



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 226 OF 2010

GLADYS WAKIO MURIUKI :::::::::::::::::::: PLAINTIFF/RESPONDENT

VERSUS

EQUITY BANK LIMITED :::::::::::::::::::: 1ST DEFENDANT/RESPONDENT

ROBERT MAINA

T/A PETER GITONGA WANGAI ::: 2ND DEFENDANT/RESPONDENT

CITIGATE DEVELOPERS LTD. :::::: 3RD DEFENDANT/APPLICANT

R U L I N G

1. The **Notice of Motion** before the court is dated **2nd September 2013** filed by the third Defendant herein. The application seeks as the main prayer an order that the court be pleased to set aside and discharge the order of temporary injunction made on 14th April 2010 and issued on 16th April 2010 restraining the Defendants from dealing in any manner with the property Title No. RUIRU/KIUBLOCK 3/49, and that the costs of the application be given to the Applicants.
2. The application is premised on the grounds stated therein and is supported by affidavit of NJAMA WAMBUGU dated 2nd September 2010 with its annexures.
3. The application is not opposed by either the 1st or 2nd Defendants who has expressly stated the same. However, the Plaintiff has neither filed a response to the application nor the submissions to the same. Despite being served with the Notice of the Hearing of the application neither the Plaintiff nor her advocate attended the court for the hearing.
4. The history of the application is as follows. The property Title Number RUIRU/ KIU BLOCK 3/49 was disposed by way of a sale by public auction held on the 27th October 2009 and conducted by the 2nd defendant, in exercise of the 1st defendant's statutory power of sale where the 3rd defendant/ applicant herein was the highest bidder thereon and the *bona fide* purchaser of the said property.

The plaintiff filed this suit against the 1st and 2nd defendant on the 14th April 2010 simultaneously with an application seeking an interlocutory injunction to restrain any dealings with and the disposition of the property being Title Number RUIRU/ KIU BLOCK 3/49. The said application was heard *ex parte* in the first instance on 14th April 2010 where the court issued a temporary injunction restraining the defendants from in any way dealing with the property until the hearing date of that application. The 3rd defendant was joined to these proceedings by way of the court

order made on 30th May 2013 and has now filed the present application.

5. The 1st defendant has already executed a transfer by chargee in favour of the 3rd defendant but the same has been frustrated by the pending temporary order of injunction made by this honorable court on 14th April 2010.
6. I have carefully considered the application. The interim injunction issued by the court Honourable on 14th April 2010 is no longer in force and this is by virtue of **Order 40 Rule 6 of the Civil Procedure Rules, 2010**, which expressly states that:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

Order 40 Rule 6 applies retrospectively by virtue of **Order 54** of the same Rules which applies to all cases pending prior to the Rules. **Order 54 Rule 2** of the Rules provides that:

“In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done.”

7. The plaintiff’s interlocutory order was made on 14th April 2010 pending the hearing of the plaintiff’s application filed on the same day. The plaintiff has been enjoying the protection of the said *ex parte* order for a period in excess of 3 years to the prejudice and disadvantage of the 3rd defendant.
8. The 1st defendant has already executed a transfer by chargee in favour of the 3rd defendant but the registration thereof has been frustrated by the pendency of the temporary order of injunction made on the 14th April 2010. This is unfair to the 3rd defendant and warrants discharge of the said temporary orders.

In the case of **Monicah Nduta Njenga –vs- Suldana Habat ELC no. 2328/ 2007 Nairobi J. Gacheru** it was held that:

...there is indeed no injunction as the plaintiff did not move the court to determine the matter within 12 months after the promulgation of the Civil Procedure Rules 2010 and the court has not given any other orders to the contrary.”

(Also refer to the case of Saifudeen Abdallah Bhai –vs- Zainab Mwinyi (2013)eKLR)

9. The plaintiff in this matter failed to prosecute her interlocutory application dated 14th April 2010 and the same has been pending for over 3 years. Neither did she move the court to have the interlocutory injunction extended as required by law.

In the case of **Nilan –vs- Patel and others (1969) EA 340**(cited in the case **Charles Muiruri Njeri & others –vs- Violet Wanui Kimui(2012)eKLR**) the court took the position that a three-year delay was culpable delay in prosecuting a matter. The duty to prosecute a matter lies with the plaintiff and never shifts to the defendant in the suit.

10. In the upshot the application dated 2nd September 2013 is allowed as prayed with costs to the Applicant.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Plaintiff

M/s Muigah holding brief for Akhulia for Defendant

Teresia – Court Clerk