



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC LAND CASE NO. 14 OF 2021

NABAKHWANA FARMERS COOPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

LOIS HOLDINGS LIMITED.....1ST DEFENDANT

ESTATE OF JASON KIAMBA KIMBUI.....2ND DEFENDANT

RULING

THE APPLICATION

1. By Notice of Motion dated 10/6/2021 and filed in court on 11/6/2021 and which is brought under **Order 40 Rule 7, Order 51 Rule 1 and 15 of the Civil Procedure Rules, Section 19(3) (h) of the Environment and Land Court Act 2011**, the 1st defendant/applicant seeks the following orders:

(1) ...spent

(2) That the injunction order issued *ex parte* on the 5/5/2021 be set aside.

(3) That the respondent/plaintiff be ordered to serve the application said to be dated 26/2/2021 upon the applicant's counsel on record.

(4) That leave be granted to the applicant to respond to the application dated 26/2/2021 within such time as the judge may direct, and whereupon the judge can give directions over the hearing of the said application.

(5) That costs be in the cause.

2. The application is supported by an affidavit sworn on 10/6/2021 of **Lois Nyegera Kimbui**, the director of the applicant's company. The grounds in which the applicant relies are as follows: that the applicant was not served with the application dated 26/2/2021 together with its supporting affidavit and the court directions; that the parcel delivered to the applicant by Wells Fargo Courier only had the summons, plaint, the verifying affidavit, list of plaintiff's witnesses and the statement of **Robert Nyongesa Makhanu**; that the applicant instructed **Ms. Kiarie & Co. Advocates** and who entered appearance and also filed a defence to the applicant's claim; that no response was filed to the application dated 26/2/2021 because the same had not been served; that a related application was filed in Kitale **ELC No. 77 of 2004** by **Ms. Sifuna & Sifuna Advocates** and served upon **Ms. Kiarie & Co. Advocates** and a response to the to the said application was duly filed and is on record and that the *ex parte* injunction order is prejudicial to the applicant who already has a judgment in its favour and against which no appeal was preferred.

THE RESPONSE

3. The respondent through its Counsel, **Prof. Nixon Sifuna**, filed its replying affidavit on 22/6/2021. Its response is that the defendant was served with the notice of motion dated 26/2/2021 through its physical address by way of a courier and an affidavit of service was filed. The respondent makes the argument that a court order and a letter that accompanied the notice of motion upon delivery referred to the notice of motion and that if the notice of motion was not attached the 1st defendant's advocate would have protested its non-inclusion and no such protest was lodged. It is also urged that the interim orders can not prejudice the 1st defendant and in any event there are interim orders which have been issued in **Kitale ELC 77 Of 2004 Lois Holdings Limited Vs Ndiwa Tamboi & 184 Others & Chesitia Marketing Co-Operative Society** regarding the suit land. I must state that at the time of the preparation of this ruling the said injunction orders in that latter suit had

been discharged upon the dismissal of their parent application on **14th July, 2021**.

SUBMISSIONS

4. The parties filed their written submissions on **9/7/2021**.

ANALYSIS AND DETERMINATION

5. I have perused the application, the supporting affidavit, the replying affidavit and the submissions filed by the parties herein. The main issue for determination in the instant application is whether the injunction granted *ex-parte* on **5/5/2021** should be set aside and service of the application be ordered to pave the way for the hearing of the application *inter partes*.

6. It is not disputed that the injunction application was granted *ex parte* in a 2 page ruling dated **5/5/2021** on the court's belief that proper service of the application had been effected on the defendants. The court nevertheless stated that it had observed that the defendants had filed appearance and defence through the same advocates now applying to set aside the injunction.

7. When a complaint has been raised that service has not been effected it must be taken very seriously for in legal disputes the right of a party to be heard is integral to the very process of justice. It embodies the very principle of natural justice.

8. At its **Article 50**, our Constitution emphasizes that

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

9. If this right applies to the person instituting the claim then the same must apply to the respondent or defendant for the purpose of balancing the scales of justice. No person can be said to have been treated justly if they are not heard out. And the 1st defendant feels and claims that it has been condemned unheard.

10. An inquiry into whether the injunction order issued on **5/5/2021** should be set aside necessarily leads to the question whether service or proper service was effected.

11. Matters regarding service should not be made the question of a long and winded argument of probabilities and guesswork. The court must be convinced beyond peradventure that service has been effected in order for a certain case to proceed in the absence of a defendant or respondent who fails to file a response to the claim. The other side of the coin is that where that service is impeached then orders that may have been obtained must be set aside at the instance of the person complaining that the service was improper or non-existent. In this case the court had been convinced that service was effected until doubts were raised in the instant application.

12. In this case also the arguments by the plaintiff is that owing to the fact that service of the plaint and summons was responded to by the defendants, then they must be taken to have been served with the subject application for injunction as there was an order enclosed within the same package referring to the application. The plaintiff faults the instant application by stating that since the application was mentioned in the order purportedly sent to the defendants, had the defendants failed to find the application in the package they would have immediately raised alarm.

13. In this court's view however whether or not service was effected can not be left to guesswork. Whoever has served must be definite about the service and state that he did so and in which manner. Moreso, when challenged, he should not raise complex arguments of logic.

14. It is purely an issue of whether the application was enclosed with the plaint and summons or not. The packaging of documents was done at the plaintiff's office and when the defendant claims that the application was not enclosed the severity of the consequences of non-service demands that the burden of proof of enclosure shifts upon the plaintiff to establish that it was, and that is the lesser evil compared to possible denial of natural justice in respect of the defendants. It is not an easy matter to so establish, but since the law requires perfect service, it must be presumed that where the party required to serve has failed to establish such enclosure, it did not serve and service has to be effected afresh.

15. In the instant case the plaintiff itself has indicated that there was another application in another suit in which the 1st defendant was involved. I find that there would be no good reason for the 1st defendant to defend one application in that suit and ignore the application in the present matter in if it was effectively served. Consequently I must conclude from the circumstances of this case that the defendants were not served and that the injunction order granted on **5/5/2021** must therefore be set aside on that ground alone. It naturally follows that after that setting aside, the application dated **26/2/2021** must be heard afresh, this time *inter-partes*.

16. I therefore find that the application by the 1st defendant dated **10/6/2021** has merit and the same is granted in terms of **prayers nos 2, 3 and 4**. The application dated **26/2/2021** shall be placed before the ELC Judge at Kitale on **28/10/2021** for directions as to hearing. The costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJORGE

JUDGE, ELC.