



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 137 OF 2011

MAHESH KANTILAL SANGRAJKA.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAY AUTHORITY...DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant moved this Court vide the application dated 15th October 2015 brought under the provisions of order 40 of the Civil Procedure Rules and section 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act and articles 62, 64 & 159 of the Constitution of Kenya. The applicant seeks the following orders ;

- (a) This application be certified urgent and heard ex-parte on priority basis.**
- (b) A temporary injunction which was granted on the 15th March, 2012 to last for four (4) months which lapsed on 16th July, 2012 be granted and/or extended for a further one (1) year to allow the Honourable Court to decide disputed issues.**
- (c) Pending the grant of the order sought herein at (b) above, there be a temporary injunction ordered by this Honourable Court directed at the Defendant/Respondent, its agents, servants, officers and or any other agency acting on the authority of the Defendant restraining them severally and jointly from demolishing damaging, trespassing and/or in any manner interfering with the plaintiff's quiet enjoyment of the property in dispute to wit; LR NO. MN/V/1720 situate at Miritini pending the hearing and final disposal of this application interpartes.**
- (d) Pending the grant of the order sought herein at (b) above, there be a temporary injunction ordered by this Honourable Court directed at the Defendant/Respondents, its agents, servants officers and or any other agency acting on authority of the Defendant restraining them severally and jointly from demolishing, damaging, trespassing and/or in any manner interfering with the plaintiff's quiet enjoyment of the property in dispute to wit; LR NO. MN/V/1720 situate at Miritini pending hearing and determination of this suit.**
- (e) Costs of this application be costs in the cause.**

2. The application is supported by several grounds listed on the face of it and the affidavit of the plaintiff. The brief facts of the applicant's case is that the defendant's agent visited his premises and alleged the same had encroached on a road reserve. The defendant ordered him to demolish it upon which he moved the Court seeking for orders of injunction. The Court granted the injunction on 15th March 2012 and an order issued on 4th April 2012.

3. The injunction issued was limited for a period of four (4) months within which time the suit ought to have been set down for hearing. The applicant deposed that he did not set down this suit for hearing within the time specified because the defendant applied to amend its defence. The applicant also deposed that as the Court process was going on, the parties put in motion the process of negotiating with the last communication being 25th May 2015. That failure to litigate in time was caused by factors beyond the applicant's control to grant orders sought.

4. The application is opposed by the defendant vide grounds of opposition and replying affidavit of one Thomas Gacoki. Mr Gacoki deposed that the Court gave injunction to last for 4 months to balance the private interests of the plaintiff vis-a-vi the wider public interest. He also deposed that the amendment of their pleadings took place between July – October 2012. That the defendant made a proposal to settle this matter in April & August 2012 so as to save time but the applicant did not reply until May 2015. He deposed that the delay in prosecuting this suit has not been caused by negotiations as there was none going on. He urged the Court to dismiss the application as extension of the injunction will only serve to prejudice public interest.

5. In the grounds, the defendant states that the applicant has been indolent for over 3 years. Secondly that the application is wrong in law as it seeks variation of a discretionary remedy given for a limited time. Lastly that the orders sought would violate the provisions of the Civil Procedure Act.

6. Parties filed written submissions in arguing the application. The applicant submitted on the facts contained in his application & supporting affidavit. He added that the Court should consider the difficulty in getting dates from the land registry due to back log of land cases. He urged the Court to allow the application. The Respondent on his part submitted that there is no order to extend the initial having lapsed. He also submits that the issuance of new injunction is res judicata on account that both parties were hired on merits.

7. The Respondent referred the Court to the decisions of **Come to Africa Safaris Ltd vs Kenya Ports Authority (2015) eKLR** in which Aburili J. expressed herself thus, "*Courts should not be used to archieve parties' pleadings forever. That delay defeats equity.*" The Respondent also cited **Abigael Gamao vs Mwangi Theuri (2013) eKLR** where Munyao J held that a Court of equity has always refused its aid to state demands where a party slept on his rights.

8. I have considered all the issues raised in the application and the submissions. It is not without a doubt that the injunction issued on 4th April 2012 lapsed in August of 2012. Is there anything for this Court to extend 3 years down the line? On this I need not belabour the point. There was no order in force when this application was filed on 15th October 2015. The issues raised by the applicant why the matter has not been prosecuted hence the need to extend the orders of injunction should have been raised before the expiry of the 4 months. My simple answer is that there is nothing for me to extend therefore prayer (b) of the motion fails.

9. The applicant also sought the Court to issue new orders of injunction in the event the earlier orders are not extended. I note from the Court record that the parties herein were served by the Court for mention for direction during the service week termed "*justice at last.*" This was in respect of inactive files. In my view it is the mention notice from the Court which woke up the applicant from his slumber to bring up the present application.

10. The Respondent has deposed that in order to save time, it wrote to the applicant in April and August 2012 to attempt an out of Court settlement. The applicant did nothing until May 2015 when they made

Counter – proposals. The applicant submitted that they did not set down the case for hearing because of back log in land cases. There is no evidence that he did write to Court requesting for a hearing date and was told none was available. The injunctive relief is an equitable remedy which requires that he who seeks the same must come with clean hands. Secondly, equity aids the vigilant and not the indolent.

11. As pointed out clearly by the Respondent, the applicant has been extremely indolent in litigating this matter. The Judge who granted the initial injunctive order was conscious of the public interest in this matter hence the reason she gave a limited time frame for parties to try to have this matter determined. Instead the applicant went to slumber and now wants this Court to issue new injunctive reliefs. In as much as it is important to preserve the subject matter of dispute, it is also unconscionable to aid a party who chooses to sleep on his rights. For the reason that the applicant has been indolent, I decline to grant new injunctive reliefs as sought in prayer (c) & (d) of the application.

12. From the foregoing reasons I do reach a finding that this application is without merit and hereby dismiss it with costs to the Respondent.

Dated and signed this 9th day of March 2017.

A. OMOLLO

JUDGE

Delivered at Mombasa this 10th day of M arch 2017

C.K.YANO

JUDGE