



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC.NO.250 OF 2017

JAMES WAITHAKA WACHIRA.....PLAINTIFF/RESPONDENT

=VERSUS=

DIPTI BHATT.....DEFENDANT/APPLICANT

R U L I N G

The matter coming up for determination is the Notice of Motion dated **2nd August 2016** , brought by the Defendant/Applicant herein brought under Order 40 Rules 6 and 7, Order 8 Rules 1(6) and 2 Order 10 Rule 2, Order 12 Rule 7, Order 2 Rule 15 and under the inherent jurisdiction of the Court. The applicant has sought for these orders.

I. That the Court be pleased to set aside the proceedings of 19th March 2015, and the injunction that was issued by the court on the same day together with all other consequential orders.

II. That the Court be pleased to strike out the suit with costs to the Defendant for the reason that the suit has already abated by operation of law.

III. That the court be pleased to order the Land Registrar to reverse the injunction orders registered against Title No IR 56803 as entry No. 3.

IV. The costs of the application be provided for.

The application is premised on the grounds stated on the face of the application and on the affidavit of **Dipti Bhatt**. These grounds are:-

I. The Plaintiff filed the above suit against the Defendant on 29th October 2014, together with an application for injunction dated 28th October 2014 filed on the same day.

II. That both the suit and the application for injunction were not served upon the Defendant.

III. The Defendant only learnt about the suit on 20th July 2016, when she obtained a search on the suit property.

IV. That the Plaintiff has never served the Defendant with summons despite the same having been issued on 30th October 2014, with result that summons have expired.

V. That the Plaintiff did not serve the application of injunction on the Defendant as alleged in the affidavit of service of one Caroline Wanjiku Boro

In the supporting affidavit, **Dipti Bhatt** averred that she is the registered owner of the suit property LR.No.14870/332. Further that on or about **14th July 2016**, she applied for a routine official search of the property and received the search results on **20th July 2016**, when she was surprised to learn that a court order was issued on the above stated land and registered against the title on **12th November 2014**. It was her allegation that she was not aware of the above stated suit until **20th July 2016**, when she received the search results and she immediately instructed her advocate to peruse the court file. She denied that she was ever served with the application as sworn by one **Caroline Wanjiku Boro** in her affidavit of service. It was her contention that the Plaintiff designed a scheme to file the suit and proceed in her absence by causing the process server to file a false affidavit of service so as to proceed ex parte and obtain adverse orders in her absence. Further that the court issued Summons on the **30th October, 2014**, but the same were never served upon the Defendant and she became aware of the suit on **20th July 2016**.

She averred that she has been informed by her advocate that the suit has abated for failure to serve the Summons and to fix the main case for hearing within one year and therefore the suit should be struck out as being **scandalous, vexatious** and **an abuse of the court process**. She urged the court to allow her application.

The application is opposed and **James Waithaka Wachira** swore his Replying Affidavit dated **18th January 2017**, and averred that the Defendant was properly served with court process herein and the Affidavit of Service filed on **19th March, 2015**, is comprehensive and exhaustive to that regard. He also averred that he was present when the Defendant was personally served by the process server after he pointed her out. That the application is an afterthought meant to reverse the merited injunction. He urged the court to dismiss the application.

The said application was canvassed by way of written submissions which this court has now carefully considered. The court has also considered the pleadings in general and the relevant provisions of law and the court makes the following findings;

There is no doubt that the Plaintiff filed this suit on **28th October, 2014**, and simultaneously to the Plaintiff, he also filed a Notice of Motion application even dated and sought for injunctive orders. The matter was certified urgent and interim orders were granted in terms of prayers **No. 2** and **4** of the said application. The matter was set for hearing of the stated Notice of Motion on **19th March, 2015**. On this date, the Defendant was absent and the court noted that the affidavit of service sworn by **Caroline Wanjiku Boro** and filed in court on **19th March 2015** was proper. Further the court noted that the said application was not opposed and allowed the same entirely in terms of prayers **No.3** and **4**.

From the Court record, it is evident that the order of the court was extracted and registered on the certificate of title, on **12th November 2014**

The Defendant has averred that she was not aware of the said court

order and/or proceedings of the court until **20th July 2016** when she happened to carry a search on the title and noted that an order of injunction had been registered on the said title. She subsequently instructed her advocate to file the instant application.

The application herein is anchored under Order 40 Rules 6 and 7. Rule 6 of the above order states that:

“when a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason, the court orders otherwise”.

Further Rule 7 provides that:

“Any order of injunction may be discharged or varied or set aside by the court on application

made thereto by any party dissatisfied with such order”

The Defendant has alleged that she is dissatisfied with the court order issued herein because she was not served with the said application and it should therefore be set aside. The court has noted that under Rule 7, the court has discretion to discharge any order of injunction or set them aside. However the said discretion must be executed judicially. The court has noted that the orders herein in question were issued on **19th March 2015**. This application was not filed until **4th August, 2016**. By then the said order had been extracted and registered on the title. The Defendant alleged that she was not served with the application as alleged by **Caroline Wanjiku Boro** in her Affidavit of Service sworn on 18th March 2015. However the Defendant has not sought to cross examine the said Process Server on the contents of the affidavit. It is not sufficient to deny service, but the Defendant should have provided proof that she was indeed not served with the application in issue.

This application of discharge and setting aside of injunction order is brought to court after one year. The said order issued by the court has already been extracted and registered on the title. The instant application was not filed within a reasonable time. The court finds that the Defendant/Applicant has not shown any good reason why the court should discharge the order of injunction which is already registered and in any event, it is meant to preserve the suit property.

On the other issue that the suit has not been prosecuted within a period of 12 months from the date of issuance of the injunction orders, the court finds that the law is very clear on that. If the suit is not prosecuted, the injunction order lapses automatically and the Defendant need not come to court for that order.

However, the court has noted that prior to **4th August 2016**, the

Defendant had not taken part in this proceedings. Defendant came on

record and sought for setting aside of the orders in force. The court finds that since the injunction was issued in order to preserve the suit property, then Defendant should seek leave to file her defence so that the suit can be prepared for hearing and be decided on merit while the suit property is

being preserved.

On the issue of ordering the Land Registrar to reverse the injunction orders registered against the title, the court finds that the said order can best be issued after evidence has been taken by the court and the suit be decided on merit.

Having now carefully considered the instant Notice of Motion dated **2nd August 2016**, the court finds it not merited and the same is dismissed entirely with costs being in the cause.

However, the Plaintiff is directed to set the suit down for hearing within the next 60 days from the date of this Ruling. Failure to do so, the court will issue **Notice to Show Cause** why the suit should not be dismissed for want of prosecution.

It is so ordered.

Dated, signed and delivered this 12th June, 2017.

L. GACHERU

JUDGE

12/6/2017

Before: GACHERU J.

Court Clerk – Rachael

Plaintiff/Respondent – Absent

Defendant/Applicant – Absent

Court – Ruling read in open court in the absence of the Counsels for the parties herein though date was taken in court in the presence of the representatives for the parties advocates.

L. GACHERU

JUDGE

12/6/2017