



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 128 of 2011

ELIAS KABURU MURITHI.....PLAINTIFF

VERSUS

HAWKINS MUTEGI KAMUNDI.....1ST DEFENDANT

MILESMIND LIMITED.....2ND DEFENDANT

CONSOLIDATED BANK OF KENYA LIMITED.....3RD DEFENDANT

RULING

This ruling is on an application made by the 3rd Defendant by way of Notice of Motion dated 22nd October 2012 under Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21, Laws of Kenya), sections 96, 98 and 104 of the Land Act 2012, order 50 Rule 1, Order 40 Rules 4,5 and 7, and Order 51 Rule 1 of the Civil Procedure Rules, seeking that the *ex parte* interim orders granted on 24th October 2011 be discharged or varied and/or set aside, the charged property Title No. Nakuru Municipality Block 12/277 be sold in exercise of a chargee's statutory power of sale, the suit in the counterclaim against the 3rd Defendant be dismissed for want of privity of contract, as well as costs of the application.

This application is based on the following grounds :

1. The 1st Defendant obtained interim orders *ex-parte* and has intentionally concealed the said orders from the 3rd Defendant with the mischief of preventing the 3rd Defendant from objecting to the said orders, to the extent of moving the Court 4 times without the knowledge of the 3rd Defendant despite them being properly on record; and that the 1st Defendant intentionally refused to serve the 3rd Defendant with the application seeking interim orders despite the Court's orders to do so.
2. The 1st Defendant has refused to prosecute the application dated 24th October 2011 on the pretext of negotiating the matters yet the 3rd Defendant had not been invited to any negotiations. Due to the failure of the 1st Defendant to serve the order, the 3rd Defendant has already proceeded with its statutory power of sale and negotiations for the purchase of the suit property are already at an advanced stage.
3. *Ex-parte* interim orders ought to be served within 3 days from the date of issue of the order, and can only be issued once for 14 days, and thereafter extended by consent of the parties for a period not exceeding 14 days. Where a suit has not been determined for 12 months from the date the interim injunction is granted, the orders automatically lapse unless there is sufficient reason, where the court may order otherwise.

4. The interim relief granted is too wide and open to abuse. The 1st Defendant is litigating in bad faith with the sole purpose of injuring the interests of the 3rd Defendant and also abusing the process of the court.

This application is supported by the affidavit of Janet Mwaluma, the Legal Officer of the 3rd Defendant, sworn on 22nd October 2012, who depones that after they were served with the 1st Defendant's amended written statement of defence and amended counterclaim, the 1st Defendant moved to court on 24th October 2011 and was granted interim orders. Inter-parties hearing of the 1st Defendant's application was fixed for 9th November 2011: That the 1st Defendant intentionally refused to serve the order knowing full well that the 3rd Defendant was the one most affected by the interim orders: That as a result the 3rd Defendant did not appear in court, and thus the interim orders were extended, without the 1st Defendant disclosing that the 3rd Defendant had not been served: That the 3rd Defendant was only served on 10th February 2012 with a hearing notice without the application.

This application is opposed through the replying affidavit of Hawkins Mutegi Kamundi, sworn on 19th November 2012, who depones that failure to serve the orders to the 3rd Defendant was an inadvertent mistake which was not meant to give the 1st Defendant an unfair advantage. That the 3rd defendant was present in court on 9th November 2011, 20th January 2012, 3rd July 2012 and 18th October 2012 when the orders were extended, and that they had no objection to the same: That the interim orders were to maintain the status quo and protect the subject from destruction, and by vacating the orders as prayed for by the 3rd Defendant, the purported statutory power of sale of the 3rd Defendant would result in the alienation of the 1st Defendant's property, and would defeat the counterclaim.

This motion came up for hearing before me on 29th November 2012. Mr Odhiambo appeared for 3rd Defendant, while Mr Kisila appeared for the 1st Defendant.

Mr Odhiambo, in his submissions, denied being in court on the dates mentioned and consenting to extension of the orders.

He further stated that the 3rd Defendant was not served with the orders made on 24th October 2011. By admitting this, the 1st Defendant was in contravention of Order 40 Rule 4(3) which makes it clear that ex-parte interim orders ought to be served within 3 days from the date of issue together with the application, and the repercussions should this not happen. Authorities under the previous Order XXXIX support this position including **Govindji Popatlal Madhavji V Nasser Alibhai and Another [1960]EA 167** and **Craig v Kanseen [1943] All ER 108**, in which it was held that failure to serve was a nullity: That the orders could only be extended with the consent of all the parties present, and in doing so, the court participated in an illegality. That orders cannot be extended beyond 14 days, and relies on the case of **Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation (C.A. No 59 of 1993)** in which the Court of Appeal held that any orders granted after 14 days became a nullity: that the court has inherent jurisdiction to set aside the orders as per Section 1A,1B and 3A of the Civil procedure Act but it must be exercised judiciously.

Mr Kisila opposes the application. He states that the orders made were based on an application under Order 40, the authorities submitted by Mr Odhiambo were from the Court of Appeal: That this court is not the forum for investigating the merits of the orders made by the other judges: That the applicant has the right to appeal: That the orders sought on 24th October 2011 were done based on real and apprehended danger, and this court should not dwell on the decision to extend the orders as they were done in sufficient cause pursuant to Order 40, Rule 4(2).The inadvertence, if any, of service never happened because the advocates were in court at all times: That in the authorities submitted, particularly **Govindji Popatlal Madhavji V Nasser Alibhai and Another [1960]EA 167**, held that it was the process of issuing the orders that was wrong, not service per-se.

I have read the court record and noted the following:-

The 1st Defendant's application dated 24th October 2011 was certified urgent and heard ex parte. A temporary injunction was granted until interparties hearing on 9th November 2011. These orders were granted by Hon. W. Ouko J on 24th October 2011 on the grounds that the Applicant had shown prima facie that there was danger to the property being wasted if temporary reprieve was not granted.

On 9th November 2011 all parties were in attendance except the third Defendant. Mr Kisila for the applicant sought leave to file a supplementary affidavit and extension of interim orders. Interim orders were extended to 17th November 2011.

On 17th November 2011, there was no appearance by the third Defendant but all the other parties were represented. Mr Kisila for the 1st Defendant stated that he was ready to proceed with the hearing of the application but counsels for the plaintiff and 2nd Defendant needed time to take further instructions from their clients. He sought for extension of the interim orders which were extended until 17th November 2011.

On 20th January 2012, only Mr Kisila for the 1st Defendant was present and sought a hearing date. Interim orders were again extended and the application fixed for hearing on 14th March 2012.

On 14th March 2012 all parties were represented. The 3rd Defendant was represented by Mr Ombati. Mr Kisila stated that he wished to take out the application as the plaintiff and the 1st Defendant were discussing the issue. By consent the application was taken out and interim orders were extended until 3rd July 2012 for interparties hearing.

On 3rd July 2012, there was no appearance by Counsels for the plaintiff and 2nd Defendant. Only counsels of the 1st and 3rd Defendants were present. Mr Odhiambo appeared for the 3rd Defendant. Mr Kisila for the 1st Defendant stated that negotiations were ongoing between the plaintiff and the 1st Defendant and sought for extension of Interim orders which were extended until 18th October 2012 .

On 18th October 2012 only the 1st and 3rd Defendants were represented. Mr Kisila for the 1st Defendant stated that negotiations were in progress. Mr Odhiambo for the 3rd Defendant denied being aware of any negotiations and of any interim orders. A further mention date was granted for 1st November 2012 and interim orders were extended.

On 22nd October 2012, the 3rd Defendant filed the instant motion.

When the application dated 24th October 2011, came up on 1st November 2012, counsels for 1st and 3rd Defendants were present. Counsel for 1st Defendant stated that negotiations were ongoing. Counsel for the 3rd Defendant strongly opposed the extension of the orders and stated that they were an illegality since the 3rd Defendant had not been served. Counsel for the 1st Defendant in response stated that the orders had been extended by consent and since parties were negotiating he prayed for extension of those orders.

The court directed that the application filed by the 3rd Defendant dated 22nd October 2012 be heard on 29th November 2012 and interim orders were extended.

Among the exhibit's supporting the 3rd Defendants application are two letters. One dated 27th February 2012 by the firm of Cheptumo & Company Advocates signed by Odhiambo Ouma. He acknowledged in the said letter receipt of a hearing notice, but stated that he had not been served with application dated 24th October 2011.

The second letter is dated 6th March 2012 by Sheth and Wathigo signed by Mr Kisila forwarding the application requested for to the firm of Cheptumo & Company Advocates. All this happened about four

months after the interim orders were granted to the 1st Defendant.

In making this ruling I have taken into consideration the court proceedings, pleadings, submissions and authorities cited. I am also guided by order 40 Rule 4(1), (2), (3) and Rule 7 of the Civil procedure Rules 2010: that ex-parte injunctions may be granted only once for not more than fourteen days and shall not be extended except once by consent of parties or by the order of the court for a period not exceeding fourteen days and further that the applicant must serve the order, application and pleadings within 3 days from the date of issue of the order.

The question before this court is whether failure to serve the order, application and pleadings meant that the interim orders had automatically lapsed.

The 3rd Defendant has detailed his case in the grounds already stated in this ruling which I need not repeat. The 3rd Defendant did not make an appearance in court until 14th March 2012 and was only served with the application after 6th March 2012.

In Order 40 Rule 7 an order for injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. From the affidavit of Janet Mwaluma, the 3rd Defendant has demonstrated that they were dissatisfied. They were not served and as a result did not appear in court until four months after the interim orders were granted. The 1st Defendant in his affidavit also admitted that this was an inadvertent mistake.

In my view and in the interest of Justice bearing in mind the provisions of Article 50 (1) of the constitution that every person has the right to be heard, Section 1A, 1B and 3A of the Civil procedure Act, and Order 40 Rule 1(3), I find that there was default of service of the interim orders, application and pleadings and therefore the injunction automatically lapses.

I therefore allow prayer 1 of the application dated 22nd October 2012 and set aside the orders granted on 24th October 2011. The application dated 24th October 2011 shall be heard inter-parties. The parties shall take a date for the hearing of the Application within 45 days of this ruling.

Costs shall be in the cause.

Dated and delivered at Nakuru this 1st day of February 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Kisila for 1st Defendant

Mr Odhiambo for 3rd Defendant

N/A for the 2nd Defendant

Stephen Mwangi – Court Clerk