



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 166 OF 2017

GILGIL TREATMENT INDUSTRIES LTD.....PLAINTIFF

VERSUS

I & M BANK LIMITED.....1ST DEFENDANT

EQUIP AGENCIES LIMITED.....2ND DEFENDANT

RULING

1. The plaintiff commenced proceedings in this matter pursuant to plaint dated 13th April 2017 and filed in court on the same date. The plaintiff was at the time of filing suit a tenant of the 2nd defendant in regard to premises located on Gilgil Township Block 2/210 (the suit property) wherein it allegedly made certain improvements or developments for purposes of its business of treatment, processing and sale of wooden poles.

2. The 2nd defendant had charged the suit property in favour of the 1st defendant. When the 1st defendant advertised the suit property for sale by public auction on 20th April 2017, the plaintiff became apprehensive that the aforesaid improvements and developments on the suit property would also be sold. Accordingly, the plaintiff filed Notice of Motion dated 13th April 2017 wherein it sought the following orders:

1. Spent.

2. Spent.

3. Spent.

4. That this court be pleased to issue a temporary order of injunction restraining the defendants either themselves or through their agents, servants and or employees from advertising or offering for sale, transferring, laying claim to or in any other manner dealing with the plaintiff's properties located on all that parcel of land known as LR Gilgil Township Block 2/210 pending hearing and determination of the suit herein.

5. That costs be provided for.

3. When the application came up for inter parte hearing on 19th April 2017, upon hearing parties, the court granted prayer 3 of the Notice of Motion on an interim basis. The court also gave directions to facilitate hearing and determination of the application.

4. Shortly thereafter, the plaintiff was back in court, this time with Notice of Motion dated 23rd October 2017 seeking the following orders:

1. That this honourable court be pleased to certify this application as urgent and be heard ex parte in the first instance.

2. That this honourable court do restrain the 1st defendant from evicting the applicant from LR. No. Gilgil Township Block 2/210 pending the inter partes hearing of this application.

3. That this honourable court do restrain the 1st defendant herein from advertising for sale or engaging into any private treaty or engaging in conduct likely to interfere with the applicant's possession and use of LR. No. Gilgil Township Block 2/210 pending the determination of the application dated 19th April 2017.

4. That cost be provided for.

5. The application dated 23rd October 2017 was placed before Munyao J. under Certificate of Urgency who upon considering the matter granted prayer 2 thereof on an interim basis.

6. Not to be left behind in the battle of applications, the 1st defendant responded by filing Notice of Motion dated 3rd November 2017 seeking the following orders:

1. Spent.

2. The interim orders of injunction given by this honourable court on 19th April 2017 and 23rd October 2017 be forthwith discharged and/or set aside.

3. The Managing Director of the plaintiff by the name James Njuguna Burugu be ordered to attend court for cross-examination on his supporting affidavits sworn on 13th April 2017 and 3rd October 2017.

4. The plaintiff be ordered to give an undertaking as to damages.

5. The costs of the application be awarded to the defendant/applicant in any event.

7. Notice of Motion dated 3rd November 2017 was not the 1st defendant's only intervention in the matter. Much earlier on 19th April 2017, the 1st defendant filed Notice of Preliminary Objection dated 18th April 2017 in which it argued that this court lacks jurisdiction to hear the present matter since another suit, touching on the same subject matter had been filed initially as Nakuru ELC No. 348 of 2016 and was later transferred to Naivasha as Naivasha HCCC No. 9 of 2016. A similar application for injunction had been made in the Naivasha case and was dismissed in a ruling delivered on 9th December 2016. Subsequently, an appeal was preferred to the court of Appeal being Nyeri Civil Appeal No. 7 of 2016. The 1st defendant therefore sought striking out of the suit.

8. This ruling is in respect of plaintiff's Notice of Motion dated 13th April 2017, 1st defendant's preliminary objection dated 18th April 2017, plaintiff's Notice of Motion dated 23rd October 2017 and 1st defendant's Notice of Motion dated 3rd November 2017.

9. Now back to Notice of Motion dated 13th April 2017, the application that was the first to be filed. It is supported by an affidavit sworn by James Njuguna Burugu, the General Manager of the plaintiff. It is deposed in the affidavit that the plaintiff leased the parcel of land known as Gilgil Township Block 2/210 (the suit property) from the 2nd defendant for a period of two years from 1st February 2016. The plaintiff's primary business is the treatment, processing and sale of wooden poles and its main place of business is located in the suit property. So as to carry out its business, the plaintiff obtained the 2nd defendant's consent to install its equipment and fixtures on the suit property. At the time the plaintiff did so, it was not aware that the suit property had been charged to the 1st defendant. Further, it did so on the understanding that it would be allowed to remove its fixtures at the conclusion or termination of the lease.

