



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES CASE NO. 1 OF 2016

ETHICS AND ANTI CORRUPTION

COMMISSION PLAINTIFF /RESPONDENT

VERSUS

JIMMY MUTUKU KIAMBA 1ST DEFENDANT/APPLICANT

TRACY MBINYA MUSAU 2ND DEFENDANT/APPLICANT

JIMBISE LIMITED 3RD DEFENDANT/APPLICANT

MUTHAIGA GREEN ACRES LTD4TH DEFENDANT/APPLICANT

AND

EQUITY BANK LIMITEDINTERESTED PARTY

RULING

1. The defendants/applicants filed a notice of motion dated 13th October, 2017 seeking the following orders:

ii. This honorable court be pleased and do hereby discharge/vacate the court order issued by *Justice Sergon* on 20th May, 2016 restraining the defendants herein from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing or in any similar manner dealing with the listed assets belonging to the defendants including their bank accounts pending the hearing and determination of this application *inter partes*.

iii. This honourable court be pleased and do hereby discharge and/or vacate the court order issued by Justice Sergon on 20th May, 2016 restraining the defendants herein from alienating, selling, charging or further charging, leasing, transferring, wasting disposing or in any similar manner dealing with the listed assets belonging to the defendants including their bank accounts pending the hearing and determination of this suit.

iv. This honorable court be pleased and do hereby allow the 1st defendant to access Sixty Million Kenya Shillings (Kshs.60,000,000/=) from account number MM [...] at Stanbic Bank Limited or any such other amount which this Honorable Court deems reasonable pending the hearing and determination of this suit.

Background

2. The plaintiff/respondents sought orders vide an application dated 13th November, 2014 in *Nairobi High Court Miscellaneous Civil Application no. 804 of 2014* restraining the 1st defendant from accessing funds in his account. In another application dated 8th May, 2015 within the same miscellaneous application the plaintiff sought to have the previous preservation orders extended as well as an order prohibiting the 1st defendant from dealing with listed properties his accounts included.

3. The application was heard inter-partes and dismissed through a ruling delivered on 25th June, 2015. The Kenya Revenue Authority (KRA) then sought and obtained orders to preserve funds held by the 1st defendant and orders prohibiting dealing with those funds for thirty days which ruling was delivered on 1st October, 2015 in *Nairobi High Court Miscellaneous Civil Application No. 285 of 2015* which orders were still in place at the time this application was filed.

4. Another ruling dated 4th April, 2016 extended the preservation orders pending the hearing and determination of tax due by the 1st defendant as alleged by the KRA. The KRA then rendered a taxable authority which the 1st defendant appealed vide *Nairobi Tax Appeals Tribunal Appeal No. 183 of 2015*.

5. An order was granted to have the 1st defendant access Kenya shillings, four million (Kshs.4,000,000/=) through an order dated 8th February, 2016 to enable him meet utilities. Thereafter the plaintiff through an application dated 29th January, 2016 in *Nairobi High Court Anti- Corruption and Economic Crimes No. 1 of 2016 (Formerly Nairobi HCC No. 33 of 2016 (O.S)* sought injunction orders restraining the defendant from proceeding with dealings or disposal of a list of assets belonging to him including their bank accounts. In a Ruling delivered on 20th May, 2016 the court noted that the plaintiff enjoyed orders as per provisions of Section 56 of ACECA as well as injunction orders as per Order 40 of the Civil Procedure Rules, 2010.

The Applicant's Case

6. The applicants have relied on a supporting affidavit and a supplementary affidavit dated 9th November, 2017. It's their case that under Order 40 Rule 6 civil procedure rules if an interlocutory injunction is granted and is not determined within a period of 12 months from the date on which the order is granted then the order shall lapse unless the court orders otherwise with sufficient reason/reasons. The applicants state that if the said orders are extended it would be tantamount to the court sitting on appeal by a court of concurrent jurisdiction.

7. It's their case that the defendants have not been able to access their accounts since the last order of access on 13th April, 2016. This to them has been a denial of the applicants fundamental rights under Article 53 of the Constitution. It's claimed that the applicant is unable to keep his children in the schools that they were before the accounts were frozen. He has been unable to service an outstanding loan of Kshs.180,000,000/= from the Interested party as well as personal debts.

8. He claims that this has left them at the risk of having the preserved assets repossessed thereby defeating the purpose for which they were preserved by the court orders. He says the freezing orders infringe on his right to property under Article 40 of the Constitution yet the 1st and 2nd defendants have not been convicted of any criminal offence. They claim to have been victims of arbitrary, offensive and illegal processes.

9. Through the supplementary affidavit the applicants state that they sought leave of the court on 12th October, 2017 to file the present application. It was done ex-parte as the plaintiff/respondent was not in court. It was their contention that the interlocutory injunction automatically lapsed after 12 months and no reason has been given for any extension to be made. Further they argue that the plaintiff/respondent has never applied for extension of the injunction. To them the orders lapsed on 20th May, 2017, and the court should grant them orders of access and release of funds.

10. Counsel for the defendants/applicants submitted on the lapse of the interlocutory injunction under Order 40 rule 6 Civil Procedure Rules 2010. He relied on *McFoy –vs- United African Company Ltd (West Africa) 3 ALL ER 1169* in which Lord Denning stated that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so”

11. He also referred to the decision in i) *Erick Kimingichi Wapang'ana & another –vs- Equity Bank Limited & Another [2015]*

eKLR and ii) John Kibor Seronei & 3 Others [2016] eKLR. In both matters the issue revolved around the lapse of the 12 months period and there being no further extension of the injunction.

12. Counsel further submitted that the 1st defendant has so far been granted access to a total of Kshs.8,000,000/=through orders granted on 8th February, 2016 and 13th April, 2016 to enable him to meet his utilities. They urged the court to use the same criteria which would have translated to him having accessed Kshs.84,000,000/= to enable him maintain the lifestyle he was used to.

13. He asked the court to grant the access as prayed to enable the applicant enjoy his fundamental rights. He referred the court to case of:

i) *First National Bank of SA Limited t/a Westbank –vs- Commissioner for the South African Revenue Services & Another*

ii) *First National Bank of SA Limited t/a Wesbank -vs- Minister of Finance (CCT19/01 [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002)* in which the court proposed a guiding test between the enjoyment of fundamental rights of citizens and the interest of the limit of the same.

The Respondents Case.

14. The plaintiff/respondent in response filed a notice of preliminary objection and a replying affidavit. The preliminary objection is on the following points:

i. The said notice of motion application is bad in law and fatally defective having been filed while there is a subsisting order of stay of proceedings in respect of this civil suit which was granted on 20th September, 2017 in Nairobi High Court ACEC Petition No. 7 of 2017, *Jimmy Mutuku Kiamba & 3 Others Versus EACC, KRA & Attorney General.*

ii. Any proceedings conducted in this civil suit while there is a subsisting order of stay of proceedings in respect thereof are a nullity.

15. They also filed a replying affidavit by their investigator *Pius Maithya* who inquired into the subject matter of this suit. They oppose the application dated 13th October 2017 which he said was an abuse of court process. The plaintiff/respondent obtained an injunction in this suit against the defendants who then filed *constitutional petition no. 7 of 2017 on 23rd March 2017 (supra)* seeking a declaration that their constitutional rights had been violated and challenged the constitutionality of the proceedings in this suit. They argue that the defendants/applicants thereafter filed a notice of motion dated 17th March, 2017 seeking orders of stay of this suit pending hearing of that application as well as pending hearing and determination of the petition.

16. The applicants obtained an order of stay of proceedings on the 29th March, 2017. Further on 20th September, 2017 this court dismissed the applicants notice of motion dated 23rd March, 2017 but allowed prayer no. 2 granting stay of proceedings in several suits this one included. That this suit could not proceed due to the stay orders being enjoyed by the applicants

17. He deponed that this court lacks jurisdiction to adjudicate over the present application dated 13th October, 2017 while there is an order of stay that was granted by a court of concurrent Jurisdiction that still subsists. He further deponed that an interlocutory injunction under order 40 rule 6 of the Civil Procedure Rules does not automatically lapse if the suit has not been determined within the period of 12 months after the injunction has been granted. He averred that time stopped running when the stay of proceedings order was granted on 29th March, 2017.

18. There are also other subsisting preservation orders in *Nairobi High Court Miscellaneous Civil Application N0. 285 of 2015* obtained by the KRA which is not a party to this suit. Stemming from that, if the court had the jurisdiction to adjudicate over this application then it would not serve the desired end as the orders obtained in aforementioned suit still subsist.

19. The said injunctive orders and preservation orders are dependent upon the determination of *Nairobi Tax Appeals Tribunal Appeal No. 183 of 2015* and *Nairobi High Court ACEC Petition No. 7 of 2017* both filed by the defendants/applicants. There is apprehension that the defendant/applicants may be unable to pay back the amounts if they are allowed to access them in the event

that the courts sustain the plaintiff's and KRA's claim.

20. In their written submissions counsel urged the court to first address the issue of jurisdiction as was decided in the case of *The Owners of the Motor Vessel Lillian 'S' versus Caltex Kenya Limited (1989) KLR 1* in which it was decided that Jurisdiction is everything and ought to be raised at the earliest opportunity. He submits that the assertion that the defendants/applicants were granted leave by court to file the instant application are untrue and they have avoided citing provisions of law that confer this court with the jurisdiction to entertain the oral application as well as the instant application.

21. He argued that it was only proper that they vacate those orders first which ought to have been by way of a formal application. The definition of Stay of proceedings as per the Tenth Edition of Osborn's Concise Law Dictionary is as follows,

'Suspension of the whole or any part of any proceedings, which may be permanent or temporary, until something requisite or ordered is done'.

They referred the court to the case of *Samuel Kamau Macharia –vs- Kenya Commercial Bank Limited and 2 Others (2012)* and a Judgment of the Supreme Court of India in the case of *Mulraj –vs- Murti Raghonathji Maharaj 1967 AIR 1386, 1967 scr (3) 84*.

22. On the issue of the injunctive orders as per Order 40 Rule 6 of the Civil Procedure Rules, counsel submits that an injunctive relief is an equitable relief/remedy based on equitable principles and the conduct of the parties is usually considered in extending the orders. He relied on the cases of *Harrishchandra Bhonvanbhai Jobanputra & Another –vs- Paramount Universal Bank Limited and 3 Others (2014)* in which the Learned Judge cited two cases, *David Wambua Ngii versus Abed Silas Alembi & 6 others (2014) eKLR* and *Filista Chamaiyo Sosten versus Samson Mutai* in which basically they outlined what the court has to look into before vacating orders of injunction as follows;

i. If the injunction was obtained by concealing facts which if they were put to the Judge in the first instance would have affected his judgment in granting the injunction.

ii. The circumstances of the suit have radically changed so that it is no longer necessary to have the injunction.

iii. The general conduct of the holder of the injunction is such that the court is impelled to discharge the injunction, and here I suggest instances where the injunction is being used to intimidate the defendant or achieve an altogether different purpose from which the injunction was issued.

iv. The sustenance of the injunction will cause an injustice, and here occurrence of substantial loss to the defendant is important, for instance an injunction obtained against a company which completely halts the operations of the company will be serving a different altogether purpose from the intention of law in granting equitable relief.

23. He urged the court not be limited to those factors. He submitted that the defendants/applicants have not demonstrated that the relevant injunction was obtained by the plaintiff/respondent's concealment of facts or that a radical change in circumstances has occurred that makes it no longer necessary to have the injunction. They have also not demonstrated that the delay in hearing and determination of the suit has been caused by any inordinate delay or inexcusable conduct on the part of the plaintiff/respondent. The suit has been held in abeyance for a period of 8 months due to the order of stay of proceedings obtained by the defendants/applicants on 29th March, 2017.

24. He contends that Order 40 Rule 6 CPR should not be used to benefit a party who is responsible for delaying the hearing and determination of a civil suit. It is also granted to maintain the status quo where there is a serious conflict of facts. He referred to the case of *Ougo & Another –vs- Otieno (1987) KLR 364* and submitted that the applicants are not deserving of the orders sought as they have not placed material before the court suggesting that the conduct of the plaintiff/respondent was deplorable and they should be disentitled from an extension of the relevant injunctive orders. Enlargement of time of the injunction will be necessary for the effectual complete adjudication of the issues in controversy. They prayed that the application be dismissed with costs.

The Interested Party's Case.

25. The interested party (Equity Bank Limited) advanced a financial facility to the 1st respondent of Kshs.180,000,000/= after all the legal documentation was complied with and instruments registered. The interested party is not objecting to the release of the Kshs.60,000,000/= from the account number MM1428009380 Stanbic Bank save for the fact that the same should be used towards offsetting the amount owed by the 1st defendant. It has not received any payments since June 2015 and this is attracting interest and penalties.

