REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 24 OF 2018 (KISUMU)

ERIC OCHIENG.....PLAINTIFF

VERSUS

FREDRICK AILA ONYANGO.....1ST DEFENDANT

BENTER OKONG'O NGOLO.....2ND DEFENDANT

R U L I N G

1. The application under consideration is a Notice of Motion dated 8/6/2018 and filed in court on 12/6/2018. It was brought under Sections 1A, 1B, 3A, 4, 5 and 80 of Civil Procedure Act (cap 21), Order 26 Rule (1), Order 40 Rules 7 and 10, Order 45 Rule 1, and Order 51 Rule 1 of Civil Procedure Rules, 2010. The Applicants **– FREDRICK AILA ONYANGO** and **BENTER OKONGO NGOLO –** are the Defendants in the suit herein filed on 8/5/2018. The Respondent **– ERIC OCHIENG –** is the Plaintiff in the suit.

2. The suit aforementioned was filed contemporaneously with an application of even date seeking, *interalia*, temporary restraining orders. That application was first entertained by court Exparte on 9/5/2018. The Applicant, who is now Respondent in this application, wanted interim orders issued exparte but the Court declined to do so and instead directed that the application be served first.

3. And service was done, with both sides appearing in court through counsel on 16/5/2018 for interparties hearing. It was on that date that the court issued an interim restraining order after hearing both sides. The order issued was to run for 14 days. The court directed that the application be heard on 30/5/2018. And when the application came up on that date, the court further directed that it be canvassed by way of written submissions. It also extended the interim orders issued earlier. The matter was given a mention date of 24/9/2018 by which time both sides are supposed to have filed written submissions. That date is still awaited.

4. In the meantime, the Respondents in the earlier application filed the application now at hand seeking to discharge, set aside and/or review the interim orders first issued on 16/5/2018 and extended on 30/5/2018. The other orders prayed for include provision for costs of the application, a site visit to the place where the Applicants project is being undertaken, and provision for security for costs by the Respondent to the tune of Kshs.615,803,555.80.

5. The Applicants sought to justify the present application on the basis that the injunctive order in force is negatively impacting their project, that they stand to make huge losses arising from stoppage of the project, and that they have borrowed loans and further losses may arise should the date of paying back arrive before the expected completion date of the project.

6. It was also alleged that due to heavy rains, a pool of water has collected on the site weakening the foundation and possibly affecting the structural layout of the project. The pool is said to pose a danger to trespassing children as well as a health risk to neighbours since it is a breeding ground for mosquitoes.

7. The Applicants averred that they have all the requisite licenses, approvals and/or permits from the relevant authorities. They have equipment and machinery on site attracting other costs yet the injunctive order has halted their use. That is why, said the Applicants, the security for costs is necessary.

8. The Respondent responded vide a replying affidavit filed on 20/6/2018. He deposed, *interalia*, that the Applicants have mis-represented the facts, particularly regarding the manner the interim order being challenged was issued and/or extended. He also took issue with allegations of borrowed loan – saying nothing was availed to show its existence – and allegations of idle equipment and machinery on site – again saying no evidence was shown to that effect.

9. On the issue of security for costs, the Respondent deposed that the Applicants have not shown they have a bonafide defence or that he

resides outside the jurisdiction of the court. He said he has an "ultra-modern home" in Kisumu and occupies a senior rank as an employee of Kenya Bureau of Standards. I think the implication here is that the respondent is reasonably well-heeled and can pay costs.

10. The application was issued before me interparties on 21/6/2018. Counsel for Applicants, Mr. Omari, broadly highlighted the salient aspects of his application and while expatiating on the subject, he availed decided case law to give legal muscle to the issues raised. Some of the case law availed include **CAROLINE WANJIRU WANJIHIA & Another Vs I & M Bank: HCC No. 160/2013, NRB, KENYA COMMERCIAL BANK Vs KIPSANG SAWE SISEI: CA No. 53/2002, NAIROBI and JOEL K. KIBIWOTT & others Vs THE REGISTERED TRUSTEES OF MONASTRY OUR LADY OF VICTORY: HCC No. 146, NAKURU.**

11. Omondi for Respondent also relied on what he filed. He then gave some background and posited, *interalia*, that the order being challenged was not issued exparte. He argued that the licenses, permits and/or approvals allegedly held by the Applicants were under challenge by his side owing to the manner of their issuance and/or the possible locale of their application (said to be several kilometres from the place where the project is being undertaken).

12. In reply, Omari reiterated that the orders granted were issued EXPARTE and that some of the Applicants input in this application was not availed to the court that issued the order. I have looked at the pleadings generally, the record of the trial court proceedings in the earlier application, the present application, response to the present application, and rival arguments by both sides.

13. The premise of the present application is that the injunctive order in force was issued exparte and would not have been issued had the court been seized of all the necessary information. This premise is contested by the other side, with the Respondent alleging that the Applicants were part of the proceedings. There was even a disagreement as to what exparte proceedings mean, with counsel for the Applicants arguing that though he was present he was not heard. To him, it is not the presence of both sides that makes the matter interparties but rather the hearing of both sides. But counsel for the Respondent sees it differently. To him exparte proceedings take place in absence of one party. The scenario in the matter at hand is said to be different. Counsel for Applicants was said to have been present and he even engaged the court on the two occasions when the order was issued and then extended.

14. I think I need to deal with this issue first because the application is founded on it. I will do so because law is always applied to proven or accepted facts. And I think it is also proper to understand what the law means when it talks of proceeding exparte. I do not need to go further than the Civil Procedure Act (cap 21) and the rules made thereunder. We are here talking of an order issued under Order 40 of Civil Procedure Rules, 2010. And that is where we will go.

15. Order 40 rule 4(1) provides for issuance of injunctive order Exparte. It provides as follows:

> **Order 40 rule 4(1): Where the court is satisfied for reasons to be recorded that the objective of granting the injunction would be defeated by the delay, it may hear the application exparte.**

But there are more provisions on exparte orders and they are as follows:

> **Order 40 rule 4(2): An exparte injunction may be granted only once for not more than 14 days and shall not be extended thereafter except once by consent of parties or by the order of court for a period not exceeding fourteen days.**

More crucially for our purposes however are provisions of Order 40 rule 4(3) which sheds light on what is to be regarded exparte. The provision is as follows:

> **Order 40 Rule 4(3): In any case where the court grants an exparte injunction the applicant shall within three days from the date of issue of the order, serve the order, the application, and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.**

16. I think one would do a summation of Order 40 rule 4(1) (2) and (3) as follows: The court, for reason of likelihood of delay, may issue injunctive relief exparte. But that can only be once, with the order issued having a legal lifespan of 14 days, with a possible extension only once for equal period. The order however is issued when the other side is not yet served (see sub-rule 3) and if issued, the order is to be served together with the application and the pleading within three days of issuance. If this is not done, the order automatically lapses.

17. From the foregoing, it is plain that the law envisages exparte proceedings to be undertaken without the presence of one side. In other words, one side is envisaged to be absent and possibly even unaware of the proceedings. That is why service is required immediately the order is issued.

18. On this issue therefore, Omondi for the Respondent is right. An exparte injunction connotes absence of one side. It also connotes non-participation arising from that absence. In this regard therefore, if the other side is already served, is in court, but nevertheless fails or refuses to participate, any order issued cannot be deemed exparte. And this is what precisely obtained in this matter. Proceedings of the trial court shows that the earlier application came up in court Exparte on 9/5/2018 and the court declined to issue the order sought. It directed instead that the application be served.

19. And service was done as directed and both sides appeared in court for hearing interparties on 16/5/2018. Omari for Applicants is shown engaging the court. He was opposing Omondi who had applied to have an interim restraining order issued. The court gave a short ruling in which a restraining order was issued. From all this, it is plain that the order was issued interpaties. And it is that same order that was extended on 30/5/2018 when the matter came up again in court. Needless to say, it is the order that is still in force.

20. The premise of the Applicants application is therefore wrong. The order was not issued Exparte. The Applicants had been served and

they participated in the proceedings. And even at the time of extension of the order on 30/5/2018, Omari for the Applicants was present and records show him participating in the proceedings.

21. Having now seen that it was wrong to base the application on the presumed fact that the order was issued exparte, can we then talk of discharging, setting aside or reviewing it? In law, it is possible to do so for Order 40 Rule 7 provides as follows:

> **Order 40 Rule 7: Any order of injunction may be discharged, or varied, or set aside by the court on an application made thereto by any party dissatisfied with such order.**

A question then arises: can the Applicants benefit from this provision?

And the answer, in my view is NO. I have already explained that law applies to proven or accepted facts. The Applicants proven or accepted fact is that the order in force was issued Exparte. If we apply that presumed fact in the context of this matter, we would be applying it to unproven and/or rejected facts.

22. On the basis of the wrong premise, the Applicants attempted an exposition of law which would generally be sound had the foundation of the application been right. But that law, sound as it may appear, cannot now apply. I am therefore unable to accede to the prayer for discharge and/or setting aside. I reject these prayers.

23. But there was also the prayer for review of the same order. On this, I think the Applicants are again wrong. The prayer for review is based on Order 45 of Civil Procedure Rules: A reading of order 45 shows that a review is done when there is an error apparent on the face of the record or discovery of new and important matter or for any sufficient reason. All this is provided for under 45 rule 1 of Civil Procedure Rules. But in the context of this application, there are provisions that do not run in the Applicant's favour. And the provisions are as follows:

> **Order 45 Rule 2(1): An application for review of a decree or order of a court upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the record, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.**
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> **Subrule (2): If the judge who passed the decree or made the order is no longer attached to the court the application may be heard by any other judge attached to that court at the time the application comes for hearing.**
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> **Subrule (3): If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the chief justice may designate.**

24. To my mind, what order 45 rule 2 (1), (2) and (3) enjoin is that, save for instances where review is sought on grounds of error on the face of record or discovery of new evidence, the same judge who issued the order or decree is the one to hear the application for review. And if the judge is no longer in the station his/her successor can do it. The only other instance where another judge may handle the application is where the judge attached to the court is away for 3 months.

25. In the application herein, review is not sought on grounds of error on the face of record or because of discovery of new evidence. The application is therefore one that should be handled by the judge who issued the order. I am not the one who issued the order; Kibunja J, the presiding judge in Environment and Land Court, Kisumu, did. The application herein was filed on 12/6/2016. Kibunja J is on leave and is resuming duties in September. That is about 3 months from the time of filing. The Applicants should have waited for him if they wanted a review. I feel impelled to resist dealing with an issue of review where the judge handling the matter is only temporarily away.

26. The Applicants also wanted security for costs. The cost of their project is said to be Kshs.615,803,550.80. This is the same amount they want the Respondent to pay. Here, the Applicants are again wrong. When we talk of security for costs, we are not talking of the value of the property or costs of the subject matter involved. We are talking of costs of the suit. In this regard therefore, I expected the Defendant to propose a modest figure of the expected costs. Such figure obviously has to be much lower than the costs of the project.

27. Security for costs is the money or money's equivalent, given to the court to satisfy costs. It is normally given by the plaintiff or appellant to satisfy costs of the defendant or respondent if such plaintiff or appellant loses. The aim is to protect a party who is dragged to court for no good reason and stands to lose even the costs of the litigation itself.

28. In order to get security for costs, the Applicant is duty bound to demonstrate that the other party will not be able to satisfy an order for costs. But that is not the only consideration. In the case of Joel K. Kibiwott (supra) availed by the Applicant's themselves; an order for security for costs was granted by Kimaru J for reasons, *interalia*, that it would be difficult for the Defendant to execute against 358 plaintiffs some of whom were residents of unknown places. The court has a wide discretion in the matter and many other factors come into play when deciding whether or not to grant an order for security for costs.

29. In this matter, I expected the Applicants to demonstrate that the Respondent would not be able to pay costs. As things stand, this was not shown. The Applicants only want the Respondent to be ordered to give security for costs. No good reason has been proffered. In my view, had the Applicants shown well that the Respondent cannot pay costs, they could easily get the order if the Respondent on the other hand failed to demonstrate that he is a man of means. The Defendant himself said he is well in employment and owns a modern home. This explanation found no rebuttal from the Applicants. It stands unchallenged.

30. When all is considered therefore, the application herein is found unmeritorious and the same is hereby dismissed with costs.

Dated, signed and delivered at Busia this 31st day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: ……..……..……..……..…..……

1st Defendant: ……..……...……..……..……

2nd Defendant: ……..……...……..……..……

Counsel of Plaintiff: ……..……..……

Counsel of Defendants: ……..……..……..…..……