



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 333 OF 2017

GICHUGU LAIKIPIA PROPERTY INVESTMENT CO. LTD...APPLICANT/PLAINTIFF

VERSUS

NJUGUAKA PROPERTY INVESTMENT LTD.....RESPONDENT/DEFENDANT

RULING

1. By a Notice of Motion dated 8th August 2016 filed under Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 1A,1B and 3A of the Civil Procedure Act and the High Court vacation rules where the plaintiff/Applicant seeks orders that:-

i. Spent

ii. Spent

iii. Spent

iv. The honourable court be pleased to grant an order of injunction restraining the defendants, its agents, licensees, representatives from trespassing, entering into, remaining thereon, offering for sale, disposing of alienating, letting out or otherwise interfering with the Applicant's possession, ownership and occupation of the land parcels LR No. 8033/192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 213, 214, 216, 219, 220, 221, 230, 231, 233, 233, and 234 pending the hearing and determination of the main suit.

v. Costs of this application be provided for.

2. The said application is supported by the sworn affidavit of Johnson N. K. Gachara the Chairman and Director of the Plaintiff/Applicant Company as well as the grounds on the face of the application.

3. On 13th June 2017, by consent, the court directed that the application be disposed of by way of written submissions and thereafter parties to highlight on their submissions. The Defendant/Respondent filed their submissions on the 27th July 2017 whereas the Applicant/Plaintiff herein filed theirs in support of their application on 18th September 2017.

4. While perusing through the written submissions herein, the court noted that parties had also submitted on a Preliminary Objection that had been filed by the Defendant/Respondent on the 30th September 2016.

5. The said Preliminary Objection raised the issue of Sub Judice wherein the Defendant/Respondent sought to have the whole suit struck out in view of the pendency of Millimani Environment and Land Court Case No. 1838 of 2007.

6. In the spirit of Article 159 (2) (a) (b) (c) and (d) of the Constitution that underscores the role of the court in the administration of Justice without undue regard to procedural technicalities, I shall proceed and deal with both the applications simultaneously in this ruling.

Notice of Preliminary Objection

7. The Notice of Preliminary Objection raised by the Defendant/Respondents and dated the 30th September 2016 is based on the grounds that this court lacks jurisdiction to hear and determine the suit herein in view of the pendency of Millimani Environment and Land Court Case No. 1838 of 2007. That in this respect, the Plaintiff/Applicant's suit is incompetent, incurably defective and a gross abuse of the court process.

8. The Defendants further submitted that the matters raised in the Notice of motion dated the 8th August 2016 suit were substantially the same in issue with as those raised in the case at Millimani Environment and Land Court Case No. 1838 of 2007 for which an order was issued on the 13th November 2014.

9. That what was in dispute in both cases was the same matter being LR No. 8033/192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 213, 214, 216, 219, 220, 221, 230, 231, 233, 233, and 234 which resulted as a subdivision of parcel No. 8033/2.

10. That the said Millimani Environment and Land Court Case No. 1838 of 2007 has since been transferred to this court for hearing and determination thus rendering the present suit Sub Judice thus this suit should be struck out.

11. The Plaintiff/Applicant submission on the other hand was to the effect that although there was indeed another matter pending in court being Millimani Environment and Land Court Case No. 1838 of 2007, yet the claim in that case was against the original vendor for specific performance of the 1061 acres of land bought by the Plaintiff and had nothing to do with the Defendants in the present suit. That in the present suit, the claim was against the defendant/ Respondent who is in the process of disposing of part of the Plaintiff/Applicant's parcels of land to third parties wherein the Plaintiff seeks for an injunction against it not to dispose of the suit property. That parties in both suits as well as the reliefs sought were different and therefore the issue of Sub Judice does not arise.

12. On the issue of the Preliminary Objection raised by the Defendant/Respondent, this court shall make its determination based on the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** Court of Appeal held that a preliminary objection per Law J.A. was stated to be thus:-

‘.....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

13. I have considered the proceedings filed in the Millimani Environment and Land Court suit No. 1838 of 2007 and I agree with the Plaintiff/Applicant that although the Plaintiff is the same in both suits, yet the Defendants in the two suits are distinct.

14. I also note that the subject matter in both the suits are directly and substantially similar and that although the reliefs sought in the two cases are slightly different to the effect that in the previous case, the Plaintiff has sought for an additional relief of specific performance, yet chain of events leading to the filing of separate suits are the same.

15. That the provisions of section 6 of the *Civil Procedure Act* provides for stay of suits as follows:-

“No Court shall proceed with the trial of any suit or proceedings 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 other Court having jurisdiction in Kenya to grant the relief claimed”.

16. The issue of this matter being sub-judice has been pleaded in paragraphs 7 of the defence herein.

17. I have since obtained the said file being Millimani Environment and Land Court Case No. 1838 of 2007 and note that the matter therein was dismissed for want of prosecution on the 25th May 2015. That the Plaintiff thereafter filed a Notice of Motion dated the 15th June 2015 wherein they sought to set aside the orders of 25th May 2015 so as to have the matter heard on merit.

18. Vide a ruling dated the 4th July 2018 and delivered on the 5th July 2018, the application dated the 15th June 2015 was dismissed. In essence therefore, there is no suit pending at the Millimani Environment and Land Court so as to invoke the doctrine of Sub Judice pursuant to Section 6 of the Civil Procedure Rules. Further, the since the suit at the Millimani Environment and Land Court was dismissed before it was heard and determined, we cannot invoke the doctrine of Res judicata either. The Preliminary Objection herein fails.

19. On the Notice of Motion dated 8th August 2016 wherein the Plaintiff applicant seeks for injunctive orders against the Defendant herein, upon considering the application, Affidavits, annexures and the submissions filed by both parties, I would summarize the Applicant's case as follows.

Plaintiff/Applicants case

20. Briefly the gist of the Plaintiff/Applicants case is that on the 25th July 1994, the Applicant purchased the following parcels of land from Sosian Ranch Ltd (the Defendants in Millimani Environment and Land Court Case No. 1838 of 2007) LR No. 8033/192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 213, 214, 216, 219, 220, 221, 230, 231, 233, 233, and 234 totalling 500 acres for a consideration of Ksh. 3,250,000/= to which they paid in full and the same was acknowledged vide a letter dated the 20th August 1998.

21. That on the 17th October 1994 the said Sosian Ranch Ltd applied for the Land control consent in favor of the Applicant which was granted. That upon full payment the Applicants were put in possession of the suit lands and are still in possession to date, however Sosian Ranch Ltd did not effect the transfer of the suit land in the Applicant's name.

22. That the Defendant/Respondent herein also owns a separate 500 acres of land being parcels No. 8033/217-218, 190-191, 235-236, 241-244, 249-255, 260-261, 110-112, bought from the same vendor.

23. That on or about the 25th June 2016, the Applicants received information that the Defendants herein was in the process of selling some of its parcels of land to a third party known as Nyasore Ltd.

24. That upon further investigations, the Plaintiff/Applicant obtained a letter of consent dated the 22nd November 2012 used by the Defendant/Respondent, to transfer its parcels of land wherein they discovered that the Defendant/Respondent had inserted some of the Plaintiff/Applicant's parcels of land being No's 192-214 and 230-234 in the said consent to transfer.

25. That vide an agreement dated the 9th November 2012 between the Defendant/Respondent and Nyasore Ltd, the same was clear that the Respondent had sold the following pieces of land, 8033/110-113, 8033/190-221, 8033/230-236, 8033/241-244, 8033/249-255 and 8033/260-261 which included some of the Applicant's pieces of land, the subject suit herein captured therein.

26. That it was because of the inclusion of some of the Applicant's parcels of land in the letter of consent dated the 22nd November 2012 as well as the sale agreement dated the 9th November 2012 that the Plaintiff/Applicants thus sort injunctive orders against the Defendants from dealing with its parcels of land.

The Defendant/ Respondent's case

27. The Application for injunctive orders was opposed by the Defendant/Respondents for reason that they had not discharged the onus placed on them by virtue of the principles laid down in the **Giella vs Cassman Brown [1973] EA 358** for the issuance of the injunctive orders sought.

28. That the Applicants had not established a prima facie case with a probability of success in that it had failed to demonstrate the relationship between the suit land and the Defendant/Respondent's parcels of land.

29. That the Plaintiff/Applicant's annexures marked as JNKG 1 and JNKG 3 were subject of litigation in the Millimani Environment and Land Court Case No. 1838 of 2007.

30. That further the Applicant had failed to demonstrate what injury it would suffer if the prayers for injunction were not granted. That the Respondent had no proprietary interest over suit parcels of land and nothing had been produced by the applicant to prove any possible sale or interference of the suit parcels in contrast to the Respondent's annexures marked as MN3 and MN4. Thus the balance of convenience did not tilt in their favour.

31. That the application herein was not merited as the parcels of land held by both parties were distinct and as such the application ought to be dismissed with costs to the Defendant/Respondents.

32. The issue for determination by this court is whether the Applicant has established a prima facie case to enable this court grant her the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

33. Has the Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

34. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

35. I have considered all the material facts placed before me, there is no doubt that both parties bought parcels of land measuring 500 acres each from Sosian Ranch limited. That subsequently the Defendant being desirous of selling part of its land to a third party, entered into an agreement dated the 9th November 2012 with one Nyasore Ltd and even obtained a consent dated the 22nd November 2012 to transfer the same.

36. According to the Applicant/Plaintiff some of its parcels of land have been incorporated into the land that the Defendant/Respondent wanted to sell hence their apprehension that the Respondent herewith wanted to dispose of their parcels of land which led to the filing of this application.

37. I have looked at the documents herein annexed as JNKG 5A and as well as JNKG5B and I am of the opinion that indeed the Applicant has made out a prima facie case that the Defendant/Respondent had infringed on his right. An order for injunctive orders is therefore necessary herewith to preserve the suit subject of which the Applicant is apprehensive that it would be disposed of as part payment has already been made.

38. On the balance of probability, I find in favor of the Applicant. The application dated the dated 8th August 2016 succeeds with costs to the Plaintiff/Applicants.

39. I now direct parties to comply with order 11 the Civil Procedure Rules within 30 days from today so that the matter can be set down for hearing.

Dated and delivered at Nyahururu this 30th day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE