



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 58 OF 2007

BETWEEN

HOTEL BIG FIVE LIMITED.....APPLICANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION.....RESPONDENT

RULING

1. By a notice of motion dated 09th September, 2019 and filed on 10th September, 2019 brought under Sections 1A, 1B and 3 of the Civil Procedure Act Order 40 rule 1 and 2, Order 12 rule 7 and Order 51 rule 3 of the Civil Procedure Rules, the Applicant prays for orders **THAT:**

1) The Honourable Court be pleased to set aside the order made on 17th February, 2019 dismissing the Applicant's suit with costs for want of prosecution

2) The Applicant's suit be reinstated for hearing and determination on merit

3) Pending the hearing and determination of this suit, an order of permanent injunction does issue restraining the defendants whether by itself, servants, employees or any of them howsoever from offering for sale, selling, alienating or in any other way interfering with and interrupting the plaintiff's quiet, legal and peaceful occupation and use of the parcel of land designated as KARACHUONYO/KONYANGO/1545 and KARACHUONYO/KONYANGO /2590 (*suit properties*)

4) Costs be provided for

2. The application is based on the grounds among others that the Applicant and its Advocate were not aware that this matter had been listed for hearing on 17th February, 2015 when it was dismissed and further that the Respondent has issued notice to sell the suit properties. The application is also supported by an affidavit sworn on 09th September, 2019 by EZRA ODONDI OPAR, who describes himself as the Applicant's managing director in which he reiterates the grounds on the face of the application.

3. The application is opposed by way of grounds of opposition dated 24th September, 2019 and filed on 25th September, 2019 in which the Respondent asserts that its intention to sell the suit properties has not been demonstrated.

4. I have considered the notice of motion in the light of the affidavits on record and submissions filed on behalf of both parties and the cited authorities.

5. It has not been demonstrated that the notice dated under Order 17 rule (2) was served on the Applicant or its counsel. There being no evidence of service of the notice, the dismissal was against the rules of natural justice and in particular the *audi alteram partem* principle which dictate that no party be condemned unheard. In **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206**, at page 210, the Court of Appeal stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

6. The record demonstrates that by an order dated 02nd July, 2007, this matter was referred to arbitration and the proceedings were stayed. Since then, no action was taken for 8 years until 17th February, 2015 when this suit was dismissed.

7. As much as there has been inordinate delay to prosecute this matter, the Applicant's suit is protected by the fact that it was not notified of the intended dismissal.

8. The record likewise demonstrates that prior to the matter being referred for arbitration, the court had by an order dated 15th May, 2007 restrained the Respondent whether by itself, servants, employees or any of them howsoever from offering for sale, selling, alienating or in any other way interfering with and interrupting the plaintiff's quiet, legal and peaceful occupation and use of the suit properties.

9. In the submissions filed on behalf of the Applicant is attached a notice of intention to sell the suit properties issued to the Applicant by the Respondent. There is therefore real danger that the suit properties might be disposed off. And whereas an order of permanent injunction cannot be granted at an interlocutory stage, this court has discretion to grant any other order that it may deem fit in the interest of justice.

10. Consequently, the notice of motion dated 09th September, 2019 and filed on 10th September, 2019 is allowed in the following terms: -

- 1) **The order made on 17th February, 2019 dismissing the Applicant's suit with costs for want of prosecution is set aside**
- 2) **The Applicant's suit be and is hereby reinstated for hearing and determination on merit**
- 3) **Pending the hearing and determination of this suit, an order of temporary injunction does issue restraining the defendants whether by itself, servants, employees or any of them howsoever from offering for sale, selling, alienating or in any other way interfering with and interrupting the plaintiff's quiet, legal and peaceful occupation and use of the parcel of land designated as KARACHUONYO/KONYANGO/1545 and KARACHUONYO/KONYANGO /2590**
- 4) **Since it appears that the matter was not settled by way of arbitration, the matter is referred to a mediator to assist the parties to resolve the dispute between them**
- 5) **This matter shall be mentioned within a period of not less than 60 days to confirm whether settlement has been reached and for further directions if need be**
- 6) **In the meantime, the Respondent is directed to file and serve its defence within 30 days' from the date hereof if need be**

DATED AND DELIVERED IN KISUMU THIS 14th DAY OF November 2019

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistants	-	Amondi/Okodoi
For the Applicant	-	Ms. Kirabo hb Mr. Ouma
For the Respondent	-	Mr. Mwesigwa