



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 353 OF 1999

P. N. MASHRU LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

CASTLEDOM PROPERTIES LIMITED....1ST DEFENDANT/APPLICANT

THE COMMISSIONER OF LAND.....2ND DEFENDANT/APPLICANT

DIM AGENCIES LIMITED.....3RD DEFENDANT/APPLICANT

RULING

1. For the Court's determination is the application dated 18th August 2017 brought by the 3rd defendant under the provisions of section 1A & 3A of the Civil Procedure Act and Order 40 rule 7 of the Rules. The 3rd defendant/Applicant seeks the following Orders:

i) The order of injunction made on 20th April 2001 and registered against the title of the property known as L. R. No. MN/V/1907 as Entry No. 4 be and is hereby set aside and discharged.

ii) The Registrar of Titles, Mombasa be and is hereby directed to register and enter the discharge order herein against the title of the property known as L. R. No. MN/V/1907 to reflect the discharge.

iii) Costs of this application be paid by the plaintiff

2. The motion is premised on the grounds inter alia; that the plaintiff obtained an order of injunction but did not prosecute the suit. That on 3.8.2016 the applicant moved the Court to dismiss the suit. This application was compromised by a consent entered on 24.11.2016 between the parties requiring the plaintiff to comply with the provisions of Order 11 of the Civil procedure Rules within specified time. That in default of the plaintiff complying within the 60 days, the suit stood dismissed with costs. Further the plaintiff not having complied there is no suit upon which the order of injunction is anchored on.

3. The application is opposed by the plaintiff/respondent via the replying affidavit of Francis Mulili dated 5th September 2017. Mr Mulili deposes that this application is bad in law and is an abuse of the Court process. He deposed that the case was filed for purposes of protecting public property and went to depose on what should happen to property compulsorily acquired. That the 2nd defendant in total violation of the law and public policy purported to allocate the suit land to the 3rd defendant/applicant. That the matter was fixed for hearing on 26.10.17 and this application is intended to scuttle that hearing.

4. The advocates then argued the application orally on 5.10.2017. Mr Oluga advocate for the applicant submitted that instead of applying for extension of time to comply with the orders the plaintiff fixed the matter for hearing yet there was no suit to be fixed as per this Court's order of 24.11.16. Mr Wafula advocate for the plaintiff/respondent opposed the application submitting that in the interest of justice, the affidavit of 8th November 2000 summarises the claim and that article 40 of the Constitution will be violated. That the orders sought are drastic given the present construction on going of the highway.

5. In the affidavit in reply of the plaintiff, he has not give any reasons why he had not complied with the provisions of Order 11 of the Civil Procedure Rules as directed by the Court. The action of fixing the matter for hearing without leave was serving no purpose in an instance where the party was aware that he had not complied with the rules having been put on notice. The hearing date was also pre-maturely fixed as the pretrial directions had not been done.

6. The plaintiff argues that the suit should not be dismissed since the land having been acquired by the government compulsorily could not

again be allocated to private use stating that the actions of the 2nd defendant in allotting the land to the 3rd defendant went against the purview of public policy and was unlawful. Yet in paragraph 3 of his amended plaint he claimed that they purchased the leasehold interest of a portion of the suit land. This means that the plaintiff is also claiming a stake in the suit land and has not brought the suit for public interest only as he deposes

7. The matter in issue is whether the orders of injunction should be discharged; I will therefore not go in depth on the merits of the case. I have perused the record and note that the plaintiff filed documents in compliance with order 11 on 30th January 2017 which was beyond the timeframe ordered by the Court on 24.11.2016. Order 40 rule 6 provides that an order of injunction would lapse after a period of 12 months from the date of its grant unless for any sufficient reason the Court orders otherwise. Order 40 rule 7 allows for variation and or discharge of the injunction on application by any dissatisfied party.

8. Given the background of this case filed in 1999 it is obvious the plaintiff has been guilty of delay in prosecuting it and given that more than 12 months have lapsed since the injunction order was granted, it is this Court's view that leaving the orders of injunction to where a party is indolent remain in force is equivalent to allowing that party to eat his cake and keep it at the same time. Justice is a double – edged sword that should serve both parties in equal measure.

9. In conclusion, in exercise of my powers under section 3 of the Civil Procedure Act and in the spirit of article 159 of the Constitution, I hereby extend the time to the plaintiff for filing of documents under Order 11 of the Rules and treat as properly on record the documents filed on 30.1.2017 but on terms that the orders of temporary injunction previously on record are hereby discharged. The application therefore succeeds with costs to the 3rd defendant/Applicant but the suit is allowed to proceed on its merits.

Dated, signed & delivered at Mombasa this 13th March 2018

A. OMOLLO

JUDGE