



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 600 OF 2008

KULDIP SINGH DEOL.....1ST PLAINTIFF

HARMINDER SINGH DEOL..... 2ND PLAINTIFF

JASPAL SINGH DEOL.....3RD PLAINTIFF

VERSUS

DIDAR SINGH BHANGU.....DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 31.3.14 brought under Order 17(2), Order 40(7) and Order 51 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The applicant/defendant seeks for the following orders:-

- i. THAT the orders issued on the 27th of March 2009 herein be vacated and or reviewed.
- ii. THAT the suit herein be dismissed for want of prosecution.
- iii. THAT costs be provided for.

2. The application is grounded on the following grounds;

- a. THAT the suit herein was instituted in the year 2007.
- b. THAT no action has been taken by the plaintiff/respondent to prosecute the suit over the last three (3) years.
- c. THAT the interim orders issued on the 27th of March, 2009 are offensive and continue to prejudice the applicant/defendant herein.

3. The application is supported by the sworn affidavit of DIDAR SINGH BHANGU who reiterated the contents on the face of the application and further deponed that the suit was instituted in the year 2008 and the plaintiffs herein were granted interim injunctive on the 27th day of March 2009; that subsequently there were orders that parties comply with Order 11 issued as he was advised by my advocates by the learned Judge on the 16th of September 2010; that on his part he has complied with the said orders; that no effort has been made by the plaintiffs or their advocates to have this matter conclude; that it is over three (3) years since the matter was last in Court and over five (5) years since the injunctive orders was issued; that the applicant is prejudiced by the said orders since no step has been made by the have the matter conclude; that he has at all times been willing and ready to proceed with the suit; that the orders granted on the 27th March 2007 be vacated since it is over one year since they were granted and the matter be dismissed for want of prosecution.

4. In a supplementary affidavit he argued that the Orders given by this Honorable Court expired on 27-03-2010 by virtue of Order 40 rule 6 of the Civil Procedure rules 2010 since the Plaintiffs herein did nothing to extend the order; that the claim by the plaintiff of intention to fix the matter for hearing are just an afterthought and the same was filed after the applicant filed the current application and that the said letter does not bear a Court stamp to confirm whether efforts were made to have the matter listed; he denied that the Court file has never gone missing and if it did, he would have never been able to file his our application and in any event if the Court file was missing nothing is on record of the plaintiffs effort to locate it since it's been almost 5(FIVE) years since the institution of the case; that when the matter was fixed for hearing on 23.5.11 the plaintiffs/respondents did not attend Court for the call over on 8/3/2011 and subsequently on 16/09/2010 the Court ordered that the parties file their list of witnesses and statements of issue within 14 days, of which they obliged but the Respondents did not file and have not filed up to date; that the plaintiffs herein are not sincere in approaching the Court and their actions are calculated to delay and defeat justice and therefore it's an abuse of the Court process to have the suit in court since they cannot explain their failure to fix the case for hearing for five good years; that he is the bona fide owner of the property known as L.R. No. 209/5091 South C House No. 15058 in Nairobi. Being a bona fide purchaser for value and a holder of good title and claim in *rem* and should not be prejudiced by the said order; that he has incurred and still continue to incur losses in rent whereas the main objective of the plaintiffs is to delay justice while enjoying the suit property for free; that the plaintiffs herein have not shown a prima facie case in regards to their claim and other than allegations the plaintiffs have never tendered any substantial evidence to warrant their claim; that this suit herein should therefore be dismissed for want for prosecution and the orders issued therein be vacated.
5. The application was opposed and the respondent filed a replying affidavit sworn by **KULDIP SING DEOL**. He deponed that there was an application dated 30th June 2010 seeking more or less the same orders and he said application is still pending before the Court; that the defendant is already in contempt of the injunction orders given by this Honorable Court; the Defendant secretly and fraudulently sold the said parcel of land to one Charles Kamuyu Ndung'u and that the Defendant together with the purported buyer had illegally evicted him from their family home, the suit premises by purporting to carry out distress for rent in disguise so that the said person could take over the house; that his matter was the subject of Chief Magistrate's Court at **MILIMANI COMMERCIAL COURT MISCELLANEOUS CIVIL APPLICATION NUMBER 412 OF 2013 ELIJAH MPUTHIA IRURA/T/A WARLEEN TRADERS, CHARLES KAMUNYA NDUNG'U AND DIDAR SINGH BHANGU**; that indeed the Court in it it's ruling and gave the following orders;
 - i. – THAT all orders issued on 1/5/2013 and all consequential orders stemming from the Court order be and are hereby vacated.
 - ii. – THAT the officer in charge Lang'ata Police Station be and is hereby directed to commence investigations on any acts of commission that surround the eviction of Kuldip Singh Deol from the premises L.R. No. 209/5091 South C House no. 15058 Nairobi.
 - iii.–THAT the auctioneer Elijah Mputhia Irura T/A Warleen Traders be and is hereby directed to release all goods taken away from order and to restore the same to the premises at his own cost forthwith upon receipt of this order and in any event not later than 12 p.m. Monday 17th June 2013.
 - iv. – THAT until and unless the High Court order is vacated, all parties herein including the Landlord are commanded and restrained from interfering with the status quo of the premises subsisting as at 27/3/2009.
 - v. – THAT the Landlord Charles Kamunya and the Auctioneer Elijah Mputhia Irura shall meet all the costs of this application.
 - vi. – THAT the Objector is at liberty to institute any action for damages.
 - vii.– THAT a copy of this order shall be extracted and served on the Deputy Registrar High Court Civil & Admiralty Division to be placed on record in HCCC NO. 600 OF 2008.
6. That soon thereafter he was informed by his advocates that their attempt to get the Court file in **HCCC NO. 600 OF 2008** was futile and their efforts to fix the matter for hearing did not bear

fruit; that his advocate has been preparing to file a suit for damages following the said lower Court order, as against the Defendant herein and the purported buyer Charles Kamunya; that the house was badly damaged by the said buyer and auctioneer and I had to have a quantity surveyor do an assessment of damages; that he has further learnt that the Defendant's son sold the said suit property on the basis of that Defendant is mentally incapacitated and that he was the Guardian ad Litem; that the alleged sale and transfer is illegal null and void in view of the fact that there is a court injunction restraining the Defendant from disposing or interfering with the suit herein; that indeed the Defendant by filing this application is seeking to sanction his illegal action of purporting to dispose of the property and the application is an abuse of the Court process; that he stands to suffer great loss as he has no other place to call home and has already suffered a lot when the Defendant and his agents evicted me from the house he had to spend money in hiring accommodation.

7. The plaintiff/ respondent gave a brief history of this case culminating to the current application and further deposed that in spite of the fact that we have always been willing to settle the issue, the Defendant has been evasive. He explained that the Court file has been missing when my Advocate is in the process of fixing the hearing date. Moreover when the court file was traced, the Court diary was said to be closed; he urged the Honorable Court to disallow this application as doing so will be sanctioning an illegality already committed by the Defendant; that they are very much interested in having this suit heard and determined as he is the victim in this matter. He averred that the Defendant is my brother in law and a prominent businessman with his own property in Nakuru. He has been using all ways to take our only family home and render me and my brothers homeless and that the Title to suit premises has been changed to the purported buyer all in a bid to defeat justice; that he is ready and willing to abide with this Honorable Court's conditions as to have this matter move forward.
8. The application came for hearing on 10th June 2014 when parties made oral submissions. Mr. Onyango for the applicant reiterated the grounds on the face of the application. He sought orders that the orders granted on 27/3/2014 be vacated or reviewed and the suit be dismissed for want of prosecution. He argued that the plaintiff had not taken any steps to prosecute the matter that the matter was filed in 2008 and injunction orders obtained on 27th March 2009; that the matter was last in Court on 23rd May 2011 that since then no steps have been taken by the plaintiff to prosecute the matter.
9. Mr. Onindo in opposing the application reiterated the contents of the replying affidavit and argued that the suit should be heard and determined on its merit and that one of the plaintiffs is deceased and substitution should follow and that there was the issue of contempt of Court orders by the defendant but the plaintiff admitted that they had not instituted any contempt of orders proceedings against the defendant/applicant.; that the injunction was issued to protect the plaintiff as it restrained both parties but the defendant has violated the injunction and sold the property in issue and that the plaintiff needs his day in Court; that they sought to fix the matter for hearing severally but the file was missing.
10. I have read and considered the affidavits by both parties. The applicant in essence seeks vacation and/ or review of Court orders issued on 27th of March 2009 and dismissal of the suit for want of prosecution. On the issue on review and vacation of orders am guided by Order 40 rule 7 provides that;

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order”.

Further Order 40 rule 6 provides 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.”

The said injunction order was granted on 27th March 2009. The said orders were granted before the current Civil Procedure Rules 2010 which specifically provides that an injunction order lasts for a year. With this in mind I can't review the orders of injunction to last a year from the date of this Ruling. In my view the Rules cannot apply retrospectively.

11. On the issue of dismissal of the suit for want of prosecution. I find from the evidence adduced that there indeed is delay in prosecuting this matter having been filed on 17th December, 2008. The application dated 10th June 2014 which the respondent speaks off was withdrawn by the applicant on 10th June 2014. From the evidence adduced it is true that indeed that there is delay in setting this matter down for hearing. There are two invitations from the plaintiff's advocate to fix the matter for hearing on 22nd November, 2012 and 13th November 2013. The invitation dated 20th February, 2013 bears no stamp from the Court's registry. I will give the applicant the benefit of doubt that the file was missing when they sought to set the matter down for hearing on condition that this matter is fixed for hearing I note that the parties are related and the matter needs to be set down for a full hearing so that the issue between them can be thoroughly thrashed. Echoing the advice given by my brother Justice Khamoni in his ruling dated 27th March 2009, *"I strongly advice the parties that it is in their interest in this suit to avoid wasting time in interlocutory applications so that they can concentrate on filling, serving and closing pleadings with the view to having the main suit heard and be determined expeditiously."*

Parties to comply with the Order 11 within 45 days from this ruling and to fix the suit for hearing. Cost shall be in the cause

Orders accordingly.

Dated, signed and delivered this **18th** day of **July** 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/Respondents

.....For the Defendant/Applicant

..... Court Clerk