



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 44 OF 2017**

**RAPHAEL MUSYOKI NDETI** (*Suing as the personal representative*

*of the Estate of PETER NZOKI NDETI (Deceased)*.....**PLAINTIFF**

**VERSUS**

**CECILIA SITUMAI NDETI** (*Sued as the personal representative*

*of the Estate of KIVUTO NDETI (Deceased)*.....**1<sup>ST</sup> DEFENDANT**

**MICHAEL KYENDE NDETI** (*Sued as the personal representative of the*

*Estate of KIVUTO NDETI (Deceased)*.....**2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 19<sup>th</sup> August, 2020, the Defendants are seeking for the following orders:

***a) The order made by this court on 20<sup>th</sup> May, 2020 be discharged, varied and/or be set aside by the court.***

***b) Costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Defendant who has deponed that the impugned Application was filed in court on 20<sup>th</sup> May, 2020; that the order and the documents were not served within three (3) days as required but were sent by email on 10<sup>th</sup> July, 2020 and that the delay is not explained.

3. The 1<sup>st</sup> Defendant deponed that the injunction order, being an *ex-parte* order, has lasted for more than fourteen (14) days; that this Application is purely geared towards defeating the order made by this court on 15<sup>th</sup> May, 2020 requiring the Respondent to prosecute the case within 120 days and that the court was manifestly misled to grant the *ex-parte* order.

4. It was deponed by the 1<sup>st</sup> Defendant that on 20<sup>th</sup> November, 2015, the Plaintiff/Respondent filed an injunction Application as this suit was being commenced; that the injunction Application was opposed by the Applicants and that the Application pending in court for almost two (2) years until it was dismissed on 10<sup>th</sup> May, 2017.

5. According to the 1<sup>st</sup> Defendant/Applicant, the date of 10<sup>th</sup> May, 2017 had been given by the Judge on 23<sup>rd</sup> March, 2017 in the presence of Mr. Martin Gitonga, the advocate for the Plaintiff/Respondent; that on 10<sup>th</sup> May, 2017, Mr. Gitonga did not attend court and the injunction Application was dismissed with costs and that after the dismissal, the Application dated 8<sup>th</sup> March, 2019 was filed.

6. It was deponed by the 1<sup>st</sup> Defendant that the Application in itself is an abuse of the court process; that the Applicants have always opposed the Plaintiff's/Respondent's injunction Applications; that it is callous for the Plaintiff/Respondent to sneak to court and be heard *ex-parte* and that the Respondent is aware that there existed High Court Succession Cause Number 1587 of 2012 - Estate of Kivuto Ndeti, in which the court confirmed the Grant in respect of the Estate of the late Professor Kivuto Ndeti and distribution of his Estate ordered.

7. The 1<sup>st</sup> Defendant finally deponed that distribution of the Estate of the late Kivuto Ndeti has taken place in accordance with the order of the court; that L.R No. 7149 no longer exists as it has been sub-divided and interests thereon passed to third parties; that the *ex-parte* order interferes with the Estate of Kivuto Ndeti in an unwarranted manner and that the entire suit is based on documents that are not only fraudulent, but forgeries including the Decree purportedly issued by the court on 17<sup>th</sup> September, 2007 but which the court has denied ever

issuing.

8. In reply, the Plaintiff deponed that the property the subject matter of this suit forms part of the Estate of the late Peter Nzuki Ndeti pursuant to an Agreement of 24<sup>th</sup> May, 2007 between the late Kivuto Ndeti and Peter Nzuki Ndeti; that on 8<sup>th</sup> March, 2019, he filed an Application dated 7<sup>th</sup> March, 2019 seeking for injunctive orders restraining the Defendants from dealing with L.R No. 7149/9 and 337/991 (*the suit property*) and that the court directed that the Notice of Motion dated 17<sup>th</sup> January, 2019 be heard first.

9. According to the Plaintiff, the court dismissed the Defendant's Application dated 17<sup>th</sup> January, 2019 and directed him to fix the matter for hearing within 120 days; that he sought to have his Application dated 7<sup>th</sup> March, 2019 heard in Chambers due to the Covid 19 pandemic and that the suit could not be set down for hearing before the Application dated 7<sup>th</sup> March, 2019 could be heard.

10. According to counsel, a temporary injunction was issued by the court pending the hearing and determination of the Application and not for fourteen (14) days; that the delay in fixing the Application for hearing was due to the Covid 19 pandemic and that any sub-division of the suit property is subject to these proceedings.

11. The Plaintiff deponed that the Defendant has not responded to the Application dated 7<sup>th</sup> March, 2020; that at the time the Application was filed and argued, restrictions of movement in and out of Nairobi were in place and that travelling to Machakos to extract the order of the court was greatly affected thus the delay in serving the Defendant with the order.

12. The Plaintiff finally deponed that the power to vary/discharge an order is discretionary, which discretion ought to be exercised judiciously; that the Estate of Peter Nzuki Ndeti will suffer irreparable harm if the orders herein are discharged and that the current Application should be dismissed by the court.

13. In the Further Affidavit, the 1<sup>st</sup> Defendant deponed that the order of the court made on 15<sup>th</sup> May, 2020 was to fix the case for hearing in 120 days and that no injunctive order has existed since 10<sup>th</sup> May, 2017 and hence none was deserved on 20<sup>th</sup> May, 2020.

14. The 1<sup>st</sup> Defendant deponed that the purported Decree dated 17<sup>th</sup> September, 2007 purported to originate from the Chief Magistrate's Court Machakos is a forgery. It was deponed that the ex-parte orders of 20<sup>th</sup> May, 2020 ought to be set aside and the Application dated 7<sup>th</sup> March, 2020 be struck out with costs *ex-debito justitiae*.

#### **Submissions:**

15. In his submissions, the Defendant's/Applicant's advocate submitted that the Plaintiff failed to disclose to the court the following cardinal facts: that there was a first injunction Application that was dismissed on 10<sup>th</sup> May, 2017; that the Application had been opposed by the Defendant herein and that the Decree purported to be relied upon to form the basis of the cause of action was declared inexistent by the Magistrate's Court at Machakos; and that the Applicants have always participated in these proceedings and hence an ex-parte order could not have been merited.

16. Counsel submitted that the Plaintiff failed to disclose to the court the existence of a confirmed Grant in respect of the suit properties; that the confirmed Grant has not been set aside; that the Defendants herein have relied on it to enter into dealings with third parties and that the ex-parte order is injurious to those dealings.

17. It was submitted that the Application dated 7<sup>th</sup> March, 2019 is an abuse of the court process; that the Plaintiff did not draw the court's attention to the earlier injunction Application dated 20<sup>th</sup> November, 2015 which was dismissed for non-attendance and that the filing of the Application dated 8<sup>th</sup> March, 2019 is an abuse of the court process.

18. Counsel submitted that the Application was filed two (2) years after the first Application was dismissed; that no reasons were given for the delay and that the Plaintiff should have applied to set aside the order of 10<sup>th</sup> May, 2017 and sought for the reinstatement of the Application dated 20<sup>th</sup> November, 2015. Counsel relied on the Court of Appeal decision in *Civil Appeal Number 101 of 1984 Wanguhu versus Kania (1985) eKLR* where Platt Ag JA stated as follows:

*"If a party to a suit does not appear to prosecute his Application, and it is dismissed can he be allowed to bring a second application. Obviously not, since there would be no end to litigation. Having failed to appear, he must seek to explain to the court why he failed to appear and thus pray for re-instatement. It is an abuse of the process of the court, to ignore its order given when the party is at fault and simply, bring further proceedings without explaining or redeeming the fault.*

*(Compare Lawrance vs Lord Norreys (1888) 39 CH.D 221 at page 237 as to an abuse of the court in duplicated proceedings). It might also lead to later judges sitting on appeal over their previous decisions or those of other judges; on the question of whether an adjournment should have been granted (compare Civil Appeal No 25 of 1977 Mburu Kinyua vs. Gachini Tuti)."*

19. Counsel submitted that the Application dated 7<sup>th</sup> March, 2019 is an abuse of the court process and that the Application should be struck out by the court with costs to the Defendants.

20. The Plaintiff's/Respondent's advocate submitted that by its Notice of Motion Application dated 7<sup>th</sup> March, 2019, the Plaintiff sought for orders that will essentially preserve the suit property and protect it from sale or alienation by the Applicants during the pendency of the suit and that Order 40 Rule 1 of the Civil Procedure Rules provides for the grant of temporary injunction in suits where it is proved by Affidavit

or otherwise that any property subject of the suit is in danger of being wasted, damaged or alienated by any party to the suit.

21. Counsel submitted that before granting orders for temporary injunction, the court must be satisfied that the Applicant has met the threshold for the grant of temporary injunctions.

22. It was submitted that on or about 1990, the late Peter Nzuki Ndeti and his late brother Kivuto Ndeti entered into a mutual Agreement at the former's home in Athi River in respect of Land Reference number 7149/9 measuring approximately 100 acres and Land Reference number 337/991 whereby it was agreed *inter alia* that the said plots having been registered in the name of Kivuto Ndeti, he shall hold the same on their behalf.

23. The Plaintiff's advocate submitted that on or about 24<sup>th</sup> May, 2007, and in the course of the ongoing dispute in Case Number 24B/2006 before the Land Dispute Tribunal Court aforesaid, the Late Peter Nzuki Ndeti and the late Kivuto Ndeti entered into a lawful and binding Agreement before the Chairman of the Land Dispute Tribunal in respect of the subject land.

