Owino, Ndoga & Okemwa (Suing in their Representative Capacities as the Secretary, Chairman and Treasurer Respectively of Tassia Welfare Association) v Board of Trustees National Social Security Funds & another (Environment & Land Case E161 of 2023) [2024] KEELC 967 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 967 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E161 OF 2023

JA MOGENI, J

FEBRUARY 28, 2024

BETWEEN

JOHN PATTERSON OWINO, ELIJAH NDOGA & AGNES OKEMWA (SUING IN THEIR REPRESENTATIVE CAPACITIES AS THE SECRETARY, CHAIRMAN AND TREASURER RESPECTIVELY OF TASSIA WELFARE ASSOCIATION) .... PLAINTIFF

AND

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUNDS .... 1ST DEFENDANT

NAIROBI CITY COUNTY .... 2ND DEFENDANT

RULING

1. The applicant moved the court through Notice of Motion dated 15/12/2023 and brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 7 of the *Civil Procedure Rules*) seeking the following orders: -

   a. [Spent]

   b. That pending hearing and determination of this Application, this Honorable Court be pleased to stay the ex-parte injunctive orders issued on 27th November 2023 and in substitution thereof, issue an order of status quo over the suit properties.

   c. That the Honourable Court be pleased to discharge the Orders issued by Lady Justice Mogeni on 27th November, 2023 and in substitution thereof issue an order of status quo over the suit properties pending the hearing and determination of the suit.

d. That the costs of this Application be provided for.

2. The order complained about is the one that was issued by this court on 27/11/2023 issuing an injunction pending the hearing and determination of the application filed by the plaintiff/applicant dated 7/11/2023. When the parties appeared in court for the hearing of the application dated 7/11/2023 on 27/11/2023 the court was satisfied that the application was served upon the respondents on 16/11/2023 and they prayed for granting of the injunctive orders pending the hearing of the application.

3. Counsel for the 2nd defendant though served had not filed any response. The 1st defendant chose not to attend court at all despite being served. The applicant served all parties with the application and had filed an affidavit of service dated 24/11/2023.

4. The application is supported by an affidavit sworn on 15/12/2023 by Christine Ireri County Attorney of the 2nd defendant where she deposed that suit properties are public properties belonging to the 2nd defendant/applicant pursuant to surrender by the 1st defendant/respondent. That the 2nd defendant/applicant holds the surrendered suit properties in trust for the people of Tassia, Embakasi and the entire populace of Nairobi City County.

5. That the injunctive orders as issued have the effect of evicting the applicant from the suit premises and this impairs the ability of the applicant to manage the suit properties by virtue of being the registered owner of the suit properties.

6. That the said injunctive orders have the effect of denying the public and more particularly the residents of Tassia from enjoying the services offered by the public utilities existing on the suit premises on account of striping the applicant of its role in managing the public properties. That the court by issuing the ex parte orders condemned the applicant unheard.

7. She finally stated that the public interest in the matter does not favour any orders that would curtail the ability of the applicants to manage the suit properties. That the plaintiff/respondent stands to suffer no prejudice granted.

8. The application was opposed through the replying affidavit deponed by John Patterson Owino dated 27/01/2024 and he deponed that the injunction issued on 27/11/2023 was issued after the court was satisfied that the orders should be issued to prevent the fraudulent sub-division of the plots surrendered by the 1st defendant to be utilized by the residents of Tassia Estate. He attached a copy of the certificate of urgency which was received by both parties on 16/11/2023 marked as "JPO1".

9. That following the court appearance on 27/11/2023 where the counsel for the 2nd defendant did not oppose the granting of the injunction by court, the court went ahead and gave directions on how the application dated 7/11/2023 would be disposed of reserving a date for ruling on 29/04/2024. That the 2nd defendant has not opposed the application dated 7/11/2023 by filing a replying affidavit but has chosen to oppose it through this instant application.

10. Further that the plaintiff's application has not been determined on merits since the ruling is scheduled for 29/04/2024. He stated that the 2nddefendant/applicant's application has not defined what status quo is since the issue in the injunction is about the defendants not to continue doing sub-division of the public utility plots reserved for the benefit of the plaintiffs/respondents who utilize he surrendered parcels of land.

11. It is the contention of the plaintiff/respondent that setting aside the injunction will mean that the plots reserved for public utilities will be dished out to third parties and at the time of hearing the main suit they will be unavailable yet the said parcels were reserved for public utilities.

12. Counsel stated further that since the issuance of the injunction the police station, the hospital and schools are functioning optimally without disruptions and that the injunctive orders are not meant to evict the 2nd defendant from public utilities but to protect and preserve the properties already sub-divided which are not part of the hospital, police and school lands.

Submissions

13. This application was disposed of by way of written submissions.

14. Upon perusing the file, at the time of writing this ruling I found that only the plaintiff/respondent filed their submissions to this application. The 1st and 2nd defendants did not file any submissions. The submissions filed by the plaintiff/respondent are dated 21/02/2024. I have considered the said submissions.

Determination

15. It is this court's opinion that the two main issues for determination are whether the applicant is entitled to a stay and/or discharge of the orders issued on 27/11/2023 and whether the applicants were properly served with the application dated 7/11/2023. The applicants seek a stay and what he calls a discharge of the interim orders granted on 27/11/2023 pending the hearing and ruling of the application filed by the plaintiff on 29/04/2024. In my understanding the discharge is like a review of the court order.

16. The 2nd respondent/applicant has sought for stay in the place of the interim equitable relief which was granted at the discretion of the court on 27/11/2023 when the Counsel for the plaintiff/respondent a Mr. Wesonga and the Counsel for the 2nd respondent, a Mr Kirpop were in court. The said discretion must always be exercised judicially.

17. The interim orders were granted pending the hearing and determination of the application filed by the plaintiff which already has a ruling dated reserved for 29/04/2024.

18. The 2nd respondent/applicant herewith has stated that they are managing the suit properties on behalf of the public and injunctive orders are tantamount to evicting them from the suit premises to the detriment of the public services they are overseeing for provision to the public. The applicant has therefore urged the Court to discharge the interim orders in force and instead replace them with status quo orders.

19. What is not in dispute is that both the plaintiff/respondent and 2nd respondent/applicant are laying claim to the public utility suit properties which they each want preserved but each party is accusing the other of meddling in the impugned suit property. The dispute herein is over the ownership and management of the suit property. The said ownership can only be resolved by calling of witnesses in the main trial. The disputed facts herein cannot be resolved by affidavits evidence. The Court at this stage is not supposed to determine the very issues which will be determined at the main trial through affidavit evidence. All the Court is entitled to do at this stage is to determine whether the applicant is

deserving of the sought orders using the usual criteria. See the case of *Edwin Kamau Muriu vs Barclays Bank of Kenya Ltd* Nairobi HCCC No. 1118 of 2002, where the court held that:

> " In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria---'

20. With regard to the application for stay, in the case of *Masisi Mwita v Damaris Wanjiku Njeri* (2016) eKLR, the Court held that:-

> " The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another v Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that: -
>
> > "The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. [Emphasis mine].

21. Essentially this should be an application for stay of execution pending appeal under Order 42(6) of the *Civil Procedure Rules* but instead it is an application for stay made under the Order 40 Rule 7 the *Civil Procedure Rules*.

22. I actually find this application to be mischievous and misconceived and that it actually lacks merit. It is mischievous and misconceived because instead of applying for a stay of execution pending appeal it seeks orders which essentially can only be granted by the Court of Appeal exercising its jurisdiction under the Rules 5(2)(b) of the *Court of Appeal Rules*. The only power vested in the High Court under the *Appellate Jurisdiction Act* falls under Section 7 which provides inter alia that –

> " the High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal ....".

23. Notably though the application before me is not one for extension of time to give Notice to Appeal and if the Applicants were desirous of obtaining the orders Under Rule 5(2)(b), 42(1) and 47(1) and (2) of the *Court of Appeal Rules* then they ought to have made their application in the Court of Appeal as provided under those rules, a fact which is within the knowledge of their counsel.

24. The above notwithstanding it is my finding that whichever way one looks at the application whether as an application for stay of execution pending appeal or as an application for a temporary injunction the same has no merit as the Applicants have not satisfied the requirements for grant of either of those orders.

25. In respect to stay of execution pending appeal Order 42 Rule 6(2) of the *Civil Procedure Rules* sets out three conditions that must be satisfied before a stay is granted. These are: -

    a. "the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

    b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

26. While the 2nd defendant/applicant in this case have complied with one of the above conditions which is that their application was filed timeously, they have not brought any evidence to satisfy this court that they stand to suffer substantial loss should this application be refused.

27. In the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held that:

> " ... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them."

28. Further, in the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, the Court held that:-

> " The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another v Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-
>
>> "The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.[Emphasis Added]".

29. The applicant in her supporting affidavit states that they were condemned and sanctioned unheard and are highly prejudiced by the orders. However, she has not shown the specific substantial loss she stands to suffer. It is my considered opinion that proof of substantial loss needs much more than merely stating that one will be highly prejudiced. She should have gone further to explain the nature of the loss that she is likely to suffer and therefore, the said condition, which I believe should be cornerstone of her applications for grant of a suspension of the orders, has not been fully proved.

30. Besides, the 2nd defendant/applicant has also not clearly exhibited any probable defence to the action which would have greatly helped in their application for stay of the order. The applicants do not therefore deserve the stay order sought.

31. The above argument would also apply in respect of the temporary injunction. The Applicants have clearly not demonstrated that they are likely to suffer loss that cannot be compensated by an award for damages. I say so given that the temporary injunction I am considering here is one under Order 40 of the *Civil Procedure Rules* and not under Rule 5(2)(b) of the *Court of Appeal Rules* which gives that court discretion to grant an injunction, a stay of execution, or a stay of any further proceedings on such terms as the court may think just.

32. Moreover, a temporary injunction under Order 40 of the *Civil Procedure Rules* can only be granted under the circumstances set out in Rules 1 and 2(1) none of which apply to this case.

33. As the Applicants have not satisfied the criteria for either a stay of execution or a temporary injunction their application is not merited.

34. I have also noted that the applicant filed this application under Order 40 Rule 7 and sections 1A, 1B and 3A of the *Civil Procedure Act*.

35. Order 40 Rules 7 provides that

> " Any Order for injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order."

36. The order for temporary injunction herein was issued on 27/11/2023. The 2nd Defendant seemed to have been dissatisfied with the said order. The applicants filed after a period of three weeks on 15/12/2023, for stay and or discharge. It is settled law that an interlocutory injunction will be set aside or discharged if it has been obtained by means of misrepresentation or concealment of the material facts.

37. A party seeking variation and/or discharge of such orders bears the burden of proving that the beneficiary thereof concealed/misrepresented some material facts which would have influenced the decision of the court. The court in the case of *Atlas Copco Customer Finance AB vs. Polarize Enterprises* [2016] eKLR distilled the factors that may be considered when faced with a question of discharge of an injunction. The court held as follows:

> " It is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:
>
> a. proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;
>
> b. a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;
>
> c. proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;
>
> d. proof that the sustenance of the injunction would cause an injustice."

38. Further, in the case of Nairobi, Commercial & Admiralty Division HCCC No. 828 of 2010; *Harrish Chandra Bhovanbhai Jobanputra and Anor v Paramount Universal Bank Ltd & 3* others F.Gikonyo, J stated that;

> " I think the discretion under Order 40 rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing an injunction, the Court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the Court would not have issued an injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in the first instance would have affected his judgment on whether or not to give the injunction, then the Court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it's no longer necessary to have the injunction"

39. I have looked at the supporting affidavit of the 2nd defendant/applicant and it is quite evident that the information therein was before the Court at the time of making of an application for granting of prayer 2 by the plaintiffs/respondents. Further, it does not indicate if there is any information, if any, that was concealed and/or misrepresented to the Court.

40. The affidavit filed by the 2nddefendant/applicant explains that the injunctive orders issued by the court have the effect of evicting the Applicant from the suit premises, who is in possession, control, and management of the suit properties by virtue of being the registered owners of the suit property. It is their contention that an injunction would make it difficult for the applicant to manage nor provide services offered by the public utilities existing on the suit premises.

41. The 2nd defendant/applicant has not presented before this court what services are these that the public shall not access if at all. The applicant even alleges that the orders were issued ex parte despite attending court on 27/11/2023 and having been served on 16/11/2023 and proffering no response. On 27/11/2023 when the counsel for the 2nd defendant/applicant, Mr Wesonga, attended court, he stated; -

> " My instructions are that we appear. We need 14 days to file our response. The oral application made I cannot comment since we have instructions"

This was after the plaintiff/respondent sought for grant of prayer 2 of the application dated 7/11/2023.

42. The plaintiffs/respondents through a replying affidavit deponed by John Patterson Owino, secretary of Tassia Welfare Association have countered this by stating that the injunctive orders are not meant to evict the 2nd defendant from managing the suit properties but to preserve the lands that are sub-divided but are not part of the land for schools, police and hospitals.

43. This suit is about the subdivision of surrendered public utility parcels numbers LR No. Nairobi/Block 97, Nairobi/Block 21189 and Nairobi/Block 21190 done in 2009 and which were to be utilized for construction of public utilities. Whereas the 2nd defendant duly utilized the surrendered suit properties for public purposes and constructed a public hospital, police post, a post office, a public school, a chief's camp and assistant county commissioner's camp he did not construct all the properties which were surrendered to it but left others to be constructed later as need arise.

44. That the 1st defendant has started hoodwinking people into purchasing the public properties where public amenities are constructed and are planning with the 2nd defendant approve to approve the plan known as NSSF Tassia II and III Embakasi Regularization plan of 2021 without the consent and approval of residents of Tassia Estate.

45. The 2nd defendant/applicant has not filed any response to the averments neither has the 1st defendant participated in the instant application.

46. I have considered the application, the response made, and the suit as filed. It would be easy to set aside or discharge the orders being challenged if the Plaintiff's/Respondent's conduct in relation to the subject matter of the suit is demonstrated to fall short of the requirements of a court of equity. But when all is considered, there is nothing convincing showing blameworthy conduct on the part of the plaintiff/respondent. If anything, it is doubtful if the 2nd defendant/applicant was denied the right of hearing as it alleges. Records show that the application dated 7/11/2023 was first filed under certificate of urgency on 10/07/2023 and upon certifying the application as urgent, the applicant was directed to serve the application within 5 days from 10/11/2023 and the parties were to appear for further directions on 27/11/2023.

47. Service is actually confirmation that the right of hearing was accorded to the 2nd defendant/applicant. The 2nd defendant/applicant had counsel in court when the matter was mentioned in court for further directions. When the parties appeared on 27/11/2023, the plaintiff/applicant sought for the court to grant prayer 2 of the application which was an injunction pending the hearing of the application.

Counsel for the 2nd defendant stated that they did not have instructions and therefore he could not comment on the application for granting of prayer 2. The court therefore granted the prayer which in essence is a temporary injunction until the hearing of the application dated 7/11/2023 which the parties agreed to canvass by way of written submissions.

48. The upshot of the foregoing is that the 2nd defendant/applicant has not discharged their burden of demonstrating why the injunctive orders should be stayed or discharged. The application herein is therefore dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28th DAY OF FEBRUARY 2024.

………………………

MOGENI J

JUDGE

In the virtual presence of:-

Ms. Njeri Kariuki holding brief for Koceyo for the 1st Respondent

Mr. Mwangi for the Plaintiff/Respondent

None appearance for the 2nd Defendants/Applicant

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE