



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION
ELC CASE NO.630 OF 2012

REUBEN M. MUSINDI.....PLAINTIFF/APPLICANT

= VERSUS=

URUTAGWO MWIRUTI WOMEN GROUP.....DEFENDANTS/RESPONDENT

RULING:

The matter coming up for determination is the Plaintiff/Applicant Notice of Motion application dated 21st September, 2012 brought under **Article 42 & 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, 63 (c) & (e) of the Civil Procedure Act Cap 21, Order 40 Rule 1 (a) and Order 51 Rule 1 of the Civil Procedure Rules 2010** and all other enabling provisions of the Law seeking for Orders that:-

- a. *The Defendant/ Respondent, its agents, servants, employees, representatives, assigns, and successor in title and/or third parties be restrained from further construction of any structure and /or perimeter wall on all that parcel of land known as **Plot No. 13LR / 7340/ 148** situated on **Utawala** Nairobi pending the hearing and determination of this application.*
- b. *A Mandatory injunction be issued to compel the Defendant and/or any third parties to bring down any construction elected on the property known as **Plot No. 13LR 7340/148 Utawala** area pending the hearing of the suit.*

The application is premised on the grounds set on the face of the application and on the supporting Affidavit of **Reuben Muhavi Musundi** . The grounds in support of the application are :-

- i. *That the Plaintiff purchased **Plot No. 13LR 7340/148 Utawala** area from the Defendant and has only left a balance of **Kshs.19, 000/=** which the Defendant has refused to accept from the Plaintiff.*
- ii. *That the Defendant has sold the said parcel of land to a third party disregarding the fact that the Plaintiff has already been making share contribution for the said parcel of land.*
- iii. *That the Plaintiff has been in possession of the said parcel and hence started construction on the said parcel of land by laying a structure foundation for the structure.*
- iv. *That a third party with the connivance of the Defendant has illegally encroached the said land and have since commenced putting up a structure on the said parcel of land.*
- v. *That the third party appears to be intending to put up a permanent structure on the property and in the process of doing this he started to bring down the Plaintiffs foundation to the structure.*

vi. *That unless restrained by this Honourable Court, the third party and the Defendant, its agents, servants, employees, representatives and/ or otherwise shall not only continue to infringe on the applicant's proprietary rights but shall continue damaging the property through the ongoing developments.*

vii. *That in order or facilitate and return the Plaintiff's access to the property, it would be in order for any structure put up by the third party brought down..*

viii. *Further, that it is in the interest of justice that the applicant be protected from having its proprietary rights over the said parcels of land interfere with.*

The application was also supported by the annexed Affidavit of **Reuben Muhavi Musundi** who averred that on diverse dated in the year 2006 and 2007 he made oral agreements with the Defendant to purchase two parcels of land from the Defendant namely **Plot No. 92 LR 7340/84** for **Kshs.50,000/=** and **plot No.13LR 7340/148** for **Kshs. 90,000/=**.

He further averred that he started paying for the parcels of land in installments as share contributions to the said parcels of land. Further , that after paying **Kshs. 31,000/=**, for plot **No.92 LR 7340/84**, the Defendant informed him that it had sold the same plot to a third party but had decided to add his share contributions for the said plot to the share contributions of Plot No. 13 LR 7340/148. It was his contention that he agreed with the Defendant that he could start constructing on plot **No.13 LR 7340/148** and that he would get a share transfer in his name after clearing to pay the full amount for the said parcel of land.

The deponent averred that he continued to pay for the Plot No. **13 LR 7340/148** until he had a balance of **Kshs.19,000/=** Then the Defendant's agents refused to accept the said money claiming that Plot No. **13 LR 7340/148** had already been sold to a third party . That indeed a third party had entered into the said parcel of land illegally and without any justification and the said third party is in the process of building a structure and a perimeter wall on the said third party. Further, the said third party has also started demolishing the foundation to the said structure. It was deposed that the Defendant sold the said parcel of land to the third party without any lawful authority and without issuing any notice to the applicant. It was his averments that he was willing and ready to clear **Kshs. 19,000/=** balance so that the share can be transferred in his name.

The applicant therefore stated that unless restrained by this court, the third party and/or the Defendant either acting alone or through its agents , servants , employees , representatives and/or otherwise shall not only continue to infringe on his proprietary rights but shall continue damaging the property through the ongoing developments . Therefore, in the interest of justice and equity, the application should be allowed.

The application is contested. **Ann Wairimu Ndungu**, an official of the Defendant's Company swore a Replying Affidavit and stated that she had been advised by her advocate that the whole suit is incompetent as drawn and filed. It was her contention that the Plaintiff has come to court with unclean hands and cannot expect equity to come to his aid in the circumstances. Further, it was her contention that whereas the Plaintiff undertook to purchase the suit plot, it was a condition precedent that the full purchase price was to be paid within reasonable time before possession and occupation could be given. She averred that the Plaintiff only paid partly and then defaulted leaving them with no other alternative but to offer the suit plot & other interested purchaser who paid fully and took possession and use of the same. She further averred that the plaintiff is guilty of laches having come to court six years after the alleged purchase which is inordinate. It was her understanding from the advice given to her by her advocate that the prayers sought are not available as a third innocent party has already taken possession and the Plaintiff's remedy lies in refund of paid. Monies which the defendant is ready to refund. She also averred that the last time the Plaintiff paid for the plot was on 10th March , 2007 and she cannot now use the court to right his fault and that the building materials on the site belongs to the 3rd party . The Defendant therefore urged the court to dismiss the Plaintiff's application with costs as it does not meet the threshold for granting of injunction.

However, before the Notice of Motion dated 21st September, 2012 could proceed for hearing, the

Defendant filed a Notice of Preliminary Objection. The Court ordered that the preliminary objection be canvassed first and parties filed their written submissions. In the Preliminary Objections, the Defendant averred that the suit is fatally defective and incapable of being sustained in law from the outset.

The Defendant has submitted that the suit herein is fatally defective and cannot be sustained. In the case of **Avtar Singh Bhamra and Another Vs Oriental Commercial Bank, Kisumu High Court Civil Case No. 53 of 2004**, the Court held that:-

“ A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained “.

In the instant preliminary objection, the Defendant submitted that the Defendant is a Society which in law has no capacity to sue or to be sued.

The issue of **capacity to sue** is an issue of pure point of law and therefore the objection raised by the Defendant qualified to be a preliminary objection as it is based on a point of law.

The Defendant further submitted that the suit is defective and should be struck out. The Defendant has averred that the Defendant herein is a Society which is not capable of suing or being sued. He relied on the case of **Eritea Orthodox Church Vs Wariwax Generations Ltd, HCC No. 672 of 2007** , where the Court held that:-

“There is no doubt that the Plaintiff is a non-incorporated body registered under the Society’s Act Cap 108 laws of Kenya. It is now trite law that a society registered under the said Act is not incorporated body which can assume capacity to sue or to be sued in its own name in any legal proceedings”.

The Defendant has alleged that the Defendant herein is a society. It is trite law that preliminary Objection on pure points of law must stem from the pleadings.

In the Plaintiff on paragraph 2, the Defendant is described as a **limited Liability Company duly in corporate under the provisions of the Company’s Act Cap 486 Laws of Kenya**. A look at the Plaintiff therefore shows that the Defendant as a limited liability Company. The Defendant alleges that it is registered as a society. However, that Certificate of Registration as Society was not attached to the Preliminary Objection or its Defence.

For the Court to ascertain that indeed the Defendant herein is a Society, then it needed to have a look at its Certificate of registration. The Court at this juncture does not have the benefit of that certificate of registration. The Court therefore cannot hold with certainty that the Defendant herein is a Society. The Court cannot arrive at a decision that Defendant is a Society without ascertaining the facts, based on the pleadings filed in court.

For the above reasons; the Court finds that the preliminary objection cannot stand for now. The same is dismissed with costs to the Plaintiff.

It is so ordered.

Dated, signed and delivered this 23rd day of September, 2014

L. GACHERU

JUDGE

In the presence of :-

Mr. Macharia holding brief for M/s Muhanda

For the Plaintiff/Applicant

None attendance for the Defendant though aware.

Court Clerk: Kamau

L. GACHERU

JUDGE

23/9/2014