injunction was issued, the plaintiff moved swiftly to destroy the maize crop which is against public policy and an abuse of the order. He asked me to vary the order and have the status quo maintained.

On the other hand, Miss. Rono learned counsel for the plaintiff opposed the application. It was her argument that the defendant never disclosed to court during the hearing of the application for injunction that she had planted a maize crop. She argued that it would be prejudicial to the plaintiff if the orders of injunction were vacated or varied. As to order 3 in the order of 4th May 2012, she stated that the defendant had frustrated the plaintiff's efforts to list the suit for hearing by filing this very application. She also argued that the application has been overtaken by events since the maize crop on the suit land has already been harvested. She asked me to dismiss the application.

I have considered the application and the submissions of the parties. It is true that the order issued on 4th May 2012 gave the defendant leeway to discharge the order if the plaintiff did not list the suit for hearing within six months from the date of the order. However, this application was filed on 18th June which was just over a month after the order was issued. The plaintiff's counsel has indeed stated that they have been unable to list the matter for hearing because of this application. That to me appears to be the position and counsel for the applicant cannot use the delay occasioned by this application to argue that the plaintiff has failed to list the main suit for hearing and therefore the order for injunction should be varied or set aside.

Under Order 40 Rule 7, any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.

What are the principles that a court should look at when faced with an application under Order 40 Rule 7 ?

In ***James Juma Muchemi & Partners Ltd vs Barclays Bank of Kenya & Another (Nairobi HCCC No.339 of 2011 (2012) eKLR***, my brother Mabeya J, expressed the view that the jurisdiction under Order 40 Rule 7 was discretionary and like in all other discretions, the same must be exercised judiciously although there are no firm rules of law or practice that have been set down. In ***Ragui vs Barclays Bank of Kenya (2002) 1 KLR 647***, Ringera J stated that

"It is settled law that if an interlocutory injunction has been obtained by means of representation or concealment of material facts, the same will on the application of the party aggrieved be discharged".

I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction.

In our case, I do not see any material facts that were concealed or any change in the circumstances of this suit which will necessitate me varying the injunction issued herein. The applicant's core reason is that the respondent when applying for the injunction never disclosed that there was a maize crop in the suit land. The very application for injunction was sought because it was the plaintiff's case that the defendant has trespassed onto the same and was ploughing and cultivating and that he needed to be stopped from doing so. In his replying affidavit, the defendant averred that he had ploughed and planted some crops on the suit land. These facts, if at all they are the material facts that the applicant is alluding to, were disclosed and indeed formed the very basis of the grant of the injunction.

The suit herein was filed by the plaintiff seeking a permanent injunction to restrain the defendant from entering into and occupying the land parcel NANDI/BARATON/1646 and also sought damages for trespass. It appears that the plaintiff established a prima facie case to the extent that she is the registered owner of the suit land and that the defendant is a trespasser. That is why the court gave the injunction.

In any event, if the application herein is sought to protect the maize crop planted early this year, I take judicial notice that the crop cannot be in the farm one year down the line. This application therefore has been overtaken by events.

I do not see any ground or reason which will make me disturb the order of injunction issued on 4th May 2012. It shall continue to remain in force. I therefore dismiss this application with costs.

DATED AND DELIVERED THIS 18TH DAY OF DECEMBER 2012.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of

Mr. T.K. Kiplimo of m/s Gicheru & Co Advocates for the defendant/applicant.

No Appearance for M/s J.K. Mutai & Co for the plaintiff/respondent.