



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MILIMANI**

**ENVIRONMENT AND LAND CASE NO. 598 OF 2013**

**CHARLES W. GITONGA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**SUPPLIERS & SERVICES LTD.....DEFENDANT/APPLICANT**

**RULING**

The Defendant /Applicant herein has brought this Notice of Motion dated 5<sup>th</sup> July, 2013 under **Order 40 Rules 7,5 and 4 of the Civil Procedure Rules and Section 63(e) and 3A of the Civil Procedure Act** seeking these orders.

- a. ***That the honourable court be pleased to set aside the Order of injunction given in the case on 6<sup>th</sup> June, 2013 and all other consequential orders.***
- b. ***That the Honourable Court be pleased to strike out and dismiss the Plaintiff's case against the Defendant.***
- c. ***That cost of this application be provided for.***

The application was premised on various grounds that:-

- i. **The Defendant is the registered proprietor of all that parcel of Land known as LR No. 15207 Nairobi.**
- ii. **That the Defendant has possession of the said plot and has been carrying on development thereon.**
- iii. **That the Plaintiff and other persons attempted to take possession of the same leading to the institution of ELC No. 691/2012 filed by the Defendant in which injunctive orders were issued in favour of the Defendant.**
- iv. **That the Plaintiff herein did not serve the Defendant/ Applicant with either the pleadings or the order issued on the 6<sup>th</sup> June, 2013.**
- v. **Further that the Plaintiff obtained the said Order by material non-disclosure or suppression of material facts.**

- vi. **That on 3<sup>rd</sup> July, 2013, the Plaintiff unlawfully and without any court orders descended on the suit premises and destroyed property worth several millions.**
- vii. **Further that the Plaintiff not only obtained the Order by misleading the Court but has misused the Order by demolishing the defendant's property.**
- viii. **That it is unconstitutional for a person to be condemned unheard and so it is just and reasonable to grant the orders sought.**

The application was also supported by the supporting affidavit of **Rajendra G Thakker** who alleged that the Plaintiff and others have been trespassing on the Defendant's parcel of land and the Plaintiff instituted this suit when he was sued in **ELC NO.691/2012**. Further that the Defendant has never been served with any Court papers in this case. That the Defendant only came to learn of this case on 17/6/2013 when a person gave a copy of the Order given on **6<sup>th</sup> June 2013** to one Kalyan an independent contract on the site as per the exhibit marked RGT4.

He further averred that on 3<sup>rd</sup> July, 2013, the Plaintiff went to the site in the company of the Police and Bulldozers and demolished the Defendant's wall which caused the Defendant great loss. He further deponed that the Defendant's still in possession of the property and the Plaintiff should be kept away pending the determination of this application.

The Plaintiff opposed the application. The Plaintiff herein **Charles Wambugu Gitonga** filed a Replying Affidavit. He deponed that the Defendant herein trespassed on his parcel of land and he thus instituted this suit. That the process server never served the Defendant with the court order and the pleadings. That the Defendant has only filed this application after the Plaintiff instituted a contempt of court application. The Respondent further stated that the orders were obtained legally and procedurally and the application. To set aside the same ought to be dismissed with costs.

The parties herein filled their written submissions which I have considered. The applicant has two main prayers.

- i. **Setting aside the Order of injunction given on 6/6/2013.**
- ii. **Striking out or dismissing the Plaintiff's case.**

Order 10 Rule 11 of the Civil Procedure Rules deals with the issue of setting aside or varying an ex parte judgement or order upon such terms as are just.

In the case of **Joseph Ngunje Waweru Vs Joel Ndiga KAR 210**, the court held that:-

**“Order 9A Rule 10 as now in force empowers the court to set aside or vary an ex parte judgement upon such terms as are just and there is no requirement of showing sufficient cause. The court has discretion to do justice between the parties. It may be just on the facts of the particular case to avoid hardship or injustice arising from in adventure or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice”.**

Further, in the case of **Kanji Navali Vs Velji Ramji (1954) 21 EACA 20**. The Court held that:

**“The Court has no jurisdiction but to set aside judgement entered by the Registrar where it appears that there has been no proper service”.**

In the instant case, the Defendant/applicant alleged that he was not served with the application dated 22/5/2013. For that reason, Defendant was not aware of the pleadings and this did not file its objection to the application dated 22/5/2013. I have considered the court proceedings of 6/6/2013. I noted that I did indicate that the return of service was proper and allowed the application to proceed ex parte. I cannot however now trace that return of service. I have noted that the Defendant requested for the said **“return of Service”** from the Plaintiff herein but the Plaintiff totally declined to avail the same. What was so

difficult in availing the said **“Return of service”** to the Defendant?.

The Plaintiff has therefore not demonstrated that there was proper service on the Defendant. I have looked at the facts and circumstances of this case as stated in the pleadings and written submissions and I find that there are reasonable grounds available allowing me to exercise the courts unfettered discretion and set aside the Court orders that were issued on 6/6/2013 and all other consequential orders arising from the said Court order.

The applicant has also asked the Court to strike out or dismiss the Plaintiff’s case against the Defendant. The Defendant did not belabour that issue of striking out or dismissing this suit.

Order 2 Rule 15 of the **Civil Procedure Rules** provides instances where a suit may be struck out. There is no doubt that there exist suit No. ELC No. 691/2012 which involves both parties herein and the same subject matter. The Defendant should have brought an application **under Section 6 of the Civil Procedure Act** which deals with the issue of staying of a suit where another similar suit exist touching on the same issues. The applicant has not done so. As was held in the case of **DT Dobie & Co. Ltd Vs Joseph Muchina & Another Civil Appeal No. 37 of 1978.** **“Striking out a suit is draconian act which can only be resorted to in very plain cases”.**

It was further held in the case **of Promotions Ltd Vs City Cabanas Ltd , Civil case No. 940 of 1999,** that :-

***“A pleading will not be struck out unless it is demurrable and something worse than demurrable. For a pleading to be struck out it must be shown to be the extent that not even an amendment can save it”.***

Since the suit herein deals with the same issues as in suit ELC No. 691/2012, the parties herein can seek to consolidate the two suits or even seek to stay one of them as they prosecute the other. I find no good reasons why the court should exercise the draconian act of striking out this suit.

For the above reasons, I decline to allow prayer No.4. However, I **allow prayer No.3 and costs be in the cause.**

It is so ordered.

Dated, Signed and Delivered this 26<sup>Th</sup> day of February 2014.

□.  
□□□.

In the Presence of:-

Gachomo for the Plaintiff/ Respondent

Nyangau for Defendant/Applicant

Zipporah : Court Clerk

□.  
□□□.  
0.

Before Gacheru Judge

Zipporah : Court Clerk

- Since we came to court under certificate of urgency, can we be given an early date.

**L .N. GACHERU**

10045.  
10046.

We have case No. 691/2012. May the two files be mentioned together for further orders.

**L. N. GACHERU**

NVI.  
0.

The tow files to be mentioned together on 5/3/2014 for further orders.

File No. 691/2014 to be availed together with this file.

**L. N. GACHERU**

NVI.  
0.