



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 391 OF 2017

(FORMERLY HCCC No. 82 OF 2014(O.S))

SERAH NYAMBURA T/A CRAYFISH CAMP.....PLAINTIFF

VERSUS

TWIGA ROSES.....DEFENDANT

RULING

1. By Notice of Motion dated 28th June 2017, the plaintiff sought the following Orders:

1. Spent.

2. That an order for eviction does issue upon the defendant and all its agents and the suit land be availed back to its owner the plaintiff/applicant forthwith.

3. Spent.

4. That pending the hearing and determination of this suits (sic), the honourable court be pleased to restrain the defendant by itself, its employees, agents and or any other person acting under its authority from entering, trespassing into, planting flowers, harvesting flowers and or the usage of any and all facilities situate on the suit land parcels LR No. 12248/16, 12248/17, 12248/18 forming part of IR No. 31135 without the express written consent of the plaintiff.

5. That an order of consolidation does issue upon this cause Nakuru HCC No. 82 of 2014 (OS) between Serah Nyambura T/A Crayfish V Twiga Roses and Nakuru HCC No. 141 of 2012 between Serah Nyamburah T/A Crayfish Camp V Karuturi Limited and Kalasha Holdings and Nakuru HCC No. 351 of 2010 between Serah Nyambura T/A Crayfish Camp V Karuturi Limited pending hearing and determination of this application.

6. That the ongoing sale of tents and greenhouse destruction be halted forthwith.

7. That the costs of this application be provided for.

2. The defendant responded to the application by filing Notice of Preliminary Objection dated 3rd October 2017. The objection targeted both the entire suit and the application and was stated to be on the following grounds:

1. The continuation of the proceedings herein is in breach of Section 228 of the Companies Act, Chapter 486 Laws of Kenya (repealed) and/or Section 432 (2) of the Insolvency, Act No. 18 of 2015 as no leave has been obtained by the plaintiff to proceed with the suit against the defendant company Karuturi Limited (In Liquidation) T/A Twiga Roses.

2. This suit should be stayed in accordance with Section 228 of the Companies Act, Chapter 486 Laws of Kenya (repealed) and/or Section 432 (2) of the Insolvency, Act No. 18 of 2015.

3. The suit and the plaintiff's Application dated 28th June, 2017 are in breach of Section 6 of the Civil Procedure Rules, 2010.

4. The plaintiff's application dated 28th June 2017, is res judicata in breach of Section 7 of the Civil Procedure Rules, 2010 and as such the honourable court lacks jurisdiction to hear and determine the said application.

5. *This suit and the plaintiff's application dated 28th June 2017 are an abuse of the court process.*

3. On 17th November 2017, directions were given that the preliminary objection be heard by way of written submissions. A schedule for filing and exchange of submissions was given. For various reasons, parties did not file submissions on time. In the meantime, the plaintiff filed yet another application, being Notice of Motion dated 15th May 2018, in which the following orders were sought:

1. *Spent.*

2. *That an order of a temporary injunction be issued restraining the respondents whether by themselves, agents and servants from receiving expression of interest and short listing prospective bidders to the said properties pending the hearing and determination of this suit.*

3. *That an order of a temporary injunction restraining the respondents whether by themselves, agents and servants from selling, dealing, interfering, alienating or disposing of all these properties listed in the notice of sale of company assets Karaturi Limited (In liquidation) premised on the applicant's land, LR. No. 12248/16, LR. No. 12248/17, LR. No. 12248/18 Naivasha South Lake pending the hearing and determination of this suit.*

4. *An injunction do issue restraining the defendants, their servants, agents or otherwise howsoever from interfering with the quiet possession of the applicant's property pending the inter parties hearing and determination of this application.*

5. *An injunction do issue to restrain the defendants, their servants or agents or otherwise howsoever from demolishing the listed permanent properties on applicant's land pending inter parties hearing and determination of the suit herein.*

6. *This honourable court be pleased to make such orders as may appear to this court to be just and convenient.*

7. *The cost of this application be awarded to the applicant.*

4. The application was supported by an affidavit sworn by the plaintiff. Fresh directions were given that this latest application and the preliminary objection be heard together by way of written submissions. This ruling is therefore in respect of both the preliminary objection dated 3rd October 2017 and Notice of Motion dated 15th May 2018. I will deal with the preliminary objection first and depending on its outcome, I will return to the application.

5. A valid 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.

6. In the case of Oraro v Mbaja [2005] eKLR Ojwang J (as he then was) stated:

I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."

7. In other words, 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.

8. As I understand it, the objection raised by the defendant has 4 facets: firstly, that the suit offends **Section 228** of the **Companies Act**, Chapter 486 Laws of Kenya (repealed) and/or **Section 432 (2)** of the **Insolvency, Act No. 18 of 2015** as no leave has been obtained by the plaintiff to proceed with the suit against the defendant company Karaturi Limited (In Liquidation) T/A Twiga Roses; secondly, that the suit and the application dated 28th June, 2017 are in breach of **Section 6** of the **Civil Procedure Act**; thirdly, that the application dated 28th June 2017 is res judicata and finally that the suit and the application dated 28th June 2017 are an abuse of the court process.

9. **Section 228** of the **Companies Act**, Chapter 486 Laws of Kenya (repealed) provided as follows:

228. Actions stayed on winding-up order

When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose. [Emphasis supplied]

10. On the other hand, **Section 432** of the **Insolvency, Act No. 18 of 2015** provides:

432. Consequences of liquidation order

(1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.

(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.

(3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them. [Emphasis supplied]

11. In this case, the parties seem to be in agreement that a liquidator had been appointed in respect of the defendant. Nevertheless, there is contestation as to whether leave of the court was sought or obtained prior to filing the present suit. It is thus manifest that before operationalizing both **Section 228** of the **Companies Act** and **Section 432 (2) of the Insolvency, Act No. 18 of 2015** with regard to the defendant, one would have to ascertain whether leave was granted by the court hearing the winding up cause. Such an enquiry will entail reviewing evidence. It is therefore not a matter that can properly be raised by way of a preliminary objection.

12. For similar reasons, a preliminary objection founded on **Section 6** of the **Civil Procedure Act** would not meet the threshold for what constitutes a valid preliminary objection since there will be need to review evidence to determine the date of filing of the various suits, the matters in issue and even the parties to those suits. The section provides:

6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

13. In view of the foregoing, the first two facets of the preliminary objection cannot succeed. If the defendant was keen to pursue those issues, a formal application supported with the relevant evidence would have enabled the court to holistically address the matter.

14. The third aspect of the preliminary objection was that the application dated 28th June 2017 is res judicata. Res judicata is provided for under **section 7** of the **Civil Procedure Act**. The said section provides:

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.

15. ‘Suit’ includes an application since it’s defined at **section 2** the Act to mean “**all civil proceedings commenced in any manner prescribed**”. For *res judicata* to apply, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

16. The Court of Appeal explained the essence of res judicata in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** as follows:

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

“...where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”

... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

17. Through the application dated 28th June 2017, the plaintiff sought orders that the defendant be evicted from the suit land and that the defendant be restrained from carrying out flower farming on the suit land. The record herein shows that the plaintiff filed an application dated 20th November 2014 in which she sought an eviction order and an injunction against the defendant, among other orders. The application was heard and was dismissed with costs in a ruling delivered by Janet Mulwa J on 11th June 2015. Through that decision, the issue of whether or not the plaintiff is entitled to an interlocutory injunction was conclusively and finally determined. The plaintiff cannot be

allowed to give her pursuit for an interlocutory injunction a facelift by introducing some new angle to it and then asking the court to determine the matter again. Res judicata stands as a firm and alert sentry against that. For those reasons, I hold that the plea of res judicata succeeds in regard to prayers 2, 3, 4 and 6 of the application dated 28th June 2017. The said prayers are hereby struck out.

18. I now return to Notice of Motion dated 15th May 2018 through which the plaintiff sought an injunction to restrain the defendant from receiving expression of interest, short listing prospective bidders and from selling or demolishing certain properties. The application was supported by an affidavit sworn by the plaintiff. The plaintiff contended that the defendant had published an advertisement in a daily newspaper in which it sought buyers for galvanized steel greenhouse support profiles, irrigation equipment, generators, pumps and cold storage units. According to the applicant, the sale is contrary to a contract between the parties dated 10th July 2006.

19. The defendant did not file any replying affidavit or grounds of opposition in respect of the application. As previously adverted to, the application was heard by way of written submissions. The applicant's submissions were filed on 24th May 2018 while the defendant's submissions were filed on 2nd July 2018.

20. I have considered the application, the affidavits filed as well as the submissions. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. She must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers to the above two tests then the court would 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 defendant has adopted its submissions in regard to the preliminary objection as a response to the application. In essence, the defendant contended that the application is res judicata and that it offends **Section 6** of the **Civil Procedure Act**. Though the application seeks an injunction, it is in respect of notice of sale of assets as advertised by the defendant and in respect of which a deadline for submission of expression of interest was set for 15th May 2018. It has not been shown that the issues raised in the application are pending before any other court. The application neither addressed the question of whether the defendant should be evicted from the suit land or whether the defendant should continue farming thereon. I therefore find that the application is not res judicata and that it does not offend **Section 6** of the **Civil Procedure Act**.

22. At the end of the day, the real issue is whether the properties sought to be sold by the defendant can in fact be so sold. Pursuant to clause 2.5 of the agreement dated 10th July 2006, the defendant was permitted to construct greenhouses and other structures on the suit land. All these were expressly stated in the agreement to belong to the defendant and the defendant is free to remove them whether by sale or otherwise. In view of the foregoing, I am not persuaded that the plaintiff has any *prima facie* case. That being the case, I need not enquire into the other limbs of the **Giella** test. Notice of Motion dated 15th May 2018 cannot succeed.

23. In conclusion, I make the following orders:

- a) Prayers 2, 3, 4 and 6 of the Notice of Motion dated 28th June 2017 are hereby struck out.
- b) Notice of Motion dated 15th May 2018 is dismissed.
- c) The defendant is awarded costs of both the preliminary objection and of Notice of Motion dated 15th May 2018.

24. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistants: Gichaba & Lotkomo