



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 537 OF 2010

MWAFA COURT LIMITED.....PLAINTIFF

VERSES

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

AND

THE COMPANY FOR HABITAT AND HOUSING

IN AFRICA(SHELTER AFRIQUE).....1ST INTERESTED PARTY

GEORGE OLOO ADUWI.....2ND INTERESTED PARTY

OLIVIA AKINYI MIDWA.....3RD INTERESTED PARTY

ROSE WAMBUI WANJEMA.....4TH INTERESTED PARTY

STANLEY KITHIA MIRITI.....5TH INTERESTED PARTY

RULING

The Plaintiff's Application

The Plaintiff has filed an application by way of a Notice of Motion dated 16th September 2013, seeking orders for extension of interim injunctive orders issued by this Court on 27th September 2012. The said orders were issued to restrain the Defendant from trespassing on, entering, demolishing structures on, destroying and or alienating the parcel of land known as LR No. 209/11629. The Plaintiff seeks to extend the orders by a further period of 12 months, and has also sought an order that an early case conference date does issue. The application is supported by an affidavit sworn by Johnson Ngarari Mwaura on 16th September 2013. The main ground for the Plaintiff's application is that by operation of law, the orders issued by the court on 27th September 2012 would lapse on the eve on 27th September 2013.

The Plaintiff has attributed the delay in prosecuting this suit to difficulties in obtaining relevant documents from the Defendant forming part of its evidence. The Plaintiff has contended that it has now procured several crucial documents, and is in a position to take a hearing date for the suit subject to the directions of the court. It is the Plaintiff's averment that prior to coming to seek relief before the court, the Defendant had threatened to demolish its development on the suit property, namely 60 complete apartments. The Plaintiff is now apprehensive that in the absence of temporary restraining orders, the

Defendant may demolish the subject property which needs to be preserved pending the hearing and determination of the suit.

The Defendant's Response

The application was opposed by the Defendant who filed a replying affidavit sworn by Thomas Gacoki on 8th October 2013. The Defendant has averred that the suit property and the improvements thereon are on a road reserve falling under the Southern Bypass. It is the Defendant's case that the Plaintiff has not taken any step to set the suit down for hearing since its filing in March 2010. The Defendant has contended that there is urgency since the contractors who were awarded the tender require the site to be handed over to them, and that further delay will be very costly to it. It is the Defendant's averment that the economic and infrastructural value and public good of the highway outweighs the private proprietorship allegedly obtained when the area was planned and surveyed.

The Submissions

The application was canvassed by way of written submissions, and the Plaintiff's Advocate filed submissions dated 19th December 2013 where it reiterated the facts of the case and argued that although it has obtained most of the documents necessary and relevant to this suit, some which are in the custody of the Defendant are yet to be availed. It is the Plaintiff's submission that this fact notwithstanding, the suit is ripe for a case conference and the Plaintiff avers that it is ready and willing to proceed with the suit and have it determined on its merits. Counsel for the Plaintiff argued that the Defendant has no *prima facie* evidence to support the allegation that the suit property stands on a road reserve. Further, that if the Defendant is convinced about the legality of its position, that it would be proper for it to deposit a sum of Kshs 503,000,000/-, and seek appropriate orders from the court to demolish the property.

The counsel for the Plaintiff further submitted that the Defendant has not demonstrated what prejudice they stand to suffer by the subject matter being preserved pending the hearing and determination of the suit. Lastly, the Plaintiff submitted that the balance of convenience tilts in favour of allowing the application, and the court was referred to the case of **William Charles Fryda -vs- Assumption Sisters of Nairobi Registered Trustees & Another**, Nakuru HCCC No. 224 of 2010 where the court allowed an application for extension of injunctive orders.

The 3rd Interested Party and the 6th Interested Parties filed submissions on 26th March 2014 and 20th May 2014 respectively, both supporting the Plaintiff's application. The 3rd Interested Party submitted that the court had an obligation to convene a case conference 30 days after pleadings closed on September 2011 which was not done. It is the 3rd Interested Party's submission that he purchased a flat no. 8 which is part of the suit property, after being financed by his employer, the National Bank of Kenya.

While stating that the Defendant's threat to demolish the suit property had created a lot of anxiety upon him and his family, the 3rd Interested Party submitted that if the interim orders granted on 27th September 2012 are not extended, the interested parties risk suffering a great loss. It was also submitted that the Plaintiff's property is currently worth more than Kshs 503,000,000/-, and that the 3rd Interested Party invested more than 6,000,000/- to purchase a flat from the suit property.

Counsel for the 3rd Interested Party further argued that whereas the Defendant alleges that the suit property sits on a road reserve, the Plaintiff and the Interested Parties maintain that the property is not on a road reserve giving rise to a serious conflict of facts. It is submitted for the 3rd Interested Party that it is in the interest of justice that the court maintains the *status quo* by extending the interim orders. For this submission, Counsel relied on the case of **Ougo & Another -vs- Otieno (1987) KLR 364** where it was held that where there is a serious conflict of facts, *status quo* should be maintained until the dispute has been decided at the trial.

The 6th Interested Party argued that Order 11 Rule 3(1) of the Civil Procedure Rules requires that a case conference be convened a month after the pleadings closed which was not the case herein. Counsel

submitted that it was important for the court to convene a case conference to expedite the hearing so that all parties may be heard. The court was referred to the overriding objective of disposing suits expeditiously and in a timely manner, as outlined by section 1B of the Civil Procedure Act. Counsel averred that under Order 40 Rule 6 of the Civil Procedure Rules, an interlocutory injunction lapses within 12 months from the date of grant, unless sufficient reasons are advanced to the court.

