



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO 23 OF 2017

BHAVASAR ANADKUMAR

T/A SARAX ENTERPRISES.....PETITIONER

VERSUS

BELOILCO HOLDINGS LTD

THE REGISTRAR OF TITLES MOMBASA

THE OFFICER COMMANDING POLICE STATION, KILIFI

THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By a Petition dated 22nd November 2017 and filed herein on 23rd November 2017, the Petitioner Bhavasar Anadkumar T/A/ Sarax Enterprises brought this Petition praying for Judgment against the 4 Respondents as follows:-

- 1. A declaration that the Respondents have violated the Petitioner's Constitutional rights to private property under Article 40 and 64 of the Constitution of Kenya.***
- 2. That a permanent injunction be issued against the Respondents, their employees, agents, servants restraining them from trespassing on, laying claim to or depriving the Petitioner off the Petitioner's property LR No 13053, Kilifi***
- 3. General damages for trespass, loss of use of the suit property and violation of the Petitioner's Constitutional rights.***
- 4. Costs of the suit.***
- 5. Interest on (3) and (4) above at commercial rates of 20% from the date of filing the suit.***

2. Contemporaneously filed with the Petition was a Notice of Motion Application dated 22nd November 2017 seeking inter alia the following orders:-

- 1. That the application herein be certified as urgent and heard ex parte in the first instance.***
- 2. That a Conservatory Order be issued against the Respondents, their employees, agents, servants, restraining them from trespassing on, claim to, evicting or depriving the Petitioner/Applicant off the property LR No. 13053 Kilifi pending the hearing and determination of this application.***
- 3. That an Interim Mandatory Order be issued directing the Respondents to restore back the Petitioner/Applicant to the suit property pending the hearing and determination of this Application.***
- 4. That a Conservatory Order be issued against the Respondents, their employees, agents, servants restraining them from trespassing on, laying claim to, evicting or depriving the Petitioner/Applicant off the property LR No. 13053 Kilifi pending the hearing and determination of this Petition.***

5. *That the Officer Commanding Police Station, Kilifi do enforce and ensure compliance with these Court orders.*

6. *That the costs of this Application be borne by the Respondents.*

3. The said Notice of Motion was based on a number of grounds stated thereon and which may be summarized as follows:-

i) That the Petitioner is and has at all material times been the registered proprietor of all that suit property known as LR No. 13053 Kilifi measuring 16 acres.

ii) The Petitioner became the registered owner of the land as a result of a public auction. On 10th August 2016, the Petitioner saw an advertisement by Messrs Kinyua Auctioneers for an auction of the suit property which auction was scheduled for sale on 26th September 2016. After conducting a search and due diligence, the Petitioner attended the public auction on the said 26th September 2016 whereupon he emerged the highest bidder having put in a bid to purchase the suit property for a sum of Kshs 200,000,000/- (Two Hundred Million Shillings). On the same date he paid a deposit of Kshs 50,000,000/- being 25% of the purchase price. Thereafter the Petitioner completed the transaction and acquired the property as an innocent purchaser for value without notice.

iii) Having learnt that the Sale was conducted pursuant to Mombasa HCCC No. 146 of 2015; Genton AG –vs- Bileilco Holdings Ltd, the Petitioner proceeded on 5th October 2016 and obtained a Vesting Order from the said Court which Order vested the property absolutely to himself. Subsequently and as a result of the Vesting Order, a Provisional Order was issued to the Petitioner on 6th October 2016 by the Registrar of Titles Mombasa (the 2nd Respondent herein).

iv) As the registered proprietor, the Petitioner took possession of the suit property and was enjoying the rights and privileges vested in such registered proprietor until the 5th November 2017 when persons acting in the name of the said Bileilco Holdings Ltd (1st Respondent herein) and in the company of the Officer Commanding Police Station Kilifi (3rd Respondent) unlawfully evicted his caretaker from the suit property with the help of heavily armed police officers while claiming that it belonged to the 1st Respondent.

v) The actions of the Respondents of unlawfully and unconstitutionally evicting the Petitioner from his property violates Article 40 and 64 of the Constitution and that there is real danger that justice will not be served unless this Court intervenes to uphold his rights to property.

4. On 23rd November 2017, the said Notice of Motion was placed before me ex parte under Certificate of Urgency. Having considered the issues raised herein, I was convinced that the matter was urgent and proceeded to grant prayer 1 and 2 of the same in the interim. Thereafter, I directed that the Application be served for inter-partes hearing on 7th December 2017.

5. However, three days later, on 27th November 2017, the 1st Respondent placed before me a Notice of Motion of even date seeking Orders that :-

a) The application be certified as extremely urgent and be heard ex parte in the first instance.

b) The ex parte Orders of injunction given on 23rd November 2017 be stayed pending the hearing and determination of this application.

c) The ex parte Orders of injunction given on 23/11/2017 be set aside as a matter of right.

d) The Petitioner be evicted from the hotel known as Black Marlin Resort situate in Kilifi County on LR Number 13053, comprised in the Title No. CR 14391 and Land Survey Plan Number 89678 deposited at the Survey Records Office (“the suit Premises”) pending the hearing and determination of this application.

e) The Petitioner by himself, employees, servants and agents be restrained from interfering with the 1st Respondent’s right to enter and remain upon the suit premises.

f) Any order given under this Application be enforced by the Kilifi County Police Coordination Commander.

g) This application be heard and determined before the Petitioner’s application dated 22/11/2017.

h) This Petition be dismissed with costs to be paid jointly and severally by the Petitioner and Mr. Koceyo O. Titus and Timothy Ilako practicing as Koceyo & Company Advocates.

i) To avoid further abuse of process of the Court by the Petitioner and to avoid conflicting orders from the same Court on the same property, involving 2 Petitions which share some common parties the Court files in this Petition and in the Petition filed by the 1st Respondent be tied together in one bundle and an order to be made in both files that none of the 2 Petitions should be heard or mentioned without the Court files in both.

j) The costs of this application be paid by the Petitioner, Mr. Koceyo O. Titus and Timothy Ilako practicing as Koceyo &

Company Advocates jointly and severally.

6. The 1st Respondent's application is based inter alia on the grounds that:-

i) The orders of injunction granted on 23/11/2017 were procured by fraud upon the Court;

ii) The Orders were given without jurisdiction as the Petitioner's claim is based on judicial sale of the suit premises in Mombasa HCCC No. 146 of 2015. Judgment in that suit was set aside;

iii) The Warrants of attachment and sale, the Notification of Sale, the Certificate of Sale and the Vesting Orders in Mombasa HCCC No. 146 of 2015 to vest LR NO. 13053 Kilifi to the Petitioner were declared to have been procured unlawfully and were expunged from the Court records on 11.10.2017.

iv) The Vesting Order and Certificate of Sale of the suit property in Mombasa HCCC No. 146 of 2015 were declared fraudulent, null and void and were expunged from the Court record in that suit on 11.10.2016.

v) Having considered the 1st Respondent's application exparte, and in view of the averment that the Vesting Orders upon which the Petitioner had relied on to obtain the earlier Orders had been apparently set aside and expunged from the record by the Honourable Justice PJ Otieno in Mombasa HCCC No. 146 of 2015, I granted a Stay of the Orders issued earlier in terms of prayers 'a' and 'b' of the 1st Respondent's application. Thereafter I directed that the 1st Respondents application be served for hearing inter-partes on 7th December 2017, the same day when the Petitioner's application was due for hearing.

7. Prior to the said date, the 1st Respondent filed another application dated 4th December 2017 in which they inter alia sought to have the Petitioner and his Advocates named therein as Hon Richard Moitalel Ole Kenta, Mr. Koceyo O. Titus, Mr. Timothy Ilako and Mr. Joe Nzyoki Mwanthi to be referred to the Directorate of Criminal Investigations and the Advocates Disciplinary Committee for investigations and punishment for misconduct and offences allegedly committed during, in the cause of and relating to this Petition.

8. Again, having considered the 1st Respondent's new application dated 4th December 2017, I directed that it be served for consideration alongside the other two applications on the 7th December 2017.

9. On the said 7th December 2017, the parties argued the two sets of applications before me and I reserved my Ruling thereon for 22nd February 2018. In the course of the hearing of the applications, it was confirmed by both parties that indeed the Vesting Orders upon which the Petitioners had relied to obtain the Orders of 23rd November 2017 had indeed been set aside and expunged in Mombasa HCCC No. 146 of 2015 in which the Petitioner herein had participated as an Interested Party. In light of this position, I did discharge in the interim the Conservatory Orders of 23rd November 2017. And since the Orders of 23rd November 2017 had by then been used to evict the 1st Respondent, I did direct that the 1st Respondent be reinstated in the suit premises pending my reserved ruling.

10. At it were, by an application dated 13th February 2018 brought under Certificate of Urgency by Messrs Moitalel Ole Kenta, the Advocate named as acting for the Petitioner in the application dated 23rd November 2017, the Applicant Advocate sought Orders as follows:

a) That the application be certified as extremely urgent and be heard ex-parte in the first instance.

b) The Ruling scheduled for 22/2/18 be stayed pending the hearing and determination of this application.

c) The record be corrected to show that the firm of Hon Richard Moitalel Ole Kenta practicing as Kenta Moitalel & Company never acted for the Petitioner herein and all documents purporting to have been drawn and filed by the said Advocate be struck out and expunged from the record of this Court.

11. When the Advocates application came up for hearing, I declined to grant the same and directed that it be kept in abeyance pending consideration with the other applications which were already pending for Ruling before me.

12. Subsequently on 23rd January 2018, Messrs Kadima & Company filed a Notice of Appointment of Advocates and not a Notice of Change, indicating that the Petitioner herein had appointed them to act effective that date. With a view to bringing these proceedings to an end, the said firm of Advocates proceeded on the same day to file a Notice of Withdrawal of suit in which they give notice as follows:-

“TAKE NOTICE that the Petitioner M/S Bhavasar Anadkumar T/A Sarax Enterprises has today withdrawn his suit wholly as against the Respondents herein.

13. That Notice should have probably ended this case with the consequences that my Ruling herein would have been rendered otiose.

14. I think as a general rule and in normal circumstances, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. As the Supreme Court observed while considering similar provisions in *John Ochanda –vs- Telkom Kenya Ltd, SC APP, No. 25 of 2014:-*

“...a prospective Appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any

further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issues of costs, which can be claimed by the respondents; if any.”

15. Order 25 of the Civil Procedure Rules which provides for withdrawal, discontinuance and adjustment of suits provides as follows:-

“1. Any time before the settling down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2(1) Where a suit has been set down for hearing it may be discontinued or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

16. As it were, Order 25 of the Civil Procedure Rules provides three clear scenarios regarding withdrawal of claims and/or discontinuance of suits. A “suit” as defined under Section 2 of the Civil Procedure Act means “all civil proceedings commenced in any manner prescribed” and I am therefore satisfied that this Petition falls under the said definition.

17. In the proceedings before me, prior to the filing of the Notice of Withdrawal, the application and the Petition had not only been set down for hearing but had been heard and was pending a determination. Under Rule 2(2) of Order 25 aforesaid, it is evident that where the suit has been set down for hearing but all the parties have not reached any consent on the discontinuance of the suit or withdrawal of the claim or any part thereof, the Claimant’s right to do so is circumscribed by the requirement that he must obtain the leave of the Court.

18. Commenting on the decision of the Supreme Court in *John Ochanda –vs- Telkom Kenya (Supra)*, the Court of Appeal in *Beijing Industrial Designing & Research Institution –vs- Lagoon Development Ltd(2015)eKLR* had this to say:-

“We understand the apex Court to say that even where leave of the Court is required, subject to considerations such as costs (terms that are just), the Courts ought not to stand in the way of a Plaintiff who wishes to discontinue his suit. The decisions of the Supreme Court (however) cannot be interpreted to mean, as the respondent implied, that a Plaintiff has a right to discontinue his suit in sundry and all cases, even without leave where the law requires such leave. To so hold would be to reduce the requirement for leave to a mere formality, which we do not think is what was intended by the decisions of the Supreme Court or Order 25.”

19. Granted the peculiar circumstances of this case, this Court found itself wondering whether at the time of the purported discontinuance of the suit, this matter was still a straightforward dispute between the Petitioner and the Respondent, and which could be brought to an end in the manner contemplated by the Petitioner.

20. As it were, the Petitioner had filed these proceedings placing reliance on a Vesting Order said to have been granted by a Court of law. As it came to pass, as at the time of filing this Petition, the Petitioner was aware that the said Vesting Order had been set aside and expunged from the record in Mombasa HCCC No. 146 of 2015. The Petitioner herein was an Interested Party in the said proceedings and the subsequent Petition filed herein was but a deliberate attempt to abuse this Court’s Process.

21. As if that was not enough, the firm of Advocates, Moitalel Ole Kenta & Company Advocates in whose name the Petition was filed moved this Court vide the application dated 13th February 2018 denying that it ever acted for the Petitioner and praying for all documents purported to have been drawn by the said law firm to be struck out and expunged from the records.

22. In my mind, the move by the Petitioner to discontinue the proceedings in the manner proposed is nothing but an attempt to subvert the cause of justice. As it were serious allegations of forgery, perjury, malpractice and grave misconduct have been raised and are apparent from the proceedings.

23. As the Court of Appeal observed in *the Beijing Industrial Designing & Research Institute Case(Supra)*

.....criminal or quasi-criminal proceedings ought not to be terminated at the exclusive instance or discretion of the Party alleged to be a Perpetrator of a criminal or quasi-criminal act.”

24. Arising from the above, I think it would be inappropriate to allow the Petitioner at his sole discretion, to withdraw this Petition in the circumstances of this case. I entertain no doubt in my mind that the Notice to Withdraw this Petition was designed for ulterior purposes and is meant to circumvent the due process of the law. Under Section 3A of the Civil Procedure Act, this Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Where a party uses the right to discontinue a suit in a manner that amounts to abuse of process of Court or to defeat the ends of justice, the Court has power to stop such abuse or undermining of justice.

25. Accordingly, I hereby make the following Orders:-

i) That the Directorate of Criminal Investigations of the National Police Service do carry out thorough investigations in regard to the role played by the Petitioner herein, Bhavasar Anadkumar, his Advocates Kenta Moitalel & Company Advocates as well as

any necessary party in regard to the filing and prosecution of this Petition in reliance to the Vesting Orders allegedly issued by the High Court at Mombasa in HCCC No. 146 of 2015; Gention A-G –vs- Beloilco Holdings Ltd, with a view to recommending appropriate action.

ii) That the Deputy Registrar of this Court should proceed to forward a copy of this file within 21 days of the date hereof to the Directorate of Criminal Investigations to facilitate the said investigations.

iii) That the 1st Respondent's application dated 27th November 2017 is hereby allowed.

iv) That the Petition herein is an abuse of the Court Process and is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE