



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 294 of 2012

EDERMANN PROPERTY LIMITED PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF THE KENYA

RAILWAYS STAFF RETIREMENT BENEFIT SCHEME.....1ST DEFENDANT

KENYA RAILWAYS CORPORATION.....2ND DEFENDANT

R U L I N G

1. By a Notice of Motion dated 5th October, 2012, the 1st Defendant has applied for the variation of the order made on 23rd May, 2012 (hereinafter “the said order”). The prayers sought are in the alternative, either, discharge order No. 3 of the said order or discharge the injunction granted herein and to leave only one property under the injunction, that is LR No.209/11953, Nairobi Railways club, Nairobi. The application was expressed to be brought under order 40 rule 7, of the Civil Procedure Act and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The motion was grounded upon the grounds set out in the body of the motion and on the Supporting Affidavit of James I. Olubayi sworn on 5th October, 2012.

2. The 1st Defendant contended that the scheme has over 10,000 pensioners who are old and sickly (between 65-100 years to be precise), that these pensioners in their twilight years only depend on the scheme for their monthly pension, that the properties set out in Order No.3 of the said order constitute the only immovable assets and therefore single source of income for the scheme, that the monthly pension to retirees is approximately Kshs.54million, that there are debts in excess of Kshs.338million that need to be serviced, that the properties of the scheme need repairs/renovation or refurbishment, that some leases have or are about to expire and cannot be renewed because of the order and that the primary responsibility of the scheme is to ensure that the retirees are paid their monthly pension.

3. For the foregoing reasons, Mr. Milimo, learned Counsel for the 1st Defendant submitted that the scheme urgently requires to deal with the suit properties set out in order 3 of the said order in the manner prohibited in order to settle the schemes monthly pension bill, secure the schemes future financial position, renew leases licences, repaid and renovate the suit properties. He further reminded the court to note that the properties injected under order 3 aforesaid are all the properties of the 1st Defendant. He referred the Court to the decision in **CA No. 109 of 2007 EA Cables –vs- Procurement Complaints Review and Appeal Board (2007) e KLR** and urged the court to exercise its discretion in favour of the 1st Defendant. He urged that the application be allowed. Mr. Wena for the 2nd Defendant supported the application.

4. The Plaintiff filed a Notice of preliminary Objection and a Replying Affidavit of Ze Yun Yang in opposition to the application. The Plaintiff contended that the application was bad in law as the provisions cited do not give the court the jurisdiction to entertain the same, that there was no order extracted before seeking review, that the application is an abuse of the process of the court and that the applicant is trifling with the court having previously filed an application to refer the matter to arbitration. It was further contended by the Plaintiff that the 1st Defendant had other income generating activities other than the suit properties, that there was no valid resolution to dispose off any of the suit properties, that justice demanded that the properties be preserved, and that the liabilities referred to arose long before the order sought to be discharged was made.

5. Mr. King'ara, learned Counsel for the Plaintiff submitted that the application was misplaced and had been brought on the presumption that since the orders had been varied in favour of the 2nd Defendant, the same should likewise apply to the 1st Defendant, that it was not correct that it is the orders of 23rd May, 2012 that had brought the 1st Defendant's matters into a standstill, that the Plaintiff had conceded release the properties under the injunction and retain eight (8) but the 1st Defendant had declined, that the application was a red-herring meant to remove the properties from the reach of the court should judgment be entered in favour of the Plaintiff and that the application sought to mutilate the Plaintiff's main application for injunction that I yet to be heard Counsel urged that the application be dismissed.

6. I have carefully considered the Affidavits on record, the written submissions and oral hi-lights of Counsel. The first challenge to the application is that the jurisdiction of this court has not been properly invoked and that the order sought to be reviewed had not been extracted and exhibited. I have looked at the provisions of the law cited. The principal provision that tend to invoke the jurisdiction of this Court is Order 40 Rule 7. That rule provides:

"7. Any order for an injunction may be discharged or varied, or set aside by the court on application made thereto by any party dissatisfied with such order." (Emphasis supplied)

7. This provision in my view allows a party dissatisfied with an order of injunction to approach the court for variation, setting aside or discharge of such an injunction. One need not approach the court under the Review process under Order 45 of the Civil Procedure Rules. In my view therefore, the application was properly made and there was no requirement to extract the order sought to be discharged or varied.

8. The Plaintiff contended that the 1st Defendant was trifling the court having earlier made an application to refer the matter to arbitration. That may be a plausible argument. But the record would show that on 7th September, 2012, the parties appeared before the Hon. Havelock J and consented, inter alia, to the withdrawal of the 1st Defendant's application for a reference to arbitration. That being the case, in my view, the 1st Defendant cannot be said to be trifling the court by asking for the orders of 23rd May, 2012 to be discharged or varied.

9. The 1st Defendant contended that the properties restrained by the orders of 23rd May, 2012 were the single source of income. The Plaintiff swore to the contrary. The Plaintiff indicated that from the 1st Defendant's Annual Returns for 2009, the 1st Defendant had other income generating activities other than the suit properties and urged that the 1st Defendant had misrepresented the facts to the court. From the evidence on record, it is clear that the 1st Defendant's Monthly Pension Bill payable to the retirees may be in excess of Kshs.54million. Looking at the so called other income generating activities, it is not clear whether they are adequate to service that obligation. In my view therefore, the 1st Defendant's other income generating activities may be adequate to service the 1st Defendant monthly obligations and their existence may not be a bar to the making of the present application.

10. It has been contended that there was no evidence of a valid resolution of the 1st Defendant to sell any of the properties. That therefore, there was no basis for the 1st Defendant to claim that it had been impeded in realizing any funds from any of its properties. It is true that there is no such resolution for

disposal of any of the 1st Defendant's assets by way of sale. However, if there was such a resolution, would that not be an act of disobedience on the part of the 1st Defendant of the court order of 23rd May, 2012? I think that parties must obey court orders however burdensome such orders may be. I have seen copies of leases or offers to lease or tenancy agreements exhibited in the Replying Affidavit of Nicholas S. Kikuvu sworn on 17th September, 2012 which were entered before the orders of 23rd May, 2012 were made. The 1st Defendant has contended that some of these leases, tenancies or licences falling for renewal cannot be renewed as doing so would be in disobedience of the subject order.

11. I am alive to the fact that the heavy liabilities disclosed by the 2nd Defendant can only be settled through either disposal of the properties the subject of the order or disposal by other means. I have however, taken into consideration that the said properties may be the only means of a livelihood to over 10,000 senior citizens of this country. I have also considered that James I. Olubayi has been very candid in his affidavit of 5th October, 2012 as to the position of the 1st Defendant. I am also of firm opinion that the interests of the Plaintiff should be taken into consideration so as not to prejudice its position as well as its pending application. In the words of the Court of Appeal in the case of **E. Muriu Kamau & Anor – vs- National Bank of Kenya Ltd (2009) e KLR**, a court of law must always strike a balance between the competing interests of the parties before it. Put in another way, the interests of both parties must be put on the scales of justice. Considering the obligation the 1st Defendant has in relation to 10,000 of its members and other creditors and considering the legitimate expectation of the Plaintiff in this case, I am persuaded to apply the dictum of the Court of Appeal in the case cited by Mr. Milimo of **East African Cables Ltd – vs- Procurement Complaints Review an Appeals Board & Anor (2007) e KLR** that:-

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action..... We should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods.”
(Emphasis supplied)

12. I have already alluded to the 10,000 members of the 1st Defendant who have been adversely affected by the order of 23rd May, 2012. The Court has been told that they have been subjected to hunger and sickness at their old age as a result of the 1st Defendant's inability to meet its monthly pension obligations. I am alive to the 1st Defendant's willingness to leave one property LR No.209/11953 Nairobi Railways Club, Nairobi to be under the injunction. I am also further aware that the Plaintiff had offered to have all the properties released from the injunction save for seven (7) of them. This shows a willingness on the part of the combatants to accommodate each other for the ends of justice. In this regard, I am of the firm view that balancing the respective parties interests on the scales of justice, it will be just and fair to release the immovable properties of the 1st Defendant from the said injunction and leave some. The 1st Defendant did not tell the court which of its said properties it would like to dispose and need be spared. In making the decision therefore, the court would be performing a balancing act.

13. In this regard, I am persuaded to retain four (4) properties under the injunction. These are LR No. 209/6829 Makongeni Estate Nairobi, 209/6502, Muthurwa Estate, Nairobi (save for the portion being purchased by the Ministry of Local government), I/437 Kindaruma Road, Nairobi and LR No. 209/11953, Nairobi Railways club.

14. Accordingly, I allow the application and order that order number 3 of the orders granted by this court on 23rd May, 2012 is varied to the effect that the injunction issued against all the 1st Defendant's properties listed therein are discharged save for LR No.209/6829 Makongeni Estate, Nairobi, 209/6502, Muthurwa estate (save for the portion being purchased by the Ministry of Local government), I/437 Kindaruma Road, Nairobi and 209/11953, Nairobi Railways Club, Nairobi. The costs of the application will be in the cause.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 3rd day of December, 2012.

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A. MABEYA

JUDGE