



REPUBLIC OF KENYA



KENYA LAW
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**Gohil v Treo Apartments Limited & 10 others (Environment & Land Case
188 of 2019) [2022] KEELC 13331 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 188 OF 2019
LN MBUGUA, J
SEPTEMBER 30, 2022**

BETWEEN

VIJAY KUMAR DAVILJI K. GOHIL PLAINTIFF

AND

TREO APARTMENTS LIMITED 1ST DEFENDANT

SURESH MOHANLAL FATANIA 2ND DEFENDANT

SHANTILAL KARSANDAS VARIA 3RD DEFENDANT

SUNILKUMAR POPATLAL DAVDA 4TH DEFENDANT

CHUNILAL SHANTILAL KHIMASIA 5TH DEFENDANT

AMEET DIPAK BHATTESSA 6TH DEFENDANT

JAYANTILAL JETHA HARJI PARMAR 7TH DEFENDANT

JAYANTILAL K. HARIA 8TH DEFENDANT

MAHENDRA PATHAK 9TH DEFENDANT

CHIEF LAND REGISTRAR 10TH DEFENDANT

PJ KAKAD & CO ADVOCATES 11TH DEFENDANT

RULING

1. Before me is an application dated May 10, 2022 where the plaintiff seeks the following orders;
 - “i. Spent.
 - ii. That pending *inter partes* hearing and determination of this application this honorable court be pleased to grant a temporary order of injunction



restraining the defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over that parcel of land known as LR No 1870/11/288 and or subleases registered over the said title.

- iii. That this honourable court do review or set aside its decision of March 2, 2020 and in lieu thereof allow the application dated June 6, 2019.
- iv. That in the alternative, pending hearing and determination of High Court Insolvency Petition No 14 of 2018, this honorable court be pleased to grant a temporary order of injunction restraining the defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over that parcel of and known as LR No 1870/11/288 and/or subleases registered over the said title.
- v. That costs be provided for.”

2. The application is premised on the following grounds;

- a. That on June 6, 2019, the applicants filed an application of even date seeking injunctive relief pending the hearing and determination of the suit.
- b. The court by its ruling dated March 2, 2020 stayed the proceedings herein pending the hearing and determination of Nairobi High Court Insolvency Petition No 14 of 2018.
- c. The court cited section 6 and 7 of the *Civil Procedure Act* as the basis for its decision.
- d. There is error of law on the face of record in that;-
 - i. The order was made in *vacuo* since no party advanced arguments or objection under section 6 and 7 of the *Civil Procedure Act* or such orders as granted in relation to Nairobi High Court Insolvency Petition No 14 of 2018.
 - ii. Section 6 and 7 of the *Civil Procedure Act* were not even applicable in relation High Court Insolvency Petition No 14 of 2018. This matter is neither *sub judice* nor *res judicata*.
 - iii. There was no such application determined or pending hearing before the High Court in High Court Insolvency Petition No 14 of 2018 to warrant the said orders.
 - iv. The two matters are different in substance and issues.
- e. There are also new matters to warrant the review in that the defendants are putting up their illegally registered leases for sale to third parties. The defendants have fraudulently been interfering with the title to the suit property and are facing criminal proceedings in Chief magistrate Criminal Cases Number Milimani CR E 4675/2021.



