



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO E021 OF 2021**

**TIGRIS DEVELOPERS LIMITED .....PLAINTIFF**

**VERSUS**

**WILLY KIHARA NJOKI KANYOTU.....1ST DEFENDANT**

**SURESHCHANDRA RAICHAND SHAH ..... 2ND DEFENDANT**

**TOPAZ INVESTMENTS LIMITED .....3RD DEFENDANT**

**AND**

**KANGAITA COFFEE ESTATES LIMITED .....INTERESTED PARTY**

**RULING**

1. The plaintiff, Tigris Developers Limited, initiated this suit against **Willy Kihara Njoki [1st defendant]** and **Suresh Shah [2nd defendant]**, through a plaint dated 18/2/2021. Their case was that they were the beneficial owners of **Land Reference Number 8261** comprised in **Title Number IR 9480, [the suit property]** situated in Ruiru, Kiambu County, having purchased it from **M/s Kangaita Coffee Estates Limited [the interested party]** in September 2007. They further contended that the suit property was still registered in the name of the interested party because the interested party “had never been able to provide the completion documents” contemplated in the agreement for sale. It was their case that they still owed the interested party an outstanding balance of the purchase price in the sum of Kshs 9,000,000.

2. The plaintiff further contended that on diverse dates between May 2020 and January 2021, the 1st defendant approached them on several occasions, demanding payment of the said balance of the purchase price, and issued threats of eviction against them, yet he was neither a director nor a shareholder of the interested party. They further contended that the defendants had made a complaint at Ruiru Sub-County Criminal Investigations Office, prompting the Sub-County DCI Officer to summon them for interrogation.

3. Consequently, the plaintiff sought the following reliefs against the two defendants:

*a) A permanent injunction restraining the defendants, their servants, agents, employees or otherwise, howsoever, from entering and/or interfering with the plaintiff's physical possession, occupation, user and enjoyment of all that parcel of land known as Land Reference No. 8261 (Title IR No. 9480/1).*

*b) General damages; and*

*c) Costs of the suit.*

4. Together with the plaint, the plaintiff brought a notice of motion dated 18/2/2021, seeking an interlocutory injunctive order restraining the 1st and 2nd defendants against entering the suit property or interfering with their possession, occupation, user and enjoyment of the suit property, pending the hearing and determination of this suit. The said application by the plaintiff is one of the three applications falling for determination in this ruling.

5. The second application falling for determination in this ruling is the notice of motion dated 4/3/2021, brought by the 3rd defendant. The first limb of the said application dated 4/3/2021 sought an order of joinder of the 3rd defendant. That limb of the application was granted. The second limb of the said application dated 4/3/2021 sought an order discharging, varying and/or setting aside the *ex parte* temporary injunction order issued by this court [Kemei J] on 23/2/2021. The third limb of the 3rd defendant's application dated 4/3/2021 sought an order striking out this suit together with the plaintiff's notice of motion dated 18/2/2021 *ex debito justitiae*.

6. The third application falling for determination in this ruling is the 1st defendant's notice of motion dated 7/10/2021, seeking an order staying the proceedings in this suit, pending the forensic examination of various itemized documents by the Directorate of Criminal Investigations. The said application by the 1st defendant was brought after the other two applications had been canvassed and a ruling date reserved. The 1st defendant's application dated 7/10/2021 was argued on 26/10/2021 and it was directed that a single ruling will be rendered for the three applications.

7. Because the 1st defendant's application dated 7/10/2021 seeks an order of stay of proceedings in this suit, I will dispose it first. I will thereafter make appropriate pronouncements on the plaintiff's application dated 18/2/2021 and the 3rd defendant's application dated 4/3/2021, depending on the court's findings on the 1st defendant's application.

8. It is important to observe at this point that there was contestation about the legal representation of the interested party. The dispute was ultimately resolved through a ruling rendered by Gacheru J on 24/6/2021. The court made a finding that the advocates property appointed to represent the interested party are *M/s Muriu Mungai & Co Advocates*. I now turn to the applications.

#### **1st Defendant's Application dated 7/10/2021**

9. The 1st defendant's application dated 7/10/2021 was supported by his affidavit sworn on 6/10/2021, in which he deposed that his late father, James Kanyotu, was a majority shareholder in Kangaita Coffee Estates Limited **[the Interested Party]** and that the company and its assets such as the suit property herein form part of his late father's estate. He added that the suit property belongs to Kangaita Coffee Estates Limited. He further deposed that there is internal conflict and conflict amongst the directors of the interested party, which has culminated in the emergence of two factions. He added that it was his "considered view that the Honourable Court [Gacheru J] relied on a fake document, CR 12, provided by one Christopher Ngata Kariuki, to make the ruling dated 24/6/2021 and this is very unfortunate." The 1st defendant further deposed that there was a scheme orchestrated by parties to this suit "including some beneficiaries of the estate of James Kanyotu" to wrestle the suit property from the interested party and from the estate of the late James Kanyotu. The plaintiff did not file a response to the application.

10. The 2nd and 3rd defendants opposed the application through a replying affidavit sworn on 19/10/2021 by Suresh Chandra Raichand Shah. He deposed that the 1st defendant had sufficient time to procure forensic examination of the itemized documents if he so desired and that no plausible reason had been given by the 1st defendant for his inaction. He added that the 1st defendant did not have *locus standi* to bring the application because he was neither a director nor a shareholder of the interested party. He added that the 1st defendant had not demonstrated that he had a known legal interest in the suit property.

11. Canvassing the application in the virtual court on 26/10/2021, Mr Ruiru, counsel for the 1st defendant submitted that the 1st defendant had filed official searches indicating that the suit property belongs to the interested while the 2nd and 3rd defendant had similar filed on official search indicating that the suit in the name of the 3rd defendant. Counsel added that the 1st defendant had filed documents indicating that the suit property has rates arrears while the 2nd and 3rd defendant had filed comments indicating that the suit property did not have rates arrears. Counsel argues that the court should allow a stay of proceedings so that reliance is not place on illegal, fraudulent or fake documents.

12. Mr Njuguna, counsel for the plaintiff submitted that the plaintiff did not oppose the application because there appeared to be conflicting documents.

13. Mr Kimani, counsel for the 2nd and 3rd defendants opposed the application. Counsel submitted that the 3rd defendant holds a tile to the suit property and was in possession of the suit property. Counsel added that the 1st defendant was neither a shareholder nor a director of the interested party. Counsel further submitted that the interested party had not taken a position in this matter despite having been served with court documents. It was the position of counsel for the 2nd and 3rd defendant that the interested party had never impeached the title held by 3<sup>rd</sup> defendant and name of the shareholders and directors of the interested party had complained.

14. Counsel for the 2nd and 3rd defendant added that the plaintiff was enjoying an exported injunctive order and the 3rd defendant would stand to be prejudiced if the proceedings were stayed and the injunctive order remained in place. Counsel urged the court to dismiss the application.

15. I have considered the application by the 1st defendant seeking stay of proceedings. I have also considered the parties' rival affidavits and submissions. The single question falling for determination in the said application is whether the applicant [1st defendant] has laid a proper basis for an order of stay of proceedings in this suit.

16. The general principles which guide our courts whenever they are invited to exercise jurisdiction to stay proceedings are best summarized in **Halsbury's Law of England, 4th Edition, Vol 37** at pages 330 and 332 as follows:

***"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."***

17. Having considered the evidence and submissions tendered by the 1st defendant, I do not think the 1st defendant has laid a proper basis for an order of stay of proceedings in the circumstances of this case. First, the documents which the 1st defendant has itemized were presented and served to the parties more than seven months ago. There was sufficient time for any party who desired to procure forensic examination of the documents to do so. No explanation has been tendered for the failure to procure the forensic examination in the preceding seven months.

18. Second, the 1st defendant has no claim in this suit. He is a defendant sued by the plaintiff. His case in relation to the present application

is that the suit property belongs to the interested party and that some people are out to wrestle the suit property from the interested party. The interested party is a party to this suit and has not sought a forensic examination of any document. It is therefore strange that the 1st defendant who is neither a director nor a shareholder of the interested party is questioning documents which the interested party does not have any problem with. What emerges from the position taken by the 1st defendant is that he does not appreciate that the interested party is a distinct legal person that speaks through resolutions of its directors and shareholders. He does not also appear to appreciate that he has no *locus standi* to speak on behalf of the interested party in this suit. If he has issues with the way the affairs of the interested party are being handled, he should channel his concerns to the interested party through the administrators of the estate of the late James Kanyotu.

19. Thirdly, the 1st defendant has not demonstrated that he has a legal interest in the suit property that would form the basis of the stay order that he seeks. In my view, the fact that the plaintiff [who after obtaining an *ex parte* injunction is now supporting the 1st defendant's plea for stay of proceedings] made the 1st defendant a party to this suit is not a sufficient ground for the court to grant an order of stay of proceedings, more so when the interested party on whose behalf the 1st defendant purports to speak is a party to the suit and has not sought a stay of proceedings or sought a forensic examination of any of the documents exchanged by the parties in this suit.

20. The totality of the foregoing is that the 1st defendant has not satisfied the court that there is a proper basis for staying the proceedings in this suit. Consequently, the 1st defendant's notice of motion dated 7/10/2021 is rejected for lack of merit. I now turn to the plaintiff's application dated 18/2/2021 and the 3rd defendant's application dated 4/3/2021. I will

dispose them simultaneously.

21. The plaintiff's application dated 18/2/2021 seeks an interlocutory injunction pending the hearing and determination of this suit. The first limb of the 3rd defendant's application dated 4/3/2021 was a plea for an order of joinder and that plea was duly granted. The second limb of the 3rd defendant's application seeks an order discharging/ varying/ setting aside the interim order issued in favour of the plaintiff on 23/2/2021. The interim order dated 23/2/2021 was issued by Kemei J and was to be in force pending the interparties hearing and determination of the plaintiff's application dated 18/2/2021. It will therefore cease to be in force upon delivery of this ruling. The third limb of the 3rd party's application dated 4/3/2021 is a plea for an order striking out the plaintiff's suit. That is the only limb which falls for determination in this ruling.

22. I have considered the evidence and submissions tendered in relation to the two applications. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in the two applications. The single question falling for determination in the plaintiff's application dated 18/2/2021 is whether the plaintiff has satisfied the criteria upon which our trial courts exercise jurisdiction to grant an interlocutory injunctive relief. The single question falling for determination in the remaining limb of the 3rd defendant's application dated 4/3/2021 is whether the application satisfies the criteria upon which our trial courts exercise jurisdiction to strike out suits *ex-debito justitiae*. I will make brief sequential analysis and pronouncements on the two questions.

23. The principle upon which our trial courts exercise jurisdiction to grant interlocutory injunctive relief was outlined in **Giella v Cassman Brown & Co Ltd [1973] EA 358**, and is well settled. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that if the interlocutory injunctive relief is not granted, he would stand to suffer irreparable damage that cannot be adequately indemnified through an award of damages. Thirdly, if the court has doubts on either or both of the above two limbs, the application is to be determined on a balance of convenience. Fourthly, at this interlocutory stage, the court does not make conclusive or definitive pronouncements on the substantive issues in the suit. The focus of the court is to establish whether the criteria has been satisfied.

24. The plaintiff claims to have a beneficial interest in the suit property pursuant to a sale agreement dated 20/9/2007 between it and the interested party. The plaintiff contends at paragraph 6 of the plaint that the "interested party has never concluded the sale transaction as it has never been able to provide the completion documents under the terms of the agreement." The plaintiff adds at paragraph 7 of the plaint that there still remains an outstanding balance of the purchase price in the sum of Kshs 9,000,000. It does therefore appear, from the pleadings and from the evidence presented at this interlocutory stage, that the plaintiff did not acquire the suit property because the purported sale agreement was never completed.

25. It is also noted that the plaintiff may not legally enforce the purported

sale agreement dated 20/9/2007 because it is now more than 14 years since the purported agreement was allegedly executed. It is also strange that the plaintiff has not made any claim against the interested party even at this stage when it has been brought to its attention that the interested party sold and conveyed the suit property to **M/s Artaxerxes Limited** who in turn sold it to the 3rd defendant. The plaintiff's case at this stage is not helped by the fact that the interested party who is alleged to have sold and conveyed the suit property to **M/s Artaxerxes Limited** has elected not to support the plaintiff's claim.

26. Given the above circumstances, it is my view that the plaintiff has not, at this interlocutory stage, demonstrated that it has a crystallized interest in the suit property which should be protected through an injunction. Secondly, what would be at stake is the money that the plaintiff may have paid to the interested party, if indeed the alleged money was paid. That money can be recovered through an appropriate suit. It is noted at this stage that no evidence has been presented to demonstrate that the plaintiff paid the alleged sum of Kshs 50,000,000. Nothing other than the unstamped agreement dated 20/9/2007 [which is alleged to have been disowned by the advocates alleged to have witnessed it] was presented as evidence of payment.

27. On its part, the 3rd defendant has presented a copy of the title bearing relevant entries. They contend that they hold the original title. Both the title and the search exhibited by the 3rd defendant show that the suit property was conveyed to the 3rd defendant by **M/s Artaxerxes Limited** on 14/4/2011. Further, the 3rd defendant has exhibited a transfer dated 1/4/2011; stamp duty pay in slip; cheque for Kshs 17,500,000 dated 20/12/2010 together with the corresponding transaction journal; and funds remittance slip dated 31/3/2011 for Kshs 156,406,568. The 3rd defendant has demonstrated that they have had quiet possession of the suit property since they acquired it in 2011.

28. The totality of the foregoing is that the plaintiff has failed to satisfy the two essential requirements in **Giella v Cassman Brown & Co Ltd [1973] EA 358**, Put differently, the plaintiff has failed to satisfy the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive relief. The net result is that the plaintiff's application dated 18/2/2021 is dismissed for lack of merit. The interim order issued on 23/2/2021 will accordingly lapse today. I now turn to the single question in the 3rd defendant's application dated 4/3/2021.

29. The single question in the 3rd defendant's application dated 4/3/2021 is whether the application meets the criteria upon which a trial court exercises jurisdiction to strike out a suit *ex debito justitiae*. The principle upon which our courts exercise jurisdiction to strike out suits *ex debito justitiae* are well-settled. The **Court of Appeal in Co-operative Merchant Bank Ltd v George Fredrick Wekesa, Civil Appeal No. 54 of 1999** summarized the principle as follows:

***"..... striking out a pleading is a draconian act, which may only be resorted to in plain cases ..... Whether or not a case is plain is a matter of fact ..... A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."***

30. The above principle has been reiterated by the Court of Appeal in a line of decisions, including: (i) **Yaya Towers Limited v Trade Bank Limited (in liquidation) Civil Appeal No 35 of 2000**; and (ii) **Kivanga Estates Limited v National Bank of Kenya Limited [2017]eKLR**.

31. The 3rd defendant contends that the plaintiff is a busy body who has no known or registrable right or interest in the suit property. The 3rd defendant further contends that the firm of *Mirugi Kariuki Advocates* and their *Mr Kahiga Waitindi* who are expressed as having drawn and attested to the agreement which the plaintiff invoked to initiate this suit have disowned the agreement. The 3rd defendant argues that to the extent that the plaintiff relied on a forged document and has boldly lied on oath about the purported sale agreement dated 20/9/2007, no action can be founded on an illegal act.

32. I have looked at the letter dated 4/3/2021 from *M/s Mirugi Kariuki & Co Advocates*. They have disowned the agreement. In his response, Mr Njuguna, counsel for the plaintiff argued that there was no proper evidence that the sale agreement was forged. He further submitted that there was no conclusive evidence that the letter dated 4/3/2021 which the 3rd defendant relies on came from *M/s Mirugu Kariuki Advocates*.

33. I have taken the above submissions into account. I have also taken into account the prevailing jurisprudence on the principle upon which the jurisdiction to strike out pleadings is exercised. I will allow the plaintiff's suit to stand, if not for anything else, for the purpose of determining the authenticity of the agreement the plaintiff is waving. The 2nd and 3rd defendants are at liberty to bring an appropriate application for security of costs.

#### **Disposal Orders**

34. In light of the foregoing, the 1st defendant's application dated 7/10/2021; the plaintiff's application dated 18/2/2021; and the 3rd defendant's application dated 4/3/2021 are disposed in the following terms:

***a) The 1st defendant's application dated 7/10/2021 is dismissed for lack of merit. The 1st defendant shall bear costs of the said application dated 7/10/2021.***

***b) The plaintiff's application dated 18/2/2021 is dismissed for lack of merit and the interim order which has been in force pending the determination of the application lapses forthwith. The plaintiff shall bear costs of the application.***

***c) The third defendant's plea for an order striking out this suit is declined without any order as to costs. The 3rd defendant and any other defendant shall be at liberty to bring an application for security for costs of this suit.***

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON**

**THIS 6TH DAY OF DECEMBER 2021**

**B M EBOSO**

**JUDGE**

**IN THE PRESENCE OF: -**

**MR NJUGUNA FOR THE PLAINTIFF**

**MR RUIRU FOR THE 1ST DEFENDANT**

**MR KIMANI FOR THE 2ND AND 3RD DEFENDANTS**

**COURT ASSISTANT: LUCY MUTHONI**