



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL AND LAND DIVISION**

**ELC SUIT NO. 505 OF 2009**

**NANAK HOSPITAL MANAGEMENT**

**SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**KENNETH K. MWANGI.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**KANG'ERI WANJOHI T/A**

**KINDEST AUCTIONEERS.....5<sup>TH</sup> DEFENDANT**

**FIDELITY COMMERCIAL BANK LIMITED.....6<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

This suit was initially filed on 8<sup>th</sup> October 2009 by way of a Plaint dated 5<sup>th</sup> October 2009, wherein the Plaintiff sought a permanent injunction restraining the Defendants from interfering with its quiet possession of LR No 209/3011/19 and the buildings erected thereon (hereinafter referred to as the suit property), and also sought mesne profits and/or general damages for trespass. The Plaintiff claimed to be owner of the suit property having bought the same at a public auction. After the hearing and determination of various interlocutory applications, directions were given to the parties as to compliance with the provisions of Order 11 of the Civil Procedure Rules and the suit was certified ready for hearing. Hearing dates were subsequently set for 17<sup>th</sup> and 18<sup>th</sup> September 2014.

During the hearing on 17<sup>th</sup> September 2014 it came to light that there is an appeal pending in the Court of Appeal, which seeks to set aside a High Court judgment in which an appeal to set aside the vesting orders issued by the City Court in Nairobi was dismissed. The said vesting orders are the ones used to transfer the suit property to the Plaintiff. This Court consequently adjourned the hearing of this suit to peruse the

pleadings filed in the Court of Appeal and make further directions as to the continued hearing of the suit. Parties were also given the liberty to apply.

### **The Application**

The 6<sup>th</sup> Defendant thereupon moved this court by way of a Notice of Motion dated on 24<sup>th</sup> September 2014 seeking the following orders:

1. This Honourable Court be pleased to set aside and/or vacate injunctive Orders issued on 7<sup>th</sup> May 2013 as against the 6<sup>th</sup> Defendant restraining it from advertising for sale, selling or in any manner whatsoever from transferring the property known as LR NO. 209/3011/19.
2. This suit be herein stayed pending the hearing and determination of Civil Appeal No. 228 of 2008 in the Court of Appeal.
3. The 1<sup>st</sup> Defendant's Further amended Statement of Defence and Counter Claim dated 30<sup>th</sup> January 2014 and filed in court on 3<sup>rd</sup> February 2014 as against the 6<sup>th</sup> Defendant be hereby dismissed and/or stayed pending the hearing and final determination of an appeal preferred by the 1<sup>st</sup> Defendant in the Court of Appeal.

The background to the 6<sup>th</sup> Defendant's application is that the 1<sup>st</sup> Defendant had been granted orders of a temporary injunction against the Plaintiff in an earlier ruling delivered by Okwengu J. (as she then was) on 8<sup>th</sup> July 2010. The 6<sup>th</sup> Defendant was subsequently joined to the proceedings, after it transpired that the Plaintiff had on the strength of a title it holds to the suit property, used the said property to secure a loan facility from the 6<sup>th</sup> Defendant, who in turn advertised the property for sale to realize its security.

The 1<sup>st</sup> Defendant subsequently moved this court on 4<sup>th</sup> August 2011 seeking orders that pending the hearing and determination of the main case herein, the orders of injunction issued on 8<sup>th</sup> July 2010 be extended to apply to the 6<sup>th</sup> Defendant. In the alternative the 1<sup>st</sup> Defendant sought orders that pending the hearing and determination of the main case herein, an order of injunction do issue against the 6<sup>th</sup> Defendant restraining them from advertising for sale, selling or in any manner whatsoever from encumbering and/or interfering with the status of the suit property to the detriment of the 1<sup>st</sup> Defendant. This Court granted orders on 7<sup>th</sup> May 2013 restraining the 6<sup>th</sup> Defendant from advertising for sale, selling or in any manner whatsoever transferring the suit property pending the hearing and determination of the suit and counterclaim filed herein, or until further orders.

Coming back to the Instant application, the Advocates for the 6<sup>th</sup> Defendant submitted that they would rely on the pleadings filed. The 6<sup>th</sup> Defendant in its supporting affidavit to the instant application sworn on 26<sup>th</sup> September 2014 by its Legal Officer, one Stella Mbuli, stated that there exists a Banker-Client relationship between the Plaintiff and the 6<sup>th</sup> Defendant, and that Plaintiff failed to service the credit facilities of the 6<sup>th</sup> Defendant which were outstanding to Kshs.16,193,560.39 as at 29<sup>th</sup> September, 2010. Further, that the 6<sup>th</sup> Defendant then engaged an auctioneer to undertake the sale of the suit property herein for realization of the security, which process of realization of the security was halted by this Court by the injunction orders of 7<sup>th</sup> May 2013.

The 6<sup>th</sup> Defendant further stated that it later came to realize that there were previous proceedings between the Plaintiff and the 1<sup>st</sup> Defendant over the ownership of the suit property, and that there was an Appeal in the matter which was pending in Court of Appeal in Civil Appeal No. 228 of 2008. The said Appeal emanated from Nairobi CMC Civil Case No. 54 of 1995 and High Court Civil Appeal No. 232 of 1996 all of which challenged the ownership of the said suit property.

It is the 6<sup>th</sup> Defendant's averment that it is in the interest of justice that the injunctive orders issued as

against it be vacated, and that this suit be stayed pending the hearing and final determination of Civil Appeal No. 228 of 2008 in the Court of Appeal. Further, that the 1<sup>st</sup> Defendant's Further amended Statement of Defence and Counter Claim dated 30<sup>th</sup> January 2014 and filed in court on 3<sup>rd</sup> February 2014 as against the 6<sup>th</sup> Defendant will serve no purpose upon stay of this matter, and ought to be dismissed and/or stayed pending the hearing and final determination of an appeal preferred by the 1<sup>st</sup> Defendant in the Court of Appeal.

### **The Response**

The Plaintiff indicated that it would not oppose the 6<sup>th</sup> Defendant's application. The 1<sup>st</sup> Defendant on his part filed a replying the said affidavit sworn on 16<sup>th</sup> October 2014 stated that the injunction orders by this Court were issued after the parties had been heard on their merits, and the Court saw it prudent to preserve the suit property pending the conclusion of the suit. Further that all material facts, including the matters before the Court of Appeal had been disclosed and were referred to extensively especially in the application before Okwengu J. (as she then was). The 1<sup>st</sup> Defendant claimed that the 6<sup>th</sup> Defendant was seeking to part with possession of the suit property and put it beyond the reach of the Court, which would render this suit academic and nugatory.

The 1<sup>st</sup> Defendant further averred that he holds a valid title to the suit property since 1974, and that his lease was extended on 12<sup>th</sup> July 2005. Further, that the Plaintiff does not hold a valid title to the suit property which can pass to the 6<sup>th</sup> Defendant, and their purported security is therefore void.

### **The Issues and Determination**

I have considered the pleadings filed by the parties and also perused the court record in this suit. The issue before the Court is whether this suit should be stayed pending the hearing and determination of Civil Appeal No. 228 of 2008 in the Court of Appeal, and if so, whether the injunction orders against the 6<sup>th</sup> Defendant granted on 7<sup>th</sup> May 2013 should be set aside, and the 1<sup>st</sup> Defendant's Further Amended Statement of Defence and Counter Claim dated 30<sup>th</sup> January 2014 and filed in court on 3<sup>rd</sup> February 2014 should be dismissed.

I have perused the Memorandum of Appeal lodged in the Court of Appeal on 3<sup>rd</sup> November 2008 in Civil Appeal No. 228 of 2008. The appeal is filed by the 1<sup>st</sup> Defendant herein against the judgment and decree of Visram J. (as he then was) that was delivered on 7<sup>th</sup> July 2005 in Nairobi HCCA No 232 of 1996. The Respondent in the appeal is the City Council of Nairobi which is also the 2<sup>nd</sup> Defendant herein. The Appellant in the said appeal seeks to set aside the judgment in Nairobi HCCA No 232 of 1996, as well as the judgment of the subordinate court in Nairobi CMCC No. 54 of 1995.

The sequence of events leading to the filing of the appeal in the Court of Appeal are described as follows in the 1<sup>st</sup> Defendant's witness statement signed, dated and filed in Court on 14<sup>th</sup> October 2013 in paragraphs 20 to 27 thereof:

20. **“Sometime in the year 1996 I started hearing rumours from property owners in Kirinyaga Road to the extend(sic) that some properties whose leases were nearing expiry were illegally being transferred to different persons without the knowledge of the owners in an illegal and corrupt scheme incorporating City Council and some Ministry of Lands officials..**

21. ...

22. **Alarmed by this information I decided to go and check out my file at the ministry, I was shocked to learn that on my Title there has been endorsed a Court Order allegedly arising from Civil Suit Numbers 386 of 1981 which I was not aware of and for which I had never**

been served. Finally there was an entry No. 16 alleged to be a vesting Order, vesting my property to a company called NANAK HOSPITAL MANAGEMENT SERVICES for a value of Kshs.4,800,000/=. I was not and I have never been shown the Original registered copy of the alleged Vesting Order.

23. Nobody at the Ministry was willing to give me any information as to what the entry entailed and as a result I reverted to my Advocate then, A. G. Kiai & Company who upon follow-up discovered that the said vesting orders had emanated from an alleged Civil Case No. 54 of 1996 allegedly filed at City Court between Nairobi City Council and myself claiming non-payment of rates alleged to be Kshs.259,396.50 which allegedly led to the sale of my property and issuance of a vesting order by the same City Court presided over by a Resident Magistrate, vesting my property to somebody else. At the same time another Case CMCC 292 of 1994 well before the Case No. 54/96 had also been filed against myself. Both were not served upon myself and yet one seemed to have been proceeded with.

24. We checked through the City Council minutes and we never found any full Council minute which had authorised the filing of any of the cases, to recover rates their process and eventual alleged sale of my property and issuance of the illegal Vesting Orders if at all they ever issued.

25. My Advocate then immediately protested this development. We then moved to set aside the Judgment and all consequential Orders but in a surprising decision the Resident Magistrate held that the vesting order having allegedly been registered, she could not cancel the same even if I had not been served.

26. I appealed to the High Court Justice Visram surprisingly again held in dismissing my Appeal that technically my Affidavit in support had not been dated (even though that was not an issue in contention) but also without addressing the salient fact as to whether I had been served or not, he went ahead to hold as the Magistrate had held, that simply because the alleged vesting order had been registered he could do nothing about it.

27. I have consequently appealed that finding to the Court of Appeal and the Case is pending determination. My position is that it was the height of injustice for the High Court to find that it cannot rectify an injustice by ordering cancellation of an entry in a land file, simply because registration had taken place. The High Court retains such residual powers. In any event, the right to be heard before one's property is alienated is so natural and fundamental that every action proceeded with before a party is heard MUST as a right be nullified. It is equally worth of note that at this point in time, my application for renewal of Lease which had commenced in 1986, well before the purported sale of my property had proceeded to conclusion and I had obtained the renewed Lease to my property....”

The Court in this respect notes that the Plaintiff herein in its Complaint dated 5<sup>th</sup> October 2009 does not aver to the existence of Civil Appeal No 228 of 2009. However, in its Further Amended Reply to the 1<sup>st</sup> Defendant's Amended Statement of Defence and Defence to Counterclaim it states at paragraph 33 thereof, that this Court lacks jurisdiction to hear and determine any issue with respect to the Plaintiff's title in respect of the suit property because it would be tantamount to reopening Nairobi CMC Civil Case No 54 of 1995 and High Court Civil Appeal No 232 of 1996, or usurping and circumventing the powers of the Court of Appeal in Civil Appeal No. 228 of 2008 pending before the Court of Appeal.

The 1<sup>st</sup> Defendant on the other hand in its Further Amended Statement of Defence and Counterclaim against the Plaintiff, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Co-Defendants dated 30<sup>th</sup> January 2014 and filed in Court on 3<sup>rd</sup> February 2014 had claimed to be the registered owner of the suit property and that the registration of the Plaintiff as owner of the same during the pendency of Nairobi HCCA N0 232 of 1996 and Court of Appeal Civil Appeal No 228 of 2008 was in contravention of section 52 of the Transfer of Properties Act, and was also fraudulent and illegal. He also sought in his Counterclaim various injunctions, orders for

general and special damages and declarations arising from his ownership of the suit property, including a declaration that the vesting orders made in Nairobi Civil Suit No 54 of 1995 are null and void and of no consequence.

It is evident from the pleadings referred to in the forgoing that the outcome of Civil Appeal No. 228 of 2008 will affect the outcome of this suit, as the vesting orders that are the subject of the said appeal are in issue in this suit being the orders that give the Plaintiff and by extension the 6<sup>th</sup> Defendant an entitlement to the suit property. The said Plaintiff and 6<sup>th</sup> Defendant are therefore essentially litigating under the same title as the Respondent in Civil Appeal No 228 of 2008.

In addition, in the event that the said vesting orders are set aside, this Court will be bound by the said decision in determining the Plaintiff's claim in the present suit. Likewise, if the said vesting orders are upheld, this will also materially change the 1<sup>st</sup> Defendants case in the present suit. It is also noted by the Court that Civil Appeal No. 228 of 2008 in the Court of Appeal was filed on 3<sup>rd</sup> November 2008, prior to the filing of this suit on 5<sup>th</sup> October 2009.

It is therefore the finding of this Court that the conditions set out in section 6 of the Civil Procedure Act as to the stay of suits have been met. The said section provides as follows:

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

This suit is therefore liable to be stayed.

As regard the outstanding issues as to the setting aside of the injunction orders granted on 7<sup>th</sup> May 2013 and dismissal of the 1<sup>st</sup> Defendant's Defence, this Court notes that the effect of a stay of a suit is to put the pleadings and proceedings in a suit in abeyance, and not to finalise the suit. This suit is therefore still subsisting, and there is no justification or reason to dismiss any pleadings on account of a stay of proceedings. In addition, during the period of stay it will also be necessary to preserve the suit property so as not to render the suit herein nugatory, and there is therefore still a need for the injunction orders granted herein.

The 6<sup>th</sup> Defendants Notice of Motion dated 24<sup>th</sup> September 2014 therefore only succeeds to the extent of the following orders:

1. That the suit herein be and is hereby stayed pending the hearing and determination of Civil Appeal No. 228 of 2008 in the Court of Appeal
2. The orders of injunction granted by Okwengu J. (as she then was) on 8<sup>th</sup> July 2010 and the injunction orders granted by this court on 7<sup>th</sup> May 2013 are hereby saved and shall subsist during the period of the stay of proceedings and/or until further orders.
3. The outstanding prayers sought in the 6<sup>th</sup> Defendant's Notice of Motion dated 24<sup>th</sup> September 2014 are hereby denied.
4. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_16<sup>th</sup>\_\_\_\_ day of \_\_\_\_April\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**