10. On 3rd April 2017, the plaintiff became aware of an advertisement in the Daily Nation Newspaper stating that the suit property and the developments thereon would be sold on 20th April 2017 by public auction. According to the deponent, the plaintiff's fixtures and structures including old plant office, washrooms, water pump house, creosote treatment plant, CCA treatment plant, pump room, mixing plant, boiler room, oil store, go down and pole shades faced threat of being sold at the auction. The plaintiff therefore sought an injunction to stop the sale.

11. Notice of Motion dated 13th April 2017 is opposed by the 1st defendant through a replying affidavit sworn on 25th July 2017 by Gilbert Banda, a Relationship Manager in the 1st defendant's Corporate Division. He urged the court to strike out his suit on the ground this court lacks jurisdiction to hear and determine the matter. He added that a similar suit being Nakuru ELC No. 348 of 2016 Equip Agencies –vs- I & M Bank was filed by the 2nd defendant herein against the 1st defendant. The subject matter in the suit is the suit property herein. The suit was later transferred to High Court at Naivasha and became Naivasha HCCC No. 9 of 2016. In the said suit, the 2nd defendant filed an application similar to the one herein seeking an injunction to stop the 1st defendant from exercising its chargee's statutory power of sale. The application was dismissed in a ruling delivered on 9th December 2016. Being dissatisfied, the 2nd defendant appealed against the ruling to the Court of Appeal at Nyeri and sought stay pending appeal from the said court in Nyeri Civil Application No. 7 of 2016. The court of Appeal granted stay pending determination of the appeal. As at the time of swearing the affidavit, judgment in the main appeal was scheduled for delivery by the Court of Appeal on 27th September 2017. It is deposed that for all these reasons, this court lacks jurisdiction and that the plaintiff is guilty of abuse of the court's process.

12. The 2nd defendant did not file any replying affidavit in response to the application. Nevertheless, I note that the thrust of the plaintiff's case is against the 1st defendant. Though orders are sought against both defendants, no evidence is adduced against the 2nd defendant that would form a basis for any orders to issue against it.

13. The 1st defendant filed written submissions in support of the preliminary objection on 26th July 2017. The grounds stated in the preliminary objection are generally reiterated in the submissions and the court is urged to uphold the preliminary objection and dismiss Notice of Motion dated 13th April 2018.

14. I will consider the 1st defendant's Notice of Preliminary Objection (P.O) dated 18th April 2017 first since it raises jurisdictional issues. If the preliminary objection is upheld, there will be no need to consider the applications dated 13th April 2017, 23rd October 2017 and 3rd November 2017. If the preliminary objection fails, I will consider the applications.

15. In response, the plaintiff in submissions filed on 8th November 2017 argued that the matter falls within the jurisdiction of the court as provided for under Article 162(2) (b) of the Constitution and Section 13(2) (d) of the Environment and Land Court Act. Additionally, the plaintiff cited the case of **Jane Wambui Ngeru –vs- Timothy Mwangi Ngeru 2015 eKLR** and urged the court to find that it has jurisdiction.

16. I have considered the preliminary objection and the submissions on it. A preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Further on, **Sir Charles Newbold JA**, stated:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct....

17. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

18. In this case, the 1st defendant relied on a lot of evidence which was introduced by way of the preliminary objection itself. Such evidence includes the existence and nature of the proceedings in Naivasha HCCC No. 9 of 2016 and Nyeri Civil Application No. 7 of 2016. That in itself is fatal to the preliminary objection. The preliminary objection could only be raised and argued on the basis of the material placed before the court by the plaintiff as at the date it was filed. In the circumstances, I find and hold that the preliminary objection herein is not a valid preliminary objection. It is dismissed with costs to the plaintiff.

19. That paves way for determination of the three applications being Notice of Motion dated 13th April 2017, Notice of Motion dated 23rd October 2017 and Notice of Motion dated 3rd November 2017. Notice of motion dated 3rd November 2017 seeks to discharge orders made at the *ex parte* stages on 19th April 2017 and on 23rd October 2017. A determination of Notice of Motion dated 13th April 2017 on its merits will render Notice of Motion dated 3rd November 2017 overtaken by events in so far as it seeks setting aside of the orders of 19th April 2017. The same applies to Notice of Motion dated 23rd October 2017 since the application sought to restrain the 1st defendant from evicting the plaintiff from the suit property and advertising the suit property for sale pending *inter parte* hearing of Notice of Motion dated 13th April 2017. I will therefore only consider notice of motion dated 13th April 2017, an application which seeks an interlocutory injunction.

20. In such an application, the applicant must satisfy the test laid down in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. It must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court will determine the matter on a balance of convenience. As was held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

21. The plaintiff's main complaint is that among the items to be sold in the auction sale which was scheduled for 20th April 2017 were its properties located on the suit property. It listed the said properties as follows:

- i) Old plant office.
- ii) Wash rooms.
- iii) Water pump house.
- iv) Creosote treatment plant.
- v) CCA treatment plant, pump room, mixing plant.
- vi) Boiler room.
- vii) Oil store
- viii) Go downs
- ix) Pole shades

22. The plaintiff's case is that it leased Gilgil Township Block 2/210 (the suit property) from the 2nd defendant for two years with effect from 1st February 2016. Generally, the plaintiff's whole case is built around the question of whether the 1st defendant should be allowed to sell the suit property alongside the items listed above which the plaintiff claims to be its property.

23. I note from the 1st defendant's replying affidavit and the annexures thereto that there exists another suit being Naivasha HCCC No. 9 of 2016 wherein the plaintiff is Equip Agencies Limited (the 2nd defendant herein) and the defendant is I & M Bank Limited (the 1st defendant herein). In the said suit, a Notice of Motion dated 25th August 2016 was filed on 30th August 2016. Among the prayers sought in the application was an injunction to restrain the defendant in the said suit from advertising for sale, selling or generally exercising any of the remedies available to a chargee under Section 90(3) of the Land Act. Similarly, in the plaint in the said case, there are prayers for judgment against the defendant therein for among others "a declaration that the defendant's statutory power of sale has not accrued as against the charged property L.R No. Gilgil Township Block 2/210 ..." Both the verifying affidavit and the affidavit in support of the Notice of Motion in the said case are sworn by Divyesh Indubhai Patel who described himself therein as a director of Equip Agencies, the plaintiff therein. Notice of Motion dated 25th August 2016 was heard and dismissed by Meoli J. in a ruling delivered on 9th December 2016.

24. I also note that in the application presently before the court, a copy of a contract for supply of wooden poles to Kenya power & Lighting Company Ltd and a copy of contract for supply of wooden poles to Zen East Africa Ltd are annexed as "JNB2." Both agreements are signed on behalf of the plaintiff herein by Divyesh I. Patel as a director of the company. It is thus clear to me that the plaintiff herein and the defendant herein are related companies to the extent that they share at least one director, Divyesh I. Patel

25. Though the plaintiff claims that the properties listed at paragraph 21 above belong to it, I also note from the affidavit of Andrew Muchina, filed in support of Notice of Motion dated 3rd November 2017 and the valuation report annexed thereto that the said properties were part and parcel of Gilgil Township Block 2/210 as at 10th October 2013 which is the date of the valuation report. This was long before the plaintiff became a lessee in respect of the premises. It follows therefore that the said properties were part and parcel of the land that was charged to the 1st defendant and were also the subject matter of the litigation in Naivasha HCCC No. 9 of 2016. The plaintiff did not file any affidavit to respond to or challenge the 1st defendant's replying affidavit.

26. Section 7 of the Civil Procedure Act provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

27. I have already found that the properties that the plaintiff claims to belong to it were and are subject of the litigation in Naivasha HCCC No. 9 of 2016. The court in the said case has already found that an injunction cannot issue to stop the 1st defendant herein from exercising chargee's statutory power of sale in respect of the said properties. The matter is therefore res judicata. The application is for striking out. I am alive to the drastic nature of the remedy of striking out. Still, in an appropriate case such as the present one, the court should not hesitate to strike out. As regards whether or not the rest of the case should remain in this court, the provisions of Section 6 of the Civil Procedure Act are clear. This court cannot entertain the matter. The rest of the case should be heard and determined by the same court that is dealing with the subject matter in Naivasha HCCC No. 9 of 2016.

28. In view of the foregoing, I make the following orders:

- a) Notice of Preliminary Objection dated 18th April 2017 is dismissed with costs to the plaintiff.
- b) Notice of Motion dated 13th April 2017 is struck out for being res judicata.
- c) The interim orders that were granted on 19th April 2017 and 23rd October 2017 are hereby discharged.
- d) Costs of the Notices of Motion dated 13th April 2017, 23rd October 2017 and 3rd November 2017 are awarded to the 1st defendant and shall be borne by the plaintiff.
- e) The suit is hereby transferred to the High Court of Kenya at Naivasha for hearing and determination.

29. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 25th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Nderitu for the plaintiff

No appearance for the 1st defendant

Mr. Nanda holding brief for Mr. Wawire for the 2nd defendant

Court Assistant: Gichaba/Lotkomoi