



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT & LAND CASE NO.81 OF 2016

JASON SORE SHIKUKU.....PLAINTIFF

VERSUS

CHRISTOPHER NAIBEY CHEMENGU.....DEFENDANT

RULING

Order 40 Rule 4(3) of the Civil Procedure Rules provides as follows:

“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 orders, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse”. *Emphasis added.*

On 18th August 2016, the Plaintiff herein filed this suit against the defendant seeking the main remedy that the defendant be evicted from the land parcel No. ELGON/KAPSOKWONY/936 (herein the suit land). He also sought an order for injunction and arrears of rent.

Contemporaneous with that plaint, the Plaintiff filed an application under order 40 of the Civil Procedure Rules seeking orders to restrain the defendant, his servant and/or assigns from in any way dealing or interfering with the suit land pending the hearing and determination of the application inter-partes. The plaintiff is acting in person and it is obvious that he is unable to draw proper pleadings. His application was placed before MUKUNYA J who granted him the following order on 12th October 2016 which is relevant to the application now before me:

“Temporary injunction is issued restraining the defendant/respondent, his servants, workers and/or assigns from in any way dealing and/or interfering, putting up buildings and other structures and also be stopped from interfering with the Plaintiff/Applicant right as the legitimate/legal and bonafide owner of the said plot of land No. ELGON/KASOKWONY/936 pending the hearing and determination of this application inter-partes and / or further orders”.

It is clear therefore that the order granted by MUKUNYA J being an ex-parte interlocutory order, the inter-partes hearing ought to have been held at least within fourteen (14) days. That was not done and to-date there has been no inter-partes hearing of that application some twenty(20) months after the ex-parte order of injunction was issued.

On 3rd November 2017, the defendant filed his Notice of Motion dated 30th October 2017 in which he sought the following substantive order:

“That this suit be consolidated with KIMILILI SPMCC No.42 of 2016 and upon such consolidation the plaint in KIMILILI SPMCC No.42 of 2016 be deemed the counter claim in this suit while the defence be deemed defence to the Counter-claim”.

The basis of the defendant’s application as supported by the affidavit of his Counsel Mr. JULIAS SAWENJA KHAKULA is that there exists KIMILILI SPM CC No.42 of 2016 between the Parties herein concerning the same subject matter i.e. title No. ELGON KASOKWONY/936 which has not been heard and it will save Judicial time if the two suits are consolidated.

That application was opposed by the plaintiff who filed a replying affidavit dated 23rd November 2017 in which he has deponed inter-alia that although he had filed KIMILILI SPMCC No.42 of 2016 he was advised to withdraw it by the trial Magistrate on the ground that the Court has no jurisdiction and so that case was withdrawn and does not exist.

On his part, the Plaintiff filed a Notice of Motion dated 23rd November 2017 seeking the main Order that the defendant be cited for contempt of this Court’s orders dated 12th October 2016 and be committed to Civil Jail. The basis of that application as contained in the Plaintiff’s Supporting Affidavit is that although this Court issued orders on 12th October 2016 restraining the defendant from in any way interfering with the suit land, the defendant has been putting up structures thereon.

The defendant on his part filed grounds of opposition to that application stating that the Orders dated 12th October 2016 lapsed and were never served within the period stipulated in Order 40 Rule 4(3) of the Civil Procedure Rules 2010, that there has never been any inter-partes hearing of the application dated 17th August 2018 and finally, that this suit has never been set down for hearing contrary to the requirements of Order 40 Rule 6 of the Civil Procedure Rules 2010.

When the matter was placed before me on 21st May 2018, it was agreed by the parties that the two applications be canvassed together by way of written submissions. I also directed that KIMILILI SPMCC No.42 of 2016 be availed. That was done and both parties filed submission as directed.

I have considered the Plaintiff’s Notice of Motion dated 23rd November 2017 seeking to cite the defendant for contempt of this Court’s Orders dated 12th October 2016 and also the defendant’s Notice of Motion dated 30th October 2017 seeking to have this suit consolidated with KIMILILI SPMCC No.46 of 2016. I have also considered the submissions by both parties.

I will commence with the defendant’s Notice of Motion dated 30th October 2017. KIMILILI SPMCC No.46 of 2016 having been availed as directed, I have perused it and found that the Plaintiff therein is the defendant in this Case while the defendant therein is the Plaintiff in this Case.

The subject matter is the suit land herein and therefore these two suits would ordinarily be consolidated. However, and as clearly deponed by the Plaintiff herein in his replying affidavit, I confirmed from the record that KIMILILI SPMCC No.42 of 2016 was infact dismissed by HON. D.O. ONYANGO (SPM) on 3rd May 2018 after the Plaintiff therein (Defendant herein) failed to prosecute it. KIMILILI SPMCC No.42 of 2016 does not therefore exists and cannot be consolidated with this Case. Thus defendant’s Notice of Motion dated 30th October 2017 must therefore be dismissed.

The Plaintiff’s Notice of Motion dated 23rd November 2017 on the other hand seeks that the Defendant be cited for contempt for disobeying the orders issued by MUKUNYA J on 12th October 2016. As is now clear, those Orders were issued ex-parte. There was no inter-partes hearing and those Orders were never extended. Indeed, there is no evidence that the said ex-parte Orders were ever served upon the defendant as mandated by Order 40 Rule 4(3) of the Civil Procedure Rules.

Those Orders therefore lapsed automatically by effluxion of law three days after they were issued. An order that has lapsed ceases to exist and cannot be the basis upon which any contempt proceedings can be founded. Even assuming, for the benefit of the plaintiff, that the orders issued by MUKUNYA J on 12th October 2016 were to last pending the hearing and determination of this suit, the plaintiff was nonetheless also required to have the suit heard and determined within twelve months from the date they were issued. The Law is that notwithstanding the wording of an Order of Interlocutory Injunction, the same lapses if the suit in which it was made is not determined within twelve months unless the Court for sufficient reasons Orders otherwise – **ERICK**

KIMINGICHI WAPANGANA & ANOTHER V EQUITY BANK LIMITED & ANOTHER CA CIVIL APPEAL NO.23 OF 2015 KSM (2015 eKLR). Therefore, even if the Orders by MUKUNYA J dated 12th October 2016 had been issued after an inter-partes hearing of the Plaintiff's Notice of Motion dated 17th August 2016 which sought a temporary injunction, such Orders would not aid the Plaintiff in any application for Orders of contempt against the defendant. The Plaintiffs Notice of Motion dated 23rd November 2017 must also be dismissed.

The up-shot of the above is that the Court makes the following Orders:

- 1. The Plaintiff's Notice of Motion dated 23rd November 2017 is dismissed.*
- 2. The Defendant's Notice of Motion dated 30th October 2017 is dismissed.*
- 3. Parties to meet their own costs.*

Having said so, it is clear from this pleadings in this case that the suit land was the subject of an agreement between the Parties dated 22nd February 2009 where the purchase price is given as Kshs.415,000. This is well within the pecuniary jurisdiction of the subordinate Court at KIMILILI where a previous suit had been instituted. I intend to transfer this suit to that Court for hearing and final determination unless the Parties satisfy me otherwise.

BOAZ N. OLAO

ELC JUDGE

3RD JULY 2018

Ruling dated, delivered and signed in open Court this 3rd day of July 2018 at Bungoma

Plaintiff present in person

Mr. Khakula for defendant absent

BOAZ N. OLAO

ELC JUDGE

3RD JULY 2018

PLAINTIFF: The suit can be transferred to KIMILILI Court.

COURT: This suit is hereby transferred to the subordinate Court at KIMILILI. It be mentioned there on 16th July 2018 for further orders as to hearing.

BOAZ N. OLAO

ELC JUDGE

3RD JULY 2018



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