



Moschion v Stuart & another; Pathmark Ventures Limited (Interested Party) (Environment & Land Case 338 of 2018) [2023] KEELC 511 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 338 OF 2018
LN MBUGUA, J
FEBRUARY 2, 2023**

BETWEEN

DOROTHY SEYANOI MOSCHION PLAINTIFF

AND

CLAUDIA STUART 1ST DEFENDANT

ANDREW STUART 2ND DEFENDANT

AND

PATHMARK VENTURES LIMITED INTERESTED PARTY

RULING

1. Vide a ruling delivered on December 10, 2020, an order to consolidate related matters was issued in ELC Case No.350 of 2018 which is the lead file. The said matters are; ELC No. 915 of 2012, 305, 338, 367, 368, 374, 348 and 349 all of 2018. The case ELC No. 352 was not consolidated with the other matters primarily because the defendant therein was deceased.
2. There are 3 pending applications for determination before this court. One dated May 21, 2019, another dated May 9, 2019 and still another dated April 8, 2019 (Amended on April 20, 2020).

Application dated 21.5.2019

3. The applicant is Pathmark Ventures Limited which seeks orders to be joined as an interested party in case no. ELC 338 OF 2018, and that the ex parte interim orders issued on March 20, 2019 and all consequential orders obtained by the plaintiff against it be set aside. The application is based on grounds on its face and on the Intended interested party's supporting affidavits sworn on May 21, 2019 by its director one Grace Temba. She deposes that the intended interested party is the registered proprietor of the parcel known as Land Reference Number 5892/23 situated at Karen which is the subject of litigation in this case.



4. She further deposes that on March 20, 2019, the court issued orders for maintenance of status quo effectively barring the intended interested party from conducting any lawful activity on the subject land. She points out that the intended interested party's efforts to develop the suit property have been frustrated as the Nairobi City County has suspended the development approval given to it to construct on the suit property due to the existence of this suit yet it has never been made a party to this suit.
5. She further deposes that the said orders were irregular as they were not issued in the instant file but in another matter being ELC No.305 of 2018 then the court ordered that the said orders also apply to this matter yet the 2 matters are not consolidated.
6. The applicant has availed an official search indicating that they are the current registered owners of parcel 5892/23 (Original 5898/12/11).

Application dated 9.5.2019

7. This application was equally filed in case no. ELC 338 OF 2018, where the defendants therein are seeking orders that the *ex-parte* interim orders issued by the court on April 9, 2019 against the defendants and all consequential orders obtained there in be set aside. The application is premised on grounds on its face and on the 2nd defendant's Supporting Affidavit sworn on May 9, 2019. The defendants contend that they were the registered owners of parcel L.R. No.5892/23 which they sold to the intended interested party for ksh.33 million. That the transfer there of was effected on 27th day of January 2015 to the intended interested party, and consequently, the Defendants ceased to be in possession of the suit land. Thus they cannot be held to be in contempt of court orders issued on March 20, 2019.

Application dated 8.4.2019, Amended on 20.4.2020

8. Again this application has been filed in the suit ELC 338 OF 2018, brought forth by the plaintiff who seeks orders that the court visits the suit premises to ascertain that there is contempt of court and that the defendants be committed to civil jail for the said contempt. Further, that the intended interested party alongside Bainridge Construction Company Limited, Agnes Idee Omoding, Grace Lunyolo Temba and Paul Karigi Karuga be also adjudged to be in contempt of the aforementioned orders and be ordered to purge the same.
9. The plaintiff avers that on March 31, 2019, the defendants, the intended interested party and the other mentioned contemnors entered the land parcel No. 5892/23 and commenced developments thereon by building an iron sheet structure, constructing a latrine and erecting a fence of which they encroached on land parcel No. 5892/11.

Determination

10. I have considered the three applications, the responses there of and the rival submissions. The issues falling for determination are: whether the intended interested party should be joined in these proceedings, whether the *ex-parte* orders given on March 20, 2019 and on 9/4/2019 as well as the consequential orders should be set aside or whether the defendants, the intended interested party and other contemnors should be held in contempt of court orders.
11. I have keenly perused the file ELC No. 305 OF 2018. I find that the orders given on 20.3.2019 and on 9.4.2019 were *ex-parte*, awaiting the interpartes prosecution of two applications filed by the plaintiff. There is nothing on record to indicate that the said applications were ever prosecuted.



12. In the case of *Maxam Limited & 2 others v Heineken East Africa Import Co Ltd & 2 others* [2017] eKLR the court stated As follows in relation to injunction orders.

