



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 134 OF 2018

1. MZEE ADSAM MAKINJA

2. MUGANGA TSUMA

3. ALI JUM KAHINDI.....PLAINTIFFS

VERSUS

1. LIVINGSTONE NDUNGU WAITHAKA

2. ELLEN PROPERTIES

3. OCS BAMBURI POLICE STATION

4. DISTRICT COMMISSIONER KISAUNI

5. OCS KIEMBENI POLICE STATION

6. OCPD KISAUNI.....DEFENDANTS

RULING

1. By a notice of motion dated 11th September 2018 made pursuant to Order 40 Rule 7 and Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, the 2nd defendant/applicant seeks orders:

a. Spent

b. That pending the hearing and determination of this application, this Honourable Court be pleased to order a stay and or suspension of the orders of injunction granted on 23rd July 2018.

c. That the Honourable Court be pleased to set aside and discharge the temporary injunctive orders that were issued on 23rd July 2018 against the 1st Defendant by himself and/or his servants and/or agents as the 1st defendant is deceased and no orders could issue against a deceased person.

d. That this Honourable Court be pleased to discharge the temporary injunctive orders that were issued on 23rd July 2018 against the 2nd Defendant by themselves and/or their servants and/or agents for want of service of the Notice of Motion application dated 4th June, 2018 and for being obtained fraudulently.

e. That costs of this application be borne by the plaintiffs/respondents

2. The application is premised on the following grounds:

a) The averments by the process server Shem Otieno Abudho vide his affidavit of service sworn on 20th July 2018 at paragraph 4 alleging service upon the 1st defendant is not true. This is because the 1st Defendant died way back on 8th June, 2017 and the alleged service is of 25th June 2018 one (1) year after the 1st defendant's demise. The said order is therefore in vain against a deceased person and ought not to have been issued in the first place.

b) The averments by the process server Shem Otieno Abudho vide his affidavit of service sworn on 20th July 2018 at paragraph 5 is not true as the 2nd defendant's office and physical address are at Pangani and not Westlands as alleged. It is therefore clear that the said process server did not serve the 2nd defendant as alleged.

c) The allegations by the plaintiffs that they are squatters on PLOT NO.MN/1/264 is false as the said plot is non-existent.

d) The 2nd defendant is the registered owner of eighty six (86) parcels of land being 28 parcels (being PLOT NO. MN.1/16636 TO 16663) and 58 parcels (being PLOT NO.MN/1/18816 TO NO.18873).

e) The plaintiffs have been using the said temporary injunction as a mandatory injunction as they have now invaded the said defendants land and are putting up temporary and permanent buildings on the same in clear abuse of the court orders and in contravention of the 2nd defendant's proprietary rights over the said parcels of land.

f) It is therefore clear that the plaintiffs/respondents are enjoying temporary injunctive orders against the 1st and 2nd defendants having obtained the same without due process of law contrary to the rules of procedure.

g) The temporary injunctive order that was issued on 23rd July 2018 against the 1st defendant is in vain since the 1st defendant has since passed away in (sic) 8th June 2017 and as such the same ought to be discharged.

h) The temporary injunctive order that was issued on 23rd July 2018 against the 2nd Defendant was obtained irregularly as the plaintiffs/respondents did not serve the Notice of Motion application dated 4th June, 2018 upon the end (sic) Defendant.

i) It is in the interest of justice and fairness that the application herein be allowed.

j) No prejudice stands to be suffered by the plaintiff/respondents if the orders sought herein are granted.

3. The application is supported by the affidavit of Margaret Muthoni Ndungu sworn on 11th September, 2018 in which she deposes that she is a director of the 2nd Defendant and wife of the 1st defendant (now deceased). She has deposed that sometime on or about 3rd September, 2018, on Mr. Ahmed Siraj who owns a property neighbouring the properties of the 2nd defendant in Utange informed her that some squatters had maliciously damaged the wall built around his property and that when he confronted them, they gave him some court papers which he noticed were in respect of this suit filed against the 1st and 2nd Defendants and that the plaintiffs had already obtained an injunction against the defendants. That she requested the said Ahmed Siraj to deliver copies of the said court papers to the advocates of Elen Properties, M/s Kiaire & Company Advocates which he did after which the said advocates were able to peruse the court file and make copies of the pleadings and proceedings and availed a copy to her.

4. It is deposed that there was no service of the Notice of Motion application dated 4th June, 2018 on 25th June 2018 upon the defendants as the 1st defendant had died on 8th June 2017 and that the 2nd defendant's offices and physical address is in Pangani and not Westlands as alleged by the process server. She has attached copies of the certificate of death dated 14th June 2017 and marked 'c' showing that the 1st defendant died on 8th June 2017 at Nairobi Hospital. It is further deposed that the injunctive orders were issued in respect of **PLOT NO.MN/1/264** in Utange which is a non-existent parcel of land. That in 1971 the 1st defendant (now deceased) acquired **PLOT NO.MN/1/264** measuring 25 acres. That sometime in October 2009, the deceased subdivided 5 acres from **PLOT NO.MN/1/264** into 28 parcels being **PLOT NOS.MN/1/16636 TO 16663**; sold 12 acres to third parties, and subdivided the remaining 8 acres into 58 plots in October 2011 being **PLOT NOS.MN/1/18816 TO 18873**. That the original title was surrendered to the land registry upon subdivisions. Copies of the title deeds of the said parcels have been annexed and marked 'D' and 'E'. It is deposed that the deceased incorporated the 2nd defendant which is a family company and sometime in 2013 transferred 86 titles comprised in **PLOT NOS.MN/1/16636 TO 18873** to it. It is denied that the plaintiffs have lived on the 2nd defendant's parcels of land for a period of over 20 years as alleged. It is averred that the plaintiff's came into the said parcels of land in March, 2018, that is why the services of the 3rd and 5th defendants were used to get them out of the 2nd defendant's property in May 2018. Photographs of the land allegedly taken sometime in February 2018 showing the land did not have any structures has been annexed and marked 'F'. It is alleged that the plaintiffs obtained the injunctive orders falsely and irregularly and the plaintiff have been using the said orders to invade the 2nd defendant's land and have been selling parcels of the same to other squatters with the view to creating the illusion that they have been occupying the said land yet the same has always been vacant. The applicant further argues that the 3rd to 6th defendants have been improperly joined in the suit as being employees of the Government of Kenya no orders of injunction can be issued against them as the same would tantamount to granting an injunction against the government which is not allowed. He applicant urged the court to allow the application.

5. The application is opposed by the plaintiffs through a replying affidavit sworn by Mzee Adam Makinja, the 1st plaintiff on 27th February 2019. He deposes that he has the authority on behalf of the other plaintiffs to swear the said affidavit. That the suit was filed on 4th June 2018 under certificate of urgency and that the same was served upon the defendants and an affidavit of service was filed to that effect on 20th July 2018. That subsequently, order of temporary injunction was issued on 24th July 2018. He further deposes that as per the suit filed, the plaintiffs have demonstrated that they have been living on the suit premises uninterrupted for many years. It is the plaintiff's contention that the 1st and 2nd defendants have not properly entered on record in this suit and therefore they cannot be heard on merit. That the deponent in the application does not have the capacity to sue or represent the 1st defendant as she does not have letters of administration and therefore does not qualify to get the orders being sought. The plaintiffs aver that the status quo on ground should be maintained pending the hearing and determination of the suit. They deny using the injunctive orders to invade the 2nd defendant's land.

6. Mr. Kariuki, learned counsel for the 2nd defendant made submissions in support of the application and submitted that the orders of

injunction granted on 23rd July 2018 ought to be set aside and discharged as no orders could issue against a deceased person. He submitted that the process server misled the court into believing that he had served the 1st defendant adding that had the court known that the 1st Defendant was dead, it could not have granted the orders. Mr. Kariuki further submitted that no suit can be brought against a deceased person, and therefore the entire suit is incompetent. He added that the 2nd defendant was also not served as explained in the supporting affidavit, arguing that the process server is guilty of perjury. It was further submitted that the plaintiffs have no cause of action as the property they are referring to in their pleadings is not in existence. That no official search has been attached to show that the property exists.

7. Mr. Kariuki further submitted that at the time of subdivision, there was no one on the land and that the plaintiffs invaded the land in 2018 and are trespassers. He further submitted that injunctive orders cannot be sought against the 3rd, 4th, 5th and 6th defendants who are officers of the Government of Kenya. Mr. Kariuki submitted that in the plaint, there is no allegation by the plaintiffs that they are owners of the land. That they claim they have been in occupation for 20 years and only seek an injunction, and therefore there is no basis for the injunction if they are not owners of the land. He pointed out that the replying affidavit does not address the issues raised in the application that is, that the 1st defendant is deceased and that the office of the 2nd defendant is in Pangani and not in Westlands, Nairobi, and therefore that there was no service. Mr. Kariuki submitted that in the replying affidavit, the plaintiffs acknowledge without admitting that the 1st defendant is deceased and still went ahead to sue a deceased person instead of his estate. He added that the applicant is properly before court as owner of the suit property and as person aggrieved by the orders granted by the court. It was his submission that the court was misled and the orders were obtained fraudulently and ought to be set aside. He urged the court to grant the orders and order the plaintiffs to serve the 2nd defendant so that it can defend itself.

8. Mr. Owino, learned counsel for the plaintiffs who appeared alongside Mr. Ngonze relied on the replying affidavit and submitted that the 2nd defendant has referred to several subdivisions but no evidence that they resulted from **PLOT NO.264/1/MN**. Mr. Ngonze on his part submitted that under order 24 Rule 1 and 4 of the Civil Procedure Rules, the law is clear that where a cause of action serves the same ought not be dismissed. He added that under Order 1 Rule 9, no suit should fail for misjoinder or non-joinder of a party, arguing that the court should deal with the matters before it as between the parties before court. Mr. Ngonze submitted that the plaintiffs moved the court pursuant to acts of the defendants that amounted to demolitions of their structures and for that reason the court granted the injunction orders. He submitted that justice of this matter shall be served by maintaining the orders of injunction or the status quo pending the hearing of the matter. He added that the only way to test the veracity of the affidavit is to cross-examine the deponent and that there is no prayer for cross-examination and therefore the affidavit of service on record should be taken as the truth.

9. In brief reply, Mr. Kariuki submitted that the court cannot rely on an affidavit of service when there is a death certificate, adding that Order 5 of the Civil Procedure Rules enjoins the court to call for cross-examination on its own motion. Mr. Kariuki further submitted that Order 24 is not applicable as it refers to surviving cause of action where the party dies in the course of the suit. He reiterated that there was no service and therefore the principles of injunction do not arise, adding that the plaintiffs have stolen a march against the 2nd defendant. That the plaintiff cannot apply for maintenance of the status quo after misleading the court to grant the orders arguing that the status quo should be that prior to the filing of the suit.

10. I have considered the application, the replying affidavit and rival submissions by both parties in support and against the application. The issue for determination is whether the temporary injunction granted to the plaintiffs on 23rd July 2018 should be set aside or discharged.

11. In the instant application, it is the applicant's contention that the temporary orders issued on 23rd July 2018 were obtained irregularly for want of service of the Notice of Motion application dated 4th June, 2018. That the averments by Shem Otieno Abudho, the process server, in his affidavit of service sworn on 20th July, 2018 are not true. This is because contrary to the said averments, the 1st defendant died on 8th July 2017 and the alleged service on him on 25th June 2018 as stated in paragraph 4 of the said affidavit of service, one year after his demise is not true. The 2nd defendant further avers that it was never served as alleged in paragraph 5 of the said affidavit of service, arguing that its offices and physical address are at Pangani, Nairobi and not Westland's as alleged.

