



Mungai & another v Cheska Agencies Limited & another (Environment & Land Case 388 of 2017) [2023] KEELC 21768 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 388 OF 2017
LN MBUGUA, J
NOVEMBER 21, 2023**

BETWEEN

MIGUI MACHARIA MUNGAI 1ST PLAINTIFF

FLAVIA SUSAN KALANDE 2ND PLAINTIFF

AND

CHESKA AGENCIES LIMITED 1ST DEFENDANT

ELDORADO GARDENS LIMITED 2ND DEFENDANT

RULING

1. The Plaintiffs' Notice of Motion application dated 26.7.2023 is for determination. They seek orders that this court does review or vary its injunctive orders issued on 3.6.2021, and that temporary injunction be issued restraining the 2nd Defendants/its agents from collecting any further rental income from the suit premises as well as a mandatory injunction compelling it to deposit into court the entire rental income collected from the suit property from 1.6.2021 and an order that the sum of ksh.5million already deposited into court by the Plaintiffs be deemed as mesne profits and be released to them forthwith.
2. The application is based on grounds on its face and on the 1st Plaintiff's supporting affidavit sworn on 26.7.2023. The averments set out there in have been captured in previous applications of the plaintiff relating to the a sale agreement dated 8.9.2016 for parcel Nairobi /Block 129/289.
3. The deponent avers that after the order of 3.6.2021, it emerged that the 1st Defendant had discharged the charge which had secured the suit property, sold and transferred the property to a 3rd party (2nd Defendant) on 18.11.2020 when this suit was pending, hence the need to vary the aforementioned order.



4. The application is opposed by the 2nd Defendant vide its replying affidavit sworn by its director one Henry Figondo on 5.10.2023. He avers that the prayers sought in the application are similar to the prayers in the substantive suit including the prayer for mesne profit, hence such a determination thereof at this preliminary stage would amount to a disposal of the suit by way of an application.
5. He also avers that the 2nd Defendant is unable to enforce the prayer for payment of rent to this court as it parted with possession of the suit property vide a sale on 14.7.2022 way before it was made a party to this suit.
6. He adds that even prior to the sale of the property, the same was informally charged to prime bank who hold the title over the same, for which the 2nd Defendant is negotiating release to enable it complete its obligations under the agreement for sale.
7. The issues that fall for determination in the matter are; (i) Whether this court's orders of 3.6.2021 should be varied to allow ksh.5 million deposited into court by the Plaintiffs to be released to them as mesne profits. (ii) Whether the Plaintiffs have met the threshold for grant of a temporary injunction restraining the 2nd Defendant from collecting rent and whether it should be compelled to deposit the said rent to court.
8. On the 1st issue, this court has power to review its orders under Section 80 of the [Civil Procedure Act](#). Order 45 Rule 1 of the [Civil Procedure Rules](#) sets the grounds for review as;

Discovery of new and important matter or evidence, mistake or error apparent on the face of the record or any other sufficient reason.
9. It is on the understanding that the suit land was still registered in Defendant's name that on 3.6.2021, this court issued orders directing that the sum of ksh.5 million paid to court by the Plaintiffs together with rental income collected from the suit premises be deposited in a joint interest earning account in the names of the advocates on record pending the hearing and determination of this suit.
10. The Plaintiffs have demonstrated that at the time the court issued its orders of 3.6.2021, the 1st Defendant had not disclosed that he had already sold the suit property to the 2nd Defendant on 18.11.2020. Nevertheless, in ordering the release of the sh.5 million as mesne profits, the court would in essence be dealing with a substantive prayer in the plaint (prayer d).
11. On the issuance of injunctive orders and an order for the rent to be deposited in court, this court notes that it is already dealing with the issue of contempt against the 1st defendant. The dispute will only be further convoluted if the court delves into the issue as to who is collecting rent at this stage. After all, the 2nd defendant has intimated that they have since parted with the possession of the suit premises.
12. Further, the court takes into account that the Plaintiffs have never taken possession of the suit property and they have not been in control of the rent proceeds. They did not demonstrate that they would suffer injury that would not be compensated by way of damages.
13. The Plaintiffs also sought a mandatory injunction compelling the 2nd Defendant/its directors and agents to deposit into court the entire rental income collected from 1.6.2021 from the suit premises pending hearing an determination of this suit. The Plaintiffs did not demonstrate special circumstances to warrant issuance of a mandatory injunction at this interlocutory stage. See [Silipet Properties Limited & another v Chege Mwaura & another \[2017\] eKLR](#).
14. The history of the litigation herein indicates that the plaintiff has strived to get orders for preservation of the suit properties through various applications as seen in the applications of 10.6.2017 and



11.11.2019 and now the current application. However, in the ruling of 3.6.2021, the court directed the parties to focus on the disposal of the main suit. This is the position I emphasize so that the dispute is once and for all brought to a closure. See my decision in [*Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & another \[2019\]*](#) eKLR.

15. In the final analysis, the court declines to grant the orders sought in the application dated 26.7.2023. Instead, I hereby give orders that the suit shall not be alienated in any manner from today. Parties are hereby directed to focus on the main trial. Each party is to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Wangui holding brief for Mr. Mungai for Plaintiff

Gatungo for 2nd Defendant

Court Assistant: June

