



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NYERI**  
**ELC CASE NO. 431 OF 2014**  
**(Formerly NYERI HCCC NO. 228 OF 2012)**

**EDWARD NJOROGE MWANGI .....**  
**PLAINTIFF/RESPONDENT**

**-VERSUS-**

**FRANCIS MURIUKI MURAGURI..... 1ST**  
**DEFENDANT/RESPONDENT**

**EPHANTUS WACHIRA NGOCHI..... 2ND**  
**DEFENDANT/APPLICANT**

**CONSOLIDATED BANK OF KENYA LTD..... 3RD**  
**DEFENDANT/RESPONDENT**

**RULING**

1. The notice of motion dated **20th February, 2015**, brought under **Order 40 Rule 6** and **7** of the Civil Procedure Rules, *inter alia*, seeks a declaration to the effect that the injunction granted on 9th March, 2013 in favour of the plaintiff/respondent has lapsed. In the alternative, the applicant prays that the said order be discharged, varied or set aside.
2. The application is premised on the grounds that on 19th March, 2013 the plaintiff/respondent obtained interlocutory orders restraining the 2nd plaintiff/ applicant from enjoying the property known as **Iraini/Kairia/747/27** (the suit property) yet he is the registered proprietor of the suit property; that the statutory period over which the injunction was supposed to subsist (12 months) lapsed without the plaintiff/respondent taking any measures to set down the suit for hearing.
3. Arguing that his rights over the suit property have been violated or infringed and that he continues to suffer loss and prejudice owing to the existence of the order, the plaintiff, who sees no need for continued existence of the orders, urges the court to discharge the orders, set them aside or vary them.
4. The application is supported by the affidavit of the 1st defendant/applicant, **Ephantus Wachira Ngochi**, sworn on **20th January, 2015** in which the grounds on the face of the application are reiterated. Annexed to the supporting affidavit is a copy of the certificate of lease showing that the applicant is the registered owner of the suit property; copy of certificate of search showing that the suit property is charged in favour of the 3rd defendant/respondent and a copy of the order sought to be set aside, varied or discharged.

5. The application is opposed vide the replying affidavit of the plaintiff/respondent sworn on 10th April, 2015. In that affidavit, the plaintiff/respondent gives a brief background of the circumstances leading to filing of the instant suit and issuance of the impugned orders. In this regard, he explained that he was approached by the 1st defendant/respondent to buy the suit property which, at the material time, was charged in favour of the 3rd defendant/respondent. The understanding between him and the 1st defendant/applicant was that the applicant would get the charge in favour of the 3rd defendant/respondent discharged and the suit property registered in his name.

6. In breach of his contractual obligation and promise, after receiving the purchase price from him, the applicant transferred the suit property to the 2nd defendant/respondent. Arguing that the 2nd defendant/applicant obtained title to the suit property fraudulently (colluded with the 1st defendant/respondent registered in his name), the plaintiff/respondent, explains that the 1st defendant/applicant told him that transfer in favour of the 2nd defendant/applicant was wrongfully effected. The 1st defendant/respondent is said to have undertaken to re-transfer the suit property to the plaintiff/respondent but failed to do so.

7. Pointing out that the issues cited above were canvassed before the court leading to issuance of the impugned orders, the plaintiff/respondent argues that granting the orders sought would leave the suit property exposed and render the suit nugatory.

8. Pointing out that some orders were issued against the 2nd defendant/applicant which the applicant is yet to comply with, the plaintiff/respondent argues that the applicant does not deserve the court's audience.

9. Terming the impugned orders conservatory and arguing that the applicant has not come to court with clean hands, the plaintiff argues that the applicant should first comply with the orders issued against him because court orders are not issued in vain.

10. In the affidavit sworn on behalf of the 3rd defendant, the order sought to be vacated is said to be arbitrary and wrongfully issued. In this regard, it is contended that the order was issued without considering the interest of the applicant and the 3rd defendant in the suit property (applicant is the registered proprietor of the suit property and the suit property is charged in favour of the 3rd defendant). Explaining that the order is prejudicial to both the applicant and the third defendant (applicant cannot collect rent from the suit property and debt obligations owed to the 3rd defendant are not being met).

11. On propriety or otherwise of the order, it is contended that because the plaintiff can be adequately compensated by award of damages, the order should not have been granted. The plaintiff is blamed for having entered into a contract of sale of the suit property with the 1st defendant without obtaining the consent of the 3rd defendant as by law required.

12. Because the property was charged in favour of the 3rd defendant when the orders were issued and given that the applicant is not meeting his loan obligations to the 3rd defendant, the court is urged to discharge the order in favour of the 3rd defendant or to order that the proceeds of rent from the suit property be deposited in an interest earning account to be opened in the joint names of applicant and the 3rd defendant.

13. When the matter came up for hearing, counsel for the applicant **Mr. Kimani**, explained that the applicant purchased the suit property from the 1st defendant by private treaty. At the time the applicant bought the suit property, it was charged to the 3rd defendant. After he bought the suit property, the 2nd defendant charged it to the 3rd defendant and started servicing the loan.

14. He pointed out that the plaintiff moved to court alleging that he had purchased the suit property before the 2nd defendant purchased it from the 1st defendant.

15. Explaining that the agreement executed between the plaintiff and the 1st defendant was clear on what would happen if the terms were not complied with, he stated that the terms of the agreement were

not complied with and as a result the suit property was auctioned.

16. He pointed out that the plaintiff obtained interim orders restraining the applicant from interfering with the suit property and collecting rent therefrom. The applicant was also forced to return the money he had collected as rent from the suit property.

17. Pointing out that it is more than one year since the interim orders were issued in favour of the plaintiff yet the suit has not been set down for hearing, Mr. Kimani urged the court to review or set aside the orders and order that the rent collected from the suit property be collected and deposited in a joint interest earning account between counsels for the 2nd and 3rd defendants. He proposed that the rent be collected by the applicant.

18. Counsel for the 3rd defendant, **Ms. Wambui**, concurred with the proposal by the applicant.

### **Analysis and determination**

19. **Order 40 Rule 6** and 7 on which the application herein is premised provides as follows:-

**“40(6)Where 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.**

**7). Any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such order.”**

20. The courts have stated as follows concerning the above provisions of the law:-

In the case of **Maria Lwande & others v. Registered Trustees of Teleposta Pensions Scheme (2015) eKLR:-**

**“ Order 40 Rule 6 provide that when an injunction order is granted and the matter is not determined within a period of 12 months, then the injunction shall lapse unless for any sufficient reason, the court orders otherwise. The injunction herein was issued in the year 2008. The Plaintiffs have not set down the matter for hearing and determination within a period of 12 months after the *Civil Procedure Rules 2010* came into force. The court has not ordered otherwise and therefore the injunction orders lapsed by operation of the law. I will be persuaded by the findings in the following cases Nguruman Ltd. vs. Ian Bonde Nielsen & 2 Others (2014) eKLR which is a Court of Appeal decision where it was held:-**

**“without going into the details, we with respect agree with the submissions of all learned counsel that the object of introducing Rule 6 in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various mechanization to delay the disposal of the suit”.**

21. Further in **Eliakim Washington Olweny vs. Wilson Kibor Mutai & Another (2013) eKLR**, the court held that:-

**“The provisions of Order 40 Rule 6 are in mandatory terms. .... Injunction shall lapse ...The court however has discretion to allow the injunction to continue for any sufficient reason”.**

The Plaintiffs/Respondents however had a duty to explain or convince the court as to why the injunction should continue. The Plaintiffs submitted that the consent order compromised the suit. However, I have noted that the said consent order also allowed the parties to continue with the Pre-trials and even exchange list of documents. That meant that the suit was not compromised and was supposed to be heard expeditiously so as to adhere to the spirit of the

overriding objective as per Sections 1A and 1B of the *Civil Procedure Act*. The Plaintiffs have not set down the suit for hearing and they have not given any sufficient reasons as to why the injunction herein should continue. I therefore see no reason why the injunction should not be declared to have lapsed. The Plaintiffs have never sought for extension of the injunction orders issued on 23<sup>rd</sup> September 2008. For the reasons stated, the said injunction lapsed after a period of 12 months by operation of the law.

