



Wanje Holdings Limited v National Bank Of Kenya Limited (Environment & Land Case 168 of 2015) [2016] KEELC 1303 (KLR) (15 August 2016) (Ruling)

Wanje Holdings Limited v National Bank Of Kenya Limited [2016] eKLR

Neutral citation: [2016] KEELC 1303 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 168 OF 2015

AA OMOLLO, J

AUGUST 15, 2016

BETWEEN

WANJE HOLDINGS LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. The interested party herein moved the Court vide her amended application dated 17th December 2015 brought under the provisions of sections 1, 1A, 1B, 3, 3A of the Civil Procedure Act and Order 1 Rule 10 (2), Order 10 rule 11, Order 22 rule 1 and Order 36 rule 7 and 10 of the Civil Procedure Rules. The interested party (hereinafter referred to as the applicant) sought for the following orders ;
 1. Spent
 2. That leave be and is hereby granted to enjoin the interested parties being SAMUEL G. NJOROGI AND JOSEPH M NJOROGI (Suing as legal Representatives of the estate of GEOFFREY GIKARU NJOROGI (deceased) as parties to this suit.
 3. Spent
 4. Spent
 5. That a mandatory be issued reinstating the interested parties being SAMUEL G. NJOROGI and JOSEPH M NJOROGI (Suing as legal Representatives of the estate of GEOFFREY GIKARU NJOROGI (deceased) SA back into the suit premises pending the hearing and determination of the application herein.



6. That there be a stay of execution of the decree, warrants of eviction of the property known as LR No. MN/VI/2360 owned by Geoffrey Gikaru Njoroge (deceased) issued to Nditimu Auctioneers and/or the servants, agents or employees pending the hearing and determination of this suit.
 7. That the judgment entered on 2nd of November 2015 and all other consequential orders be and are hereby set aside unconditionally.
 8. That interested parties SAMUEL G. NJOROGE AND JOSEPH M NJOROGE (Suing as legal Representatives of the estate of GEOFFREY GIKARU NJOROGE (deceased) be granted unconditional leave to defend this suit.
 9. That OCS Changamwe does ensure compliance of this Court order.
 10. That cost of this application be borne by both the plaintiff and the defendant.
2. The application is supported by the grounds on its face and several affidavits sworn jointly by Samuel Gikaru and Joseph Njoroge. The grounds include inter alia that the applicants have lived on this property since 1977. That their father Geoffrey Gikaru Njoroge – deceased who worked with KENATCO purchased the suit premises through the company housing scheme before KENATCO went into receivership. Further that the company sued their father vide HCC No 262 of 1996 which suit is still pending.
 3. In the affidavit in support of the application, they have accused the plaintiff of discrepancies and non – disclosure. The applicant avers that the plaintiff and the defendant colluded to steal a match by failing to notify them of this suit. In the HCC 262 of 1996, the applicants depose that the receiver manager alleged there was no sale. They deposed that having perused the title documents, they did not see any charge registered in favour of the defendant. The applicants annexed the order/warrants issued for their eviction; pleadings in HCCC No 262 of 1996 and the Court cause list for 2nd November 2015.
 4. In the supplementary affidavit sworn on 15.12.15, the applicants annexed letters of administration ad litem issued on 10th December 2015. In the further affidavit, they have annexed their draft defence and counter – claim which they depose raises triable issues of facts and law. They also annexed copies of correspondence in regard to the sale between their father and KENATCO. They urged the Court to allow their application.
 5. The application is opposed by the plaintiff via a replying affidavit sworn by its operations manager, Mr Peter Waweru. He explained how the Respondent came to learn of the sale of the suit property. Mr Waweru deposed that they made an offer to buy the land at Kshs 35,000,000 on 6.8.2014 which offer was accepted the same day. Subsequently they made a deposit of 10%. He deposed further that the plaintiff enquired why the property was being sold to which he was informed the defendant had secured a debenture over the suit property for Kshs 20,000,000.
 6. The plaintiff denied being involved in any fraud during the entire transaction. The plaintiff also deposed that the deceased had put a caution over the suit property which was subsequently removed and a lease to Julius Hamisi Kwajumbe registered. It is her case that the proposed interested party has failed to prove their interest in the suit property and hence the application should be dismissed with costs.
 7. Both parties filed written submissions which I have considered. I will refer to the necessary portions in the body of this determination. I will begin with the prayer for consolidation. The applicants admit the defendant was appointed the receiver of KENATCO in 1995 and in the process it sought to evict



employees of the Insolvent Company from their houses. The applicants submit that the matters in issue herein are similar to those in HCCC No 265 of 1996.

8. The plaintiff submitted that there was no need to consolidate this suit with HCC 265 of 1996 as the same is already determined or has abated. The plaintiff submits that the deceased died on 9.12.15 and there is nothing to show that the deceased has been substituted in the earlier suit. Lastly that this suit may have been dismissed for want of prosecution during the justice at last week.
9. The applicants annexed a grant issued to them on 10th December 2015. In the grant, it is indicated that Geoffrey Njoroge Gikaru passed away on 19th December 2014. One year has thus lapsed since the death of the applicants' father. I agree with the plaintiff's submission that the suit HCC 265 of 1996 as abated as provided under section of the *Civil Procedure Act*. There was no document annexed to show that the process of substitution or revival of the suit had commenced.
10. As regards whether the suit has been determined by dismissal for want of prosecution, the plaintiff had a duty to peruse the file and confirm those facts. This Court cannot take judicial notice of a fact capable of being established but which a party neglects to do. However I decline to issue an order of consolidation on the basis that the suit may have abated.
11. The second prayer is for setting aside the judgement entered on 2nd November 2015. Under this heading the applicants submitted that they have lived on the suit property from 1974 and provided documents that their father purchased the property. Further that KENATCO was not made a party to the suit. Secondly that the applicants were never served with the pleadings in this suit yet they are the beneficiaries of the extremely adverse orders issued.
12. On the question of leave to defend, the applicants submit that some of the triable issues raised was whether the plaintiff paid the sum of Kshs 35 Million. They urged the Court to consider if the terms of the judgement would have changed were the interested parties served.
13. The plaintiff on its part submits that the applicants have no legitimate interest in the suit property. The plaintiff sought to introduce through submission that the deceased was a tenant. He went into details analysing the defence and counter – claim filed in HCC 265 of 1996 which is not for determination before this Court. The plaintiff also submits that the applicants have failed to show that indeed they were in possession of the suit premises or why the deceased was never issued with a title deed from 1977. Lastly the plaintiff submits that no explanation was given why the deceased never prosecuted the counter – claim in No 265 of 1996 with the result that the applicants have not shown on a probability that they have a legitimate claim to the suit property.
14. The Court has a very wide discretion under order and there are no limits and restrictions except that if the judgement is varied, it must be done on terms that are just: *Patel vs E A Cargo Handling Services Ltd(1974) E A 75*; Except while exercising discretion, the Court ought to consider whether there is a defence on merits, would there be any prejudice and what was the explanation for the delay.
15. In this instance, the explanation for delay is not applicable since the applicants were not served. The Court will only consider whether there is a defence on merit and if there is any prejudice. The applicants have annexed a draft defence which they submit raises triable issues. In the draft defence, the applicants deny the defendant held a charge over the suit property and he put the defendant to strict proof. Would this be a triable issue where the applicants have acknowledged the appointment of the defendant as the receiver/manager? Under Company law, only creditors can be appointed receiver/manager. This means the applicants were aware of the defendant's interest in the said company.
16. The second issued raised in the draft defence is whether the plaintiff paid the sum of Kshs 35,000,000 which in my view would be a question between the defendant and the plaintiff and does not concern



the applicant hence cannot be a triable issue. In the counter – claim, the applicants claimed for adverse possession having lived on the suit premises from 1976 to date.

17. They are claiming the premises through their father who is said to have purchased the land in 1976. The vendors then (KENATCO) filed a suit for vacant possession against their father in 1996. They aver that suit is still pending. That suit interrupted time from running therefore this may not be a meritorious defence. Looking at the draft defence and counter – claim in whole, I am not satisfied it raises triable issues as against the plaintiff. These issues if any relate between the applicants and the defendant, the law does not bar them from filing a claim against this defendant.
18. Lastly can the mandatory injunction be granted? Such orders are granted in very clear cases. From the applicants own pleadings, it is not clear whether they were completely evicted or not. They stated that only their goods were thrown out. Since I found above that I do not find any merit their draft defence, the orders of mandatory injunctions cannot issue as they have no foundation to lean on.
19. In conclusion, I find no merit in the amended notice of motion dated 17th December 2015. The same is hereby dismissed. Each party to bear their respective costs.

RULING DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF AUGUST 2016

A. OMOLLO

JUDGE

