



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT

LAND CASE NO.48 OF 2013

M/S FLAVEMART ENTERPRISES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT/APPLICANT

RULING

1. Kenya Railways Corporation, the Applicant, filed the Notice of Motion under certificate of urgency dated 11th November 2014 seeking six prayers marked 1 to 6. Prayer 1 and 4 have already been dealt with leaving prayers 2,3,5 and 6. Prayer number 3 is for setting aside an Exparte order of injunction issued on 22nd February 2013 while prayer 2 is for setting aside the interlocutory judgment entered on 6th June 2013 and granting Applicant leave to file defence and counterclaim. The fourth prayer is for injunction order against the **M/S Flavemart Enterprises Limited**, the Respondent, over land parcel **Kisumu Municipality Block 11/7**. The notice of motion is based on the seven grounds on the application and the affidavit sworn by Stanley Gitari, who describes himself as a Senior legal officer with the Applicant, sworn on 11th November 2014.

2. The application is opposed by the Respondent, through the replying affidavit of Peter Ochieng Okore, who describes himself as a director of the Respondent , sworn on 2nd February 2015.

3. That the counsel for for the parties appeared before the court on 4th June 2015 and agreed to proceed with the application through written submission. The Applicant's counsel filed their submission dated 17th June on the 18th June while the Respondent's counsel filed theirs dated 29th September 2015 and on the same date. The following issues stand out for determination.

- (a) Whether the Applicant has shown that they have a reasonable defence to the plaintiff's claim.
- (b) Whether there was a proper service of the summons.
- (c) Whether failure to file the defence is excusable.
- (d) Whether any of the orders sought should issue.
- (e) Who pays the costs.

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties and the submission by counsel and come to the following findings;

(a) That the application is brought under Order 10 Rule 11 and Order 40 Rule 1 and 2 of Civil Procedure Rules invoking this court discretion to set aside judgment entered following the non appearance of the Applicant and issuance of injunction orders to conserve the suit property. The filed submissions by counsel clearly that both parties are in agreement that this court has the power, to issue the orders sought but in appropriate situations. The Respondent submits that the Applicant do not deserve the orders sought first because they were served with the summons and for not apparent reasons chose not to enter appearance and file defence within the time prescribed. Secondly that the applicant has disclosed that they had sold their interest over the suit land and therefore have no basis to interfere with the plaintiff's interest over the land. The counsel for the Applicant submitted that the Applicant has held title to the suit land since 1976 and were in the process of selling it to M/S Dube Holdings when they discovered that another title to the same suit land existed in the names of the Respondent. The court has confirmed that the correct position is as contained in the Applicant's submissions when one considers paragraphs 2 to 6 of the supporting affidavit. As the Applicant had not registered the transfer documents alienating the suit land to the purchaser, then the submissions that they have no interest over the suit land capable of being defended in this suit cannot be based on the available facts.

Looking at the affidavit of service on George Omondi Ogonji sworn on 11th March 2013, the suit papers were served on Mr Amoke, the estate manager, Kisumu region on 25th May 2013 at 4.00 pm. The said Amoke had reportedly declined to sign the principal copy in acknowledgement of service. The Applicant has not disowned or confirmed that the said Amoke was at the said time their Kisumu region estate Manager. The Applicant only say, that the service was not proper as it offends Order 5 Rule 3 of the Civil Procedure Rules. The rule sets out the officers to be served where the suit is against the corporation like the Respondent herein. It is obvious the options in subrule (b) should only should be considered for service where the "Secretary, director or other principal officer of the corporation," set out in subrule (a) cannot be traced. That is why subrule (b) starts with the words; "(b) if the process server is unable to find any of the officers of the corporation mentioned in 3(a)". The affidavit of service by George Omondi Ogonji does not disclose any efforts that he may have taken to trace the Applicant's secretary, director or other principal officers before opting to serve the Kisumu Region estate Manager, Mr Amoke. The process server received the court paper from the Respondent's counsel on 25th May 2013 and on the same day served Mr Amoke at 4.00 pm. He did not make any attempt to effect, service at the Applicant's principal offices or headquarters where the secretary, director or other principal officers would ordinarily be based. The choice of the person served may have caused the delay that occasioned the Applicant not to instruct counsel in time to enter appearance and file their defence.

(b) That the judgment was requested for in writing on 6th June 2013. The interlocutory judgment was entered on the same date while the application dated 11th November 2014 was filed the 12th November 2014. the Applicant has not explained why it took them that long to file the same. The Applicant has also not disclosed how they came to know of the filing of this proceedings. However, looking at the annexed draft defence and counter claim, the court is of the view that it contains a reasonable answer to the Respondent's claim. I raises triable issues.

(c) That the Respondent having manifested their desire to be allowed to defend the suit by filing the application dated 11th November 2014 and the court having noted that the draft defence and counterclaim contains a reasonable answer to the claim lodged by the Respondent, the Applicant deserves an opportunity to be heard. The court has the power to grant the prayers sought as already confirmed in the case of Shah - V - Mbogo (1968)EA 93, Patel – V- Cargo Handling Services Ltd {1974} EA 75. Joseph Ngonje Waweru - V – Joel Wilfred Ndiga {1982-88} IKAR 210.

(d) That when the Respondent filed the plaint dated 20th February 2013, they contemporaneously filed a Notice of Motion under certificate dated 21st February 2013 and obtained prayers 1 and 2. Prayer 2 was for injunction against the Applicant over the suit land pending hearing of the application. The Application has never been heard interpartes and the interim orders of 21st February 2013 have since lapsed. The Applicant have themselves obtained similar orders against the Respondent which are still in force. The court is of the view that, so as not to delay this matter any longer, the status quo obtaining now be maintained pending the final determination of this suit.

5. That having found as above, the court finds the Applicant's notice of motion dated 11th November 2014 has merit and is allowed as follows:

(a) That the interlocutory judgment entered against the Defendant on 6th June 2013 is hereby set aside.

(b) That the defendant do file and serve their defence and counterclaim within the next thirty (30) days.

(c) That the parties do maintain the status quo existing today pending the hearing and determination of this case.

(d) That the parties do comply with Order 11 of Civil Procedure Rules within the next 60 days.

(e) That the costs of the application be in the cause.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

Dated and delivered this **11th day of November 2015**

In presence of;

Applicant N/A

Respondent N/A

Counsel Mr Mwamu for Mutai for Defendant/Applicant.

Mr Rakewa for plaintiff/Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

11/11/2015

S.M. Kibunja J

Court clerk Oyugi

Parties absent

Mr Mwamu for Tom Mutai for Applicant

Mr Rakewa for Respondent

Court: Ruling delivered in open court in presence of Mr Mwamu for Mutai for Defendant/Applicant and Mr Rakewa for Plaintiff/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015