In any event, this application was filed in the year 2012 and Plaintiffs have also not taken any step to set the suit down for hearing at least to forestall the orders sought herein or even to seek for extension of the injunctive orders. The injunctive orders herein cannot last forever while the suit remains unprosecuted...”

22. In Regina Pacis University College through Board of Trustees & Another v. William Charles Fryda (2012) e KLR Omondi J., in an application for orders that had subsisted for more than 12 months observed:-

“Certainly once the order lapsed – it died as it were and cannot be extended. The only way to bring it to life would be by seeking to reinstate it – not to review it. However I am alive to the fact that the situation on the ground has been volatile and created confusion because the Respondent took advantage of that lapse, to effect the orders made on 4<sup>th</sup> March 2011 – these orders were obtained after the ones of 23<sup>rd</sup> February 2011 and the prudent way to go about this matter and stem the chaos is to direct that:

“The status quo that currently exists be maintained as this is the only way the suit property will be preserved; especially in view of the speed with which the Respondent is acting to effect changes which are adverse to the applicants. No further adverse activity should be undertaken by either party.”

23. In the case of Erick Kimingichi Wapang’ana & another v. Equity Bank Limited & another (2015)e KLR the Court of appeal observed:-

“Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined provides, “*for any sufficient reason the court orders otherwise.*”

In this case there was no subsequent order extending the injunction. Having been issued on 11<sup>th</sup> October 2011, the injunction order therefore lapsed on 12<sup>th</sup> October 2012. We agree with counsel for the appellants that Mukunya, J’s order of 16<sup>th</sup> December 2014 declaring that the injunction of 11<sup>th</sup> October 2011 had lapsed was inevitable.”

24. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought or any of them. As pointed out herein above, the applicant, *inter alia*, seeks a declaration that the injunction granted on 9th March, 2013 in favour of the plaintiff/respondent has lapsed.

25. With regard to that question, I wish to point out that under **Order 40 Rule 6** aforementioned, the plaintiff was obligated to fix the suit for hearing and determination within 12 months from the date the injunction was issued failing which it would lapse by operation of law. The court has discretion to allow the injunction to continue for any sufficient reason. However, a reading of that section of the law reveals that, the court has to be moved for extension of the time for subsistence of the injunction before the injunction lapses, failing which the injunction will automatically lapse by operation of law, at the time stated therein. In this regard see the cases cited herein above.

26. In the circumstances of this case, the period limited in law for subsistence of the injunction issued in favour of the plaintiff lapsed after the 12 months ended without the suit having been heard and

determined or without any application for its extension being made. In this regard see the cases cited herein above.

27. The upshot of the foregoing is that the application dated 20<sup>th</sup> February, 2015 has merit and is allowed in terms of prayer (2) and (4).

28. With regard to the proposal that the 2<sup>nd</sup> defendant be allowed to collect rent and deposit it in a joint interest earning account to be opened in the names of the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, having considered the peculiar circumstances of this case, I hold the view that pending the hearing and determination of the suit, the rent accruing from the suit property should be collected by a neutral person. In this regard, I order that a registered estate agent be appointed by the plaintiff, the 2<sup>nd</sup> defendant and the third defendant within 14 days from the date of this ruling failing which the court shall appoint the agent from its panel. The agent shall collect the rent, effective 1<sup>st</sup> July, 2016 and deposit it in account to be opened and operated in the joint names of the plaintiff, the 2<sup>nd</sup> defendant and the third defendant.

29. The costs of the application to abide the outcome of the suit.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 18th day of May, 2016.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Mr. Kimani h/b for Mr. Gathii for 2nd defendant

Ms. Wambui for 3rd defendant

Edward Njoroge Mwangi – plaintiff

Mr. Muthui h/b for Mr. Gori for plaintiff

N/A for 1st defendant

Court assistant - Lydia