



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 362 OF 2017

CHINA WU YI COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

BELGO HOLDING LIMITED.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 12th July 2018 brought under Section 4(a), 5 (b) and 7 (1) of the Contempt of Court Act, Section 63 of the Civil Procedure Act, Order 40 Rule 1, 2, 4 and 10, Order 21 Rule 7 of the Civil Procedure Rules and all enabling provisions of the law.

2. It seeks order:-

(1) Spent

(2) That pending the hearing and determination of this application or until further orders of this court, the plaintiff as well as its servants, agents and others acting on its behalf and each one of them be restrained from entering upon or trespassing on land reference numbers 28487 and 28686 (original numbers 3859 and 3860), Peponi Road, Nairobi or any part or parts thereof except in accordance within strict compliance with the consent order made herein on 16th June 2017.

(3) That pending the hearing and determination of this application the plaintiff, its servants, agents and other acting on its behalf and each one of them, be directed to vacate and cease to utilize or be in possession of any part or parts of Land Reference 28487 and 28686 (original numbers 3859 and 3860), Peponi Road, Nairobi except the portion thereof which plaintiff was allowed to be possession of under the said consent order made herein on 16th June 2017.

(4) That the sealed order herein, signed and certified by the Deputy Registrar on 20th June 2017 in total disregard of Order 21 Rule 7 of the Civil Procedure Rules be struck off as being a nullity.

(5) That the Draft formal order prepared by the defendants advocates in accordance with the recorded order made by Lady Justice Bor be approved as drawn and the Deputy Registrar be directed to sign and seal the same.

(6) That the plaintiff and its site agent are Liu Qing Hua, and other persons to be identified by the Defendant, be committed for the contempt of the said order in accordance with the Contempt of Court Act.

(7) That costs of the application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs I to xiv.

4. The application is supported by the affidavit of Kennedy Kulei a director of the defendant/applicant sworn on the 12th July 2018.

5. The application is opposed. There is a replying affidavit by sworn by Lui Qing Hua the project manager of Red Hill Project-Waiyaki Way on Peponi Road Westlands, on the 24th July 2018.

6. The application was canvassed by oral submissions on the 31st October 2018.

7. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures. I have considered the oral submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

8. There is no doubt that there is a consent order dated 16th June 2017. The main contention seems to be the manner in which the said order was extracted.

Order 21 Rule 8 (2) of the Civil Procedure Rules provides that:-

“Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly”.

9. Sub Rule 4 provides that:-

“On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties”.

10. It is the defendant’s/applicant’s contention that they were not served with a draft decree and or order for approval. I have gone through the replying affidavit of Lui Qing Hua the project manager and the same does not contest the defendant’s/applicant’s position.

In the case of **Rono Limited vs Caltex Oil Limited Hccc No 1388 of 1992 Mbaluto J** held that:-

“..... as far as the instant case is concerned what the law provides is clear, direct and cannot be the subject of any doubt, reasonable or otherwise. It provides that in event of disagreement the issue of a decree is to be referred to the judge who he heard the case for settlement and the deputy registrar has no jurisdiction to certify or approve a disputed decree. The effect of that provision is that the decree certified by the deputy registrar, in this matter was an incurable nullity and it matters not that it is the subject of an appeal to the Court of Appeal”

11. I am guided by the above authority. In the instant case the draft order was not presented to the defendant/applicant for approval.

12. I have gone through the lease agreement dated 8th March 2016 clause 1.8 provides that:-

“The tenant shall use the existing access road passing through the two parcels of land and shall prevent any new roads, footpaths or other encroachments or casements from being made in or acquired over any parts of the property except with the consent of the landlord in writing.”

13. I have considered the submissions in regard to prayer (6) of the application. I have considered the circumstances prevailing. I find it is premature to seek the plaintiff/respondent’s manger to be cited for contempt at this stage.

I find that the order was extracted without the approval of the defendant/applicant

14. In conclusion I find merit in this application and grant the orders sought namely:

(a) That a temporary injunction be and is hereby issued restraining the plaintiff/respondent, its servants, agents and others acting on its behalf and each of them from entering upon or trespassing on Land Reference 28487 and 28686 (original numbers 3859 and 3860), Peponi Road, Nairobi or any part or parts thereof except in accordance with strict compliance with the consent order made herein on 16th June 2017 pending the hearing and determination of this suit.

(b) That the plaintiff/respondent, its servants, agents and other acting on its behalf and each one of them be and are hereby directed to vacate and cease to utilize or be in possession of any part or parts of land reference numbers 28487 and 28686 (original numbers 3859 and 3860), Peponi Road, Nairobi except the portion thereof which plaintiff/respondent is allowed to be in possession of under the said consent order made on 16th June 2017.

(c) That the sealed order herein signed and certified by the Deputy Registrar on 20th June 2017 is hereby struck out as being a nullity.

(d) That the draft formal order prepared by the defendant/applicant in accordance with the recorded order made by Lady Justice Bor be forwarded for approval by the plaintiff/respondent and thereafter the Deputy Registrar to sign and seal the same.

(e) Costs be in the cause.

It is so ordered.

Dated, signed and delivered in Nairobi on this 20TH day of December 2018

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the defendant

.....Court Assistant