“I must however also appreciate that Order 40 Rule 6 of the Civil Procedure Rules anticipates that where an interlocutory injunction has been issued on merit, then the suit is to be determined and the parties respective rightsasserted within one year of the interlocutory order being made. The Rule appreciates and seeks to ensure that neither party is placed at an indefinite hardship through an intermediary order. The mischief was to guard against sluggish and dawdling litigants who seek to delay the prosecution of their claims”

13. In the Court of Appeal case of *Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another* [2015] eKLR, the court had this to say on interlocutory orders;

“Temporary injunctions are issued under Order 40 Rules 1 to 5.

Rule 6 of that Order provides 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.”

Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless,” as the Rule further provides, “for any sufficient reason the court orders otherwise.”

14. The order of maintenance of Status Quo given on March 20, 2019 was anchored on the prosecution of the Application for injunction dated January 23, 2019 filed in case ELC 305 of 2018. The subsequent application dated 8.4.2019 filed in ELC 338 OF 2018 was seeking orders to cite the defendants for contempt due to alleged willful disobedience of the orders of March 20, 2019. That application of April 8, 2019 (now amended) gave rise to the exparte orders of April 9, 2019 requiring the defendants to remove all the temporary structures and building materials deposited on the suit land.
15. There is no indication that the initial application for injunction was ever heard on merits, let alone the subsequent application for contempt. The main suit is still pending. It is therefore not tenable that close to 4 years down the line, the plaintiff is seeking to enforce the exparte orders.
16. In the case of *Regina Pacis University College through Board of Trustees & another v William Charles Fryda* (2012) eKLR, where injunctive orders given had apparently lapsed, the court gave orders as follows;

“The status quo that currently exists be maintained as this is the only way the suit property will be preserved;”

17. Similarly, I believe that the most efficacious order to give is that of maintenance of the current status quo with a rider that no activities should be undertaken by any parties in relation to both registration and ground status.
18. On the issue of joinder of an interested party, it is noted that the said party has availed an official search indicating that it owns the suit land. Indeed in her application of April 20, 2020, the plaintiff is seeking orders against not only the intended party, but she mentions other parties too. That in itself is a tell tale



sign that the mentioned parties are intricately connected to the subject property. Thus the intended interested party fits the description of a necessary party as set out in Order 10 rule 10 of the [Civil Procedure Rules](#).

19. I find that this is a case which is in dire need of Active Case Management so as to deal with the substantive issues in lieu of the myriad applications. In the case of *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & another* [2019] eKLR, I applied Active Case Management and went ahead to forcefully dismember a Gordian Knot which had choked that file for decades where the lifespan of the matter was anchored on nothing but applications. In the said case, I had stated as follows:

“In exercising its judicial authority this court has a duty to facilitate the just and expeditious determination of proceedings. One of the cardinal principles in our Constitution is “the expeditious delivery of justice” –see article 159(2)(b) of the [Constitution](#) of Kenya, which in effect codifies the 17th century maxim “Justice delayed is justice denied”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide.....

Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the overriding objective is achieved.

Active Case management enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.

Active Case management is also the effort by courts to handle cases in such a manner that they are resolved fairly and as promptly and economically as is reasonable in the circumstances of the case. The fairness part can be found within the notion of procedural justice while the promptness and economics part of the case management can be found within the notion of the efficiency of justice. Efficiency of justice implies that justice is done at reasonable costs to the parties and the court and within a reasonable time, that is without an abnormal delay. Procedural justice concerns the fairness, consistency and the transparency of the processes by which progress in a case is made”.

20. Whereas this file is not all that old, nevertheless, it is apparent that a Gordian Knot is in the offing, unless there is active intervention from this court.
21. The court has already given both a Pre trial date as well as a hearing date. To this end, parties should focus on the substantive issues geared towards finalization of the suits instead of filing various applications.
22. In the final analysis, this court invokes the guiding principles of Active Case Management as well as its inherent powers of giving orders necessary to meet the ends of justice and proceeds to give the following orders.
1. The application dated May 21, 2019 for joinder of an Interested Party is hereby allowed.
 2. The interested party is hereby directed to file his statement of claim, witness statements and any supporting documents within 14 days from the date of delivery of this ruling.



3. The application filed by the defendant dated May 9, 2019 is hereby allowed.
4. The application filed by the plaintiff dated April 8, 2019, amended on April 20, 2020 is hereby dismissed.
5. All other pending applications are hereby dismissed to pave way for the substantive hearing of the main suits.
6. Pending the hearing and determination of the suits, the subject parcel(s) of land shall not be alienated and no developments shall be undertaken on the said land by any of the parties.
7. Each party shall bear their own costs in respect of the three applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Miyare for plaintiff

Wanjiku Kingori holding brief for Jan Mohamed for the

Defendants

Mungai for the Interested Party in 338 of 2018

Court assistant: Eddel