12. The plaintiff on the other hand contends that service was effected as per the said affidavit of service by Shem Otieno Abudho filed on 20th July 2018.

13. In the instant case, the suit was filed on 4th June, 2018. At the time of filing the plaint, the plaintiffs also filed the Notice of Motion application dated 4th June, 2018 under Certificate of Urgency. When the application came before me on 4th June, 2018 I declined to certify it urgent and directed the plaintiffs to take a date for the application from the registry and serve the defendants for inter partes hearing. When finally the application came up for inter partes hearing on 23rd July, 2018 there was no appearance by the 1st and 2nd defendant and based on the affidavit of service filed, I granted the temporary injunction order pending the hearing and determination of the suit.

14. I have perused the affidavit of service herein. In paragraph 4 thereof, Shem Otieno Abudho has deponed that on the day he received the summons and the application (that is on 25th June, 2018), at 2.00 p.m. together with the 3rd plaintiff, they proceeded to Utange where the 1st defendant resides and that upon arrival the 1st defendant was pointed out to him by the 3rd plaintiff after which the process server allegedly introduced himself to him (the 1st defendant) and stated the purposes of his visit and that the 1st defendant then received the documents but declined to sign on the service copy. At paragraph 5, the process server has deponed "that on 27th day of June, 2018 I arrived at Nairobi and went straight to the 2nd defendant's offices located in Westlands and upon my arrival I met the secretary I then stated the purpose of my visit she then receive but declined to sign on my service copy"

15. The 2nd defendant/applicant in the affidavit in support of the application through a certificate of death marked "C" has proved that the 1st defendant died on 8th June, 2017, that is about a year before the filing of this suit and before the alleged service was effected upon him on 25th June 2018. If the 1st defendant died on 8th June 2017 as confirmed by the certificate of death, whom did the 3rd plaintiff point out to the process server to effect service on 25th June, 2018? The plaintiffs cannot claim that they served the 1st defendant on 25th June, 2018 when

there is documentary evidence on record to show that infact the 1st defendant had died a year earlier, on 8th June, 2017. Indeed in their replying affidavit, I note that the plaintiffs have not challenged or controverted the averment that the 1st defendant died on 8th June, 2017 and therefore was not available for service on 25th June, 2018 as alleged by the process server in the affidavit of service that was filed. I find and hold that no service was effected upon the 1st defendant as he was already dead by the time the suit was filed and at the time of the alleged service. The affidavit of service drawn and filed by Shem Otieno Abudho dated 20th July, 2018 is full of falsehoods and amounts to perjury.

16. In the case of **Geeta Bharat Shah & 4 Others –v- Omar Said Mwatayari & Another (2009) eKLR**, the Court of Appeal when considering an application in a matter where a suit had been filed against a deceased person after his demise stated:

“..... We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to do so once the respondent also admitted that he had sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead.

That alone was, in our view, enough to cause the superior court judge to act even suo moto in the matter. In fact, this was enough to cause him to set aside the ex-parte judgment for it was not sought with clean hands. It goes without saying that dead people cannot read advertisements and thus could not be said to have been served. ”

The court of appeal went ahead and concluded as follows:

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed we hold the view that the suit was a nullity.....”

17. It goes without saying that this court is bound by the above decision of the court of appeal. The 1st defendant herein, Livistone Ndungu Waithaka was already dead by the time this suit was filed. I therefore hold the view that the suit against him is a nullity. The temporary orders issued against him on 23rd July 2018 and subsequent orders are set aside. The suit against the 1st defendant being a nullity is also struck out.

18. The 2nd defendant has also averred that it was not served as its offices and physical address are in Pangani and not Westlands, Nairobi as alleged by the process server. The plaintiffs have also not challenged or controverted the 2nd defendant’s averment on the location of its offices. I also note that in the affidavit of service filed, the process server did not indicate the particular building or location in Westlands that he effected the alleged service and who directed him to that place, if at all. It is common knowledge that Westlands is a big location. Moreover, if the process server could lie about effecting service on a deceased person who was already dead a year earlier, there is every likelihood that he could also lie about the service upon the 2nd defendant. From the evidence that has emerged this court finds that the alleged service upon the 2nd defendant could as well be untrue.

