



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC SUIT NO. 1256 OF 2014

ESTHER MUTHONI PASSARIS.....PLAINTIFF

-VERSUS-

CHARLES KANYUGA.....1ST DEFENDANT

GRACE WANJIKU KANYUGA.....2ND DEFENDANT

ALKA ROSHANLAL HANSPAL.....3RD DEFENDANT

RULING

1. This troublesome case is about a property known as land Reference No. 7741/75 (“the suit property”). The parties at least the Plaintiff and the 3rd Defendant or her predecessor in title have been in court since the year 2009 with interlocutory applications. The 3rd defendant has sought to have the Plaintiff vacate the suit property. The Plaintiff conversely has sought to assert her rights as a tenant previously and also affirm her position as a purchaser on the basis of an option to purchase contained in a lease between the Plaintiff and the 3rd Defendant as attorney for the now deceased Kultar Singh Hanspal.

2. Briefly the relevant facts and litigation history can be stated as follows.

3. The deceased Kultar Singh Hanspal (“Kultar Singh”) was until his demise the registered proprietor of the suit property. The 3rd Defendant is the widow and administrator of the estate of the late Kultar Singh’s estate. In September, 2006, the 3rd Defendant acting with the full permission of the late Kultar Singh and through a properly constituted power of Attorney, entered into a lease agreement with the Plaintiff. The term absolute was originally for one (1) year effective 1st September, 2006. The Plaintiff took possession. The lease contained an option to purchase. During the term of the lease the 3rd Defendant also sold to the Plaintiff certain fixtures and fittings. On 1st October, 2007, the late Kultar Singh entered into another tenancy agreement with the Plaintiff for a period of two years. The Plaintiff was then already in possession.

4. Then in April 2009, the late Kultar Singh moved to court. He sought vacant possession of the suit property. That suit is still pending before this court. The late Kultar Singh sought a delivery up of vacant possession but the Plaintiff would hear none of it. The Plaintiff claimed to have exercised her first right of purchase.

5. In November 2013 the dispute escalated. The Plaintiff filed an application seeking to restrain the 3rd Defendant from inter alia trespassing into, selling, transferring, mortgaging, leasing, charging, alienating or in any way dealing with the suit property. The Plaintiff also sought to restrain the 3rd Defendant from evicting the Plaintiff or levying distress or in any way interfering with the Plaintiff's quiet possession. The application also sought to cite and commit the 3rd Defendant and her counsel to jail for allegedly being in contempt of the court orders of 16th April, 2011. The ruling on the application by the Plaintiff is still pending before the court (Hon. Lady Justice Gitumbi presiding). The case is suit No. ELC 1171 of 2013.

6. In the meantime, the Plaintiff discovered that notwithstanding the pending suit, the suit property had been transferred to the 1st and 2nd Defendants herein. Promptly the Plaintiff filed the instant suit together with the substantive motion. Both the suit and the motion sought basically the same orders and prayers that the Plaintiff had previously sought, albeit by way of counterclaim, in Civil Suit No. ELC 1171 of 2013.

7. In response to the Plaintiff's application the Defendants filed affidavits and applications.

8. The 1st and 2nd Defendants filed their affidavit on 24th October, 2014. They also filed an application on the same day seeking orders, inter alia to restrain the Plaintiff from evicting them or taking possession of part of the suit property occupied by the 1st and 2nd Defendants. The said Defendants also sought specific orders from the court to enable them upgrade the property especially the perimeter fence to a masonry boundary wall.

9. The 1st and 2nd Defendants application was premised on two main grounds. The 1st and 2nd Defendants firstly contended that they were the now registered proprietors of the suit property and not the 3rd Defendant. They could thus deal with the property and also they were entitled to receive the market rent from the Plaintiff. Secondly, the 1st and 2nd Defendants stated that the plaintiff had failed to disclose material facts when she approached the court on 26th September, 2014, the day she filed this suit. In particular the 1st and 2nd Defendants complained that the Plaintiff had failed to disclose that there were two distinct houses on the suit property and the Plaintiff occupied only one while the 1st and 2nd Defendants now occupied the other house.

10. The 3rd Defendant also filed a Replying Affidavit. The 3rd Defendant repeated her now familiar story. The Plaintiff never bought the suit property, so stated and 3rd Defendant. The Plaintiff was not and is not entitled to the orders of specific performance and had merely sought to take undue advantage of the later Kular Singh's demise to distort the circumstances and facts surrounding the entire transaction, so added the 3rd Defendant. Finally, in her rather prolix affidavit the 3rd Defendant concluded with the deposition that the 1st and 2nd Defendants have a genuine and valid title to the suit property and the Plaintiff was now only bent in denying the Defendants the entitlement which accompanies such ownership and occupation. The 3rd Defendant also filed an application on 19th November, 2014 seeking to have the instant suit consolidated with Case No. ELC 1171 of 2013 (formally HCCC 280 f 2009).

11. The parties urged two applications by way of written submissions which were highlighted before me on 16th December, 2014. The application by the 3rd Defendant was not urged.

12. Three issues emerged immediately for my consideration and determination. Firstly, is whether there was material non-disclosure on the part of the Plaintiff as the court was moved ex parte for an interlocutory injunction. Secondly, is whether both or either of the applications dated 25th September, 2014 and 24th October, 2014 should be heard and determined. Finally, is what is the impact of the pending ruling and suit before Hon. Lady Justice Gitumbi.

13. Whilst Mr. Muchemi advocating for the 1st and 2nd Defendants was of the view that there was material non-disclosure on the part of the Plaintiff, Mr. Issa submitted that all relevant material facts had

been placed before the court. The Plaintiff was accused of not disclosing that there are two houses on the suit property and that the Plaintiff occupies one whilst the 1st and 2nd Defendants occupy the other. The Plaintiff was also accused of not disclosing the “Shambolic state” of the fence on the suit property. To the 1st and 2nd Defendants had such disclosure been made it would have swayed the court whilst determining the *ex parte* application and also impacted any subsequent determinations.

14. There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders *ex parte* (without notice) then that party is obligated to disclose all facts which the court thinks are most material to enable the court to fairly form its judgment. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the *inter partes* stage. This rule which has existed since **Castelli –v- Cook [1849] 68 E.R. 36** and was intended to ensure that parties who appear *ex parte* before the court are not deceitful and do not break faith with both the court and the other parties to the litigation, has been followed in various subsequent cases both outside and within our jurisdiction. See for example **R. –v- Kensington Income Tax Commissioners ex parte Princess Edmond De Polignac [1917] 1 KB 486**, **Smith –v- Croft (No. 1) [1986] 1 WLR 58**, **Boreh –v- Djibouti [2015] EWHC 769**, **Tiwi Beach Hotel Ltd –v- Stamm [1990-94] EA 565**, **The Owners of the Motor Vessel Lilian S –v- Caltex Oil (K) Ltd [1989] KLR 1 and Bonde –v- Steyn [2013] 2 KLR 8**, among others. See also the treatise on Civil Procedure by Adrian Zuckerman, **Zuckerman on Civil Procedure: Principles of Practice, the 3rd edition** thereof at Chapter 10 on interim injunctions.

15. So strong is the rule that where disclosure has not been met the court will not even decide the applicant’s application on its merits. In **Ex parte Princess Edmond de Polignac [1917] 1 KB 486**, Washington L. J stated as follows at page 509:

“It is perfectly well established that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him”

16. I would agree entirely and add that it is to be noted too that even as a party is expected to fully investigate the cause of action and the facts relied on, he is also expected to make full disclosure. He sieves any facts at his own risk because it is the court that determines what is material and not the party applying. The party must nonetheless act in utmost good faith without appearing to steal a march on the court or on the other party. I also hasten to add that even when invoking the rule as to full and free disclosure of material facts, the court must also exercise caution not to cause injustice to either party, including the applicant.

17. In the circumstances of this case, is there non-disclosure of any material fact? First in the issue of the fence. The Plaintiff disclosed that the existing fence was being pulled down. The Plaintiff stated the persons pulling the fence down were acting on the instructions of the Defendants. Then the Plaintiff disclosed the condition of the fence prior to its being hacked down by the person allegedly sent by the 1st and 2nd Defendants. The Plaintiff availed photo images to the court. They were coloured images and notes thereto especially at pages 30, 31 & 32 of the Plaintiff’s application specifically referred to the fence prior to its being cut down.

18. I do not view it that the Plaintiff was or could have been expected to do any more. Nothing could have been more vivid than the photographs availed by the Plaintiff. I find that in these respects, there was full disclosure by the Plaintiff of that which was within her knowledge and material to the application then made *ex parte*.

19. I have also studied the documents filed herein with regard to the two houses on the suit property and the alleged nondisclosure of their existence and occupation. The record reveals that the Plaintiff had

sworn affidavits stating that she is in occupation of one house. An affidavit sworn by the 3rd Defendant also was to the effect that the 3rd defendant occupied another house on the suit property. This latter affidavit was sworn in 2013. A copy of the same constituted the Plaintiff's annexures and documents filed before the court. There is even an earlier affidavit sworn by the 3rd Defendant way back in the year 2006 which revealed that there are multiple houses on the suit property. That fact was present before the court on 26th September, 2014. As the court is expected to read through all documents availed and on record, I do not view it that there was nondisclosure of the existence of two houses if not more on the suit property.

20. The Plaintiff has denied in her supplementary affidavit that the 2nd house was in the occupation of the 1st and 2nd Defendants as the Plaintiff moved the court in September, 2014. The Plaintiff indeed states that the house was vacant and is still vacant till date. I sincerely have no reason to doubt the Plaintiff's statement made on oath but assuming for one minute that the 1st and 2nd Defendants have been in occupation would it have been a material fact dictating disclosure thereof?

21. I would answer that question in the negative. A brief synthesis of the litigation history between the 3rd Defendant and the Plaintiff would reveal that notwithstanding the existence of the two houses on the suit property the litigation has been focused on the entire property LR No. 7741/75. The orders previously issued in favour of or against the 3rd Defendant have been in regard to LR No. 7741/75 rather than any specific house or houses. I have the strong impression that additional disclosure was not material especially in view of the Plaintiff's contention that the other house previously occupied by the 3rd Defendant has been vacant. Besides, if the 1st and 2nd Defendants were already in possession the orders sought by the Plaintiff were purely prohibitory orders and not mandatory in nature to be used to evict or eject the 1st and 2nd Defendants.

22. I am in the totality of the foregoing and in the circumstances not convinced that the sanction of locking out the Plaintiff from prosecuting the application on its merits would be applicable.

23. I now move to the final issue as to the position of the two applications filed one by the Plaintiff and the other by the 1st and 2nd Defendant. Both applications seek injunctive reliefs. With a lot of reticence, I come to the conclusion that both applications should not be determined on their merits at this stage of the proceedings.

24. This is for the reason, firstly, that as regards the Plaintiffs application there is as has been disclosed, pending before this court a similar application which even seeks contempt orders against the 3rd Defendant. That application was prosecuted and the court reserved a ruling. It may still be pending. Even though the 1st and 2nd Defendants were not a party to that application, harmony rather than cataclysm should reign in such circumstances. There is absolutely no need to prompt judicial embarrassment by my rendering a ruling on the same facts whilst my sister or brother judge also conversely renders himself or herself. I must be alive to that possibility. I am also alive to the fact that the 1st and 2nd Defendants were not party to ELC Civil Suit No. 1171 of 2013 but it must be remembered that the orders sought therein are orders *in rem* including orders for the ultimate transfer of the property. Better case management strategy would not lobby for adjudication by a different judicial officer but, even at the risk of prejudicing either party, for a brief stay of the similar application which has come later in time.

25. The 1st and 2nd Defendant's application dated 24th October, 2014 has to be stayed by the court though for a different reason. The application is not pegged on any claim statement. A statement of claim would take the form of either a plaint or a counterclaim. It is more appropriate when applications of a rather substantive nature, as the 1st and 2nd Defendants' current application, are pegged on substantive claims: see **Yellow House Inns Ltd –v- A. A. Kawir Transports Ltd & 4 others [2014] eKLR**. The 1st and 2nd Defendants may well file a counterclaim to form the basis of their application.

26. Yet too the circumstances of this case would dictate that the court acts to ensure that the administration of justice continues to run fairly. In my view it would be appropriate to make an order for

