



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 157 OF 2012

DAVID WAMBUA NGIIPLAINTIFF

Versus

ABED SILAS ALEMBI & 6 OTHERS DEFENDANT

RULING

Setting aside an injunction

[1] The 7th Defendant in the Motion dated 25/07/2013 is asking the court to discharge the injunction which was given on 16/03/2013 and extended on 03/05/2012. And as a consequence thereof, the court to direct removal or withdrawal of the entry of 8/8/2012 which registered the said court order upon L.R No.209/11521 (Grant No.71609). It is submitted that the injunction was obtained to stop Extra Ordinary General Meeting of the company but it was used to register an inhibition on the land not subject matter of this suit. Second, the 7TH Defendant argued that HC Misc. Application 340/2011, the main cause for the grant of injunction has been determined. Third, that the said order of injunction lapsed by operation of law in terms of Order 40 rule 6 Civil Procedure Rules because this suit has not been determined over one year since the injunction was issued. And four, the registration of the order against company land is an abuse of court process. Indeed, it was contended, this court is not a land court to issue an order prohibiting dealing on land. For those reasons, the defendants pray for their application to be allowed.

The plaintiff responded

[2] In opposition to the application herein, the Plaintiff filed a replying affidavit sworn on 14th October, 2013, a supplementary affidavit sworn on 24th June, 2014 and submissions. According to the Plaintiff the suit has not been overtaken by events and that the order has lapsed by virtue of the provisions of Order 40 rule 6. To him, the arbitration award is the basis of this suit and has never been honoured and as such equity demands that this suit must proceed to full hearing. The award was recognized for purposes of enforcement by the court in miscellaneous application No.340 of 2011. No appeal was filed on the award and following the ruling by Havelock J on ruling of 28th May, 2013, the award was embodied as a decree of the court issued on 4th February, 2014. The decree has not been honoured to date and the 7th defendant has unequivocally stated that it does not intend to take any steps towards voluntarily honouring the same. The decree in question confers proprietary interests on the plaintiff herein in shares awarded by the Arbitrator, and as such the assets of the 7th defendant must remain protected to avoid attempts to frustrate the award.

This, since the 7th defendant does not indicate how it intends to honour the plaintiff's decree, compulsion by the court becomes necessary.

[3] The order issued herein was not purely a restraint on the 1st to 6th defendants to hold the scheduled meeting. It was restraining sale of the assets of the Company. The order in question is reproduced below:-

“That pending the hearing of this suit, or until further orders of the court, an interim order of injunction do issue restraining the 1st, 2nd, 3rd, 4th, 5th and 6th defendants whether by themselves, their proxies, agents and/or servants from conducting any business passing any resolutions, acting upon or in any manner whatsoever dealing with or disposing the assets of the 7th defendant.”

According to the Plaintiff, the order was a restraint against the other defendants from disposing of the assets of the 7th defendant unless and until the arbitral award in the plaintiff's favour is honoured. As long as the award has not been honoured, all the 7th defendant's assets need to be preserved so as not to make a mockery of the arbitration award. The argument is in line with the following prayer in the plaint:-

“A declaration that the plaintiff is entitled to the full benefit and recognition of the reliefs granted to him in the final award dated 30th April, 2009 by Hon. Richard Mwongo.”

[4] The Plaintiff urged further that the fact that HC Misc. Civil Application No. 340 of 2011 is determined does not mean this suit has been overtaken by events. The decree therein cannot constitute a “determination” in the true sense of the word. The plaintiff believes that a true “determination” of the arbitration can only be via court orders compelling the 7th defendant to honour the decree, which means that this suit of necessity has to proceed. The plaintiff also submitted on order 40 Rule 6 of the Civil Procedure Rules entails discretion on the part of the court to order otherwise. And the factors listed below should incline the court to exercise discretion in favour of the plaintiff:-

- a. In pursuit of the prayers to compel the 7th defendant to honour the arbitral award herein, the plaintiff had to first obtain the final decree in Miscellaneous Cause No. 340 of 2011, which ruling he obtained on 28th May, 2013 via the ruling of Justice Havelock recognizing his arbitral award.
- b. The 7th defendant, in an attempt to frustrate the plaintiff filed an application to set aside the ruling of Justice Havelock (see annexure “A-1a” in the replying affidavit sworn by the plaintiff on 14th October, 2013. But, due to the inaction in this application for setting aside aforesaid, the plaintiff eventually obtained the decree on 4th February, 2014.
- c. It is a matter of judicial notice that the year 2013 was basically an “election petitions” year and this suit could not have been heard then;
- d. The 7th defendant has not demonstrated good faith in dealing with the plaintiff. Attempts by the Plaintiff to settle the matter amicably have been unsuccessful; and
- e. The summons to enter appearance are in the court file awaiting signature and if signed by this Honourable Court shall be served immediately subject on costs that the honourable court may make.

These matters gravitate towards the dismissal of the application and an order that the suit be heard expeditiously.

[5] The Respondent cited case law; Munyao Sila J in **Filista Chamaiyo Sosten v Samson Mutai (2012) eKLR** stated that:-

“I think the discretion under order 40 rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is

because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction”

The Plaintiff submitted that the injunction herein was granted with the acquiescence of all the parties, including the 7th defendant which filed an affidavit supporting the injunction. The conduct of the 7th defendant in itself also disentitled it from the orders sought. For those reasons, the plaintiff urged the court dismiss the application and direct the plaintiff to expedite the hearing of the suit within such time as the Honourable Court may direct.

THE DETERMINATION

[7] I have been asked to discharge the injunction which was issued on 03/05/2012. And as a consequence of the discharge, the court to order cancellation of the entry made on 8/8/2012 in L.R. No. 209/11521 (Grant No. 71609) registering the said court order issued on 16/03/2013. L.R. No. 209/11521 (Grant No. 71609) is the property of the 7th Defendant. The reasons given by the Applicant are that; 1) the order stopped the Extra Ordinary General Meeting of the company but it was used to register an inhibition on land which was not the subject matter of this suit; 2) HC Misc. Application 340/2011 which was the main basis for the grant of injunction has been determined; 3) the said injunction has lapsed by virtue of order 40 rule 6 of the CPR because the suit has not been determined within twelve months since it was issued. The Plaintiff has opposed the application and has given reasons why the suit has not been set down for hearing. He has also explained at length the incidents which he believes constitute frustration and lack of willingness by the Defendants to honour the award herein. He has also gone to great pain to say that the conclusion of the cause in which the award was recognized is not a determination in the real sense of the word. And finally, he submitted that he has proprietary interest in the shares awarded by the arbitral award which makes it imperative that the injunction should remain to preserve the assets of the company. Such move, according to the Plaintiff is in the interest of justice. The court should just order the suit to be disposed of expeditiously.

[7] There are two distinct issues I should determine. The first issue is, whether the injunction herein should be discharged. The second is, whether the inhibition on the company's property should be removed. But there are positions which have been stated by the Plaintiff in his arguments which need to be settled in a resounding manner. I will mention and determine both the nascent positions I have talked about and the main issues.

The impugned order of injunction

[8] The Respondent has reproduced the order in question as below:-

“That pending the hearing of this suit, or until further orders of the court, an interim order of injunction do issue restraining the 1st, 2nd, 3rd, 4th, 5th and 6th defendants whether by themselves, their proxies, agents and/or servants from conducting any business passing any resolutions, acting upon or in any manner whatsoever dealing with or disposing the assets of the 7th defendant.”

[9] The said order was granted on 3rd May 2012 and it was prayer number 4 of the Motion dated 15th March 2012. The order was issued after the judge had heard the parties and considered the affidavit of the company. The judge observed that the company was supporting the motion and so the order was granted. The earlier interim orders were not extended and it seems they lapsed. The effective order, in my view and according to the record which I will address is the one granted on

3rd May 2012. I will proceed on that basis.

[10] Prayer 2 is the one which restrained the 1st – 6th Defendants from ***conducting any business, passing any resolutions, acting upon or in any manner whatsoever implementing the agenda relating to item numbers 1 and 2 in the Notice of Extra Ordinary General Meeting of the 7th defendant dated 15th February, 2012 to wit:***

- a. ***Sale and disposal of the company's plant, land and machinery.***
- b. ***Formation of plant/land disposal committee.***

But prayer 4 was restraining the 1st – 6th Defendants from ***conducting any business, passing any resolutions, acting upon or in any manner whatsoever dealing with or disposing the assets of the 7th defendant.*** The order was specific and clear on the persons and the actions it restrained. There was no restraint against the company from dealing in or selling its properties and, here, the distinction between the company and those who compose it becomes necessary. I need not cite the famous case of **Salomon v Salomon** on this aspect. In that light, the argument by the Applicant that the registration of the order upon the property of the company is wrong makes sense. The registration of the order goes beyond the scope of the injunction for it inhibits the company from even using or dealing with the property absolutely. Such order has the potential of destroying the company and bringing its operations to a halt yet it is an action by a shareholder who also wants to partake of the shareholding of the company. The argument by the Plaintiff that, as long as the decree on the award remains unhonoured, all the assets of the company must remain preserved is a very dangerous proposition in law. For that position to hold a specific freezing order directed to the company and its assets will be needed. There is none here. And registration of inhibitions upon a property is done on a clear order to that effect. Turning an injunction issued in the terms herein into an inhibition of property is contrary to law. Accordingly, I hereby order the entry and registration of the order of this court on the property to be removed forthwith by the relevant office concerned with rectification of register of titles in land. But, I am yet to determine the other issue on whether the injunction will be discharged or not.

