



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 203 OF 2009

THOMAS GATURA GATHU..... PLAINTIFF

VERSUS

JORETH LIMITED.....1ST DEFENDANT

KENNETH MBOGO MARARO2ND DEFENDANT

KAMIRI THUO.....3RD DEFENDANT

RULING

Background

1. The plaintiff instituted this suit through a plaint dated 30/4/2001 seeking among other prayers, an order of specific performance, to compel the 1st defendant to transfer **LR No. 13330/275** to the plaintiff. The plaintiff alleges that on 13th February 2008, he entered into a sale agreement with the 1st defendant for the purchase of LR No. 13330/275 (*the suit property*). He contends that despite meeting his part of the bargain, the 1st defendant did not transfer the suit property to him. He instead sought to rescind the agreement and dispose the property to the 2nd and 3rd defendants.

2. The 1st defendant in a defence dated 8th March 2010 denies the plaintiff's claims and in particular, denies entering into a sale agreement with the plaintiff. The 2nd and 3rd defendants in their statement of defence dated 9th March 2010 state that they purchased the suit property from Thome 5 Limited on 24th May 1994 and that as at the time of filing of this suit, the 1st defendant who had taken over ownership from Thome 5 Limited was in the process of completing the sale transaction.

3. On 28th February 2013, the plaintiff and the 1st defendant entered into consent to compromise the suit. The terms of the consent were that the plaintiff was the bonafide purchaser for value of the suit property; an injunction entered herein on 5th February 2010 would be vacated and that the 1st defendant would transfer the suit property to the plaintiff. The 2nd and 3rd defendants objected to the adoption of the consent through a replying affidavit sworn by the 2nd defendant on 4th April 2014. In a ruling delivered on 16th May 2014, the court [*Mutungu J*] found that the plaintiff was at liberty to compromise his suit with all or any of the defendants and proceeded to adopt the consent as an order of the court.

The Present Application

4. What is now before the court is the 2nd and 3rd defendants' Notice of Motion dated 29/5/2014 in which the said defendants are seeking to review or set aside those orders. They have prayed for the following orders:

i. *The orders of the court granted on 16th May 2014 be reviewed and set aside or vacated.*

ii. *A temporary injunction be issued restraining the 1st defendant and the plaintiff from trespassing onto, alienating, dealing, selling, transferring, committing acts of waste or in any way dealing with land known as LR No. 13330/275(the suit property)pending the hearing and determination of this suit.*

iii. *Costs of the application be provided for.*

5. The application is supported by the 2nd defendant's affidavit sworn on 29th May 2014. The principal ground upon which the application is premised is that the consent order which discharged the injunction order earlier given exposes the 2nd and 3rd defendants to total loss as far as their claim is concerned without hearing them on merits. The 2nd and 3rd defendants contend that, in view of the 1st defendant's change of position which endorses the plaintiff as the bonafide purchaser of the suit property, it had become necessary for them to amend their defence and include a counterclaim, and that there was a pending application in that regard.

6. The 2nd and 3rd defendants sought a review of the order adopting the consent on the basis that they applied for leave to amend their defence, file a counterclaim and join Thome 5 Limited in this suit and further, that the court had stated in its ruling dated 5th February 2010 that there were issues that needed to be determined through trial.

7. The present application is opposed. The 1st defendant filed grounds of objection dated 17th June 2014 in which it states that the application herein is bad in law, misconceived and an abuse of the court process. The 1st defendant contends that the application is frivolous and vexatious since the draft amended defence and counterclaim did not raise any claim against the proposed third party. Further, the 1st defendant argues that the application is an attempt by the 2nd and 3rd defendants to have the court sit on appeal against the decision of a judge of the same court because the issues raised, were raised and determined in the Ruling of 16th May 2014.

8. The plaintiff in his replying affidavit sworn on 4th July 2014 contends that the application is fatally defective, scandalous and vexatious in so far as it seeks orders which cannot be availed to the 2nd and 3rd defendants. The plaintiff states that the order sought to be reviewed had not been appended to the application and further, that an order of injunctive relief was not available to the applicants as it was not part of their pleadings on record.

9. The plaintiff contends that the application raises issues which were determined by the court in rulings delivered on 5th February 2010 and 16th May 2014 and is therefore asking the court to sit on appeal against its own findings. The plaintiff contends that the applicants' claim, if any, lay against Thome 5 Limited who is not party to this suit. It is the plaintiff's contention that the plaintiff as the initiator of the suit had every right to compromise the suit as it did and that the application by the 1st and 2nd defendants was an afterthought aimed at delaying the conclusion of the suit.

10. The application was canvassed by way of written submissions. The 2nd and 3rd defendants filed submissions dated 10th September 2015 where they argued that **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules** provide the substantive and procedural law for review. The 2nd and 3rd defendants submitted that by seeking review, they were seeking equity and fairness to avoid an injustice which had been visited upon them as they had been condemned unheard. Counsel for the 2nd and 3rd defendants referred the court to the case of **PATEL V E.A. CARGO HANDLING SERVICE LTD, (1974) EA 75** where it was stated that the court has unfettered discretion to vary an *ex parte* order provided it does so on such terms as may be just. Reliance was also placed on the case of **MOHAMED ALI MURSAL V SAIDIA MOHAMED & 2 OTHERS (2013) EKLR.**

11. It was submitted for the 2nd and 3rd defendants that the law makes provision for a party to apply for review where sufficient reason has been shown. The court was referred to the cases of **WANGECHI KIMITA & ANOTHER V MUTAHI WAKIBIRU, (1982-88) 1 KAR 977** as cited in **THE OFFICIAL**

RECEIVER AND LIQUIDATOR V FREIGHT FORWARDERS KENYA LTD, (2000) eKLR for the submission that “*any other sufficient reason*” need not be analogous with the other grounds specified in the Order. The case of **MOSES WACHIRA V NIELS BRUEL & 2 OTHERS, (2013) eKLR** was also relied on in support of the applicants’ contention that condemning them unheard was in breach of the principles of natural justice.

12. The plaintiff in submissions dated 10th March 2017 makes reference to the provisions of **Order 45 Rule 1 of the Civil Procedure Rules** and argues that there is no evidence of new and/or important evidence. He further argues that there is no error apparent on the face of the record. Counsel for the plaintiff also argues that no steps had been taken to have the 2nd and 3rd defendant’s application for leave to amend defence heard. Further, the plaintiff argues that the said defendants are seeking to introduce a new party after a lengthy and inexplicable delay. The plaintiff relies on the maxim ‘*equity does not favour the indolent*’ and submits that any claim which the 2nd and 3rd defendants have lies against Thome 5 Limited. Counsel for the plaintiff submits that there being no nexus established between the 1st defendant, the plaintiff and Thome 5 Limited, the application to amend defence had very limited chances of succeeding. Further, it was submitted that it is trite law that an order in respect to which an application for review has been preferred must be annexed and that failure to do so was fatal.

13. In respect to the prayer for injunction, it was submitted that the 2nd and 3rd defendants have no rights in the suit property as they were not the registered owners and were not in possession and further, that the said defendants had not proved that they were bonafide purchasers for value. The plaintiff submitted that an injunctive relief must be specifically pleaded. Counsel argued that the interlocutory injunction herein predicated on a future event being hearing and determination of the application for leave to amend the defence was an afterthought and an abuse of the court process. Further, that having failed to dislodge the ruling of 5th February 2010, the applicants would not suffer loss or damages caused by the plaintiff or 1st defendant.

14. The plaintiff also submitted that the issues raised in the application having been heard and determined in the rulings delivered on 5th February 2010 and 16th May 2014 were *res judicata* and offended **Section 7 of the Civil Procedure Act**. Counsel argued that the only forum where the same issues may be canvassed afresh was in appeal and not review and reliance was placed on the cases of **POP-IN (KENYA) LTD V HABIB BANK AG ZURICH, (1990) KLR 609** and **ORCHID PHARMACY LTD V SOUTHERN CREDIT BANKING, (2009) eKLR**.

15. The 1st defendant in submissions dated 4th April 2016 argues that whereas their claim was for a specific parcel registered in the name of the 1st defendant, the 2nd and 3rd defendant’s claim was against Thome Farmers Number 5 Ltd who was not party in these proceedings. Counsel argues that the 2nd and 3rd defendant’s claim against Thome Farmers Number 5 Ltd could be filed as a separate suit without involving it or the plaintiff.

16. It is further submitted that the orders sought to be reviewed were consent orders adopted by the court. The 1st defendant relied on the cases of **BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND V MICHEAL MWALO, CA NO. 293 OF 2014** for the submission that a consent order can only be set aside on grounds of fraud, collusion or violation of public policy. Counsel contended that the 2nd and 3rd defendants had not tendered any evidence showing illegality in the consent giving rise to the orders of 16th May 2014 and therefore, that there was no basis upon which the consent order should be set aside. Lastly, it was submitted that the applicants were trying to impugn the ruling of 16th May 2014 without filing a proper appeal.

Issues for determination

17. There are two issues to be determined in the present application. The first issue is whether the application satisfies the criteria for review under **Section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules**. The second issue is whether a temporary injunction should issue as prayed.

18. The jurisdiction to grant an order of review is set out under **Section 80 of the Civil Procedure Act** as

follows:

“Any person who considers himself aggrieved –

a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

b) By a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

19. **Order 45 of the Civil Procedure Rules** lists specific grounds upon which an application for review can be made thus:

a) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed;

b) Where there is a mistake or error apparent on the face of the record; and

c) For any other sufficient reason.

20. The present application sets out the following as the grounds for review:

a. That the 2nd and 3rd defendants have now applied for leave to amend their defence to include a counterclaim and enjoin Thome No. 5 Limited as a 3rd party to the suit.

b. That one of the consent orders which was adopted by the court on 16/5/2014 directed the 1st defendant to forthwith effect registration of the suit land in favour of the plaintiff. In the event that the execution of the orders is not herein stayed, the 1st defendant will transfer the suit property to the plaintiff and the objects of this application and the application for leave to amend the defence shall be defeated.

c. That the terms of the consent between the plaintiff and 1st defendant if executed would deprive the 2nd and 3rd defendants of their rights to the suit land.

d. That the 2nd and 3rd defendants would have been condemned unheard.

e. That it is in the interests of justice for the court to grant a party to a suit, to the largest extent possible, the opportunity to be heard conclusively before its rights in any cause are determined.

f. That it is just and equitable in the circumstances for this honourable court to grant the orders being sought.

21. The phrase ‘any other sufficient reason’ in **Order 45 Rule 1 (1)** was interpreted by the Court of Appeal in **PANCRAS T. SWAI V KENYA BREWERIES LIMITED NAIROBI, CA NO. 275 OF 2010** as follows:

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In SARDER MOHAMED V. CHARAN SINGH NAND SING AND ANOTHER, (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In SHANZU INVESTMENTS LIMITED V

COMMISSIONER FOR LANDS, (CA No. 100 of 1993) **this Court with respect, correctly invoked and applied its earlier decision in WANGECHI KIMATA & ANOTHER V CHARAN SINGH, (C.A. No. 80 of 1985) (unreported) wherein this Court held that:**

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

22. The 2nd and 3rd defendants have argued that the consent order deprives them the right to the suit property without giving them a hearing. This position is incorrect because prior to the adoption of the consent, the 2nd and 3rd defendants were afforded an opportunity to be heard on the grounds which they have raised in the present application. Indeed, they even filed an affidavit sworn by the 2nd defendant on 4th April 2014. In the said affidavit, the 2nd defendant averred that the proposed consent was prejudicial to their interest and that the consent had the effect of determining the issues in the suit without giving them a hearing. The court considered the merits of the 2nd and 3rd defendants’ objections and found that the 2nd and 3rd defendants had not made a claim against the plaintiff or the 1st defendant, and that the plaintiff had a right to withdraw or compromise the suit against all or any of the defendants.

23. In my view, the 2nd and 3rd defendants are faulting the court’s failure to appreciate the effect of the consent order on their claim. The grounds relied on in the present application were before the court which adopted the consent. The applicants are basically attempting to have a second bite at the cherry. Applications for review must be treated with great caution so as not to sit on appeal of a decision of the same court or permit re-litigation of an issue. See **KAKUZI LIMITED V KENYA PLANTATION & AGRICULTURAL WORKERS UNION, (2014) eKLR**. In my view, the applicants’ proper forum of redress is an appeal against the ruling allowing the adoption of the consent.

24. I now turn to the question as to whether the 2nd and 3rd defendants are entitled to an order of temporary injunction. The effect of the consent dated 28/2/2013 was to compromise and settle the suit herein between the plaintiff and the 1st defendant. An interlocutory injunction by a defendant under **Order 40 of the Civil Procedure Rules** and in the manner framed by the applicant ought to be predicated upon a counterclaim and ought to satisfy the criteria set out in **GIELLA V CASSMAN BROWN**. At this point, the 2nd and 3rd defendants do not have a counterclaim directed against any specified party or parties. While I fully appreciate the fact that in special circumstances the court may grant a conservatory or preservative order under **Order 40 of the Civil Procedure Rules** in the absence of a counterclaim, the application before me seeks a restraining order as opposed to a conservatory order. Secondly, considering the history of this dispute, it would be inappropriate for the court to grant an interlocutory injunctive order in favour of the 2nd and 3rd defendants in the absence of a counterclaim.

25. The upshot of this ruling is that the Notice of Motion dated 29/5/2014 by the 2nd and 3rd defendants is dismissed for lack of merit.

Dated, signed and delivered at Nairobi on this 31st day of October, 2017.

B M EBOSO

JUDGE

In the presence of:

Halima Abdi: Court Assistant