



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CIVIL SUIT NO. 113 OF 2015

EMFIL LIMITEDPLAINTIFF

VERSUS

THE ATTORNEY GENERAL & 424 OTHERS..... DEFENDANTS

RULING

1. In this matter some of the defendants/respondents represented orally moved the Court for the discharge of the orders of injunction earlier issued on 27th May, 2015. The said defendants are;
 - i) Nos. 157, 158, 161, 166 and 167 (all represented by Mr. Asige Advocate).
 - ii) Nos. 155, 233, 234 and 395 (represented by Mr. Mogaka Advocate).
 - iii) Mr. Ngare State Counsel for the 1st-7th defendants.
 - iv) 283rd defendant represented by Mr. Birir.
2. None of these defendants present had filed documents in reply to the application. Mr. Asige in submissions stated that his clients have valid titles and the order issued has the effect of determining the application before the defendants are heard. That the orders as couched Contravenes Order 40 as there is admission the title deeds are in the names of his clients. This as put by Mr. Asige amounts to abolishing the right of a title holder at an inter-locutory stage. He continued that it is necessary to give the other parties an opportunity to be heard thus need to discharge the orders sought.
3. The second issue he raised is that the order was not served within 3 days as his clients became aware of the order on 12th June, 2015. In default of service, the injunction shall automatically lapse. He urged the Court to therefore discharge the orders. Mr. Asige concluded that the hearing of the application slated for 16th June, 2015 was also premature as the service through advert only gave them 3 days in contravention of Order 51 rule 13 (3). Lastly that the defendants should be given leave to defend the suit without any orders retraining them.
4. Mr. Ngare associated himself with these submissions and added that he needed 45 days to get instructions from the various departments (government) sued. He also expressed intention to raise a preliminary objection. Mr. Birir for the 283rd defendant apart from associating himself with the submissions of Mr. Asige added that his client has 5 plots and is currently working on a few of them building a perimeter wall. The effect of the order is to make her leave the plot. Mr. Birir

further submitted that the 283rd defendant is a purchaser of value without notice and the applicant ought to have disclosed in the pleadings that some people are living on the land. He concluded that the orders are in appropriate and ought to be discharged.

5. Mr. Mogaka advocate associating himself with earlier submissions continued that the applicant misled the Court as the defendants have been in occupation for over 4 years. He also questioned the locus of the plaintiff who he said is a foreign company. Counsel also submitted that the orders are not capable of implementation as they lapsed by operation of law since they were not served within three days. On this aspect, he cited the case of ***Elias Mureithi Vs Hawkins Muteji & 2 Others (2013) eKLR***. He also submitted that police officers are not supposed to enforce Court Orders and lastly the applicant did not give undertaking as to damages.
6. Mr. James Gitau advocate for the applicant in reply to these objections submitted that they are made without foundation as what is presented to Court is evidence from the bar. He submits that you require affidavit evidence to show the defendants are in occupation. He also submitted that for an order to be discharged, you must formally move the Court and there is no such application before the Court. He continued that the applicant has been the owner of the suit property since 1987 and referred to the Judgment in a previous suit annexed at page 450. Further that on 8th April, 2012 stay orders were issued against the 1st – 7th defendants. It is his submissions that all the respondents were issued with the titles after this order.
7. The applicant submitted that the minister also directed the registrar to abstain from issuing further titles but he disregarded. It is his case that there is need for the respondents to show how they acquired their titles. On service, Counsel stated that he could not serve the order before it was extracted. The original Order was granted with the wrong Officer Commanding Police Station (O.C.S) hence their application to correct the error. In any event the defendants were served as at this date, hence no prejudice occasioned and that late service does not go into the merits of the case. Mr. Gitau also submitted that there is no harm in the police maintaining the status quo. He says there is attempt to dispossess the applicant using a different system of land law. They have also given undertaking to damages in paragraph 9 of the application. Lastly he submitted the applicant is duly incorporated in the republic of Kenya.
8. From the submissions above I find three issues for determination. First whether the application to vary or discharge the injunctive orders can be made orally or in writing (formal application). Secondly whether the issues raised in support of the variation and or discharge of the Order needed to be put in by way of affidavit evidence. Lastly whether the injunctive orders herein lapsed by operation of the law for failure to serve them within 3 days from the date of issue.
9. Under Order 40 rule 7 of the Civil Procedures Rules states thus,

“An order for injunction may be discharged or varied or set aside on an application by any party dissatisfied with such order”.

In my interpretation of this rule, ***“application made to Court”*** refers to a formal application since within the rules where oral application is provided, it is always specified. Further the issues raised by the respondents e.g. defendants having title or in occupation are matters requiring support by affidavit or documentary evidence. You cannot present such evidence orally. Mr. Birir submitted that his client owning 5 plots is a purchaser for value without notice or that she is constructing a perimeter wall are issues which required evidence. This limb of the objection as put by Counsel for the applicants amounts to adducing evidence from the bar. Accordingly I shall disregard them as no affidavit was filed to lend any credence to such submissions.

The main issue for me in discharging the orders of injunction is to determine whether there are no orders in existence having lapsed by operation of the law. Order 40 rule 4(3) reads,

“In any case where the Court grants an ex parte injunction, the applicant shall within

three days from the date of issue of the order, serve the order, the application and pleadings on any party sought to be restrained.

In default of service of any of the documents specified, the injunction shall automatically lapse".(underline mine)

The orders were given on 27th May, 2015 and issued on 2nd June, 2015. They were placed on the newspapers of 12th June, 2015.

10.The applicants' counsel explained that the delay was occasioned by their quoting a wrong O.C.S and police station which error they had to amend before serving the order. From the record, the application to correct the error was filed on 5th June, 2015 and the Orders granted on 8th June, 2015. The advertisement was thus placed outside the 3 days if we assumed to go by the date of 8th June, 2015 as date of issue. The applicant has justified the delay that in the end the defendants were served and no prejudice has been suffered. Unfortunately the rules is silent on whether or not the compliance with this order is subject to any prejudice suffered by any party. The orders of injunction issued ex parte on 27th May, 2015 have in deed lapsed by operation of law as they were not served within the 3days as provided under order 40 rule 4(3). This is my finding.

11.In conclusion, I direct the respondents to file their respective replying affidavits to enable the application be heard on its merits.

Ruling signed and delivered at Mombasa this 22nd day of July, 2015.

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A. OMOLLO

JUDGE