Lapse of injunction

[11] It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure. So, a party who applies to have an injunction discharged in the circumstances obtaining in rule 6 is acting in accordance with the statutory obligation to assist the court attain the overriding objective of the law under Article 159 of the Constitution, section 1A and 1B of the Civil Procedure Rules. Except, however, an application under rules 6 of order 40 of the Civil Procedure Rules involves discretion of the court. Towards that end, I am in agreement with the observation of Munyao J in the case of *Filista Chamaiyo Sosten v Samson Mutai* (supra). I should think factors which should guide the court in the exercise of discretion under Order 40 rule 6 of the CPR include but not limited to; 1) if the injunction was obtained by concealing facts which if were put to the judge in first instance would have affected his judgment in granting the injunction; 2) the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction; 3) the general conduct of the holder of the injunction is such that the court is impelled to discharge the injunction, and here I suggest instances where the injunction is being used to intimidate the Defendant or achieve an altogether different purpose from which the injunction was issued; 4) the sustenance of the injunction will cause an injustice, and here occurrence of substantial loss to the defendant is important, for instance an injunction obtained against a company which completely halts the operations of the company will be serving a different altogether purpose from the intention of law in granting equitable relief. This list is not

intended to be exhaustive. What amounts to sufficient cause will really depend on the peculiar circumstances of each case.

[12] Applying this test, are circumstances of this case sufficient reason to discharge the injunction herein? I note the Plaintiff has not moved the court or set down the suit for hearing for over twelve months since the injunction was granted. The nature of the order of injunction herein would definitely substantially affect the operations of any company. I have noted that in my discussion of the first issue and appropriate order has been made. However, I note that the company has not also shown any willingness to honour the award herein. The decree arising out of the award confers proprietary interests on the plaintiff as a shareholder in the 7th Respondent Company. Here, I need to make certain legal indents on recognition and enforcement of an arbitral award. As a matter of law, and I believe I am right, once recognition and enforcement of arbitral award under section 36 of the Arbitration Act have been given by the court, the award becomes executable as the decree of the court. But it should be noted that enforcement and or execution of arbitral award should be specifically applied for in the same cause on recognition. And once recognition and enforcement have been ordered by the court in the manner prescribed in the Arbitration Act, the decree issued therefrom becomes the decree of the court and is amenable to execution just like any other decree. The execution of the decree herein on shares in the 7th Defendant Company is a decree for all purposes and one does not need another "superior" or "real" decree in another substantive suit in order to execute a decree in a recognition and enforcement proceeding under section 36 of the Arbitration Act. A proceeding for recognition and enforcement of the award under section 36 of the Arbitration Act is not an interlocutory proceeding and so I do not see how the determination thereof is not a "determination" in the real sense of the word as it was argued by the Plaintiff. Such decree on an award issued under section 36 of the Arbitration Act, should be easy to execute through the summary procedures provided in the Companies Act for instance, through the wide powers of the Registrar of Companies or rectification of the register of members and shareholders, without intense inquiry of a suit. The Plaintiff through his advocates seems to have commenced the process of change of particulars of membership and shareholding of the company but they abandoned the process or it stalled. These facts of this case bring to mind to think that, even if court action is needed, the summary procedure under section 118 of the Companies Act may be an option. For further elucidation see an excerpt from *Halsbury's Laws of England, (4th Edn.), Vol. 7(1) para 372* on court's jurisdiction to rectify company register:

"372. General jurisdiction to rectify company's register of members

The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the

company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required.”

[13] The foregoing notwithstanding, the matter before me is the plaintiff substantive suit, but which he must quickly progress to resolve the registration of his shares as awarded by the arbitral tribunal and recognized by the court. The explanations given by the plaintiff on the delay in prosecuting this suit are not quite convincing and are tinged with some arrogance or don't-care attitude about what harm the injunction herein may do to the operations of the company. However, and in the meantime, I still find there is need to secure his interest in the company as evidenced in the award herein. On that basis, I will not discharge the injunction at this stage. I will sustain the injunction purely in the interest of justice. Nonetheless, it will not be without conditions because of the reasons I have stated above and other which follows below. Another default; I note the Plaintiff has never served the Defendants with summons to enter appearance and the plaint as required in law. Failure to serve summons and plaint is not a technicality which can be overlooked or diminished by Article 159(2) (d) of the Constitution. It is a fundamental aspect of fair trial as it brings to the attention of the Defendant the kind of case it is faced with and has to reply to. In fact, but without making a decision on the matter, I doubt whether a suit where summons have expired could be a suit on which a person can validly exert rights. The plaintiff is really guilty of dilatory behaviour in many respects and such indolence should not be allowed to continue. Accordingly, therefore, I will subject the sustenance of the injunction herein to one condition; that the plaintiff shall set down this suit for hearing within 90 days from today which failing the injunction will stand discharged. It is so ordered. The protection offered by the injunction the way it has been styled is sufficient as sale of company properties can only be by a resolution in a meeting of the company in accordance with the Companies Act.

Dated, signed and delivered in court at Nairobi this 12th day of November, 2014

F. GIKONYO

JUDGE