



REPUBLIC OF KENYA



Simiyu v Unity Court Limited & 2 others (Environment and Land Appeal E140 of 2022) [2024] KEELC 7258 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E140 OF 2022
AA OMOLLO, J
OCTOBER 17, 2024**

BETWEEN

PAMELA NAMWENGE SIMIYU PLAINTIFF

AND

UNITY COURT LIMITED 1ST DEFENDANT

KENYA COMMERCIAL BANK(K) LTD 2ND DEFENDANT

ONESMUS MACHARIA T/A WAT'S AUCTIONEERS 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant has moved this court vide the application dated 2nd April, 2024 brought under the provisions of sections 1A, 1B and 34 of the Civil Procedure Act. It is also premised on order 40 rule 1 and Order 51 rule 1 of the Civil Procedure Rules. The Applicant prays for orders:
 1. Spent
 2. Spent
 3. Spent
 4. That this Honourable Court be pleased to reinstate and extend the interim orders issued on December, 8, 2022 directing that pending the hearing and determination of the main suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents or their agents, employees, assigns, representatives, servants and/or any other person whomsoever from advertising for sale, selling transferring, disposing of or in any way dealing with house number 23 erected on parcel of land otherwise known as L.R No. Nairobi Block 93/1711.



5. That in the alternative to prayer 4 above pending the hearing and determination of this suit this Honourable court be pleased to issue an order of temporary injunction restraining the Respondents or their agents, employees, assigns, representatives, servants and/or any other person whomsoever from advertising for sale, selling, transferring, disposing of or in any way dealing adversely with house number 23 erected on parcel of land otherwise known as LR No. Nairobi Block 93/1711.
6. That the costs of this Application be in the cause.
2. The Applicant pleaded that they were granted interim orders of injunction on 8th December, 2022 to last for a period of 12 months during which period she was to endeavour to prosecute the suit. That the matter was listed for hearing on 26th July, 2023 but the hearing collapsed due to absence of the 1st Defendant.
3. The Plaintiff avers that they duly served the 1st Defendant by way of advert in the D. N. Newspaper of 25th September, 2023 and hearing fixed for 7th February, 2024. That the 12-month life period of the orders lapsed on 8th December, 2023 not due to indolence on the part of the Applicant.
4. The Applicant asserts that unless the orders are extended, she is apprehensive the 2nd Defendant will advertise the property for sale. That she stands to suffer irreparable loss unless the orders are extended.
5. The 2nd Defendant/Respondent opposed the application through the replying affidavit of Velma Okoth sworn on 28th June, 2024. She deposes that this application is an abuse of the court process for being res judicata. That the Applicant is a stranger to the 2nd Respondent with no known contract binding them. She avers that the delay in hearing the case within the 12 month period was occasioned by lack of diligence on the part of the Applicant such as failure to timeously move the court to serve the 1st Defendant by substituted service.
6. Ms. Velma deposes that it is within the 2nd Respondents rights to deal with the suit property as it deems fit including selling it off in exercise of statutory power of sale. Further, that the 2nd Respondent's rights supersedes that of the Applicant. It is the 2nd Respondent contention that there is no irreparable loss that the Applicant will suffer as one cannot lose what they do not own. In any event, the Applicant's recourse is against the 1st Respondent.
7. The 2nd Respondent further stats that it came to the knowledge of the Applicant through the proceedings relating to the Application dated 1st April, 2022 that the suit property was charged to the 2nd Respondent. Hence the Applicant cannot feign ignorance as to the 2nd Respondent's right over the property. That the 1st Respondent has todote wilfully failed to regularise its loan account despite several demands. The 2nd Respondent urged the court to dismiss the application as it does not meet the threshold.
8. The parties were granted leave to file brief written submissions which were highlighted on 31st July, 2024. I have read and considered the same and will make reference in the body of this ruling. There is no dispute that the plaintiff had previously moved this court vide a notice of motion application dated 1st April, 2022. The former application sought orders of temporary injunction restraining the Respondents from selling and or advertising for sale house No. 23 erected on L.R No. NBI/BLOCK 93/1711.
9. The said application was heard and determined on merits and delivered a ruling on 8th December, 2022. By dint of that ruling, the plaintiff was granted the orders of injunction for a period of 12 months and it required the plaintiff to take steps to prosecute the case within the 12 months period. Therefore, this



court cannot be invited to re-consider the current application on the threshold of *Giella vs Cassman Brown*. To do so is to regugicate the matter twice.

10. The issue before me in my view is whether the Applicant has shown cause why this court should exercise discretion and extend the orders of injunction granted on 8th December, 2024. In their opening submissions, they have addressed this court on the issues of proof prima facie case; irreparable injury and balance of convenience. I find these headings irrelevant as the application for injunction cannot be argued twice. The Applicant went further to cite case law to support these headings and the importance of order 40 of the Civil Procedure Rules.
11. Unfortunately, the Applicant did not in the written submission address this court on grounds for extending orders of injunction given for a limited period. She reiterated in paragraph 22 that she endeavoured relentlessly to serve the 1st Defendant. That it was never her intention to delay the prosecution of this case. In the oral submissions, counsel for the plaintiff stated that they are not telling the court to determine the matter afresh rather to re-instate the orders. That the Applicant has an equitable interest in the property that ought to be protected.
12. The 1st Respondent did not oppose the application. The 2nd Respondent by its submissions dated 26th July, 2024 also discussed the question of whether or not the Applicant has established a prima facie case. It endeavoured to show that none was proved by stating there is no privity of contract between the Applicant and them.
13. The 2nd Respondent submitted on whether the doctrine of laches is enforceable on the order for re-instatement of interim orders. They cited the case of *Amina Karama vs. Njagi Gachangua & 3 Others* (2020) eKLR holding at paragraph 20 thus:
 20. It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of *Ibrahim Mungara Mwangi v. Francis Ndegwa Mwangi* (2014) eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:

“The court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”
14. It is the 2nd Respondent's contention that no plausible reason has been given by the Applicant to explain the delay in filing the present application since the Applicant was not vigilant, she does not deserve any remedy. The remainder part of the 2nd Respondent's submissions on whether the Applicant owns the suit property or the reasons they are entitled to exercise their statutory power of sale are not applicable to the issues for determination currently.
15. I have perused the court record post the issuance of the orders of 8th December, 2022. The parties appeared twice before the Deputy Registrar for pre-trial directions on 2nd February, 2023 and 5th April, 2023. Thereafter they appeared before me on 19th April, 2023 for fixing the matter for hearing. The hearing was then set for 26th July, 2023.
16. When the matter came up for hearing on 26th July, 2023, it is the plaintiff who informed court that the matter could not proceed because she had not served the 1st Defendant. This suit was filed in April, 2022 and the plaintiff had over one-year period to effect service on the 1st Defendant. More particularly she ought to have confirmed service during the pre-trial stage between February – June, 2023.



17. Notwithstanding delay due non-service upon the 1st defendant, the matter was then fixed for hearing on 7th February, 2024. On this date, the plaintiff's counsel was not ready to proceed because they had received some documents that morning which they sought leave to file. All this time the Applicant was aware that time was running against her in terms of the temporary injunction in place.
18. In a nutshell, despite the court diary not having near hearing dates, the Applicant did not utilize the two hearing dates allocated to her to demonstrate effort aimed at prosecuting her case. As submitted by the 2nd Respondent, equity aids the vigilant and not the indolent. An order of temporary injunction is an equitable remedy which a person seeking to enjoy must ensure that she/he is doing equity.
19. Thus, I find the Applicant has not demonstrated plausible reasons to warrant the extension of the interim orders of injunction granted on 8th December, 2022. Order 40 rule 6 of the [Civil Procedure Rules](#) states that;

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.
20. The Applicant could only move this court for extension of the interim orders earlier issued and the alternative prayer contained in prayer 5 of the motion urging the court to issue fresh orders of temporary injunction without stating any new set of facts amount to abuse of the court process. In light of the foregoing, I hold that there is no merit in the application dated 2nd April, 2024. It is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

A. OMOLLO

JUDGE