19. The injunction order of 23rd July, 2018 was issued under Order 40 Rule 10 (1)(b) of the Civil Procedure Rules which states:

“10 (1) the court may, on the application of any party to suit, and on such terms as it thinks fit –

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit.”

20. Whereas the plaintiffs allege that they have stayed in the suit land for over 20 years, their application contradicts this averment as they clearly sought orders authorizing them to enter upon the suit property. This in my view corroborates the 2nd defendant’s averment that the plaintiffs have used the temporary injunction as a mandatory injunction to invade the suit land.

21. Under Order 40 Rule 7 of the civil Procedure Rules, it is provided.

“7. Any order for an injunction may be discharged, varied or set aside by the court on application made thereto by any party dissatisfied with such order..”

22. In the case of **Raqui –v- Barclay Bank of Kenya (2002)IKLR 647**, Ringera J (as he then was) held:

“It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged. The injunction was granted because of non-service of the statutory notice of the exercise of the power of sale on the administrators of the estate, which was the true position hence it would not be unjust or inequitable to maintain the interlocutory injunction issued in force.”

23. In the case of **Mobile Kitale Service Station –v- Mobil Oil Kenya Limited & Another (2004) eKLR**, Warsame J (as he then was) held:

“An interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield a party against violation of the legal rights of the person seeking it.”

24. From the above, it is clear that although a court has unfettered discretion donated to it pursuant to order 40 Rule 7, it only exercises it when circumstances so require it after considering the position of both parties at the particular instant and as well as when the injunction was given. This is because, before granting an injunction, a court is usually guided by the principles for granting injunction as stated in **Giella – v- Cassman Brown & CO Ltd (1973) EA 358**. 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 the court can be inclined to vary or vacate the injunction in light of the new facts.

25. The court is alive to the fact that an interlocutory injunction, being an equitable remedy would be discharged upon being shown the person’s conduct with respect to the matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party obtained the orders fraudulently. Once a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the orders were obtained through an abuse of the court process and through unclean hands. No court would allow its process to be abused and its orders to be used to defeat the ends of justice. In a proper case, a court of equity will not hesitate in correcting or reversing a status quo or situation obtained or created by the violation of the law. In my view the plaintiffs have abused the court process by filing suit and obtaining orders based on falsehoods.

26. In the plaint dated 4th June, 2018, the Plaintiffs have named Livingstone Ndungu Waithaka as the 1st Defendant. From the evidence that has emerged in this case, the said Livingstone Ndungu Waithaka died on 8th June, 2017, about one year before the suit against him was filed. In the plaint, the plaintiff only seek permanent injunction against the defendants as well as costs. The suit herein was filed against the 1st defendant when he was no longer alive. In my view, the plaintiffs have abused the court process by filing a suit and obtaining orders against a deceased person based on falsehoods. A pleading which is an abuse of the court process really means in brief a pleading which is a misuse of the court machinery or process. In my view, the plaintiffs’ suit against the 1st defendant has no foundation or chance of succeeding. As already stated, it is a nullity. I think it is a plain and obvious case that ought to be struck out.

27. In the circumstances of this case I find that the application dated 11th September, 2018 is merited. The upshot is that the application is allowed in the following terms: -

a) The interlocutory injunction orders issued on 23rd July, 2018 are hereby set aside, vacated and discharged.

b) The suit against the 1st defendant is hereby struck out.

c) The plaintiffs are directed to amend and serve the 2nd defendant with the summons and pleadings within 14 days.

d) The costs of this application are awarded to the 2nd defendant and the same to be borne by the plaintiffs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Owino for plaintiff/respondent

Ms. Layoo holding brief for Kariuki for 2nd defendant/applicant

No appearance for 1st, 3rd, 4th, 5th and 6th defendants

Yumna Court Assistant

C.K. YANO

JUDGE