



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 39 OF 2019

JOHN MUTHEE NGUNJIRI

PETER OTIENO OKECH

CHARLES MAINA WANDAKA

EVANS EKALICHE ATTANASI

SILAS RICHARD MUKOLWE(Suing as the registered trustees of

KENYA AFRICAN NATIONAL UNION NAKURU BRANCHPLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL1ST DEFENDANT

THE MINISTRY OF LANDS AND PLANNING.....2ND DEFENDANT

THE MINISTRY OF TOURISM AND WILDLIFE.....3RD DEFENDANT

KENYATTA INTERNATIONAL

CONFERENCE CENTRE4TH DEFENDANT

AND

KENYA POWER & LIGHTING CO. LTD.....1ST INTERESTED PARTY

THE COMMISSION ON ADMINISTRATIVE

OF JUSTICE (OMBUDSMAN).....2ND INTERESTED PARTY

RULING

1. Before me for determination is the plaintiff's Notice of Motion dated 5th November 2019. The application is expressed to be brought under Sections 1A, 1B, 3, 3A and 63 (e) of Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules prays for the following substantive order under prayer (c) of the application: -

*(c) That pending hearing and disposal of the suit herein, this Honourable court be pleased to grant a Moratorium suspending the settlement and satisfaction of the decree in Nairobi HCCC No. 14 of 2004 (Commercial & Admiralty Division) and the sale of all that piece or parcel of land known as **Nakuru Municipality Block 9/31** owned, occupied and possessed by KANU Nakuru Branch as the registered proprietor (s).*

2. The application is grounded on the extensive grounds set out on the body of the application and the affidavit sworn in support by Silas Richard Mukolwe. The essence of the plaintiff's instant application is to forestall the attachment and sale of the property **LR Nakuru**

Municipality Block 9/31 owned by the plaintiff by the 1st interested party in execution of the decree in Nairobi HCCC No. 14 of 2004 made in favour of the 1st interested party. Inter alia, the plaintiff applicant in the grounds in support of the application avers under grounds No.2, 9,16,17 as follows: -

2. The suit herein and this application are made in good faith and not at all to prejudice or undermine the 1st interested party that is the decree holder in Nairobi HCC No.14 of 2004 (Commercial & Admiralty Division).

9. In this suit plaintiffs (alias KANU) fundamentally and substantially rely on doctrine of equitable and/or promissory estoppel against the government of Kenya which irrevocably gifted, transferred and registered Title No. L.R No.209/11157 (currently L.R No.209/19829) in favour of KANU and which the former had no right to forcefully retake through an illegal and questionable presidential executive orders and without adequate and sufficient compensation of the same.

16. A moratorium is a necessary and proper tool to facilitate, procure, sustain and implement the productive and intended consequences of the ends of the interests of justice.

17. A moratorium, if granted, will be a reasonable, excusable and justifiable pendulum and axis to permit room for the hearing and determination of the substantive controversial issues in the main suit for the achievement of the ends of justice.

3. The plaintiffs in the affidavit in support of the application contend that the recovery of L.R No. 209/11157 currently L.R.No.209/19829 on which Kenyatta International Conference Centre (KICC) is erected was forceful, illegal and unprocedural and hence the 1st, 2nd and 3rd defendants ought to be the parties who should settle the decree in Nairobi HCCC No. 14 of 2004 (Commercial & Admiralty Division) in view of their illegalities in the forceful takeover of the property. The deponent of the affidavit in support of the application under paragraph 10 of the affidavit depones:-

10. That the plaintiffs are not seeking to defeat the decree of Nairobi HCC No.14 of 2004 (Commercial & Admiralty Division) in favour of the 1st interested party, but are urging that the defendants be declared to be the parties to settle and satisfy the same in view of their illegalities and irregularities of the government of Kenya as set out in the plaint and the grounds in support of the current application.

4. The deponent further under paragraph 13 of the affidavit depones thus:-

*13. That this application is seeking a moratorium to suspend for a reasonable period the settlement and satisfaction of Nairobi HCC No. 14 of 2004 (Commercial & Admiralty Division) and the sale of **Title No. Nakuru Municipality Block 9/31** for Nakuru KANU Branch.*

5. The 1st Interested party vide Justus Ogoda its Legal Officer filed a replying affidavit dated 25th November 2019 in opposition to the plaintiff's application. The 1st interested party deponed that it had instituted Nairobi HCCC No. 14 of 2004 against the plaintiff and obtained judgment in its favour annexed as ("JO1") and averred that the instant application by the plaintiff was intended to circumvent and scuttle the settlement of a valid decree/judgment of the court. The 1st interested party contended the only option available to the plaintiff/applicant was to appeal or seek review of the judgment but not to file a fresh suit in a different court. The 1st interested party contended further that the issues raised by the plaintiff against it in the present suit are Res Judicata and the instant application is frivolous and an abuse of the court process.

6. The plaintiff and the 1st interested party canvassed the Notice of Motion application dated 5th November 2019 by way of written submissions. The 1st, 2nd and 3rd defendants also filed submissions opposing the application. The plaintiff submissions were filed on 17th February 2020 while those of the 1st interested party were filed on 4th August 2021. The plaintiffs have in their submissions argued that the court has jurisdiction to grant the orders sought in the application and cites Articles 48, 50 and 159 (2) of the Constitution which guaranteed access to justice, and such justice, to be administered without undue delay and without undue regard to technicalities of procedure. The plaintiffs argued the courts ought to endeavor to do substantial justice having regard to the attendant circumstances. The plaintiff denied that the application was Res Judicata by virtue of Nairobi HCCC No. 140 of 2004.

7. The 1st interested party in its submissions submitted that the court lacked the jurisdiction to entertain the application arguing that the dispute in Nairobi HCCC No. 14 of 2004 (Commercial & Admiralty Division) that gave rise to the judgment and decree which the 1st interested party seeks satisfaction of, related to payment of electricity consumed by the plaintiff (KANU) and had nothing to do with environment and/or land which this court had jurisdiction over. The 1st interested party submitted that the jurisdiction of the Environment and Land Court is conferred under Article 162 (2) (b) of the Constitution and under section 13 of the Environment and Land Court Act No. 19 of 2011 and did not include a jurisdiction to grant a moratorium over decrees/judgments issued by other courts. The 1st interested party submitted the application was a clear attempt to frustrate the 1st interested party from enjoying the fruits of its judgment. The 1st interested party in support of its submissions cited the case of **Republic -vs- Town Clerk of Webuye County Council & Another (HCCC Misc Appl 448 of 2006) (2014) eKLR** where Majanja, J stated thus: -

"---a decree holder's right to enjoy fruits of his judgment must not be thwarted when faced with such a scenario, the court should adopt an interpretation that favours enforcement and as far as possible secure accrued rights. My reasoning is under pinned by the value of the Constitution particularized under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) and (b) and the applicant's right of access to justice protected under Article 48 of the Constitution"

8. In the present matter, that there was Nairobi HCCC No. 14 of 2004 where the 1st interested party was the plaintiff and KANU was the

defendant is not disputed. The claim as per the plaint filed in the said suit related to the supply of electricity by the plaintiff to the defendant in the sum of Kshs.212,816,986/80. Judgment was entered in favour of the plaintiff (the 1st interested party herein) and a decree issued on 7th August 2009. The record shows the 1st interested party has taken out execution proceedings of the decree against the plaintiff (KANU).

9. Notably the 1st interested party sought to execute its decree issued in the Nairobi suit by attachment and sale of the plaintiffs (present suit) property identified as **Nakuru Municipality Block 9/31** registered in the plaintiff's name. The plaintiffs objected to the attachment on the basis that the property was registered in its name. (KANU Nakuru Branch) and being a Branch its property could not be attached to satisfy the liability of KANU as a party registered under the political parties Act 2007. The objection was disallowed by the Deputy Registrar, Hon. D W Nyambu.

10. On appeal F Tuiyott, J (as he then was) held :-

“A branch of a political party is not a separate and distinct legal entity from the mother party unless there is a legal instrument or legal provision separating them”

11. In the same judgment F. Tuiyott, J went on to hold that:-

“Having conceded that KANU (Nakuru Branch) is a branch of KANU, the inescapable conclusion to be made is that what belongs to the party. The conclusion does not take away the suit property from the Branch as the Branch is part of the party and does not exist as separate Legal persona”.

12. The appeal against the objection was dismissed which essentially paved the way for the 1st interested party to proceed with the execution of the decree.

13. It is important to note that the matter before the High court and which was determined was a commercial matter and that this court would have had no jurisdiction to handle it. Once that court issued a judgment/decree, this court, equally would have no jurisdiction to stay, review, vary or set aside any order that the High court may have issued consequent thereto.

14. Under section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya all questions that arise in consequence of execution of the decree ought to be submitted to the court executing the decree for determination. In the present matter it is evident that there is a question whether or not the 1st interested party can proceed with execution of its decree against the plaintiff. Though that question would appear to have been answered by F Tuiyott, J, if the plaintiff was dissatisfied with the answer they ought to have appealed against the decision and/or applied for a review if there were any grounds to seek one.

15. Although the plaintiff has formulated a prayer that he calls a moratorium suspending settlement of the decree and the sale of the suit property pending the hearing and disposal of the suit herein, the prayer essentially is one, if granted that would have the effect of staying execution of the High Court decree by way of attachment of the suit property by the Decree holder. If there was anything that could justify such a suspension, in my view, the proper court would still be the High Court which was seized with the application for execution.

16. Section 34 Civil Procedure Act provides as follows:-

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

17. In my view issues and questions of the settlement of the decree in Nairobi HCC No.14 of 2004 (Commercial and Admiralty Division) are not issues that this court has jurisdiction to deal with. This court cannot purport to play an oversight role over the High Court. The court has concurrent jurisdiction with the High Court and in matters reserved for the High Court, it lacks jurisdiction to deal with the same and viceversa.

18. In the result it is my determination that the Notice of Motion application dated 5th November 2019 by the plaintiff /applicant is devoid of any merit and is an abuse of the court process. The same is ordered dismissed with costs to the 1st interested party.

19. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF NOVEMBER 2021.

J M MUTUNGI

JUDGE