



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 142 OF 2008

BENARD GETECHA & 36 OTHERS.....APPLICANTS/PLAINTIFFS

-VERSUS-

NATIONAL HOUSING CORPORATION.....RESPONDENT/DEFENDANT

MUNICIPAL COUNCIL OF NAKURU.....3RD PARTY

RULING

1. This is a very old case having been filed on the 31st July 2008 vide a plaint dated 31st July 2008. Together with the plaint, a chamber summons was also filed whereof an interim order of injunction was sought. Upon hearing of the application, an order of temporary injunction restraining the defendant, his gents and servants from selling or interfering with the suit plots (stated in the plaint) pending hearing and determination. That was on the 14th August 2008.

2. The defendant filed his statement of defence on the 17th December 2008 denying all the plaintiffs allegations.

The Municipal Council of Nakuru (as it was then) was enjoined in the proceedings as a third party. I have not seen the 3rd parties defence on record. Despite the age of the case, no serious progress of the case is demonstrated since then.

3. On the 3rd May 2016, the plaintiffs by their Notice of Motion brought under Section 1A, 1B and 3A of the Civil Procedure Act sought.

1. That the claim lodged by the plaintiffs vide a plaint dated 31st July 2008 be allowed in the following terms:

(a) A declaration that notice published in the Daily Nation Newspapers of 21st July 2008 was illegal, invalid and of no consequence.

(b) A declaration that the Defendant has no interest over the plaintiffs plots mentioned in Paragraph 3 hereinbefore capable of being protected by disposal of plots in the manner adopted by the defendants.

(c) A perfectual injunction restraining the Defendant by itself and/or its servants, or agents or assigns from ever advertising for sale, selling, disposing, charging, dealing in, trespassing into the plaintiffs parcels of land mentioned at paragraph 3 herein.

(d) General damages for defamation.

(e) Costs and interest.

4. In summary, the grounds for the application are that no money was owing to the defendant as the applicants had purchased the plots from the Municipal Council of Nakuru and that there was no privity of contract between the applicants and the Respondents.

5. In opposition to the application is a Replying Affidavit by one Joash Onguko, the Accounts assistant of the Defendant. It is deponed that the defendant, upon request by the third party. Advanced to them some loan facilities upon an understanding that the persons allocated the plots including the Plaintiffs/Applicants were to repay the same failing which the plots were to be repossessed. It is averred that the applicant's defaulted in loan repayment and therefore the plots were advertised for sale.

6. Parties opted to file written submissions on the application save the 3rd party who did not enter appearance nor filed a defence to the plaintiff's claim.

7. I have considered the pleadings and the application dated 3rd May 2016, as well as counsel submissions.

The prayers sought are in the nature of declarations and injunctive orders, together with general damages for defamation. Upon such reliefs, it is sought that the same be allowed. Looking at the submissions by the Applicants dated 4th August 2017 and the Respondents dated 18th September 2017, it is evident that this matter ought be heard upon evidence for the court to determine on the numerous triable issues apparent in the pleadings, among others, whether there was privity of contract between the Respondent and the 3rd party and the applicants, and whether indeed the alleged loans were advanced to the applicants and if so, on what understanding or terms.

8. The Respondent/Defendant fully agrees that what the applicants are seeking by their application is summary judgment on admission of facts as may be discerned from the pleadings or otherwise. I have perused the parties pleadings. I have not seen any plain and obvious admissions of the Applicants claims by the Respondent.

I have also noted that the applicants did not cite the correct legal provisions in their application.

When there is substantive legal provision in a statute, **Section 1A, 1B and 3A of the Civil Procedure Act** ought not be invoked singly.

9. Judgment on admission is anchored upon order **13 (2) of the Civil Procedure Rules**. The court has unfettered discretion to enter judgment on admission if such admissions are:

“---Plain and obvious, as plain as pikestaff, and clearly readable because they may result in judgment entered.---” - See

Chifram -vs- Nazari (1984) KLR 327

In the case **Mombasa Motor Vehicles Sales Ltd & 5 Others -vs- Jane Kariti nzioka (2013) e KLR, Paragraph 4**, the court held that:

“The Judges discretion to grant judgment on admission of facts under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment.”

10. The pleadings by all parties in the suit cannot be seen to be plain and clear as it ought to be. They are muddled up with accusations and counter accusations. There are numerous and weighty issues that can only be resolved through a trial, upon evidence. This is not a matter that the court can even try to determine on summary procedure.

11. I have indicated that no reasons have been advanced as to why this 2008 case has remained unheard. The applicants cannot be heard to complain of the long pendency of the case in court shelves.

A case belongs to the plaintiff and it is its duty to progress the same for hearing. The court cannot be blamed for the plaintiffs in action.

The defendant too is obligated to take action to have the case against it finalised, one way or the other. Both parties have not shown any willingness to conclude the case. None should complain against the other, yet options abound.

12. For the above reasons and without going into further details, **I find the application dated 3rd May 2016 devoid of merit. It is dismissed with costs to the respondent, National Housing Corporation.**

I further direct that parties do appear before the Judge on a date to be given herebelow to confirm compliance with **Order 11 of Civil Procedure Rules** and taking a hearing date as there is no justification whatsoever why the case should remain unheard, ten years after close of pleadings. **Mention for pretrial directions on the 9th July 2018.**

Dated, signed and delivered this 28th Day of June 2018.

J.N. MULWA

JUDGE