



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC NO. 187 OF 2018

THE COUNTY GOVERNMENT OF KWALE.....PLAINTIFF

VERSUS

UNITED INSURANCE COMPANY (Under Statutory Management).....1ST DEFENDANT

THE POLICY HOLDER COMPENSATION FUND

(Sued as the Statutory Manager of United Insurance Company Limited).....2ND DEFENDANT

RULING

(Application by defendants seeking to have orders to set aside the order of leave granted to the plaintiff to commence suit, and further seeking that the suit be struck out; plaintiff claiming to own certain land and alleging that the 1st defendant illegally created two plots out of its land; before filing suit, plaintiff having sought and obtained leave to sue the 1st defendant, an insurance company under statutory management; defendants now arguing that leave ought not to have been granted as the 1st defendant is under statutory management and a moratorium was issued to stop litigation against it; position of the court that the moratorium only covers insurance claims and accounts, and not the recovery of land; application dismissed)

1. The application before me is that dated 25 November 2019 filed by the defendants. It seeks the following orders :-

(i) That the suit herein be consolidated with Mombasa High Court Miscellaneous Application No. 262 of 2017.

(ii) That upon grant of prayer 1 hereinabove, the court be pleased to set aside proceedings and orders as issued on the 2nd May 2018 in Mombasa High Court Miscellaneous Application No. 262 of 2017.

(iii) That in alternative to prayer (2) hereinabove, the orders granted by the court on the 2nd May 2018 in Mombasa High Court Miscellaneous Application No. 262 of 2017 be and are hereby vacated and or discharged.

(iv) That both proceedings as instituted vide Mombasa High Court Miscellaneous Application No. 262 of 2017 and the suit herein as filed against the defendants be stayed during the pendency of the moratorium declared by the Statutory Manager of United Insurance Company on the 15th July 2005.

(v) That in the alternative to prayer (iv) hereinabove, both proceedings as instated vide Mombasa High Court Miscellaneous Application No. 262 of 2017 and the suit herein be and are hereby struck out with costs to the defendants.

(vi) That the costs of this application be borne by the plaintiff.

2. To put matters into context, the plaintiff/respondent is one of the 47 County Governments created by the 2010 Constitution. The 1st defendant is a limited liability company engaged in the insurance business but is under statutory management. The 2nd defendant is an insurance compensation scheme pleaded to have been created by Section 179 of the Insurance Act, for the primary purpose of protecting policy holders of insolvent insurance companies. It is the statutory manager of the 1st defendant. Through a plaint filed on 16 August 2018, the plaintiff pleaded that it is the owner of the land parcel Kwale/Diani Complex/33 (Plot No. 33) which it avers to have leased out to the Ministry of Tourism for a period of 33 years commencing on 16 July 1999. It is therefore contended that this is public land. It is pleaded that the 1st defendant irregularly purported to create two parcels of land registered as Kwale/Diani Complex/724 and 725 (Plots No. 724 and 725), from the same land that is comprised in the Plot No. 33, thus alienating the plaintiff's land. The plaintiff contends that the two titles

were illegally created as it never undertook any subdivision of the Plot No. 33. The plaintiff pleaded that the 1st defendant has now developed a permanent building on the disputed land. In the plaint, the plaintiff mentioned that before filing suit, it had been granted leave to do so through the case Mombasa High Court Miscellaneous Application No. 262 of 2017. In the suit, the respondent seeks orders to revoke the title of the 1st defendant to the Plots No. 724 and 725 and a permanent injunction against the 1st defendant from the land.

