



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELCNO.35 OF 2010

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

WILLEDEN INVESTMENT LIMITED.....1ST DEFENDANT

BEN MULI.....2ND DEFENDANT

JATIN PATEL.....3RD DEFENDANT

HITESH RATHOOD.....4TH DEFENDANT

MARTHA KIMWELE.....5TH DEFENDANT

KENYA HOTEL PROPERTIES LIMITED.....6TH DEFENDANT

WILSON GACHANJA.....7TH DEFENDANT

CITY COUNCIL OF NAIROBI.....INTERESTED PARTY

RULING

Background

1. This is a ruling in respect of a Chamber Summons dated 3rd February 2010 in which the Applicant seeks the following orders: -

1) Spent

2) Spent

3) *A temporary injunction be issued restraining the Defendants, their servants, agents or any other person from wasting, damaging, alienating or in any other way further alienating or interfering with the property referred to as LR NO. 209/12748, IR NO.66986 in Nairobi pending the hearing of the suit herein.*

4) *An injunction restraining the 6th Defendants from paying the 1st Defendant the award or the decretal sum together with interest thereof awarded in light of court civil case No.367 of 2000 and as varied by the Court of Appeal in civil Appeal No. 149 of 2007 pending determination of the ownership of the property referred to as LR NO. 209/12748, IR NO.66986 in Nairobi and in any event until this suit has been heard and determined.*

5) *In the alternative to prayer (4) above, the award or the decretal sum together with interest awarded in High Court Civil Case No. 367 of 2000 and as varied by the Court of Appeal in Civil Appeal No. 149 of 2000 be paid into court or an interest earning account as this Honourable Court will direct pending the hearing and determination of the suit herein.*

6) Spent

7) The costs of this application be provided for.

2. The subject matter of this suit relates to LR No.209/12748 IR 66986 (suit property) which is between Nyayo House and Hotel Inter-Continental. The suit property is registered in the name of the 1st Respondent. The history of the current suit and this application can be traced to a suit which had been filed by the 1st Respondent against the 6th Respondent (HCCC No. 367 of 2000 Willelson Investments Limited Vs Kenya Hotel Properties Limited).

3. The High Court awarded the 1st Respondent mesne profits of Kshs.54,902,400/= with interest at Court rates from January 1994 till payment in full, general damages for trespass in the sum of Kshs.10,000,000 and Kshs.6,000,000/= as damages for loss of business opportunity . The 6th Respondent preferred an appeal against the Judgement vide civil appeal No. 149 of 2007. The award in respect of general damages for trespass and damages for loss of business opportunity were set aside. The award on mesne profits was reduced from 54,902,400/= to 22,729,800/= in a judgement delivered on 2nd April 2009.

4. The 6th Respondent following the Judgement of the Court of Appeal delivered on 2nd April 2009, filed an application under rule 35(1) and (2) of the Court of Appeal Rules seeking correction of the Judgement at page 12 by striking the words “Kshs.22,729,800/= with interest at court rates from January 1994 to date of full payment” and substituting for them the words “Kshs.1,894,150/= with interest at court rates from 14th December 2006 until date of full payment” . The Court disallowed the request holding that the 6th Respondent was trying to reopen the case. The court however made a slight correction to the last part of the Judgement to the effect that interest at court rates will be from 5th September 1995 instead of January 1994.

5. The 1st Respondent started the process of executing the decree in its favour . This is when the Applicant filed the suit herein together with the chambers summons in which among other prayers, the Applicant seeks orders restraining the 6th Respondent from paying the decretal sum to the 1st Respondent pending the determination of the ownership dispute over the suit property. The Applicant’s suit was struck out vide a ruling delivered on 27th May 2010 but the Applicant successfully appealed to the Court of Appeal which in a Judgement delivered on 22nd March 2019 reinstated the suit and the court directed that the suit together with the chamber summons which is the subject of this suit be heard on merits.

6. Prior to the determination of Civil Appeal No.325 of 2010, the 6th Respondent had unsuccessfully tried to obtain stay of execution of decree in HCCC 367 of 2000 vide civil application No.131 of 2010 at the Court of Appeal. In 2011, the 6th Respondent filed Constitutional Petition No.13 of 2011. In this petition, the 6th Respondent filed an application seeking injunctive orders restraining the 1st Respondent from executing the decree in HCCC No.367 of 2000. The application by the 6th Respondent was dismissed by Justice Musinga (as he then was).

