



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC NO 270 OF 2012**

**WATERFRONT OUTLETS LIMTED.....PLAINTIFF**

**VERSUS**

**NJEKA OCHUNYI.....1<sup>ST</sup> DEFENDANT**

**WILLIS AGWATA .....2<sup>ND</sup> DEFENDANT**

**RULING:**

There are two applications herein. The 1<sup>st</sup> application is a Chamber Summons dated 16<sup>th</sup> May, 2012 brought by the applicant herein, Waterfront Outlets Limited, against the Defendants herein, seeking various Orders. The application is brought under **Order 40 Rule s 1,2,3, of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act and Section 1A and 1B** of the same Act and all other enabling provisions of the Law. The applicant has sought for these Orders:-

- a. That a Temporary Injunction be issued restraining the Respondents and/or their agents or servants from entering upon **LR No. 209/16717 Parklands, Nairobi**, pending the hearing and determination of this suit.
- b. That the Court be pleased to grant the applicant leave to forcibly evict the Defendants from **LR.No 209/16717 Parklands, Nairobi**.
- c. That the Respondents do handover **vacant possession** of LR No. 209/16717 Parklands,Nairobi.
- d. That the OCS Gigiri Police Station and or any other officer in charge of Administration Police of Nairobi, Westlands Division, or any officer acting under him do implement or supervise the implementation of the forceful eviction.
- e. Costs of the application be provided for.

The application was premised on the grounds on the face of the application notably;

- i. That Plaintiff/Applicant is the registered proprietor of the property known as LR No. 209/16717 Parklands, Nairobi.
- ii. That the Defendants without colour of right have through its agents , and/or servants refused to hand over vacant possession of the suit property and are subjecting the property to waste as they are running a garage with and several motor vehicles are grounded therein thereby causing wanton damage and massive destruction to the property.
- iii. That the Defendants have also subjected the premises to third party in contravention of the agreement dated 30<sup>th</sup> July, 2010 and read together with the agreement executed on 4<sup>th</sup> November, 2010 extending the completion date.
- iv. That the Plaintiff has already given the Defendants adequate notice.
- v. That the said illegal acts are causing great hardship, inconvenience and financial loss particularly

- to the Plaintiff herein despite being the registered owner.
- vi. That the Plaintiff has literally being deprived of peaceful possession and enjoyment of its title No LR No. 209/1671 Parklands.
  - vii. That the Defendants action amount to trespass and attendant the Wanton wastage of the suit property will occasion the Plaintiff harm and immense loss which loss will persist unless restraining Orders are issued.

The 2<sup>nd</sup> application is dated 12<sup>th</sup> October, 2012 and it is brought by the 1<sup>st</sup> Defendant herein, **Njeka Ochunyi**. The application is brought under **Section 1A,1B, 3 and 3A of the Civil Procedure Act and Orders 11 Rule 3(1) and 51 Rule 1 & 3 of the Civil Procedure Rules** and all other enabling provisions of the law. The 1<sup>st</sup> Defendant/Applicant applied for these Orders:-

- i. That the Court, do Order that, this suit be consolidated with Nairobi **HCCC No. 609/2010 ( ELC) Njeka Ochunyi Vs Peter N. Mugo** which is pending before the Court for determination.
- ii. Costs of the application be in the cause.

The application was based on these grounds:-

- a. That the present suit seeks to evict the 1<sup>st</sup> Defendant/Applicant from the suit premises alleged to be LR No. 209/16717, Nairobi ( an alleged sub division of Land reference No. 209/1539 , Nairobi while in Nairobi **HCC No. 609 of 2010 ( ELC) Njeka Ochunyi Vs Peter N Mugo**, the 1<sup>st</sup> Defendant/Applicant seeks to assert his right of ownership of the entire reference No. 209/1539 Nairobi.
- b. That Nairobi **HCCC No. 609 of 2010 ( ELC) Njeka Ochunyi Vs Peter N Mugo** which touches on land registration No. 209/1539, Nairobi is still pending before the Court for determination.
- c. That the Plaintiff in this suit also claims ownership and interest in Land registration No. 209/16716 Nairobi.
- d. That it is only fair, proper and expedient that the honourable Court Orders for consolidation of the two suits for a full and effectual determination of the issues herein.
- e. That the Court should exercise its discretion in favour of granting the Orders sought. The application was also supported by the affidavit of **Njeka Ochunyi**.

Both applications were opposed. The parties put in written submissions and highlighted their submissions in Court. I have considered the pleadings generally and the Written Submissions and I make the following findings:-

Firstly, I propose to deal with the 2<sup>nd</sup> Notice of Motion dated 12<sup>th</sup> October, 2012. The 1<sup>st</sup> Defendant has brought out the application under Order 11 Rule 3(1) which states that:-

*“With the view to furthering expeditious disposal of cases and case management, the Court shall within 30 days after the close of pleadings convene a case conference in which it shall consider consolidation of suits”*

The application is also premised under Section 1A & 1B of the Civil Procedure Act which deals with overriding objective of the Act which is to facilitate the **just, expeditious** and **proportionate** resolution of Civil disputes. Section 1B deals with the duty of the Court in furthering the overriding objective specified in Section 1A.

The 1<sup>st</sup> Defendant urged the Court to consolidate these two cases as the parties are the same and the issues are the same. However, the Plaintiff in case No. 270/2012 and Defendant in case No. 609/2010 opposed the application and submitted that the subject matters are not the same and the application is brought out so that it can delay the suit. Case No. 270 of 2012 involves LR No. 209/16717 while case No. 609/2010 involves LR No. 209/1539. It was alleged the lease in LR No. 209/1539 expired in the year 2006.

I have considered the two cases that have been sought to be consolidated. I have noted case No 270/2012 involves LR No.209/16717 whereas suit No. 609/2010 involves LR No. 209/1539. These are different parcels of land. The suit No. 609/2010 has been pending in Court since then. I have noted that since 14/6/2012, no action has been taken on case No. 609/2010 by the 1<sup>st</sup> Defendant/Applicant herein. The suit No. 270/2012 was filed by the Plaintiff herein under certificate of urgency. Both the **Civil Procedure Act in Section 1A & 1B and Civil Procedure rules in Order 11 Rule 3** deals with the issue of expeditious disposal of case in court. I will rely on the case quoted by the 1<sup>st</sup> Defendant- **Mombasa HCCC 922 of 1994 ; Nyati Security Guards services Vs Municipal Council of Mombasa** , where Justice Maraga stated as follows:-

*“Consolidation is a process by which two or more suits or matters are by Order of Court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action”.*

*The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same Court where;*

- i. Some common questions of law or fact arises in both or all of them.*
- ii. The right or relief claimed in them are in respect of or arise out of the same transaction or services of transactions or;*
- iii. For other reasons, it is desirable to make an Order for consolidating them”.*

In the instant suits, the two suits do not involve common questions of law. Case No. 270/2012 deals with issue of contract and case No. 69/2010 deals with issue of adverse possession. The two suits do not involve same transactions.

I find that the spirit of Civil Procedure Act and Rules therein, is to have Civil disputes resolved expeditiously. Consolidating the suits herein, will amount to delay. I find that the suits herein need not to be consolidated. The Court disallows the 1<sup>st</sup> Defendant’s application dated 12/10/2012 . Costs in the cause.

On the 1<sup>st</sup> application dated 16<sup>th</sup> May, 2012, the Plaintiff/Applicant seeks for restraining Orders and also mandatory Orders. The said application is also opposed. I have considered the written Submission and the pleadings thereon and I make the following findings.

There is on record a Sale Agreement dated 30<sup>th</sup> July, 2010 for sale of all that parcel of land No. 209/167717. The Sale Agreement was between **Njeka Ochunyi, Willis Agwata and Ternic Enterprises Ltd** as the vendors and Water Front Outlets Ltd (Plaintiff herein) as the purchaser. The purchase price was agreed at **Kshs. 26,000,000/=**.

There is also evidence that the vendors were represented by Mr Kennedy Asinuli Advocate. From the various correspondences attached to the application, there is evidence that the purchase price was paid fully. Some of the monies were paid to Njeka Ochunyi through Banker’s Cheques dated 18/11/2010 and 28/8/2010. Some other monies were transferred to the Account of Njeka Ochunyi in KCB Sarit Centre. There is also evidence that various correspondences were exchanged between the Advocates for the vendors and advocates for the purchaser. Transfer of this parcel of land No. 209/16717 was executed on 30<sup>th</sup> November, 2010 and the consideration was Kshs.26,000,000/= as per the Sale Agreement.

The Plaintiff alleges that after the Sale Agreement, payment of the full purchase price and the transfer, the 1<sup>st</sup> Defendant, Njeka Ochunyi, failed to give vacant possession.

The 1<sup>st</sup> Defendant alleges that he did not participate in the sale of parcel of land. That he has lived on the land since 1958. However, one Willis Agwata has sworn an affidavit to the effect that they indeed sold the land and have been paid full purchase price. The advocate who acted for the vendors also swore an

affidavit and confirmed that 1<sup>st</sup> Defendant was paid the full purchase price. There is no evidence that the 1<sup>st</sup> Defendant has reported to the police the alleged forgery of his signature. However, what is clear is that as the plaintiff herein sought the 1<sup>st</sup> Defendant to give vacant possession after transfer was executed, the 1<sup>st</sup> Defendant herein in December, 2010 filed a case No. 609/2010 against one Peter N Mugo. The 1<sup>st</sup> Defendant failed to honour his obligations as stipulated in the sale agreement of 30/7/2010.

The Plaintiff herein has met its obligations under the sale agreement but claims it cannot enjoy the fruits of the transaction because 1<sup>st</sup> Defendant has failed to give vacant possession. The 1<sup>st</sup> Defendant alleges that he was defrauded by the Plaintiff. However, there is no evidence that he has lodged any complaint with the police.

Applicant has sought for an injunction and for a Mandatory relief. The Plaintiff needed to establish that he has met the threshold principles for grant of Injunctive relief as was held in the case **of Giella Vs Cassman Brown Ltd 1973**

**( EA ) 358.** Applicant has to prove that he has a prima facie case with high chances of success; that he will suffer irreparable loss which cannot be compensated by damages and in the event of doubt, the court to decide on a balance of convenience. In the instant application, applicant has demonstrated that it entered into a Sale Agreement with the Defendants herein.

Applicant also paid the purchase price but has not been given vacant possession of the suit land. Applicant therefore has a prima-facie case with high probability of success. Though the 1<sup>st</sup> Defendant claims that he was defrauded, he has not lodged a complaint with the police that his signature was forged and did not refund the money paid to him by the Plaintiff. The applicant has therefore met the threshold for grant of Injunctive relief.

On Mandatory Injunction, it is trite Law that mandatory relief is only granted where special circumstances prevails. This was the findings in the case of **Mombasa HCCC 83 of 2003; Qualitronic Ltd Vs Shaban Swedi**, where it was held;

*“ A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances , it will not normally be granted. However, if the case is clear and one which the act thinks it ought to be decided at once, or if the Court done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff mandatory Injunction will be granted on an interlocutory application”.*

The Plaintiff herein, entered into a Sale Agreement with the Defendants as per the Sale Agreement dated 30<sup>th</sup> July, 2010. Plaintiff paid the full purchase price. A transfer was executed in its favour on 30/11/2010. However, 1<sup>st</sup> Defendant has failed to give vacant possession. Plaintiff interest is safeguarded under Section 26(1) of the Land Registration Act. From the documents attached herein, the Plaintiff was indeed a bona-fide purchaser. This is a clear case of breach of covenant and therefore there are special circumstances herein that would warrant the Court to issue mandatory Orders.

The 1<sup>st</sup> Defendant submitted that, the applicant brought this application as Chamber Summons instead of Notice of Motion as provided by Order 51 Rule 1 of the Civil Procedure Rules. However, Section 3A gives the Court discretion to issue Orders that will ensure that justice is done. I will also be guided by Article 159(2) (d) of the Constitution of Kenya 2010 where the Court is enjoined to administer justice without undue regard to technicalities. The court will consider the substance of the application herein but not the form.

For the above reasons, the Court finds that, the applicant has demonstrated the existence of special circumstances to warrant the Court to issue mandatory relief . The applicant has also sought for vacant possession in his Plaint and it is not the true position as it was submitted by the counsel for 1<sup>st</sup> Defendant that applicant has sought for Mandatory relief that was not sought for in the Plaint.

The upshot therefore is that, the Plaintiff/Applicant's application dated 16<sup>th</sup> May, 2012 is merited. The Court allows the said application entirely with costs to the applicant.

It is so ordered.

**Dated, Signed and delivered this 26<sup>TH</sup> day of July, 2013**

**L. N. GACHERU**

**JUDGE**

**In the Presence of:-**

.....for the Applicant

.....for the Defendant

**Anne Court Clerk**

**L N GACHERU**

**JUDGE**