- f. The intended illegal and fraudulent sale in effect is intended to take away the substratum of the suit out of the jurisdiction of the court.
 - g. The defendants have forestalled the hearing of High Court Insolvency Petition No 14 of 2018 and have sought stay of the same while at the same time selling the suit property.
 - h. That only this court has jurisdiction to preserve the suit property pending the hearing of the suit without in any way meddling or touching on matters before the High Court.
 - i. That the application seeks to uphold the rule of law and protect the court from embarrassment intended by the defendants.
 - j. That the defendants will not suffer any prejudice if the application is allowed and no law will be flouted.
 - k. The intended sale is imminent and disregards the doctrine of lis pendence and is calculated to defeat the ends of justice.
 - l. The application herein seeks to have the *status quo ante* maintained pending the hearing and determination of the suit.
 - m. It is in the interest of justice and fair play that the application be heard urgently for necessary orders to issue.
3. The 2nd 3rd and 11th defendants have opposed the application *vide* the replying affidavit of Lila Koki Kyalo dated June 15, 2019 (the year 2019 must have been put in error because the response thereof relates to the application dated May 10, 2022). The deponent avers that the ruling delivered by this court on March 2, 2022 dealt with the issue of *subjudice* on account of the preliminary objection dated July 5, 2019. Further it is averred that the alleged criminal suit is another instance of how the plaintiff is using the courts to antagonize the respondents.
 4. The deponent further states that the legality or illegality of the registered subleases herein can only be determined upon determination of the insolvency petition but not in isolation thereof. In that regard, the substratum of the suit is only on shareholding of the subject company but not ownership of the property, and therefore the plaintiff should stop misleading the court. In any event the jurisdiction of this court relates to use, ownership and occupation of the land but not company matters which are preserve of the high court. It is averred that the plaintiff has failed to distinguish between the personal property and the company property and is using his shareholding in the company to oppress, antagonize and intimidate the other shareholders.
 5. The deponent further states that there has never been an order for an injunction or status quo of the subject property and that the plaintiff has not established any grounds for the grant of such orders. It is averred that the insolvency petition was instituted by the plaintiff and therefore it is the plaintiff who has been indolent in prosecuting the same. Thus the 2nd ,3rd and 11th respondents urge the court to dismiss the application with costs.
 6. The 4th – 6th and 9th respondents have opposed the application through the replying affidavit of Mahendra G Pathak dated June 20, 2022. They urge the court to find that the history of the dispute was captured in their previous replying affidavit of September 28, 2019 and the notice of preliminary objection of July 1, 2019. They contend that the application is one of the many frivolous and vexatious applications and suits filed by the plaintiff in the past. They added that the injunction orders sought are conflicting and amorphous as each defendant just like the plaintiff owns individual units constructed



on the mother title no. 1870/11/288 registered in favour of the 1st defendant, a company in which the plaintiff himself is a director and the land cannot be sold without his participation.

Oral Submissions

7. The application was heard orally on June 23, 2022. It was argued for the applicant that the review of judge Eboso's orders is merited because there is an error apparent on the face of the record. That the insolvency case is on the resolution of the company yet this is a land matter, hence the insolvency suit will not deal with the leases or subleases. It was argued that the original defendants had built 6 apartments on their side of the land and instead of waiting for subleases, they sold the same to the clients of Mr Okeyo. The applicant avers that he is entitled to 50% thereof or even more because of the house. Further the applicant states that he doesn't know the 6 people as they were made directors without his knowledge.
8. The applicant also stated that the orders sought cannot be issued in an insolvency suit, and that under the doctrine of *lis pendence* the suit property ought to be preserved.
9. The response by the 4th – 9th respondents is that there is no new evidence and there is no error apparent on the face of the record to warrant an order for review. They contend that the properties in question belong to the 1st defendant of which the plaintiff is a major shareholder hence no sale or transfer can happen without his knowledge (plaintiff). They dispute the claim by the plaintiff that the orders were given in *vacuo*. They contend that the ruling of March 2, 2020 which the applicant seeks to review has never been appealed against and that in essence, the applicant is appealing against the said ruling before this court. Further they aver that there is a delay of 2 years and no good reason has been given as to why the applicant has just woken from his slumber.
10. It is further avered that the injunction sought had already been sought before not just in this case but also in a related matter HCCC No 64 of 2006, and the said injunction was not granted. The respondents contend that the high court has jurisdiction to give orders of preservation of assets of a company which is undergoing insolvency. Thus the application for review amounts an abuse of the court process.
11. The 2nd, 3rd and 11th respondents associated themselves with the sentiments advanced by the 4th – 9th respondents in opposing the application. They contend that the ruling in question was delivered pursuant to the preliminary objection dated July 5, 2019 which stayed the current proceedings. They aver that the prayers sought by the applicant have not been substantiated by any facts, and the facts remain as they were as at the time of the delivery of the ruling. In any event, the plaintiff has not withdrawn, settled, or had the other suit determined.
12. These respondents aver that there is a clear demarcation of the subject property, so the issue of unlawful leases is unfounded. They aver that the property is owned by the 1st respondent and all the other parties are shareholders. Therefore the question to be determined is on the shareholding and therefore this court cannot determine this case before the insolvency suit.
13. The respondents have urged the court to see annexure 2 of their affidavit which shows the various suits including appeals and criminal matters before various courts, which have been instituted by the plaintiff. The respondents therefore contend that the plaintiff is abusing the court process.
14. In rejoinder the applicant avers that the issue of sale of the suit property was not before judge Eboso, that the applicant would not have come before this court if the respondents were not trying to sell the property to 3rd parties. The applicant contends that investigations have been conducted relating to unlawful forgeries and these issues were not before judge Eboso. The applicant also reiterated that the



insolvency case is not affected by the provisions of section 7 of the Civil Procedure Act as they depend on insolvency and the company's statutes. The applicant added that they don't want to be in a company with these people (read respondents). He also states that no lease has been issued on the 50% that is owned by the plaintiff and to this end there is a need to preserve the register.

Determination

15. I have considered all the arguments proffered herein. The issue for determination is whether this court should review and set aside the orders given on March 2, 2020 by this court and proceed to allow the application dated June 6, 2019 or in the alternative, whether this court should grant injunctive orders pending the hearing and determination of the High Court Insolvency case No 14 of 2018 (the insolvency suit).

16. Section 80 of the Civil Procedure Act (cap 21) Laws of Kenya provides as follows:

“ Any person who considers himself aggrieved:-

- (a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

17. Order 45 of the Civil Procedure Rules sets out the grounds for review of a judgment/order. The same provides as follows:

“(1) Any person considering himself aggrieved;-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

18. In the case of Jeremiah Muku Methodist Church of Kenya Registered Trustees & another (2009) eKLR, the court stated that:

“The three conditions for applying for a review of either the decree or order of court may be summarized from the above rule 1(1) of order XLIV of the Civil Procedure Rules as – Firstly the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order was made; secondly; on account of some mistake or error apparent on the face of the record, or thirdly; any other sufficient reason”.



19. In the instant case, the applicant’s grounds are that there is error apparent on the face of the record as well as the emergence of new issues.
20. In regard to the question of error apparent on the face of the record, the applicant avers that the orders of March 2, 2020 were given in *vacuo* as no party had advanced arguments relating to the provisions of section 6 and 7 of the *Civil Procedure Act*. In the Court of Appeal case of *National Bank of Kenya Ltd v Ndungu Njau* Nairobi CA No 211 of 1996, it was held that;

“A review may be granted whenever the courts consider that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require a deliberate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter, nor can it be a ground for review that the court proceeded on an incorrect expression of the law.”
21. As correctly pointed out by the respondents, the issue of subjudice was a subject of contest in the ruling of March 2, 2020 on account of the preliminary objections raised there in. In particular the notice of preliminary objection raised by the 2nd, 3rd & 11th respondents dated July 5, 2019 had raised the grounds that:

“Pursuant to section 6 of the *Civil Procedure Act*, this suit is *subjudice* to other pending suits”
22. I find that the issues being raised by the applicant invites arguments, hence there is no error or mistake apparent on the face of the record and the application fails on that ground.
23. On the issue of discovery of new matters, the applicant contends that the respondents are putting up their illegally registered leases for sale to third parties and have been interfering with the suit properties such that they are even facing criminal proceedings. However there is no tangible evidence to indicate that there is discovery of new and important matters. The issues being advanced by the applicant that the original defendants had built apartments on their side of the land and sold them to Mr Okeyo’s clients, as well as issues of registration of subleases are not new. A perusal of paragraph 14 of the applicant’s supporting affidavit in the application of June 6, 2019 reveals that the purported sale took place in year 2005!
24. Again the application cannot succeed on the above ground.
25. On whether the court should grant injunction pending the determination of the insolvency case, the applicant contends that the orders sought cannot be issued in the insolvency suit. There is however nothing to show that the aforementioned court cannot issue such preservative orders.
26. It is quite clear that the issues being raised by the applicant are the same same issues raised in the earlier application dated June 6, 2019. This court cannot purport to cloth itself with appellate attires (where none exist) over the ruling of my brother judge Eboso dated March 2, 2020.
27. In the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR cited in *Bank of Baroda (Kenya) v Margaret Njeri Muiruri* [2019] eKLR, the court stated that:

“We further add that the review window so envisaged is not meant to grant an applicant a second bite of the cherry. It is not an opportunity for an applicant to re-litigate his/her case.”
28. The applicant did not appeal against the ruling of March 2, 2020 and he cannot now turn around to re-litigate the issues raised in his application of June 6, 2019 all over again. The upshot of my findings



is that the application dated May 10, 2022 is found to have no merits, the same is dismissed with costs to the 2nd, 3rd and 11th respondents as well as the 4th – 6th and 9th respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Koki I am for 2nd, 3rd & 11th Defendants

Court Assistant: Joan