24. It was submitted that the Estate of the late Kivuto Ndeti has failed and or refused to implement the provisions of the Agreement dated 24<sup>th</sup> May, 2007, and relinquish and/or transfer 65% of the subject land to the late Peter Nzuki Ndeti or his Estate and that the Estate of the late Kivuto Ndeti now purports to claim the whole subject land absolutely in utter disregard of the Agreement aforesaid and the circumstances leading thereto.

25. The Plaintiff's counsel submitted that it is not in dispute that there is imminent danger that the suit property stands to be fraudulently sold or transferred to innocent third parties or interfered with to the greatest detriment and or prejudice or against the interests of the Estate of the late Peter Ndeti.

26. On the issue of whether the ex-parte orders of this court should be discharged, counsel relied on the case of *Atlas Copco Customer Finance AB vs. Polarize Enterprises [2016] eKLR* which distilled the factors that may be considered when faced with a question of discharge of an injunction. The court held as follows:

*"It is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:*

*a. proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;*

*b. a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;*

*c. proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;*

*d. proof that the sustenance of the injunction would cause an injustice."*

27. Counsel also relied on the case of *Filista Chemaiyo Sosten vs. Samson Mutai [2012] eKLR* where the court 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."*

28. In the present case, it was submitted, the Respondent disclosed all relevant facts within its knowledge; that the Applicant has not stated and/or particularized the material facts that have not been disclosed by the Respondent and that the Applicants herein have not filed a response to the Notice of Motion Application dated 7<sup>th</sup> March, 2020.

29. It was submitted by the Plaintiff's advocate that the purported transfer of the suit property to third parties was done during the pendency of this suit and that the principle of *lis-pendens* preserves the suit property until the suit is finally determined or until the court issues orders and gives terms on the suit property.

30. It was submitted that the injunction continues to serve the ends of justice as was intended; that it is in the interest of justice and equity that the said Order remain in force during the pendency of the Application and the suit and that the circumstances of the suit have not radically changed and/or the Applicants have not met the threshold to warrant this court to discharge, vary and/or set aside the orders of the court issued on 20<sup>th</sup> May, 2020.

#### **Analysis and findings:**

31. In his Application, the Defendant is seeking for an order made by this court on 20<sup>th</sup> May, 2020 to be discharged, varied and/or be set aside by the court. The Application is made pursuant to Order 40 Rule 7 of the Civil Procedure Rules which provides as follows:

*"Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party*

*dissatisfied with such order.*”

32. The court in the case of *Atlas Copco Customer Finance AB vs. Polarize Enterprises [2016] eKLR* distilled the factors that may be considered when faced with a question of discharge of an injunction. The court held as follows:

*“It is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:*

*a. proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;*

*b. a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;*

*c. proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;*

*d. proof that the sustenance of the injunction would cause an injustice.”*

33. Further in *Filista Chemaiyo Sosten vs. Samson Mutai [2012] eKLR* the court 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.”*

34. The 1<sup>st</sup> Defendant/Applicant has deponed that the impugned Application was filed in court on 20<sup>th</sup> May, 2020; that the order and the documents were not served within three (3) days as required but were sent by email on 10<sup>th</sup> July, 2020 and that the delay has not been explained.

35. The Defendant deponed that the injunction order, being an *ex-parte* order has lasted for more than fourteen (14) days; that this Application is purely geared towards defeating the order made by this court on 15<sup>th</sup> May, 2020 requiring the Respondent to prosecute the case within 120 days and that the court was manifestly misled to grant the *ex-parte* order.

36. It was submitted that the Application dated 7<sup>th</sup> March, 2019 is an abuse of the court process; that the Plaintiff did not draw the court's attention to the earlier injunction Application dated 20<sup>th</sup> November, 2015 which was dismissed for non-attendance and that the filing of the Application dated 8<sup>th</sup> March, 2019 is an abuse of the court process.

37. The Defendants'/Applicants' counsel submitted that the Application was filed two (2) years after the first Application was dismissed; that no reasons were given for the delay and that the Plaintiff should have applied to set aside the order of 10<sup>th</sup> May, 2017 and sought for the reinstatement of the Application dated 20<sup>th</sup> November, 2015.

38. The record shows that the Plaintiff commenced this suit by way of a Complaint on 20<sup>th</sup> November, 2015. Together with the Complaint, the Plaintiff filed an Application dated 6<sup>th</sup> November, 2015 in which he sought for temporary orders of injunction restraining the Defendants from selling, sub-dividing, alienating, transferring and or dealing with Land Reference Numbers 7149/9 and 337/991 (*the suit property*) pending the hearing and determination of the suit.

39. The record shows that on 10<sup>th</sup> May, 2017, this court dismissed the Plaintiff's Application dated 6<sup>th</sup> November, 2015 for want of prosecution. The Defendant then filed an Application dated 17<sup>th</sup> January, 2019 for the dismissal of the suit for want of prosecution, which Application was dismissed by the court on 15<sup>th</sup> May, 2020 on the following terms:

*“The Plaintiff to fix the suit for hearing within 120 days of the date of this Ruling, and if not, the suit will stand dismissed.”*

40. Instead of fixing the suit for hearing as directed by the court, the Plaintiff filed an Application dated 19<sup>th</sup> May, 2020 under a Certificate of Urgency, which made reference to an existing Application dated 7<sup>th</sup> March, 2019. When the Application dated 19<sup>th</sup> May, 2020 came up for hearing *ex-parte* on 22<sup>nd</sup> May, 2020, this court granted the temporary order for injunction pending the hearing of the Application *inter partes*.

41. Order 40 of the Civil Procedure Rules provides the manner in which Applications seeking for temporary orders of injunction are supposed to be heard. Order 40 Rule 4 of the Civil Procedure Rules provides as follows:

*“4. (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application *ex parte*.*

*(2) An *ex parte* injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except*

once by consent of parties or by the order of the court for a period not exceeding fourteen days.

(3) In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.

(4) All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.”

42. Although the above provision of the law requires the court to grant an ex-parte Application for only fourteen (14) days, and the order to be served on all the parties within three (3) days, Section 3 A of the Civil Procedure Act provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

43. Order 50 Rule 6 of the Civil Procedure Rules on the other hand provides as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders.”

44. It is common knowledge that from the beginning of March, 2020, there was Covid 19 pandemic in this country. Due to the pandemic, several executive orders were made by the President, including cessation of movement in and out of Nairobi. The Judiciary also had to scale down its operations, and allowed only limited operation of the registry.

45. It is on the basis of the above that this court, instead of granting the ex-parte order for only fourteen (14) days, granted the order pending the hearing of the Application, pursuant to the powers granted to it by Section 3A of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. The said order was therefore validly issued by this court.

46. As already stated above, this court can discharge or vary an ex-parte order if it is shown that the injunction was obtained by concealing facts which if put to the Judge in the first instance, would have affected his Judgment on whether or not to give the injunction.

47. This court dismissed the Plaintiff’s Application dated 6<sup>th</sup> November, 2015 for want of prosecution. The Plaintiff filed an Application dated 7<sup>th</sup> March, 2019 seeking for orders similar to the orders that were sought in the Application dated 6<sup>th</sup> November, 2015. The Application dated 7<sup>th</sup> March, 2019 is still pending.

48. I have gone through the Application dated 7<sup>th</sup> March, 2019, and the Certificate of Urgency dated 19<sup>th</sup> May, 2020 together with the Supporting Affidavit sworn on 19<sup>th</sup> May, 2020. The said Application and the Certificate of Urgency does not disclose that indeed a similar Application was filed by the Plaintiff and was dismissed by the court for want of prosecution.

49. The process to be followed by a party whose Application, or suit has been dismissed by the court for want of prosecution was explored by the court in the case of *Wanguhu versus Kania* (1985) eKLR where Platt Ag JA stated as follows:

“If a party to a suit does not appear to prosecute his application, and it is dismissed can he be allowed to bring a second application. Obviously not, since there would be no end to litigation. Having failed to appear, he must seek to explain to the court why he failed to appear and thus pray for re-instatement. It is an abuse of the process of the court, to ignore its order given when the party is at fault and simply, bring further proceedings without explaining or redeeming the fault.

**(Compare *Lawrance vs Lord Norreys (1888) 39 CH.D 221 at page 237* as to an abuse of the court in duplicated proceedings). It might also lead to later judges sitting on appeal over their previous decisions or those of other judges; on the question of whether an adjournment should have been granted (compare *Civil Appeal No 25 of 1977 Mburu Kinyua vs Gachini Tuti*)... No steps to remedy the situation were taken. Nothing new emerged on the second application. In the result, I would dismiss the appeal with costs to the respondent.”**

50. Indeed, as correctly submitted by the Defendants’ counsel, the Plaintiff should have sought for an order reinstating the dismissed Application, instead of filing a similar Application, which was the basis for the grant of the ex-parte order.

51. The Plaintiff did not disclose that indeed this court had dismissed a similar Application for want of prosecution. The ex-parte injunction was therefore obtained by concealment of material facts which if presented would have worked against the granting of the injunction.

52. On that ground alone, I allow the Defendants’ Application dated 19<sup>th</sup> August, 2020 as follows:

*a) The order made by this court on 20<sup>th</sup> May, 2020 be and is hereby discharged.*

*b) The Plaintiff to pay the costs of the Application.*

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O. A. ANGOTE**

**JUDGE**