



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 879 OF 2013

TALENT ACADEMY LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant on 22nd July, 2013 seeking a permanent injunction to restrain the defendant from entering into, taking possession, alienating, destroying, demolishing or in any other way interfering the all that parcel of land known as L.R No. 209/11630 together with the buildings erected thereon. The plaintiff also sought general damages and costs of the suit. The plaintiff averred that it was the registered owner of L.R No. 209/11630 situated at Langata, Nairobi (hereinafter referred to as “the suit property”) on which it had erected a three storey permanent building comprising of 16 apartments and 6 servant quarters which were let out to tenants.

The plaintiff averred that on 20th July, 2013 the defendant without any lawful authority and in violation of the plaintiff’s rights proceeded to put an “X” mark on the perimeter wall of the suit property indicating its intention to demolish the buildings standing thereon. The plaintiff averred that the suit property was not on a road reserve. The plaintiff averred that the defendant did not serve it with a notice indicating the basis for the intended demolition.

The defendant entered appearance and filed a statement of defence on 19th August, 2013. In its defence, the defendant denied that the plaintiff was the bona fide owner of the suit property. The defendant averred that the suit property was situated on a road reserve that was earmarked for the Southern Bypass Transport Corridor which was designed before the suit property came into existence. The defendant averred that the suit property was acquired by the plaintiff fraudulently and unlawfully and that the structures put up thereon were similarly illegal as the same were on a known road reserve. The defendant averred that the plaintiff was given adequate notice to vacate the suit property so as to give way for the construction of the Southern Bypass but it failed to do so.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 22nd July, 2013 seeking a temporary injunction to restrain the defendant from demolishing or interfering with the buildings on the suit property pending the hearing and determination of the suit. The plaintiff’s application which was brought under certificate of urgency was placed before the Deputy Judge on 22nd July, 2013 who certified the same as urgent and granted the injunction sought on an interim basis pending the hearing of the application inter partes.

On 5th March, 2014, the plaintiff informed the court that the circumstances on the ground had changed in that the defendant had demolished the buildings on the suit property and as such the plaintiff did not wish to proceed with the injunction application in the form in which it had been brought. The plaintiff sought and was granted leave to amend its pleadings and the application for injunction. For reasons which are not clear from the record, the plaintiff did not amend its pleadings pursuant to the leave that was granted by the court on 5th March, 2014 and did not take any steps for a period for over one (1) year to prosecute the suit.

On 8th January, 2016, the defendant filed an application seeking the dismissal of the plaintiff’s suit for want of prosecution. The application was opposed by the plaintiff. In its replying affidavit in opposition to the application, the plaintiff contended that following the demolition of the buildings on the suit property, it was necessary for it to amend the plaint and that such amendment required professional assessment of the damage that it had suffered. The plaintiff averred that to engage professionals to advise it on the loss required finances which it did not have following the demolition of the buildings on the suit property from which it was deriving income. The plaintiff averred that it also required money for additional court fees for the proposed amended plaint. The plaintiff averred that it took it sometime to secure finances to pay a quantity surveyor to advise it on the loss it had incurred following the demolition of the buildings on the suit property. The plaintiff averred further that it was ready to amend the plaint and proceed with the prosecution of the suit.

In a ruling that was delivered on 31st August, 2017, the court dismissed the defendant’s application to strike out the suit for want of prosecution and directed the plaintiff to set down the suit for hearing within 60 days from the date of the ruling in default of which the suit was to stand dismissed for want of prosecution.

The plaintiff did not take action immediately to set down the suit for hearing following the order aforesaid. On 1st September, 2017 the court on its own motion set down the suit for mention on 16th October, 2017 for the purposes of listing it for hearing as ordered by the court. The advocates for both parties were served with a mention notice by the court. When the matter came up for mention before the Deputy Registrar on 16th October, 2017, the plaintiff's advocate did not appear. The defendant's advocate who appeared for the mention informed the Deputy Registrar that the suit had been overtaken by events as the National Land Commission had made a determination that the suit property was on a road reserve. The Deputy Registrar listed the matter for further mention on 13th November, 2017. The plaintiff still took no action to ensure that the suit was listed for hearing within 60 days as ordered by the court. When the matter came up for mention for the second time on 13th November, 2017, the 60 days within which the plaintiff should have listed the suit for hearing had lapsed with the consequence that the suit stood dismissed as had been ordered by the court.

What is now before the court is the plaintiff's application brought by way of Notice of Motion dated 14th November, 2017 seeking the following orders:

1. THAT the court be pleased to review the ruling and order made by the court on 31st August, 2017.
2. THAT the court be pleased to enlarge the time within which the plaintiff may amend the plaint and that the National Land Commission be added to the suit as 2nd defendant.

The application was brought on the grounds that, on 31st August, 2017 the court ordered the plaintiff to fix the suit for hearing within 60 days failure to which the suit would stand dismissed. The plaintiff averred that after that order, it learnt that the National Land Commission (NLC) had directed the Chief Land Registrar to revoke the plaintiff's title over the suit property through Gazette Notice No. 97 dated 17th July, 2017. The plaintiff averred that it sought the proceedings of the National Land Commission on the matter with no success and in the meantime, the 60 days that it was given to fix the suit for hearing lapsed.

The plaintiff averred that it was condemned unheard by the National Land Commission and that the decision of the National Land Commission completely altered the substratum of its claim. The plaintiff averred that it was necessary in the circumstances to amend the plaint and join the National Land Commission as a party to the suit.

The plaintiff's application was opposed by the defendant through a replying affidavit sworn by Thomas Gacoki on 23rd January, 2018. The defendant contended that the plaintiff's application was an abuse of the process of the court, incompetent, unmeritorious and brought in bad faith. The defendant averred that the plaintiff had been given leave on 23rd July, 2013 to amend its pleadings which it failed to do. The defendant averred that after the plaintiff was given leave to amend its pleadings, it went to sleep until the defendant filed an application dated 30th December, 2015 seeking to dismiss the suit for want of prosecution. The defendant averred that upon hearing of the said application, the court gave the plaintiff 60 days to set down the suit for hearing. The defendant averred that the plaintiff failed to list the suit for hearing as a consequence of which the suit stood dismissed on 31st October, 2017. The defendant averred that the prayers sought by the plaintiff were not available because there was no suit pending in which a review application could be maintained. The defendant contended that the dismissal order was not amenable to review and that the only avenue that was available to the plaintiff was to appeal. The defendant contended in the alternative that in any event, no valid grounds had been advanced by the plaintiff to warrant the review sought.

The application was heard on 1st October, 2018. In his submissions in support of the application, Mr. Lusigi advocate who appeared for the plaintiff reiterated the grounds set out on the face of the plaintiff's application and in the supporting affidavit sworn by Otieno B. Javan on 14th November, 2017. He submitted that the plaintiff was unable to take further steps in the matter due to the revocation of its title by the National Land Commission. He submitted that it was necessary to join the National Land Commission in the suit as a party.

In his submissions in reply, Mr. Mwenesi who appeared for the defendant reiterated that the orders sought by the plaintiff were not available to it. He submitted that the decision of the National Land Commission was not new. He contended that the said decision was within the knowledge of the plaintiff when the plaintiff was ordered to fix the suit for hearing within 60 days on 31st August, 2017. Mr. Mwenesi submitted further that the plaintiff's attempt to join the National Land Commission as a party to the suit was misconceived because the decision of the National Land Commission could not be challenged in a suit such as the one before the court. He submitted further that this was not the first time the plaintiff had sought leave to amend the plaint. He contended that the plaintiff had been given leave to amend the plaint earlier but failed to do so. He urged the court to dismiss the application as an abuse of the process of the court.

I have considered the application together with the supporting affidavit. I have also considered the replying affidavit by the defendant filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. I am satisfied that the plaintiff has given good grounds to warrant the review of the orders that were made herein on 31st August, 2017. The court has power to review a decree or order on the ground of discovery of new matter or evidence or for other sufficient reason. I am of the view that the plaintiff's application falls under the latter ground. Since the filing of this suit, the plaintiff has been befallen by tragic circumstances beyond its control all aimed at scuttling its claim herein which made it impossible for it to prosecute the suit.

When the plaintiff came to court, it was to prevent the defendant from demolishing a three (3) storey building which it had constructed on the suit property and which was occupied by tenants. The plaintiff succeeded in obtaining an interim order of injunction restraining the demolition of the said buildings. While this suit was pending and with the said order in force, the defendant went ahead and completely flattened the plaintiff's buildings on the suit property. In view of that development, it became necessary for the plaintiff to amend the plaint to plead these new facts. The plaintiff sought and obtained leave of the court to amend the plaint. As the plaintiff explained in its affidavit in opposition to the defendant's application to dismiss the suit for want of prosecution, the amendment of the plaint to plead the losses arising from the demolition of the plaintiff's buildings needed the input of building experts which could only be procured at a cost. While the plaintiff which had been crippled financially was still looking for funds to engage professionals to assess its losses to enable it amend the plaint, it was confronted with an application to dismiss the suit for want of prosecution which took over 1½ years to be disposed of.

While the said application was pending, the defendant which was aware that the dispute over the legality of the title held by the plaintiff over suit property was pending before this court for determination initiated a parallel adjudication process by lodging a complaint with the National Land Commission against the plaintiff. When the court delivered a ruling on 31st August, 2017 on the defendant's application seeking to dismiss the suit for want of prosecution in which it gave the plaintiff 60 days to prosecute the suit, the National Land Commission had already made a determination which was published in the month of July of the same year revoking the plaintiff's title to the suit property. This fact was not known to the court. I believe that if the court's attention had been brought to the same, the court would not have given the plaintiff 60 days to prosecute the suit because with that development, the prosecution of the suit was not possible the substratum of the suit having been lost completely.

I am satisfied that sufficient reason has been given to warrant a review of the orders that were made herein on 31st August, 2017. If the said orders are not reviewed, serious injustice would be occasioned to the plaintiff and the court would have aided the defendant in its use of extra judicial means to defeat the cause of justice.

In conclusion, I find merit in the plaintiff's Notice of Motion application dated 14th November, 2017. The orders made herein on 31st August, 2017 are reviewed to the extent that the suit is revived and the time within which the plaintiff was to set down the suit for hearing is extended by 12 months from the date hereof. The plaintiff is also granted leave to amend the plaint and add the National Land Commission as a defendant to the suit. This shall be done within 21 days from the date hereof. The defendant shall be at liberty to amend its statement of defence within 14 days from the date of service of the amended plaint. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 21st day of March, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Beyo for the Plaintiff

Mr. Mwenesi h/b for Mr. Mutua for the Defendant

C. Nyokabi-Court Assistant