



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 7 OF 2014

1. DAMARIS AKINYI NONDI

2. CHARLES DUCE OPONDO

(suing as administrator and personal representative of James Opiyo Opondo

.....**PLAINTIFFS**

=VERSUS=

1. ASGHAR KHANBAI

2. NOOORDIN BHAIJEE

3. SIAFUDIN BHAIJEE.....DEFENDANTS

R U L I N G

1. The Application before me is dated 11th February, 2016 seeking for the following orders:-

(a) THAT the injunctive orders of 27th May, 2011 have lapsed and the Defendants are now at liberty to deal with the suit property as deemed fit.

(b) THAT the suit be dismissed for want of prosecution.

(c) THAT the costs of this Application be provided for.

2. The Application is premised on the grounds that the injunctive orders were granted by the court on 27th May, 2011; that by dint of Order 40 Rule 6 of the Civil Procedure Rules, the lifespan of an injunction is twelve (12) months and that the current application has been made out of abundant caution.

3. In response, the 1st Plaintiff deponed that the order of injunction was issued by the court on 14th April 2010; that the Civil Procedure Rules, 2010 came into force on 10th September, 2010 and that the said Rules do not apply retrospectively.

4. The 1st Plaintiff deponed that he will suffer prejudice and injustice if the Application is allowed because the Defendant will deal with the property; that he will be driven out of the seat of justice unheard and that all along, he has been interested in prosecuting this case.

5. The advocates filed their respective submissions which I have considered.

6. It is not in dispute that on 14th April, 2010, Azangalala J (as he was then) granted to the Plaintiffs an order of temporary prohibitory injunction restraining the Defendants from trespassing on the suit land which forms part of the Estate of the late James Opiyo Opondo pending the hearing of the suit. A similar order was given by Ojwang J (as he was then on 27th May, 2011.

7. The Defendant now wants the said injunction order set aside and for the suit to be dismissed for want of prosecution.

8. Although Order 40 Rule 6 of the Civil Procedure Rules provides that where an interlocutory injunction has been granted and is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for sufficient reasons. The order of injunction herein was granted before the provisions of order 40 Rule 6 came into force.

9. In fact, the order of 14th April, 2010 was granted by the court pursuant to the provisions of Order XXXIX, which order was subsequently repealed.

10. Section 23(3) (b) and (c) of the Interpretation and General Provisions Act provides as follows:-

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not:-

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.”

11. In the circumstances, and in view of the provisions of Section 23(3) (b) and (c) of the Interpretation and General Provisions Act, Cap 2, Order 40 Rule 6 of the Civil Procedure Rules is not applicable in this case.

12. Even if Order 40 Rule 6 of the Civil Procedure Rules was applicable in this matter, I will still be slow in discharging an injunction after the lapse of one year, especially in a situation where the Plaintiff has not been the cause for the delay in the prosecution of the suit.

13. The other reason why I would be slow in invoking the provisions of Order 40 Rule 6 is because under the doctrine of *lis pendens*, a party to a suit is not supposed to deal with a suit property *pendente lite*, and where that happens, the person who acquires such a property will still be bound by the Judgment of the court.

14. Consequently, where the court has issued an injunction pending the hearing of the suit, the order should remain in force to protect, not just the Plaintiff's interest in the event that he succeeds in his claim, but also to protect the innocent members of the public from purchasing such a property.

15. The only recourse that is available to the Defendant in this matter is to have the suit dismissed for want of prosecution. That is one of the prayers in his Application of 14th February, 2016.

16. From the record, this matter was mentioned on 7th November, 2013 when Mukunya J directed that it should be transferred to this court for hearing and determination.

17. The record shows that on 21st February 2014, the matter was fixed for hearing on 31st March, 2014 on which date parties took it out of the cause list of the day. The court then fixed the matter for hearing on 9th June, 2014.

18. The record does not indicate what happened on 9th June, 2014. However on 3rd May, 2014, the

Plaintiffs' advocate filed an Application to cease acting for the Plaintiffs.

19. The act of the Plaintiffs' advocate to cease acting for the Plaintiffs explains why this matter was never fixed for hearing until 12th February, 2016 when the current Application was filed.

20. In view of the fact that it is the Plaintiff's advocate who did not prosecute the Application to cease acting for the Plaintiff, the delay in fixing the matter for hearing cannot be visited upon the Plaintiff.

21. In the circumstances, I find and hold that the Plaintiff has shown plausible reasons why she has not set down the matter for hearing since 31st March, 2014.

22. For those reasons, I dismiss the Application dated 11th February, 2016 with no order as to costs.

Dated, signed and delivered in Malindi this 14th day of **November**, 2016.

O. A. Angote

Judge