3. A Memorandum of Appearance was entered for both defendants “under protest.” A joint statement of defence and counterclaim was then filed. It was denied that the 1st defendant irregularly carved out the Plots No. 724 and 725 from the Plot No.33. It was pleaded that the 1st defendant bought the Plot No. 724 from one Said Mwambavu and Hamisi Omari Mwandaro in the year 1996. It was asserted in the counterclaim that the two plots are the property of the 1st defendant and that it was the plaintiff who had acted illegally by inter alia creating and tampering with the records and manufacturing a fake title. It was further pleaded that the 1st defendant is under a moratorium, issued in Nairobi HCCC No. 67 of 2012, staying all proceedings and suits relating to the 1st defendant during the pendency of the moratorium. It was further pleaded that under Section 67 (e) of the Insurance Act, the Statutory Manager cannot be sued while discharging its mandate under the instrument of the moratorium and that he is obligated to preserve all assets of the company for the benefit of creditors. It was pleaded that by obtaining leave, the plaintiff will be creating a priority over the other creditors, which was contended to be illegal and unprocedural. It was pleaded that the pendency of this suit, and its continuation, is against public policy and the law, as it will open a flood gate of suits against the Statutory Manager. It was further averred that this suit is fatally defective and incompetent, inter alia because the acts complained of were not committed by the Statutory Manager; that the Statutory Manager cannot be sued for the acts and omissions of the company during its subsistence as a going concern; and that there exists an order of moratorium. It sought for orders to vacate the leave issued in Mombasa High Court Miscellaneous Application No.262 of 2017, a declaration that the 1st defendant is the lawful owner of the Plots No. 724 and 725, and a permanent injunction against the plaintiff from the said land.

4. A Reply to Defence and Defence to Counterclaim were filed principally joining issue with the defendants. There were some applications filed, more or less seeking the same orders herein, but which were withdrawn as they were said to be defective. This application was then filed.

5. The grounds listed go to almost 20 paragraphs and I do not find it necessary to list all of them. Among the grounds is that the application in Mombasa Miscellaneous Application No. 262 of 2017 was served upon the 2nd defendant’s receptionist who did not have capacity to receive or comprehend court documents, and that the said receptionist filed it away, thus no response could be filed. It is reiterated that the 1st defendant is under moratorium issued in Nairobi HCCC No. 748 of 2009; that in the said moratorium, the court suspended the running of time for purposes of limitation; that the judicial process shall be brought into disrepute by having two parallel orders; and that the duties of the Statutory Manager do not go to taking responsibility for the action of the 1st defendant’s previous managers.

6. The supporting affidavit is sworn by Christopher Onyango, who has been retained by the 2nd defendant as the operations manager of the 1st defendant. He has more or less reiterated the above, and has deposed that they only came to know of the order in Miscellaneous application No. 262 of 2017 when the plaint in this suit was served upon them. He has repeated that the 1st defendant is under a moratorium and has annexed the order of moratorium. He has pointed out that there are numerous other cases that have been stayed against the 1st defendant. There is also an affidavit sworn by Violet Gichia, who has deposed that she is employed by the 2nd defendant as a receptionist. She has deposed that she received court documents in respect of Mombasa HCCC Miscellaneous Application No. 262 of 2017 and since none of the senior officers were in office, she inadvertently filed the same away. She has deposed that her failure to forward the documents to her senior officers was based on an honest mistaken belief that the documents did not require immediate attention.

7. The application is opposed by the replying affidavit of Kevin Dzumo, the director of legal services of the plaintiff. He has deposed inter alia that upon finding out that the 1st defendant has title to the disputed land, the plaintiff instituted the suit Mombasa HCCC Miscellaneous No. 262 of 2017, a motion that was filed in court on 24 October 2017 and which was later amended. He has deposed that the original motion and the amended motion were properly served with service being duly acknowledged. He has annexed an affidavit of service outlining how the Miscellaneous Application was served. He has deposed that the application disclosed all material facts including that the 1st defendant has been under statutory management since the year 2005. Leave to institute these proceedings was granted and this case was filed. He is of opinion that the current application is a thinly veiled attempt to appeal the orders of leave and an attempt at frustrating the plaintiff from recovering fraudulently acquired public land.

8. Counsel filed written submissions in support of and in opposition to this motion and I have taken into account these submissions.

9. The application is said to be premised upon the provisions of Order 40 Rule 7, Order 11 Rule 3(1)(h), Order 51 Rules 1 and 3, Sections 1A, 3A, of the Civil Procedure Act, Cap 21, Laws of Kenya, and “all other enabling provisions of the law” which said provisions have not been disclosed and I am unable to speculate which provisions are intended to apply. Order 40 Rule 7 makes provision for the discharge, variation, or setting aside of an order of injunction. Order 51 Rules 1 and 3, only provide for the manner in which applications are filed, that is through a Notice of Motion, and that such motion can be heard ex-parte. Section 1A set out the overriding objectives of the statute and Section 3A provides for the general power of the court. Clearly, the applicants have not pointed me to any provision of the law that has a direct and specific connection with the orders sought. Be that as it may, I will still look into the veracity of the prayers sought.

10. The first prayer seeks a consolidation of this matter with Mombasa HCCC Miscellaneous Application No. 262 of 2017. My view of Mombasa HCCC Miscellaneous Application No. 262 of 2017 is that it is a matter which is finalized. It was merely an application seeking leave to commence this suit, which leave was given, and this suit was then filed. There is nothing left in that case. I do not see what there will be to gain for this suit to be consolidated with Mombasa HCCC Miscellaneous Application No. 262 of 2017. I am thus not persuaded to grant the order of consolidation.

11. The second prayer seeks to set aside the proceedings and orders issued on 2 May 2018 in Mombasa HCC Miscellaneous Application No. 262 of 2017. Those are the orders that gave the plaintiff leave to file this case. My view is that I have no jurisdiction to set aside those orders. I will reiterate that the said orders were only aimed at giving permission to the plaintiff to file this suit because a suit was intended to be filed

against a company that was under statutory management and leave was required. The orders that granted leave to commence suit are now spent after this suit was filed. If the applicant was aggrieved by those orders, the avenue would have been to appeal against them, or file a review application. This application is not one of review and I cannot sit on appeal against the said decision. I am therefore unable to grant the prayer to set aside the order of 2 May 2018.

12. The third prayer seeks the vacation of the order of 2 May 2017. I have already pronounced myself in the above paragraph and need not add any more. I am not persuaded that I have jurisdiction to set aside those orders.

13. The fourth prayer is to have this suit stayed for reason that there is a moratorium. Again, I do not think that I have jurisdiction to revisit this issue because the court that granted leave must have considered that the company is under statutory management. But assuming I have jurisdiction, I am unable to grant a stay of these proceedings. The applicants have annexed the said orders of moratorium and I have had a critical look at them. We have to consider the context of the moratorium in order to understand it. The 1st defendant is an insurance company that is under statutory management. Insurance companies generally pay claims that have matured against policy holders. My view of the matter is that the moratorium is to stop the payment of such claims pending the revival or winding up of the company. I do not think that such moratorium should be extended to anything more than the payment of claims against policy holders or the settlement of debts and such like accounts. If you take the moratorium and extend it to everything else, then you will basically be saying that such a company is above the law and can do anything without the aggrieved party taking any legal action. That would be against public policy. If for example one is of the view that an asset claimed by the company is not part of the company's asset, surely he can file suit to recover the asset, for this has nothing to do with an insurance claim. Let me give an illustration. Let us assume the 1st defendant orders some stationery which is delivered by a hired truck, and when the truck arrives at the 1st defendant's store, the 1st defendant refuses to let the truck go, and instead retains it. Does it mean that because of the moratorium, the owner of the truck cannot sue for its release? Clearly not.

14. It is more or less the same scenario that we have in this case. The case here is that the 1st defendant holds illegal titles superimposed upon what the plaintiff claims to be a genuine title which is claimed to be public land. I think the plaintiff should be allowed to ventilate that case, for if it is the position that the properties are actually public properties, then they ought to be removed from the list of assets of the 1st defendant. If they are not removed, then they may be distributed to creditors, and if that happens, then the plaintiff may very well lose its right to claim them.

15. The moratorium should not be abused to cover each and every scenario. Litigation that is outside the parameters of insurance claims, and outside the settlement of accounts, and particularly those involving the recovery of land, in my view, may be continued as against the 1st defendant, and since the 2nd defendant is its manager, I do not see why the 2nd defendant is complaining for having been enjoined in this case. If for one reason or another, upon a hearing, it is found that the 2nd defendant ought not to have been enjoined, the 2nd defendant can be compensated by way of costs.

16. The fifth prayer is to have these proceedings struck out. From my discourse above, it will be seen that I see no reason why these proceedings should not continue. In fact, I see no prejudice to the defendants by this case proceeding. If it is the position of the defendants that the disputed land is properly owned by the 1st defendant, all they need to do is to present their evidence in court, and have the matter decided on its merits. The defendants suffer absolutely no prejudice by this case being determined on merits and any inconvenience can be settled by way of costs. The justice of this case tilts towards having the case proceed for hearing on merits and a decision made on who is the proper owner of the disputed land.

17. The last prayer is for costs, and since I see no merit in this application, I dismiss it with costs to the plaintiff.

18. The end result is that this application is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF MAY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA.