



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 23 OF 2020

SOUTHFORK INVESTMENTS LIMITED.....PLAINTIFF

-VERSUS-

ESQUIRE INVESTMENTS LIMITED.....1ST DEFENDANT

ADAN MAALIM MURSAL.....2ND DEFENDANT

NAIROBI CITY COUNCIL.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

DIAMOND TRUST BANK KENYA LIMITED.....5TH DEFENDANT

THE ATTORNEY GENERAL..... 6TH DEFENDANT

RULING

INTRODUCTION

1. The 1st Defendant/Applicant has taken out a Notice of Motion Application dated the **23rd March 2021**, and in respect of which the 1st Defendant/Applicant seeks the following Reliefs;

i.(Spent)

ii. The undertaking as to Damages dated the **9th July 2020**, and filed on the **10th July 2020**, by the Plaintiff/Respondent be expunged from the courts record.

iii. As a consequence to 2 above, the Temporary order of injunction issued on the **7th July 2020**, be vacated forthwith.

iv. In the alternative to 3 above, the Plaintiff be compelled to deposit the sum of **Kes.100, 000, 000/=** only, in a joint interest earning account within 30 days, failure to which the said Injunction issued on the **7th July 2020**, automatically elapses.

v. In the alternative to 3 & 4 above, the Plaintiff to be compelled to give undertaking in the form of a bank guarantee for the sum of **Kes.100, 000, 000/=** only within **30 days**, failing which the Temporary injunction issued on the **7th July 2020**, automatically elapses.

vi. Costs of this application be provided for.

2. The subject Application is based and/or premised on the numerous grounds contained at the foot thereof and same is further supported by the Affidavit of one Ramji D Varsani, sworn on the **23rd March 2021**, to which the deponent has attached for annexures.

3. Following the filing and/or lodgment of the subject Application, the Plaintiff/Respondent herein responded to same by way of grounds of opposition dated the **6th May 2021**, whereby the Plaintiff/Respondent, has adverted to various reasons, pertinent of which is that the orders of temporary injunction, which is the subject of the current application were granted in the presence of all the parties and thus same are

anchored on consent.

DEpositionS by the parties

1st Defendant/Applicant's Case

4. The 1st Defendant/Applicant herein through the affidavit of Ramji D Varsani, sworn on the **23rd March 2021**, has averred that the 1st Defendant/Applicant is the registered proprietor and/or owner of **L.R No. 1870/II/452**, [hereafter referred to as the suit property] and that by virtue of being the owner of the suit property, same is entitled to exclusive use and possession thereof.

5. The Deponent further avers, that despite being the lawful owner of the suit property, the Plaintiff/Respondent has since filed and/or lodged the subject suit as well as an Application for Temporary injunction, the latter which gave rise to the orders of injunction issued on the **7th July 2020**.

6. It is further the averment of the 1st Defendant/Applicant that as a result of the issuance of the orders of injunction, the development activities that were being carried out on the suit property, have since abated and/or stalled. In this regard, the 1st Defendant/Applicant contends that same has been exposed to serious loss, by the actions of the Plaintiff/Respondent.

7. On the other hand, the Applicant has further averred that though the Plaintiff/Respondent filed an Undertaking pursuant to and in line with the orders of the court issued on the **7th July 2020**, the said Undertaking is worthless and in any event unenforceable.

8. Owing to the foregoing, the 1st Defendant/Applicant has thus sought for orders that the said Undertaking, which was filed pursuant to the orders issued on the **7th July 2020**, be Discharged and/or vacated.

Plaintiff/Respondent's Case

9. The Plaintiff/Respondent responded to the 1st Defendant's/Applicant's Application by way of Grounds of opposition dated the **26th May 2021**, and in respect of which the Plaintiff/Respondent enumerated the Grounds following;

- i. The 1st Defendant's Application is groundless, defective and has no basis in law
- ii. The Injunction orders in place are consent or consensual orders made to expedite the hearing of the suit.
- iii. There is no new information or basis to warrant the grant of the orders sought.
- iv. The 1st Defendant's Application is not bona fide and only seeks to insidiously delay the expeditious determination of the suit as required under Sections 1A & 1B of the civil Procedure Act.
- v. On at least one occasion, 4th December 2020, the 1st Defendant needlessly agreed to an adjournment of the trial at the request of the 5th Defendant.
- vi. All possible efforts have been made by the court to try this suit expeditiously.

2nd to 6th Defendants Case

10. The said Defendants do not appear to have filed any responses to the subject Application, either by way of a Replying Affidavit or Ground of Opposition.

Submissions BY THE PARTIES

11. The subject suit was fixed for hearing on the 18th May 2021, on which date it transpired that the subject Application had been filed. Consequently, the honourable court was enjoined to and indeed issued directions pertaining to and/or concerning the disposal of the Application.

12. For the avoidance of doubt, the honourable court ordered and/or directed that the subject Application be heard and/or disposed of by way of written submissions. In this regard, the parties herein thereafter proceeded to and filed their respective submissions which were duly adopted.

Issues for determination

13. Having reviewed the Notice of Motion Application dated the 23rd March 2021, as well as the Affidavit in support thereof, together with the written submissions filed on behalf of the parties, I am of the humble view that only two issues arise for determination, namely;

- i. Whether this court has jurisdiction to vary, discharge and/or substitute the limb of the order issued on the 7th July 2020, directing

the Provision of an Undertaking.

ii. Whether the orders made on the 7th July 2020, were made by consent of the parties and if so, whether any Ground exists for their variation.

Analysis and determination

Issue Number One

Whether this court has jurisdiction to vary, discharge and/or substitute the limb of the order issued on the 7th July 2020, directing of an undertaking.

14. On the 7th July 2020, the Application dated the 27th April 2020, was fixed and/or listed for hearing before the court. During and in the course of the hearing of the said application the various advocates in the matter agreed on terms to have the pending Application compromised on terms.

15. Pursuant to and in line with the compromise, the honorable judge proceeded to and recorded the terms of the compromise, which included the fixing of the main suit for hearing and in particular the grant of orders of temporary injunction to last and/or subsist until the hearing and determination of the suit.

16. It is also imperative to note that part of the compromise also included a direction that the Plaintiff shall provide and file in court, an Undertaking to pay Damages within 7 days from the date of the said orders.

17. Pursuant to and in line with the compromise, which was duly recorded by the court and thus constitute a consent, the Plaintiff herein proceeded to and indeed filed the requisite Undertaking as to Damages. For clarity, it is this Undertaking as to Damages, which is the subject to the current Application.

18. My understanding of the current Application is that same is seeking to have the Undertaking as to Damages filed vacated and same be substituted with an order for provision of a Bank guarantee in the sum of kes.100, 000, 000/= only, or by Depositing of the said sum on a Joint earning Interest Account within 30 days of the orders.

19. If I understand the Application very well, the 1st Defendant/Applicant is inviting me to substitute the terms of the undertaking and to particularly, make further *albeit* drastic orders including provision of a Bank guarantee.

20. In my humble view, the nature and kind of Reliefs that I am being invited to make shall be tantamount and/or otherwise amount to sitting on an appeal on the decision of a court of equal jurisdiction. Simply put, the subject application is a disguised appeal, seeking to challenge, negate and/or nullify a substantive decision of the court.

21. In my humble view, I do not have the jurisdiction to seat on appeal on a decision of Court equal jurisdiction, which in her wisdom, found and held that provision of undertaking to pay damages, without more, would suffice and/or be satisfactory.

22. If I were to attempt to add and/or subtract to the binding nature of the orders that were recorded by the court, the impression that shall arise and/or ensue, shall be that the learned judge was wrong in setting and/ or circumscribing the terms of the undertaking as she did.

23. I am afraid such kind of an invite shall lead to general conflict in the corridors of justice and shall no doubt, create anarchy. In this regard, the invite at the foot of the subject Application must be frowned upon.

24. In support of the foregoing observation I beg to refer to the Decision in the case of **Mukuru Munge v Gilied Mwanyasi (2018) eKLR**, where the Court observed as hereunder;

“This court cannot reverse the finding of a court of concurrent jurisdiction on matters that go to the root of the decision. I do not agree with the applicant that there is an error in the ruling made on 20th APRIL 2017 that is capable of being reviewed.”

25. In further support of the foregoing position I take guidance from the decision in the case of **United States International University (USIU) v Attorney General [2012] eKLR**, where the Court stated as hereunder;

“The intention to provide for a specialist court is further underpinned by the provisions of **Article 165(6)** which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by **Article 165(6)**.”

26. By parity of reasoning, one Judge of the Environment and Land Court cannot supervise, superintend and/or seat on an appeal on the Decision of another judge of the same court and yet that is what the subject Application seeks to achieve.

Issue Number Two

Whether the orders made on the 7th July 2020, were made by consent of the parties and if so whether any ground exists for their variation.

27. I have already pointed out that the orders made on the 7th July 2020, were made arising out of a compromise and/or consent between the parties and in any event the consent was aimed at facilitating the expeditious hearing and disposal of the suit.

28. Having Been made by the consent of the advocates or better still in the presence advocates, who did not oppose the terms of the said orders, the orders were made by consent and therefore binding on both the advocates and the parties. In this regard, the said orders can only be set aside on the limited or circumscribed grounds known for purposes of setting aside a consent and not otherwise.

29. In respect of the subject matter, no grounds have been stated and/or shown to warrant the impeachment, variation and/or setting aside of the said order.

30. In support of the foregoing position I invoke and find support in the case of **Brooke Bond Liebig Ltd v Mallya [1975] EA 266, where it was held as hereunder**

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

31. In my humble view, the subject Application is yet an attempt to vacate and/or renege from the terms of the consensual order which was made in the presence of Counsel of the 1st Defendant/Applicant and whose terms are binding.

32. Notwithstanding the foregoing, the 1st Defendant/Applicant has however not satisfied and/or complied with the terms, envisaged for setting aside and/or varying a consent order or at all.

33. In the premises, the subject Application, is not merited.

Final disposition

34. To entertain and/or to allow the said Application, shall be tantamount to sitting on an appeal in respect of the Decision on a court of Concurrent and/or equal jurisdiction. Such an endeavor shall be a recipe for injustice, anarchy and shall amount to travesty to Justice.

35. In a nutshell, the order that commends itself to me, is one for the Dismissal of the said Application dated the 23rd March 2021.

36. As pertains to costs, it is my humble view that the subject Application was wholly unnecessary, taking into account the circumstances that necessitated entry into the compromise and/or consent on the 7th July 2020, which were aimed at facilitating the Expeditious Hearing and Disposal of the Subject Suit.

37. In the premises, the 1st Defendant/Applicant shall bear the costs of the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant