



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 224 of 2010

WILLIAM CHARLES

FRYDA.....PLAINTIFF/APPLICANT

VERSUS

**ASSUMPTION OF SISTERS OF NAIROBI REGISTERED TRUSTEES.....1ST
DEFENDANT/RESPONDENT**

**ST. MARY'S MISSION HOSPITAL.....2ND
DEFENDANT/RESPONDENT**

RULING

This Ruling relates to an application brought by way of Notice of Motion dated 21/02/2012 and filed on the same day which seeks the following orders-

- (a) *The temporary injunction order given herein on 4/03/2011 and issued on 22/3/2011 be extended pending the hearing and determination of this suit or further orders of this court,***
- (b) *Costs of this application be provided for.***

The Application was supported by the Affidavit sworn on 21/02/2012 and the Further Affidavits sworn on 22/02/2012 and on 29/02/2012 by William Charles Fryda.

The Applicant is seeking extension of the orders made on 4/03/2012 which provide-

- (a) *A temporary injunction do issue to restrain the Defendants by themselves, their servants or agents from entering, remaining or in any other manner from interfering with the Plaintiff's use and enjoyment of all the premises known as L.R NO. 27228 and 18590/11, both at Nairobi, L.R NO. 9361/10 at Nakuru and Kiine/Rukanga/2486 at Sagana pending the hearing and determination of this suit or further orders of this court.***

He avers that he has been unable to prosecute and have the suit disposed within one year of the grant of the injunctive orders because the of various applications filed in this suit and another suit filed by the 1st Defendant and another party in Nairobi dealing with the same subject matter. He submits that if the above orders are not extended then he stands to be greatly prejudiced as the Defendants may dispose of the suit properties.

The Application is opposed by the Replying Affidavit sworn by Sister Marie Theresa Gachambi on 28/02/2012 and filed on 29/02/2012. The Respondents have put in written submissions dated 31/03/2012 and filed on 4/04/2012 to which they have annexed various authorities in further support of their case.

Order 40 Rule 6 provides-

“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.”

By virtue of the above stated Order, the same were meant to lapse on 4/03/2012 unless extended by the order of court. The same have been extended severally by consent pending the hearing and determination of this application. The Applicant now seeks to have the same extended pending the hearing and determination of this suit.

The issue for determination is not whether or not the injunctive orders issued on 4/03/2011 were properly granted but whether the same should be extended. Order 40 Rule 6 of the Civil Procedure Rules, 2010 grants this court unfettered discretion in extending the same. In exercising its discretion, the the court will consider whether the purpose of this suit will be defeated if the same are not extended, whether any party will be greatly prejudiced if the same are extended, and if it is just and proper to extend the same in the circumstances.

In his submissions the Applicant states that he has been unable to successfully prosecute this case within one (1) year. The Respondents have accused the Applicant of delaying to prosecute this suit and that he is bent on sitting on the injunctive orders.

The question for this court to determine is whether the Applicant has been guilty of delay and if so, whether the same has been inordinate and if the Defendants/ Respondents herein have been greatly prejudiced as a result.

I have noted that there are indeed numerous applications that have been made in the present suit . I have also take note of the existence of Nairobi HCCC NO. 9 OF 2011 which by a Ruling delivered on 20/12/2011, the court directed that it be transferred to Nakuru and be heard together with the current suit. The Plaintiff herein cannot therefore be accused of being indolent in disposing of this suit, there has not been such inordinate delay as a result of which the Defendants have suffered any prejudice.

The Defendants however aver that the same should not be extended. They contend that the Applicant is undeserving of the exercise of the court's discretion in his favour as he has failed to disclose material facts to the court namely; the existence of HCCC NO. 9 OF 2011 **REGINA PACIS UNIVERSITY COLLEGE THROUGH THE BOARD OF TRUSTEES & ANOTHER VS. WILLIAM CHARLES FRYDA** and the Ruling delivered on 20/12/2011,with the aim of misleading this court.

The Defendants aver that the court in Nairobi HCCC NO. 9 OF 2011 by its Ruling made on 20/12/2011 ordered that the said suit be transferred to this court for trial and disposal alongside the current suit. They further contend that a 3rd Party, Regis Pacis University College, the 1st Plaintiff in Nairobi HCCC NO. 9 OF 2011 is currently in occupation of one of the suit premises and it would be unfair to extend the same without hearing the said third party.