It was also the 6th Interested Party's submission that it is important for the orders to be extended to protect his financial investments, as he is the owner of flats no. 7 and 11 on the suit property which he purchased in 2009 and 2010 at a cost of Kshs 4,750,000/- and Kshs 5,000,000/- respectively. Further, that he collects a monthly rent of Kshs 30,000/- from each of the flats which he stands to lose, in addition to the psychological and emotional torture caused by the situation. Counsel argued that the investments by the Plaintiff and the Interested Parties which exceeds Kshs 503,000,000/- needs protection awaiting resolution by the court and therefore, that it is in the interest of justice that the orders are extended.

While stating that the Defendant has only contended and not proved that the suit property is on a road reserve, Counsel for the 6th Interested Party submitted that it was important that parties were given an opportunity to defend their position. Reliance was placed on Articles 40 and 159 of the Constitution and it was argued that unless the orders are extended, the 6th Interested Party and the other applicants will lose their investments without being accorded a fair hearing contrary to the spirit and wording of the Constitution.

The Defendant filed submissions dated 31st March 2014 where it relied on the definition of the term "temporary" in the Black's Law Dictionary to mean for a limited time. It was submitted that the Plaintiff had not taken any step to set down the suit for hearing since its filing in March 2010, and that the Plaintiff was seeking to make the orders permanent through the backdoor. Counsel for the Defendant submitted that the wording of Order 40 Rule 6 of the Civil Procedure Rules is mandatory, and that no sufficient reason had been advanced to vary the mandatory position in law.

While arguing that the general public has an interest in the matter, Counsel submitted that the Defendant had contracted a contractor to build the Southern By Pass, and that the project had been stalled because of the Plaintiff's occupation of part of the road reserve. It was argued that the situation would give rise to a breach of contract where the tax payer would bear the burden. Counsel argued that the Southern By Pass was a public utility, and that public interest should supersede private interest. Reliance was placed on the decisions in the cases of Kenya Civil Aviation Authority & Another vs African Commuter Services, Nairobi CA No. 311 of 2009, Kenya Hotel Properties Ltd -vs- Willesden Investments Ltd & 4 others (2013) eKLR, East Africa Cables Ltd -vs- The Public Procurement Complaints Review & Appeals Board & Another (2007) eKLR for the position that public interest overrides private individual's interest.

In further submission, the Defendant stated that injunctive relief being an equitable remedy was based on equitable principles, and that the conduct of the parties should be considered in extending the interim orders. Counsel submitted that Plaintiff had not taken any steps to set down the suit for hearing for four years after it was filed in March 2010. Lastly, it was submitted that this amounts to inordinate delay and inexcusable conduct by the Plaintiff and that delay defeats equity.

The Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The issue for determination is whether the Plaintiff has offered a sufficient reason why the interim injunction orders issued herein should be extended as contemplated under Order 40 Rule 6 of the Civil Procedure Rules. Order 40 Rule 6 of the Civil Procedure Rules provides as follows:-

“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.”

It is notable that even though the said rule is couched in mandatory terms, the court has discretion to extend injunction orders if there are sufficient reasons. The Plaintiff has in this regard argued that the matter was not set down for hearing as documents necessary for its case, some which were in the custody of the Defendant, were yet to be availed. This allegation was not rebutted by the Defendant.

The Plaintiff and the Interested Parties have also averred that the suit property is valued at Kshs 503,000,000/-, and that it needs to be protected pending the hearing of the case on its merits. This Court in this regard notes that if the injunction orders issued herein are not extended, there is the risk of the developments on the suit properties being demolished before the rights of the respective parties, if any, are established. The Court of Appeal has in this respect stated in the case of **George Orango Orago -vs- George Liewa Jagalo & 3 Others, [2010] eKLR** that the purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.

It was argued that the Plaintiff and Court had failed to set down the suit for hearing. However, the duty to ensure there is expeditious hearing of a suit is imposed on all actors in a suit under sections 1A and 1B of the Civil Procedure Rules. In addition, no pre-trial questionnaire has been filed by any of the parties as required by Order 11 Rule 2 of the Civil Procedure Rules. It is thus my view that sufficient reasons have been advanced why the injunctive orders herein should be extended, and that the suit property needs to be protected pending the determination of the case. However, I also agree that the suit herein needs to be heard and determined expeditiously.

I accordingly allow the Plaintiff's Notice of Motion dated 16th September 2013 and hereby orders as follows pursuant to the provisions of sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 6 of the Civil Procedure Rules:

1. The interim injunction orders issued by this Court on 27th September 2012 be and are hereby extended for 6 months subject to the following conditions
 - (a) The Plaintiffs shall file and serve their list and bundle of documents within three months of the date of this ruling
 - (b) The Plaintiff shall set this suit for pretrial conference within six months of the date of this ruling.
 - (c) Upon default by the Plaintiff the interim orders of injunction herein shall lapse.
2. The Costs of the said Notice of Motion dated 16th September 2013 shall be in the cause.
3. Parties shall be at liberty to apply

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 9th day of October, 2014.

P. NYAMWEYA

JUDGE