



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 664 OF 2005

JEDA LIMITED.....1ST PLAINTIFF

KIKA CONSTRUCTION CO. LTD.....2ND PLAINTIFF

- VERSUS -

EVANS M. NJIHIA 1ST DEFENDANT

JAMES NJOROGE KABERERE 2ND DEFENDANT

JACKSON WAINAINA K. (sued as Chairman,

Secretary and Finance Director of

NEEMA WELFARE ASSOCIATION 3RD DEFENDANT

NEEMA WELFARE ASSOCIATION LTD. 4TH DEFENDANT

R U L I N G

1. Before the court are three Notice of Motion applications as follows:-

The first application is a **Notice of Motion** dated 23rd July 2012 by the Objector – Neema Trust Company Limited. The application seeks the following orders namely:-

- a. *That the application be certified urgent and heard ex-parte at the 1st instance.*
- b. *That the court be pleased to order a stay of execution of warrant of attachment and sale issued against the Objector's parcel of land being L.R. No. Mavoko Town Block 3/2014 pending hearing and determination of this application.*
- c. *That the court be pleased to set aside the warrants of attachment and sale issued against Objector's property L.R. No. Mavoko Town Block 3/2104.*
- d. *That the court be pleased to lift unconditionally the prohibition orders made against the Objector's title L.R. No. Mavoko Town Block 3/2104.*
- e. *That costs of the application be provided for.*

2. The application is based on the grounds set out therein and is supported by affidavit of **JACKSON K. MUIRURI** dated **23rd July 2012** and its annexures.
3. The application is opposed by a replying affidavit sworn by **MR. DORON WEBER** dated and filed in court in **27th July 2012**. All the other parties except the **1st Plaintiff** support this application.
4. The second application is a **Notice of Motion** dated **3rd August 2012** and seeks the following orders namely:-

1. *Spent.*
2. *Spent.*
3. *Spent.*
4. *That the Honourable Court be pleased to review the Ruling to set aside the default Judgement against the Defendants dated 19th March, 2007 and to grant the Defendants unconditional leave to defend this suit on the basis of the attached draft defence .*
5. *That the Honourable Court be pleased to review the Ruling issued on 13th December 2011 placing conservatory orders on parcel of land L.R. No. Mavoko Block 3/2104.*
6. *That the warrant of attachment and sale of immoveable property issued herein be discharged unconditionally forthwith and/or set aside.*
7. *That the Honourable Court be pleased to lift unconditionally forthwith the prohibition orders made against title L.R. No. Mavoko Town Block 3/2104.*
8. *That the suit and claim against the 2nd Defendant has abated as it is over 2 years since the said Defendant died and there have been no efforts to substitute the said Defendant.*
9. *That the 4th Defendant is non-existent as a legal entity.*
10. *That further and/or in the alternative this Honourable Court do adopt the consent order executed by the 1st Plaintiff and the 1st and 3rd Defendants in partial settlement of the dispute herein.*

5. The application is supported by affidavit of **EVANS M. NJIHIA & JACKSON WAINAINA K.** dated **3rd August 2012** with its annexures.
6. The application is opposed by the undated affidavit of **DORON WEBER** filed in court on **8th August 2012**. This application is supported by all the other parties except the **1st Plaintiff**.
7. The third application is a **Notice of Motion** dated **10th August 2012**. The application seeks the following orders:-

1. *Spent*
2. *Spent*
3. *That the Judgement entered in favour of the Plaintiffs herein be set aside.*
4. *That further and/or in the alternative this Honourable Court do adopt the consent order executed by the 1st Plaintiff and the Defendants in partial settlement of the dispute herein.*
5. *That the 1st Plaintiff be ordered to amend its pleadings and remove the names of 2nd Plaintiff Kika Construction Company Limited.*
6. *That the 1st Plaintiff and its counsel be condemned to pay the costs of this application in any event.*

8. The application is based on the grounds set out therein and is supported by affidavit of **FESTUS MWANGI KABARU** and **SAMUEL KAMANDE MUCHOKI** dated **10th August 2013** with its annexures and a supplementary affidavit by **FESTUS MWANGI KABARU** dated **25th October 2012**. This application is opposed by the **1st Plaintiff** but is supported by all other parties.
9. All the above applications appear to me to be seeking the same end objectives. In addition, all the three applications are opposed only by the **1st Plaintiff**.
10. The brief history of the matter, as I understand it, is that the Plaintiffs sometime in 2007 secured a Judgement against the Defendants which to date has not been satisfied. Seeking to execute the said Judgement the Plaintiffs came to this court through a Notice of Motion application dated **3rd**

October 2011 seeking a conservatory order to be issued to preserve the premises known as Mavoko Town Block 3/2104 purportedly registered in the 4th Defendant's name. That prayer was granted by a Ruling of this court on 13th December 2011. Sooner, also, warrants of attachment and sale was issued against the said parcel of land. These applications therefore jointly appear to seek the following orders:-

- i. ***That the warrants of attachment and sale issued against the Objector's title L.R. No. Mavoko Town Block 3/2104 be set aside.***
- ii. ***That the court be pleased to unconditionally lift the prohibition orders made against the title L.R. No. Mavoko Town Block 3/2104.***
- iii. ***That the court be pleased to review the default Judgement against the Defendants dated 19th March 2007 and to grant the Defendants unconditional leave to defend the suit.***
- iv. ***That it be declared that the suit against the 2nd Defendant has abated.***
- v. ***That the 4th Defendant is a non-existent legal entity and that the court does declare this.***
- vi. ***That in the alternative the court do adopt the consent order executed by the 1st Plaintiff and the 3rd Defendants in partial settlement of the dispute herein.***

11. All parties filed written submission, and orally highlighted the same before me in court on 21st January 2014.

12. I have carefully considered these three applications and the submissions of the parties. I raise the following issues for determination:-

- a. ***Whether this court can review the Ruling made on 19th March 2007 and grant the Defendants unconditional leave to defend the suit.***
- b. ***Whether this court can review the Ruling of this court made on 13th December 2011.***
- c. ***The legalities surrounding the 3rd and 4th Defendants as parties to these proceedings.***

13. To address the first issue, I note that this court has powers under Order 45 Rule 1 and 2 to review its orders. The Rule states that:-

“(1) Any person considering himself aggrieved –

- a. ***by a decree or order from which an appeal is allowed for which no appeal has been preferred;***
- b. ***by a decree or order from which no appeal is hereby allowed,***

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or when the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of Judgement to the court which passed the decree or made the order without unreasonable delay.”

14. It is therefore incumbent upon an Applicant to show that new and important evidence was not available at the time when evidence was given. The current Applicant alleges that the 1st Plaintiff filed the current suit without the authority of the 2nd Plaintiff, and that being so, the proceedings leading to the said Judgement in 2007 were a nullity *ab initio*. To prove this fact the 2nd Plaintiff supports this application and is a party to a consent dated 28th July 2012 filed in this court to the effect. The Applicant intends to persuade me that since 2007 when the said Judgement was delivered, he just discovered recently that the 1st Plaintiff did not go to court with the authority of the 2nd Plaintiff. If that is so, then it is not explained why there is such an unreasonable delay. The applicant did not exercise due diligence as is required under the said rules. Further, since 2007, it is evident that the Defendants had not preferred to appeal the said Judgement. If they had no intention to appeal, how come they did not made any efforts to satisfy the decree? A court of

law which secures the rights of all litigants must ask why the Defendants having no intention to appeal the Ruling, have, seven (7) years down the line, not attempted to satisfy the Judgement. Coming to court at this time, by the Defendants, and the 2nd Plaintiff, must be treated as an afterthought provoked by the conservancy orders herein and threat of sale of the suit property. I treat very skeptically the application for review of the Ruling made in 2007. In as much as it an afterthought and premised on bad faith, it has failed to satisfy two requirements, that is, that of due diligence on the part of the applicant and unreasonable delay. In **National Bank of Kenya Limited – Vs – James Orengo [2005] e KLR** the court upheld that a review cannot issue if the Applicant fails to give satisfactory explanation for the unreasonable delay. I therefore decline to allow this prayer and dismiss it.

15. The second issue I raised is whether this court can review the Ruling of this court issued on 13th December 2011. In this regard, the delay is not unreasonable. Again I have considered the fact that title number L.R. No. Mavoko Town Block 3/2104 belongs to the Objector and not the 3rd or 4th Judgement Debtor. However, this court is not hoodwinked. There is a clear nexus between the Objector, the 3rd Judgement Debtor and indeed with all other Defendants. They have also now persuaded the 2nd Plaintiff to disengage from the 1st Plaintiff. A court of law is composed of neutral reasonable people, and is able to know who is trying to mislead the court. There is clear evidence of collusion between the 2nd Plaintiff and all other parties except the 1st Plaintiff. Be that as it may, I am still persuaded to review the Ruling if that will enable the parties to agree to move forward. Since the Judgement of 2007 stands and has not been appealed against, and since I have not allowed its review, what remains now is for the Defendants to honour the said Judgement. The 1st Plaintiff should know what to do if the Defendants fail to honour that Judgment.

16. The last issue I raised was the legal status of the 3rd Defendant, who is said to have passed on. There was no document attached to the affidavit to prove death of the 3rd Defendant. In any event, where the death has occurred the legal status of the deceased party is determined by law, and I need not pronounce it since it was not the subject matter of the applications. Likewise, the legal personality of the 4th Defendant was not one of the main issues for consideration and so the court will not pronounce itself on the issue.

17. In the upshot, I allow a conditional review of this court's Ruling of 13th December 2011 and make orders as follows:-

- a. *The First, Second and Third Notice of Motion applications dated 23rd July 2012, 3rd August 2012 and 10th August 2012 respectively are allowed to the extent stated in paragraphs (b) and (c) hereunder.*
- b. *I herewith lift forthwith the prohibition orders made against the title L.R. No. Mavoko Town Block 3/2104 and also set aside and discharge the warrant of attachment and sale of immovable property issued herein on the following CONDITION, namely that the Defendants shall provide security for the decretal sum within 30 days of this order, failure whereof this prayer shall not be realized.*
- c. *In the alternative to prayer (b) above, and on the assumption that the Plaintiffs came to court as equal partners with equal shares to the claim as it appears from the Plaint (and since the 2nd Plaintiff appears not to be interested in the Judgement of 2007) prayer (b) above shall be available without its CONDITION on the condition that the Defendants pay to the 1st Plaintiff half ($\frac{1}{2}$) of the decretal sum now due on the 2007 Judgment within 30 days from the date of this Ruling.*
- d. *Parties shall bear own costs.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 11TH DAY OF MARCH 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Oyosi holding brief for Kiiru for Plaintiffs

Macharia for Defendants

Makori for Objector

Teresia – Court Clerk