26. Counsel is of the opinion that the plaintiff has not moved this honorable court for extension of the aforesaid injunctive orders as they do not have any sufficient reasons to warrant such orders. They submitted that the injunctive orders issued on 20th May 2016 by Justice Serگون automatically lapsed on 20th May 2017. They cited the cases of *Erick Kimingichi Wapang'ana and another –vs- Equity Bank Limited and Another [2015] eKLR* in the Court of appeal where it was stated:

“Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that Order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction. The same lapses if the suit in which it was made is not determined within twelve months unless, as the Rule provides, for any sufficient reason the court orders otherwise” the court further observes that “there was no subsequent order extending the injunction... that the injunction of 11th October 2011 had lapsed was inevitable.”

27. He submitted that similar observations were made in *John Kibor Seronei and 3 Others versus Stanley Kiptarus Chemsoy & 2 others [2016] eKLR*. He contended that the plaintiff has failed to provide before this court any sufficient reason for extension of the said orders and that there are no facts before the court to warrant the extension of the same. The interested party says it has suffered immense losses and continues accruing losses since 20th May 2016 when the orders of injunction were issued.

Determination

28. I have considered the application, affidavits and submissions. From the pleadings by all the parties the main issues that are in contention are:

i. The implications of the orders of stay of proceedings issued in Petition no. 7 of 2017.

ii. Whether the orders of Injunction issued on 20th May 2016 have lapsed and if so whether they ought to be extended.

iii. Whether the funds should be released to the defendant/applicants as prayed.

29. I will deal with issue no. (i) and issue no. (ii) simultaneously as they are inter-related. There is no dispute that interlocutory injunction orders were issued in this case on 20th May, 2016. **Order 40 Rule 6** of the **Civil Procedure Rules** provides that;

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.” Further on Rule 7 provides that “Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.”

30. Under Rule 6 it is clear that the Orders shall lapse after a period of 12 months unless for any sufficient reason the court orders otherwise. This therefore means that the buck stops with the court if sufficient reasons are in place. The defendants/applicants and the interested party contend that there is no sufficient reason advanced by the plaintiff/respondent but this is opposed by the plaintiff/respondent. The orders of injunction were granted as the plaintiff/respondent demonstrated to the court the reasons why they ought to have been granted. The learned Judge found that the plaintiff/respondent established a prima facie case with a probability of success and he stated that on the face of the Originating Summons within which this application has been filed. The issues therein can only be determined in a trial, he said.

31. The learned Judge found that there will be suffered an irreparable loss if the order of injunction is not granted and this loss shall be suffered by the interested party as it would not be in a position to exercise its statutory power of sale. The plaintiff/respondent showed the Court that this would have been an irreparable loss that cannot be compensated in monetary terms. Lastly the court concluded that the plaintiff/respondent will suffer a greater inconvenience if the injunctive orders are not issued as the property in

question will be likely transferred to third parties and recovery of the same will be more treacherous than preservation until the main suit is heard.

32. The defendants then filed an application for stay of proceedings in *Nairobi H.C ACEC Petition No. 7 of 2017* staying this suit as well as *Nairobi High Court Anti-corruption and Economic Crimes No 1 of 2016 Formerly Nairobi High Court Civil Suit no. 33 of 2016 (O.S)*. The plaintiffs/respondents have invited the court to the definition of stay of proceedings as per the Tenth Edition of Osborn's Concise Law Dictionary which is as follows:

'Suspension of the whole or any part of any proceedings, which may be permanent or temporary, until something requisite or ordered is done.'

33. The stay orders in Nairobi H.C ACEC Petition no. 7 of 2017 have not been vacated as the matter is yet to be finalized. There was no way this suit could have proceeded with a stay of proceedings order hanging on its head. It is the defendants/applicants who applied for the stay of proceedings orders. The record is clear that counsels in this matter were before this court on 12th October, 2017 when Mr. Makokha made an oral application for discharge of the injunctive orders herein among others. This is what the court stated in form of directions:

Court:

"Counsel is directed to file a formal application to explain all these things he is trying to tell the court. The plaintiff will have an opportunity to respond."

34. Counsel did not seek the leave of the court and neither did the court grant leave for him to file anything. He was orally seeking several orders and leave was not one of them, hence the direction which is very clear.

35. It is true an injunction was issued in this suit on 20th May 2016. Just how many times did this matter come for hearing without proceeding after 20th May 2016" At first there was a hint on an out of court settlement so the hearing dates given as 27th and 28th July, 2016 were shelved. It came for mention for review of the settlement progress on 7th October, 2016. The report was that there was no progress due to some demands by the defendants/applicants.

36. The next hearing dates were 13th and 14th February 2017, the same could not proceed due to the absence of counsel for the defendants (Mr. Nyachoti). Fresh dates were again taken for 28th February, 2017 and 1st March, 2017. The defence was given a last adjournment. When parties appeared on 28th February, 2017 the defendants had brought in a new lead counsel (Professor Ojienda) who asked for time to prepare for the case. The court expressed its disappointment in this turn of events but gave him the time he wanted.

37. The matter was adjourned to 10th and 11th April, 2017 for hearing. I must mention that all along the plaintiff/respondent had witnesses in court for the hearing of the case. Before the said hearing dates could be reached the defendants/applicants filed the Petition no. 7 of 2017 dated 17th March, 2017 and filed on 23rd March, 2017. In the said petition they sought for orders of stay of proceedings in this suit among others. They got the orders they sought and this suit was stayed as from 29th March, 2017. Everything came to a standstill meaning even the injunction time stopped running, at their own request.

38. It cannot therefore be said that the injunction lapsed on 20th May, 2017 yet there were lawful orders in place stopping the process. It should also be noted that all the delays in the proceeding of this suit have been conveniently caused by the defendants/applicants herein.

39. On the issue of release of funds, the Orders of injunction were sought with interest of various parties in mind, the public and the interested party herein included. The learned Judge in his Ruling of 20th May, 2016 stated that whichever decision he was to make there would be a party that would be inconvenienced. The reason for arriving at the decision to grant the orders of injunction was so that the property in question be preserved to avoid various suits in an attempt to recover property from third parties in case it is indeed determined that the defendant acquired property fraudulently. I believe the applicant ought to have demonstrated further to the court that they indeed are in dire need of the funds to be released to them. The law under **Section 89 (1)(a) of the Proceeds of Crime and Anti-Money Laundering Act** provides for the variation and rescission of orders and states that:

(1) A court which makes a preservation order-

(a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorizing the seizure of the property concerned or other ancillary order if it satisfied-

i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred;

Even with this in mind, the court must always be mindful of the interest of other parties.

40. In the case of *Terry Wanjiru Kariuki versus Equity Bank Limited & another* [2012] eKLR the court extended orders of injunction pronouncing itself as follows:

“it is clear from the provisions of Order 40 rule 6 of the Civil Procedure Rules that the lifespan of an injunction is 12 months from the date the same is granted and no express order is required to vacate such orders. The only order required is to extend the lifespan of an injunction beyond the said period. However, in the circumstances of this case and the matter having been brought to the attention of the court, it would be an abdication of duty on the part of the Court if it were to avoid dealing with the same.”

41. The interested party prayed that the funds be released so that their loan repayments can be updated as they have not been repaid in a loan advanced in the year 2014. It is worth noting that some funds were released on 8th February 2016 and on 13th April 2016. The interested party has not indicated whether there have been any loan repayments from the year 2014 and what the amounts owing are. In my opinion they have approached the court with laxity and yet claim they have suffered irreparable loss. The injunctive orders were in the first place granted to protect their interests and I believe that remains the position. They will recover their money once this case is determined.

42. I will however allow the 1st defendant/1st applicant access to Kshs.3,000,000/= only (three million shillings) for personal utilities from Account no. [...] at Stanbic Bank Limited.

43. In the present case I find that the injunction orders did not lapse as claimed by the applicants. The stay of proceedings order sought and obtained by the applicant in petition No. 7 of 2017 is the one that grounded this suit. The applicants can't turn around and use it to obtain the orders they now seek.

44. In conclusion I find no merit in the application which I dismiss save for the grant of prayer 5 to the limited amount. The order of injunction will remain in force until this matter is heard and determined.

45. Costs will be in the cause.

Signed, dated and delivered this 20th day of March, 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE



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