



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT

CIVIL CASE NO. 1321 OF 2013

MARIA LWANDE & OTHERS.....PLAINTIFFS

VERSUS

REGISTERED TRUSTEES OF

TELEPOSTA PENSION SCHEME.....DEFENDANT

R U L I N G

The matter coming up for determination is the Notice of Motion dated **25th October 2012** brought by the Defendant herein and premised under **Order 40 Rules 6 and 7, Order 51 Rule 1** of the *Civil Procedure Rules 2010, Sections 1A, 1B and 3A* of the *Civil Procedure Act* and all other enabling provisions of the law. The Applicant seeks for these orders:

- i. That the orders of the Honourable Court issued on 23rd September 2008 by Hon. Lady Justice Ang'awa be deemed to have lapsed.*
- ii. In the alternative, the orders of the Honourable Court issued herein on 23rd September 2008 by the Hon. Lady Justice M. Ang'awa be discharged, varied and/or set aside.*
- iii. That costs of the application be borne by the Plaintiffs.*

The application is supported by the grounds set out on the face of the application and also by the supporting Affidavit of **Peter K. Rotich**. These grounds are:

- a. That there exist a landlord/tenant relationship between the Defendant/Applicant and Plaintiffs/Respondents which relationship has been admitted.*
- b. Further, that the Defendant/Applicant relies on rental incomes and other revenues to meet the sums drawn by its members as monthly pension or benefits paid out as lump sum.*
- c. That since the grant of the order issued herein on 23rd September 2008, the Plaintiffs/Respondents have neglected and/or failed to prosecute the suit herein and have it determined expeditiously.*
- d. Again, since the grant of the orders issued herein on 23rd September 2008, some of the Plaintiffs/Respondents (twenty six) in number have already purchased the housing units in*

dispute and transfer has dully been registered in their favour.

e. Further, since the grant of orders issued herein on 23rd September 2008, the remaining 47 (forty seven) Plaintiffs/Respondent have further refused, failed and/or neglected to remit their monthly rent to the Defendant/Applicant with some continuing to draw the pension.

f. That as at 30th September 2008, the remaining Plaintiffs/ Respondents owed the Defendant/Applicant rent in excess of twenty one million Kenya Shillings – Kshs.21,000,000/= which amount constitutes a serious draw on the Defendant/Applicant's finances and the welfare of its members.

g. That attempts by the Defendant/Applicant to collect rent from and/or distrain the Plaintiffs/Respondents for the rent in arrears have been resisted through the misuse and misinterpretation of the orders granted herein on 23rd September 2008.

h. That the Plaintiffs have tendered no undertaking as to the damages that have been and likely to be incurred by the Defendant/ Applicant.

i. Further, that the unequitable conduct of the Plaintiffs/Respondents disentitles them from enjoying the orders issued herein by the Honourable Court on 23rd September 2008.

j. That it would be the interest of justice to deem the order issued on 23rd September 2008 to have lapsed, or on the alternative to discharge and vary or set it aside.

Peter K. Rotich, an Administrator/Trust Secretary sworn a supporting affidavit and averred that the Plaintiffs filed the suit herein on 8th May 2008 praying for various orders against the Defendant. Among them are an order for specific performance of all the respective sale agreements entered between the Plaintiffs and the Defendant for the purchase of the subject properties. He further averred that the Plaintiffs filed an application under certificate of urgency seeking various interim orders pending the hearing and determination of the suit. The Defendant opposed the said application. However, after the hearing of the said application, the court issued restraining orders pending the hearing and determination of the suit. The orders were issued on 23rd September 2008.

He deposed that the orders issued by the court did not excuse the Plaintiffs herein from their obligations as tenant of the Defendant which obligation included payment of rent. He further deposed that since 23rd September 2008, the Plaintiffs have not made any honest effort to prosecute the suit herein and their attempt to settle the matter out of court only worked to delay the determination of the matter and waste the Defendant's properties. Further, that the Plaintiffs/Respondent are not desirous of concluding this matter but only intend to unfairly benefit from the interlocutory orders of this Honourable Court.

It was contended that since the grant of the orders issued on 23rd September 2008, some of the Plaintiffs/Respondents (twenty – 20) in number have already purchased the housing units in dispute and transfer have duly been registered in their favour.

He also contended that since the grant of the orders issued on 23rd September 2008, the remaining forty seven (47) Plaintiffs/Respondents have either refused, failed and/or neglected to remit their monthly rent to the Defendant/Applicant. It was his contention that the rent arrears as of **18th September 2012** amounted to Kshs. 21,996,600/=. Further that Teleposta Pension Scheme which provides custody of pension and other retirement benefits of the employees and former employees of Kenya Posts and Telecommunication Corporation pays a cumulative monthly sum of Kshs. 59,994,691/= to 7590 pensioners covered under the Scheme including some of the Plaintiffs herein.

Therefore any attempts by the Defendant/Applicant to collect from and/or distrain the Plaintiffs/Respondents for the rent in arrears have been resisted through the orders granted herein by the

court on 23rd September 2008. He further contended that the actions of the Plaintiffs/Respondents are undeserving of the orders granted by this Court as some have already benefitted from lump sum payment of the pensions while others continue to draw their pensions to date while withholding funds that are crucial from the operation of the scheme. Therefore, the inequitable conduct disentitles them from enjoying the order issued herein by the court on 23rd September 2008.

Further that despite the magnitude of the losses and damages the Defendant/Applicant has and is set to incur as a result of the pendency of the present suit, the Plaintiffs have tendered no undertaking to cover the same. He therefore urged the court to allow the application for the interest of justice.

The application is contested. **Joyce Kitumbo** one of the Plaintiff herein sworn a replying affidavit and averred that she had been authorized by the other Plaintiffs to swear the said affidavit on their behalf and on her own behalf. She averred that by virtue of membership to the Respondent, the Plaintiffs were given priority right to purchase their respective houses following the issuance of letters of offer and the Plaintiff formally expressed their acceptance. Further, that the Defendant/Applicant refused to accept remittance of the purchase price from the Plaintiffs/Respondent through their advocate, notwithstanding the agreements reached. She further averred that on 23rd September 2008, the parties herein recorded consent before Ang'awa J. That despite the said **consent order** and attempts by the Plaintiffs to conduct the sale as directed by the court, the Defendant declined to accept the funds but selectively allowed and accepted completion of the purchase by some of the Plaintiffs.

The Respondent further deposed upon recording of the consent order and through the assistance of their advocates, the Plaintiffs sought for financiers by running an advertisement in the newspaper on **12th March 2009**, but the Defendant put up another notice of caveat emptor on **17th March 2009**, warning members of the public and prospective financiers that the Plaintiffs/Respondents' advocates had no authority to deal with the houses and to transact thereof. Therefore the actions of the Defendant/Applicant frustrated the compliance with the court orders and the conclusion of the sale of the houses and delayed any progress on the matter particularly following any action for defamation instituted by the Plaintiffs Advocates. Further, she averred that following the record and adoption of the said consent order on 23rd September 2008, the suit was compromised as between the Plaintiff and the Defendant.

The Respondent also averred that they have all along been ready and willing to complete the transaction, the subject of this suit but the Defendant/Applicant has frustrated all their efforts and the application herein is subject and furtherance of the Defendants efforts to frustrate them. It was therefore her contention that the Plaintiffs/Respondents efforts to conclude this matter has been frustrated by the Defendant/Applicant unwillingness to cooperate. She further denied that the Plaintiff have been indolent, refused, failed or neglected to prosecute the matter and/or revert the balance of the purchase price to the Defendant/Respondent.

The parties herein canvassed this Notice of Motion by way of written submissions. I have now carefully considered the written submissions, the pleadings generally and the annexures thereto together with the attached authorities and I make the following findings:

There is no doubt that the Plaintiffs/Respondents filed this suit in the year 2008. There is also no doubt that simultaneously to the main suit, the Plaintiffs filed a Notice of Motion and sought for interlocutory orders of injunction which order was granted on 23rd September 2008 by Hon. Lady Justice Ang'awa. Indeed the orders issued was a temporary order of injunction restraining the Defendants from doing certain activities on the houses stated in the order issued. The injunction orders were to remain in force pending the determination of this suit. The orders were issued on 23rd September 2008. This application was filed on 25th October 2012 after a period of four years after the injunction orders were issued. The matter had not been set down for hearing. The purpose of the injunction are to maintain the status quo pending the outcome of the main suit.

The applicant has alleged that after the Plaintiffs/Respondents were issued with the injunctions orders,

they became comfortable and went to sleep. The applicant contended that the Plaintiffs failed to prosecute the main suit and therefore the order of injunction did lapse by dint of **Order 40 Rule 6** thus by the operation of the law.

The Plaintiffs/Respondents have submitted they have not failed to remit the monthly rent to the Defendant nor failed to prosecute the matter. They submitted that the consent order entered by the parties herein on 23rd September 2008 compromised the suit. Further, that the sale of the houses have not gone through due to the Defendants action.

I have indeed gone through the present file and court record. It is indeed correct that on 23rd September 2008, the court entered two sets of orders.

The first set was the order of injunctions and the second set of order was by consent whereby the Defendant advocate was to forward copies of title documents to the Plaintiffs who had not purchased the respective houses within five days from the date of that order.

Further, the matter was to be mentioned on **18th November 2008** to confirm that the Plaintiffs had found purchasers and to confirm that pre-trials, had been undertaken and the court was to give further directions.

Parties were also to file and exchange list of documents and agreed issues within a period of 15 days. The above orders given meant that the suit was not compromised but was an ongoing suit which was supposed to be set down for hearing after pre-trials.

From the court record, the matter was not mentioned in court on 18th November 2008 as earlier ordered by the court. The next action was 12th October 2009 when the Plaintiffs filed an application dated 23rd September 2009 against the Defendant.

The Applicant/Defendant has alleged that by dint of **Order 40 Rule 6** of the *Civil Procedure Rules*, the injunction orders issued have lapsed and the court should declare so. **Order 40 Rule 6** provides that:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of grant, the injunctions shall lapse unless for any sufficient reason the court orders otherwise”.

In the instant suit, the injunction order was issued on 23rd September 2008. The application herein was filed on 25th October 2012 within a period of 4 years after the injunction order were issued.

The injunction order was issued in the year 2008 under the repealed *Civil Procedure Rules*. However **Order 54** of the *Civil Procedure Rules* provides that the provision of *Civil Procedure Rules 2010 shall* apply to all proceedings that were pending under the repealed *Civil Procedure Rules*. Therefore, the proceedings herein are bound by the provisions and Orders of the *Civil Procedure Act and Rules 2010*, **Order 40 Rule 6** being one of them.

It is not in doubt that since the suit was filed, it has never been set down for hearing. After the new *Civil Procedure Rules* came in force, the injunction orders were never extended. **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”.

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 23rd 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.

From the foregoing, the court finds that the Defendant/Applicant application dated 25th October 2012 is merited. The same is allowed entirely with costs to the Applicant.

It is so ordered.

Dated, Signed and delivered this 19th day of March 2015.

L. GACHERU

JUDGE