REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ENVIRONMENT AND LANDS CASE NO: 294 OF 2015

ERERI COMPANY LIMITED.....PLAINTIFF

VERSUS

CORNERSTONE PREPARATORY ASSOCIATION.....1ST DEFENDANT/APPLICANT

STEPHEN NDUNGU NJENGA.....2ND DEFENDANT

RULING

The application dated 12th November 2015 is brought under certificate of urgency wherein the 1st Defendant prays for an order that upon hearing inter-parties the court be pleased to set aside stay or vary the Ex-parte orders issued on 3/11/2015 by Honourable Justice Munyao. The 1st Defendant/Applicant further prays that the suit be struck out for being frivolous, scandalous and an abuse of court process.

The application is based on grounds that the 1st Defendant herein purchased Longonot/Kijabe Block 1/17 (Ereri) from Beth Kabura Njau and is therefore a third party bonafide purchaser for value of the aforementioned land parcel having complied with all the legal requirements in the transaction resulting into the conveyance of the title and is thus protected under sections 26 and 53 of the Land Registration Act of 2012, and section 39 of the repealed Registered Land Act. The said section 53 of the Land Registration Act of 2012 provides inter-alia that if a person acquires or receives land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that the land was acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which the part applies, or acquired or received through a person who acquired or received it in the circumstances set out in paragraph and that reference to knowledge in this section shall include actual, constructive and imputed knowledge.

The 1st Defendant believes that being one such party who acquired its parcel of land in good faith from a party who had also sold it without malice deserves the protection from this court as it is the registered owner and bona fide purchaser who should also be protected under section 26(1) of the Land Registration Act. The said section 26(1) states that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the Land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge. In addition, the Plaintiff had known all along that the 1st Defendant had been in occupation of Longonot/kijabe Block 1/17 (Ereri) and that massive construction activity were ongoing and which are currently being concluded and has thus approached the court with unclean hands. The learned Judge was misled by counsel for the plaintiff herein into granting the aforesaid orders which have the effect of rendering the activities and functions of the 1st Defendant herein on its parcel of land illegal when the 1st Defendant herein is the

legally registered owner of the parcel known as Longonot/Kijabe Block 1/17 (Ereri).

The plaintiff obtained the far reaching ex parte Orders of temporary injunction herein against he 1st Defendant/Applicant by concealing relevant material facts that were against their case and by mischievously misleading the Learned Honourable Justice S. Munyao into granting the said orders. The plaintiff has even failed to disclose or indicate to the court the Land Parcel Number belonging to the 1st Defendant that was sought to be the subject of their Application as is clear on the face of record in their Notice of Motion dated the 13th October, 2015.The Plaintiff has further failed to disclose or indicate to the court that there were other subsequent suits with orders that were against their case and which include Judicial Review case 76 of 2011 where the question of ownership which was part of the subject matter canvassed in the suit was dismissed and the plaintiff herein ordered to file proper suits to determine questions of validity of titles they contested.

There is no decision in Nakuru HCCC No. 220 of 2010 that resulted into cancellation of any titles then and that what the plaintiff is misguiding the court to rely on is a statement that was made as an obiter dictum by the hon. Justice Emukule. Further, the 1st Defendant is likely to incur exemplary costs suppose it were to be forced to stop construction as it has contracts with different parties involved in the construction which is scheduled to be complete by December of this year 2015. Additionally, the 1st Defendant whose primary objective is to help the under privileged in the society had already recruited children from the community, mostly orphaned by epidemics, for purposes of offering them eduction from January, 2016 ad shelter and therefore stands to suffer irreparably. The plaintiff has either been sleeping on its rights if at all and now hopes that the Honourable Court would sidestep justice to bend to its whims in depriving the rightful parties being the 1st Defendant herein and the public it seeks to help from undertaking its legal and equitable roles.

The plaintiff misled the learned Honourable Judge into thinking that the portion of land currently owned and occupied by the 1st Defendant herein, and which was sold to itself with vacant possession and a valid title issued and which exists to date, is still amongst the Plaintiff's land parcels for allocation to its members when in fact no such land belongs to the Plaintiff company capable of being transferred.

There being no such parcel free for allocation and in the name of the Plaintiff Company, it is only fair that the current legal owner of Land Parcel Number Longonot/Kijabe Block 1/17 (Ereri) being the 1st Defendant herein be declared as such and that the plaintiff be injuncted from interfering in any way with the said parcel of land. The 1st Defendant/Applicant can therefore not be barred from use and disuse of its own property and is protected against such interference by the provisions of Article 40 of our Constitution of Kenya 2010.

The plaintiff has not satisfied the three limbs for the grant of a temporary injunction since there is no harm likely to be suffered by them.

The balance of convenience and the principle of proportionality tilt on favor of setting aside the temporary injunction as there in no cause of action established capable or requiring to be addressed by the Honourable Court as against the 1st Defendant.

The application is supported by the Affidavit of Mary Wanjiku Thuo who states that the orders made on 3/11/2013 were obtained without full and material disclosure of facts to the learned judge who was misled into granting the aforesaid orders which have the effect of rendering the activities and functions of the 1st Defendant on his parcel of land illegal where the 1st Defendant herein is legally registered owner of the parcel of land known as Longonot Kijabe Block 1/17 (Ereri).

The deponent states that the 1st defendant is the absolute proprietor of Longonot Kijabe Block 1/17 (Ereri). He was registered as proprietor after a legal process sale leading upto registration as proprietor. The plaintiff has also undergone the process of development and obtained necessary approvals Herein from National Environmental Management Authority and National Construction Authority and has commenced developing the property.

He states that having acquired the property in good faith from a party who had also sold it without malice, deserved the protection of the court, under section 26(1) of the Land Registration Act 2012. The applicant's bone of contention is that the judge was misled to entertain the application and that there was material non – disclosure. He claims that Nakuru HCCC No. 220 of 2010, Nairobi HCC No. 512 of 2010 and Nakuru HCCC No 187 of 2012 annexed in the affidavit sworn by one Njuguna M. Kungu involve entirely different parties and not the 1st Defendant and that the plaintiff therefore voluntarily misled the learned judge onto thinking that the the portion of land currently owned and occupied by the 1st defendant and which was sold to itself, with vacant possession and a valid tile issued and which exists to-date, is still amongst the plaintiff's land land parcels for allocation to its members when in fact no such land belongs to the plaintiff company capable of being transfered.

The plaintiff was served on 24/11/2013 by Mr Kyalo Kamina a process server of the High Court of Kenya and authorized to serve court process but did not file a replying affidavit. The application dated 19/10/2013 and filed on the same date was in the 1st instance brought before the judge on the 19th October 2015 but the court declined to hear the matter exparte and directed that it be heard inter-parte on the 3/12/2015. It came for hearing on 3/11/2013 before the learned judge in Nakuru in the presence of the representatives of the parties. The interim order was issued then until ***inter-parte*** hearing on the 6/2/2016.

Mr Steve Biko learned counsel for the 1st defendant' submits that the Notice of motion was in respect of Longonot/Kijabe Block) --(Ereri) which does not belong to the 1st Defendant. The 1st Defendant was unable to defend himself for the unknown parcels of land it lays no claim over. Mr Biko submits that parties will be denied orders obtained ex-parte for failing to disclose material facts to the court.

Justice Mbaru in the case of ***Aviation & Airport services Workers Union (K) v Kenya Airport Authority & Another (2014) Eklr*** aptly pointed this out in his holding where he delivered thus'

"When a party comes to court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders,such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in-law. Any advantage gained by such non-disclosure, the grant of ex-parte orders will be taken away from the offending party." According to Mr Biko, The plaintiff indeed obtained the ex-parte orders by managing to portray falsehood to the judge and concealing facts against their case. For example, the plaintiff did not in its application, reveal the Land Parcel number belonging to the 1st Defendant that was sought to be the subject of their Application.

It is further submitted that in the Plaintiff's Notice of Motion, it prayed for orders in relation to parcels he only referred to as Longonot/Kijabe Block …./(Ereri) series and Longonot/Kijabe Block 1/54 (Ereri) which do not belong to the 1st Defendant. It is preposterous to allege that the 1st Defendant ought to defend itself for unknown parcels of land it lays no claim over.

This concealment has been impugned by courts which have severally ruled that the duty of disclosure applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. This was the holding in the matter of Ruaha Concrete Co. Ltd et al versus paramount universal Bank Ltd et al, HCCC No. 430 of 2002 relied on by Justice Mbaru in the case of Aviation & Airport Services Workers Union (k) (supra). The Court in Ruaha outlined in that case the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure in which the court reiterated:

"The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all

the circumstances of the case including:

a. The nature of the case the applicant is making when the makes the application.
b. The order for which the application is made and the probable effect of the order on the 'defendant or the plaintiff.
c. The degree of the legitimate urgency and the time available for the making of the inquiries."

The plaintiff materially relied on several cases; for example Nakuru HCCC No. 220 of 2010, Nairobi HCCC No. 512 of 2010 and Nakuru HCCC No. 187 of 2012 as annexed in its Affidavit sworn by one Njuguna M. Kungu. These involved entirely different parties none of whom are the 1st Defendant herein; the purport of the decision in the aforementioned cases are such that the decisions affected the different parties therein and that it has since been along time since the said issues were canvassed and several new and legitimate transactions have occurred.

I have considered the application before court and do find that the order was not issued ex-parte as all counsel were before court when it was made. The Judge restrained the 1st defendant from constructing on the parcel of land until 16/2/2016 when the matter will be heard after listening to the counsel for the parties and therefore these issues should have been raised then.

I do find that the argument that the Honourable judge was misled into issuing the order is without basis as there was enough material on record to enable the judge to arrive at the decision he made. To begin with, this is not an appeal as I do not have the power to sit over an appeal in respect of a decision made by my brother Judge Justice Munyao, however I do agree that I have the power to review the decision on basis of material non-disclosure in the event that the judge is not available to review his own decision. I'm aware that the judge is currently on leave and that is the reason the matter has been placed before me.

In the application dated 19/10/2015, the plaintiff's sought the orders inter-alia namely that **this matter be certified urgent and to be heard forthwith and ex parte in the first instance and that pending the hearing and determination of prayers 3 and 4 of the application or further orders of court, the Defendants their agents, servants, or any other person under their instructions, consent, authority and control be restrained by an interim injunction from constructing structures on, entering, remaining on, trespassing or in any manner whatsoever from dealing with or interfering with any portion of parcel of land number L.R 8622. The application was based on grounds that the plaintiff is the registered owner of all that parcel of land known as LR. 8622 Longonot and that the Defendants had unlawfully entered the Plaintiff's parcel of land and started putting up illegal permanent structures thereon without authority and/or consent of the plaintiff.**

The application was supported by the affidavit of Njuguna M. Kungu the chairman of the plaintiff's Board who stated that the plaintiff was the registered owner of all that parcel of land known as LR. 8622 Longonot. Some Times in the year 1991 some unscrupulous persons unlawfully, corruptly and irregularly obtained a title document in the series ***LONGONOT/KIJABE BLOCK …./(ERER)*** allegedly out of the Plaintiff's land number 8622. On the strength of one of "title deeds" one VIRGINIA NYAKIO CHEGE (using "Title Deed number Longonot/Kijabe Block 1/49 ERERI) sued the plaintiff for injunctive orders in Nakuru HCCC 220 of 2010 and on 6th May 2011 the court (Emukule J) made a finding that indeed the title deed held by her and others were unlawfully obtained which decision has never been varied, set aside or successfully appealed against. He stated that ***learned judge, justice Kimondo*** In Nairobi HCCC 512 of 2010 has also made findings that indeed the Plaintiff's land number 8622 is still intact and has never been sub divided and that the 2nd Defendant herein and others sued the plaintiff herein for injunctive orders in Nakuru HCCC 187 of 2012. Omondi J. heard the case and upheld the positions of Emukule and Kimondo JJ and dismissed the application for injunction. It came to the Plaintiff's knowledge that the 1st Defendant had commenced construction of permanent structures on the suit land the plaintiff caused its advocates to send a demand letter to the Defendant who complied and stopped construction. However, the Defendants their agents, servants or person acting under its authority, instruction, consent and/or control have re-started constructing permanent structure on the Plaintiff's land. He believes that the act of constructing permanent structures on the said land is unlawful and in breach of the plaintiff's statutory and constitutional rights over property and is intended to provoke the plaintiff and its members and excite

emotions which may lead to mayhem, chaos and probably blood shed as the portion on which the construction is going on ought to be allocated to a shareholder of the plaintiff. The plaintiff therefore prays for an order of injunction restraining the Defendants their agents, servants, children or any other person under its instructions, consent, authority and control from constructing structures on, cultivating, entering, remaining on, trespassing or in any manner whatsoever from dealing with or interfering with any portion of parcel of land number L.R. 8622 or any other portion Forming part of land purportedly registered in the series Longonot/Kijabe Block1/ …. (ERERI). It is upon this background that the learned justice Munyao issued the interim orders.

This court observes that the plaintiff claims that the disputed parcel falls within L.R 8622 which parcel of land is riddled with disputes up to the Court of Appeal. The history of this matter dates back to 1988, which has been disclosed by the applicant by annexing Nakuru HCCC No. 220 of 2010 in which Nairobi HCCC No. 3746 of 1988 consolidated with Nairobi HCCC No. 3200 of 1990 and Nairobi Court of Appeal Application No. Nai 7 of 1998, which was dismissed on 17/2/1998, and Civil Appeal Application No. 172 of 2006, which was dismissed on 14/2/2002, were considered by the judge. The main issue was whether subdivision of L R 8622 was effected and new tittles issued to parties. All these matters were placed before the Honourable Judge before he made the aforesaid decision.

The Plaintiff/Respondent also annexed Commercial and Admiralty Division Civil Suit No.512 of 2010 Ereri Co. Ltd -VS- Simon Kamu Gitau where Justice Kimondo observed that " I have also referred to the fact that there existed an order of the court in HCCC No. 3200 of 1990 prohibiting registration of the transfers" this was in respect of an application by th company against the former directors for a return of its properties.

Justice Kimondo again heard and dismissed an application for review of this earlier order in a ruling dated 20/4/2012 that in which is annexed in the Plaintiff/Respondents affidavit of 14/10/2015 as Exhibit D.

There is the case of John Kamau Murigi & 60 others -vs- Ereri Company Ltd. NKR HCCC NO 187 of 2012 annexed as Exhibit F where the judge Hon. H. Omondi considered the issues at length in HCCC NO 3746 of 1988 (NRB), NKR HCCC 189 of 2011, and NKR JR NO 76/2011 NKR HCCC no 220 of 2010, NRB (Commercial and Admiralty Division) and HCCC No. 512 of 2010 and HCCC No 245 of 201 (NRB Commercial and admiralty Division).

In this matter, justice H. A Omondi, states that the issues raised are the same addressed by Judges and as Emukule J stated in HCCC No. 220 of 2010, the courts are being bogged down by the same issues, clothed in new names. This decision is annexed as EXHIBIT F.

In Nakuru HCCC No 220 of 2010, Virginia Nyakio Choge -vs- Ireri Co. Ltd, Hon Emukule observes that the main issue is subdivision.

These decisions were brought before the Honourable justice Munyao and therefore it cant be said that the Judge was misled as there was enough material before the judge to issue the order. Failure to disclose the parcel number in itself is not material non disclosure as it is not demonstrated by the 1st defendant that the plaintiff knew the title no of the disputed portion and willfully failed to disclose the same to the court. It is interesting to note that the interim orders were obtained in respect of L.R 8622 and not Longonot/Kijabe Block 1/17 (Ereri) which from the history of the disputes relating to this matter was allegedly subdivided and titles issued. This court is not convinced that the plaintiff is guilty of Material non disclosure.

On the prayer for striking out the entire suit, this court is required to give the aforesaid words their natural and ordinary meaning. It is a basic rule of statutory interpretation that if the meaning of statute is plain clear and unumbiguos and susceptible to only one meaning, effect must be given to that meaning irrespective of consequences.

The Concise Oxford English Dictionary[defines the word ***"scandalous"*** as derived

from the word ***"scandal"*** which means *"an action or event regarded as morally or legally wrong and causing general public outrage."* The word ***frivolous*** is defined as something *not having any serious purpose or value*. *Vexatious* is something *causing annoyance or worry* and in law refers to an action *brought without sufficient grounds for winning, purely to cause annoyance to the defendant.*

Black's Law Dictionary, 7th Edition, states the following on the word *scandal. "Scandal consists of the allegation of anything which is unbecoming the dignity of the court to hear,or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous. The matter alleged, however, must be not only offensive, but also irrelevant to the cause, for however offensive it be, if it be pertinent and material to the cause the party has a right to plead it. It may be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge."*

A scandalous matter is defined as a matter *that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense*. The word *frivolous* is described as something *lacking a legal basis or legal merit; not serious; not reasonably purposeful*.

As to the word *vex*, the same means *to harass, disquiet and annoy*. *Vexatious* is taken to refer to conduct, which is *without reasonable or probable cause or excuse; harassing; annoying.*

A *scandalous pleading* in my view is a pleading that attempts to put the other party into bad light. It attempts disparage the other party to the proceedings. Such pleadings border on defamation. However, such disparaging words attributed to the other party must not be in issue in the suit. If they are in issue in the suit, then of course the words cannot be scandalous.

They must be disparaging pleadings which are completely irrelevant to the proceedings in issue.

A *frivolous pleading* in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. For example if a litigant founds his cause of action on a law that has been repealed, then such pleading obviously lacks legal foundation and can be said to be frivolous.

A *vexatious pleading* in my view is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily, a frivolous pleading or a scandalous pleading. Its main quality is that it stands out as a pleading only aimed at harassing the other party.

A pleading that is an abuse of the process of court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situations where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons.

The court through the provisions of Order 2 Rule 15 is given leeway to strike out pleadings that are *scandalous, frivolous , vexatious or otherwise an abuse of the process of court.* Before striking out such pleading, the court needs to make an examination whether such pleadings are scandalous, frivolous, vexatious or otherwise an abuse of the process of law. If they are, then a court would be perfectly entitled to strike such pleadings out because essentially it is not fair and neither is it worthy having a defendant shoulder the burden of such litigation. Courts have faced such applications on numerous occasions.

In *DT Dobie & Co vs Muchina.*

In the said case it was stated that :-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption

and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

in Richard Nchapi Leiyagu -vs- IEBC & 2 others *Court of appeal of Kenya* ***held:-***

> *"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."*

The court finds that the defendant has not demonstrated that the plaintiff's constitutional right to be heard should be taken away.

This court finds further that the suit is not vexatious as there is no evidence that the plaintiff is vexing the court or the defendant as there is no other pending suit or determined suit between the parties, the suit is not scandalous and abuse of the process of court. The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF DECEMBER, 2015.

ANTONY OMBWAYO

JUDGE