With much respect, I do not think this is the correct position. The Plaintiff has stated that it has been unable to prosecute this suit because he has been busy in another suit filed by the 2nd Defendant. He did bring to the attention of this court of the existence of another suit. In any event, I do not think that existence of Nairobi HCCC NO. 9 OF 2011 is material for the purposes of determining this application. This Court while granting the orders made on 4/03/2011 looked into the issue of whether the applicant has a prima facie case with a probability of success and whether an award of damages would be sufficient to compensate him. It stated-

“the court is however able to say from the material in both the Applicant's Supporting Affidavit and the Respondent's Replying Affidavit and other Affidavits in the cross-application that though the land on which the 2 hospitals are situate is registered in the name of the 1st Respondent, the property in them is an asset of both the Applicant and the 1st Respondent.”

It has not been shown how the existence of the said suit alters the status of the rights of the parties as stated by this court hence making such disclosure of such importance that the failure would warrant the dismissal of this application. They have not shown that the failure to disclose was in bad faith.

The Respondents further aver that the Applicant has failed to disclose that another party is currently in occupation of the suit premises and that it will be greatly prejudiced if the orders herein are extended. The orders have been in place for one year. If the third party was or is being prejudiced by their continued existence, nothing is stopping it from filing an application to have the same set aside. The 1st Plaintiff in Nairobi HCCC NO. 9 of 2011, who according to the Defendants stands to be prejudiced should the injunction orders be extended, is aware of the existence of this suit and the injunctive orders issued on 4/03/2011 because reference to the same was made by the Nairobi court in its Ruling delivered on 20/12/2011 in Nairobi HCCC NO. 9 of 2011.

The Respondents have also stated that there are in existence injunctive orders issued in favour of the Plaintiffs in Nairobi HCCC NO. 9 OF 2011 and if the orders made on 4/03/2011 are extended then they would be in conflict and would prejudice the parties. These orders have not been exhibited before this court hence the court does not know when the same were issued or their contents, it therefore cannot be able to determine if they would be inconsistent with the orders of 4/03/2011 and to what extent.

Firstly the Respondents have not shown how the existence of the latter suit alters the status of the current suit so as to make this court depart from its observations cited above and make a finding that the injunctive orders ought not to be extended.

Secondly, the Respondents allege that the Applicant has been misusing the orders granted by purporting to unfairly terminate the employees at the Hospital who were affiliated to the 1st Defendant/Respondent Congregation and has forcefully sought to evict them from their residences. They aver that the Applicant is acting in total contravention of the law.

The Respondents had filed an application dated 29/03/2011 wherein they were asking this court to review the injunctive orders the subject matter of this application on similar grounds, -

“that the Applicant was misusing the orders of this court to terminate the services of the staff of the 1st Defendant/ Respondent who were working in various capacities in the 2nd Defendant hospitals and had even forcibly evicted the sisters from their residences.”

While refusing to grant the application by its Ruling made on 20/05/2011, the court stated that-

“the letters were not signed by the Plaintiff and are directed to employees who ordinarily would have a contract of service with the employer, and do not concern the matter in this suit. Indeed the matter herein is in rem so is the counterclaim. The allegations of criminal acts or behaviour are matters for reports to the Police, not before this court”

There is no reason that has been given to persuade this court to depart from its earlier finding on the issue and the same is restated and affirmed.

Finally, the Respondents in their submissions allege that the Plaintiff exclusively collects money from the hospitals situate on the suit premises and there is likelihood that should the suit be determined in favour of the Defendants they would not be able to recover the same from the Applicant who is a foreign citizen. There is no evidence that has been produced to prove any of the above allegations and these averments are not even contained in the Replying Affidavit.

The Applicant further submits that an injunctive order is given to preserve the subject matter of the suit during the pendency of the suit unless otherwise directed. I agree entirely with this submission as Order 40 Rule 1 provides that the order given thereunder are for the purpose of -

“staying and preventing the wasting ,damaging ,alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

Such orders are meant to maintain the status quo until the rights of the parties are finally determined.

In order to further the spirit of this law, it is in the interest of justice that the injunctive orders made on 4th March, 2011 are extended and the status of the suit premises is maintained as it has been for the past ten years till this suit is heard and determined to conclusion.

I would therefore allow the Application dated 21/02/2011 in terms thereof and with costs to the Plaintiff.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE