



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT**

#### **AT NAIROBI**

#### **ELC CASE NO. 23 OF 2014**

**YORK HOUSE PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**MOHAMED YUSUFALI.....DEFENDANT**

#### **RULING**

1. This is the notice of motion dated 29<sup>th</sup> November 2018. It seeks orders that: -

It seeks orders: -

**1. Spent.**

**2. An order to varying, discharging and or set aside, to permit the defendant application to repair, refurbish, maintain and to commercially utilize the order of court made on 16<sup>th</sup> January 2014, pending hearing and determination of this application.**

**3. The honourable court be pleased to discharge the ex-parte order of injunction issued against the defendant on 16<sup>th</sup> January, 2014 and allow the defendant to gain access to the portion of York house that is Zanzibar curio shop.**

**4. Costs of this application be provided for.**

**5. Any other and or further relief that this honourable court may deem fit and just to grant.**

2. The grounds are on the face of the application and are set out in paragraphs 1 to 20.

3. The application is supported by the affidavit of Mohamedali Yusufali, the defendant/application sworn on the 29<sup>th</sup> November 2018 and supplementary affidavit sworn on the 23<sup>rd</sup> April 2019.

4. The application is opposed. There is a replying affidavit sworn by Bharat Bhardwaj, one of the directions plaintiff/respondent sworn on the 13<sup>th</sup> February 2019.

5. On the 29<sup>th</sup> April 2019, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

#### **The Defendant's/Applicant's submissions**

6. They are dated 16<sup>th</sup> May 2019 and filed on 7<sup>th</sup> June 2019. Order 40 rule 6 of the Civil Procedure Rules provides that an injunction issued under order 40 Rule 1, can only subsist for twelve (12) months. He has put forward the case of **Barclays Bank of Kenya Limited vs Henry Ndungu Kinuthia & Another [2018] eKLR**.

7. The respondent procured orders on 16<sup>th</sup> January 2014, the suit in which the injunctive orders were granted has not been heard at the time of the hearing of this application, over five and a half years later. No sufficient reason has even been advanced by the respondent before the trial court. The trial court has never been marked to extend the temporary injunction for sufficient reasons.

8. The applicant herein seeks to resume use and occupation of the business premises of forty (40) years. It is not equitable to allow Bharat

Bhardwaj to use part of the suit premises without paying a single coin while denying the applicant herein the same benefit. That is abuse of an equitable relief and it is an oppression court order.

9. There were no orders to be extended on 19<sup>th</sup> May 2017. The injunction should be discharged as it only serves to occasion an injustice rather than to preserve the subject matter of the suit. The said property faces no danger of alienation or disposal. Neglect of the building poses the danger that the suit premises may be demolished by Nairobi County Government. He prays that the application be allowed. He has put forward the case of **Estate of Kahawa Sukari Limited and the matter of the Companies Act, Winding Up Cause No. 23 of 2002, Milimani Commercial Court.**

#### **The Plaintiff's/Respondent's submissions**

10. They are dated 4<sup>th</sup> October 2019 and filed on 7<sup>th</sup> October 2019. The dispute was triggered by the defendant/applicant after he vacated the premises and reentered the same with strangers and commenced unauthorized alteration on the building. The orders of injunction were extended by Lady Justice Gitumbi on 19<sup>th</sup> May 2017 and were to subsist until the hearing and determination of the suit. The defendant/applicant has not only refused to disclose but has failed to deny that the parties have been in negotiations to settle the dispute out of court and that the suit had been fixed for the main hearing on 11<sup>th</sup> June 2019. The defendant/applicant has concealed material facts which would guide the court to make a proper determination. It has put forward the case of **Terry Wanjiru Kariuki vs Equity Bank Ltd & Another [2012] eKLR.**

11. This application is filed in bad faith and clearly made to take advantage of the discretion of the court. The defendant/applicant concedes that the order of injunction is still operative and effective pending the hearing and determination of the suit. The only available remedy to the defendant/applicant is to appeal against the order of 19<sup>th</sup> May 2017.

12. The objective of order 40 rule 6 was to prevent delay by a party to prosecute the suit after obtaining an order of injunction. The defendant/applicant has the burden of proof to demonstrate that there were no sufficient reasons to extend the orders of 19<sup>th</sup> May 2017. It has put forward the case of **Filista Chimayo Sosten vs Samson Mutai [2012] eKLR.**

13. The defendant/applicant has not demonstrated that the plaintiff/respondent failed to disclose any facts or that the circumstances have since changed. It has put forward the case of **David Wambua Ngii vs Abed Silas Alembi.** It prays that the application be dismissed.

14. I have considered the notice of motion, the affidavits in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions and the authorities cited. The issue for determination is whether this application is merited.

15. On the 19<sup>th</sup> May 2017, Hon. Lady Justice M Gitumbi granted the following orders:-

#### **“Order**

**This matter coming up for directions before Hon. Lady Justice M. Gitumbi on 19<sup>th</sup> May 2017 in the presence of counsel for the plaintiff and defendant.**

#### **It is hereby ordered**

**1. That the interim orders issued by Hon. Justice Mutungi on 16<sup>th</sup> January 2014 and extended on various dates are hereby extended and will remain in force until this suit is heard and determined.**

**2. That to facilitate the full and final determination of this suit, this matter is fixed for pretrial conference before the Deputy Registrar, ELC on 31<sup>st</sup> May 2017.”**

16. Order 40 rule 6 of the Civil Procedure Rules provides that:-

**“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 clear from the foregoing that the trial court can extend the orders for any sufficient reason. The said provision does not make it mandatory for the Judge to note down the reasons for extending the orders.

17. In the instant suit, Honorable Lady Justice Gitumbi must have appreciated there were sufficient reasons to warrant the extension of the said orders. In any case, if the defendant/applicant was prejudiced by the said extension he ought to have appealed against the said orders. He waited for two years before bringing this application. This was enough time to set down the suit for hearing, so that all the issues could be resolved.

18. I find that he has failed to demonstrate that the said orders ought to be varied and/or discharged. Order 40 rule 7 of the Civil Procedure rules is discretionary. I find that the defendant/applicant has failed to demonstrate that he deserves the orders sought.

19. I find no merit in this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 3<sup>rd</sup> day of December 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

Mr. Mwangi K. M. for the Defendant

Steve – Court Clerk