7. In 2012, the 6th Respondent moved to the Court of Appeal seeking stay of Justice Musinga’s Ruling. The Court of Appeal granted stay of execution pending hearing and determination of Civil Appeal No. 184 of 2013. The Appeal was finally heard and the same was dismissed in a judgement delivered on 16th February 2018. While civil appeal No.184 of 2013 was pending, the 6th Respondent moved the High Court in Petition No.438 of 2015 where it sought among other orders a permanent injunction restraining the 1st Respondent and Kenya Revenue Authority from executing the decree in HCCC No.367 of 2000. This Petition before the High Court was dismissed vide a judgement delivered by Justice Mwita on 28th September 2018.

8. The 1st Respondent filed an application under Civil Appeal No. 322 of 2006 in which it sought release of the bank guarantee which had been deposited in that Appeal .The 6th Respondent filed a cross application seeking stay of execution and for leave to enjoin other parties. As the applications were in the process of being heard, the 6th Respondent filed civil appeal No.404 of 2018 against the judgement of Justice Mwita. The 6th Respondent also filed an application for review and setting aside judgement in Civil Appeal No. 149 of 2007. The 6th Respondent obtained stay of release of the bank guarantee. After full hearing of the application for review and civil appeal No 404 of 2018, both the application for review and civil appeal No.404 of 2018 were dismissed in a Judgement delivered on 7th August 2020.

9. The 1st Respondent proceeded to file an application before the Court of Appeal for the release of the bank guarantee. Directions were given regarding disposal of the application. In the meantime, the 6th Respondent moved to the supreme Court under petition No.16 of 2020 and filed an appeal against the judgement in civil appeal no. 404 of 2018 and a further application on E038 of 2020 seeking stay of execution of the decree in HCCC No. 367 of 2000 and or calling up the bank guarantee. The application for stay of execution was dismissed in a ruling delivered by the supreme court on 20th November 2020.

Applicant’s application.

10. It is in light of the above background that the Applicants application will be decided. It is the Applicants contention that the title to the suit property was unlawfully and fraudulently acquired. The Applicant contends that it carried out investigations which revealed that the place where the suit property was created from formed part of Kaunda Street which connects Uhuru Highway to the central Business District in between Nyayo House and Inter-Continental Hotel. A section of Kanuda Street where the suit property is situated has now been renamed as Cardinal Otunga Street.

11. The Applicant argues that as per the plans of 1967, the roads width was 80 feet (which is equivalent to 24.4 meters) but the same was fraudulently reduced to 37.76 feet (11.51 meters). It is through these maneuvers that the suit property was created. The Applicant therefore argues that the road being public property, it was not available for alienation and that an injunction should be given against the Defendants restraining them from interfering with the suit property.

12. On the issue of the injunction restraining the 6th Respondent from giving the award in 367 of 2000 as modified by Appeal No.149 of

2007, the Applicant argues that if the payment is released to the 1st Respondent, it will amount to unfair enrichment of a private entity through public property which was fraudulently acquired. The Applicant therefore argues that it is the duty of the court to guard against unlawful enrichment where the fraud involved has been brought to the court's attention.

1st to 5th Respondent's contention

13. It is the 1st to 5th Respondent's contention that the Applicant has not met the threshold for grant of an injunction. The 1st to 5th Respondents argue that they are innocent purchasers for value who have an indefeasible title which should not be interfered with by issue of an injunction which will restrain them from dealing with property. The 1st to 5th Respondents argue that no attempt has ever been made by the 1st Respondent to transfer the suit property since its acquisition and that there is no basis for grant of an injunction.

14. The 1st to 5th Respondents further argue that in other suits like HCCC No. 24 of 2008 (**Willesden Investment Limited Vs City Council of Nairobi**) consents have been entered settling the suits and by this court granting injunction in this particular suit, it will amount to settling aside orders in Courts of equal status.

15. On the issue of injunction restraining the 6th Respondent from meeting the decretal sum, the 1st to 5th Respondents argue that to grant prayers No. 4 and 5 of the chamber summons will be going against decisions of superior courts which include the Court of Appeal and Supreme Court which have pronounced themselves on stay where they have both declined to grant stay. The 1st to 5th Respondents therefore argue that this court has no jurisdiction to grant what higher courts have declined to grant as to do so will amount to this court not respecting the hierarchy of the courts.

16. The 6th Respondent supported the Applicant's position. On the other hand, the 7th Respondent did not take a stand on the application as he neither filed a replying affidavit nor submissions in this matter.

Analysis.

17. I have carefully considered the Applicant's application as well as the opposition to the same by the 1st to 5th Respondents. I have also considered the submissions filed by the parties. This is indeed a case which has chequered history. Since the judgement against the 6th Respondent was delivered on 14th December 2006, the 6th Respondent has made various attempts to avoid meeting the decree with little success. Whereas the Court of Appeal saw the need to reduce mesne profits awarded to the 1st Respondent from 54,902,400 /= to 22,729,800/= on 2nd April 2009, barely three years later, the 1st Respondent through a consent recorded on 6th February 2012 in HCCC No.24 of 2008 (**Willesden Investments Ltd Vs Nairobi City Council**) received a whopping Kshs.85,000,000/= in mesne profits in yet another case involving the same property. What is interesting is that it is the Nairobi City Council which had complained to the Applicant that the suit property was unlawfully acquired , yet it is the one which was recording a consent giving the 1st Respondent more money than had been awarded in the other case.

18. The issues which emerge for determination are firstly whether the Applicant has met the threshold for grant of injunction and secondly, whether this court has jurisdiction to grant a relief which has been declined by two higher courts. Lastly which order should be made on costs in this application.

19. It is the Applicant's contention that there was reduction of the width of Kanuda street which led to the creation of the suit property. The suit property had been allotted to a company called Centre park Limited which then requested for title to be processed in the name of the 1st Respondent. It is alleged that Centre Part Limited did not exist in either the records as the Companies Registry or even the Registrar of Societies.

20. There are allegations that there was no proper procedure which was followed to create the suit property which was initially a public road. This being the case and alive to the fact that in considering an interlocutory application of this nature, the Court is not expected to make final findings, I find that from the materials placed before court, a case has been made to warrant the Respondents to be called upon to explain. In other words, I find that the Applicant has made out a prima facie case with probability of success.

21. There are issues which need to be interrogated in a full trial and not through affidavit evidence. The court will need to interrogate whether indeed as per the survey which was completed on 3rd February 1967 the width of the road was 80 feet as alleged. Also to be interrogated is whether Centre Park Limited was a non-existent entity and the nexus between that company and the 1st Respondent if any.

22. In considering whether the Applicant will suffer irreparable harm if an injunction is not issued, I resort to the Court of Appeal decision in **Joseph Ntombura Vs Godfrey Simiyu & 4 others (2018) eKLR** where it was held as follows: -

“ The test should be whether the person applying for the injunctive relief will suffer irreparable harm. The test is not whether the person against whom the orders is to be made will suffer irreparable harm”.

23. It is also important to consider what the court stated in the case of **Michael Osundwa Sakwa Vs Chief Justice and President of the Supreme Court of Kenya & Another (2016) eKLR** where it was stated that:-

“ There is the public interest that harm shall not be caused to the nation or public and that there are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest public or private , can be allowed to prevail over it”.

24. Relying on the two cases hereinabove, it is clear that the injury which might occur if an injunction were not granted should be looked at from the view that public interest which demand that where rights of private individuals are apparently in conflict with public interest, private interests have to give way to public interest particularly given the traffic gridlock in the CBD which is at times caused by narrow roads.

25. I am in no doubt as to the case which has been made out by the Applicant. It is a strong case which should be tested in a full hearing. I therefore find that even if there were to be doubts, the balance of convenience will tilt towards protection of public interest given the prima facie circumstances of this case.

26. On the second issue, it is clear that the court of Appeal and the Supreme Court have declined to grant any stay. I will therefore be out of order if I purport to allow the injunction in terms of prayer (4) or even the alternative prayer sought in prayer (5) of the Chamber Summons dated 3rd February 2010.

Disposition.

27. From the analysis hereinabove, it is clear that the only prayers which are allowed are prayer (3) together with prayer (7) of the Chamber Summons dated 3rd February 2010.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Wambugu for Plaintiff/Applicant

Mr Oyatta for 1st to 5th Defendants/Respondents

Mr Allen Gichuhi for 6th Defendant/Respondent

M/s Omutimba for 7th Defendant/Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE