



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI
COMMERCIAL COURTS CIVIL CASE NO 635 OF 2012

BAKER STREET INVESTMENT LIMITED.....PLAINTIFF

VERSUS

BERNARD K. NJAU.....1ST DEFENDANT

COUNCILLOR BENSON N KANGARA.....2ND DEFENDANT

GEOFFREY J. MUGO.....3RD DEFENDANT

RULING

1. On 4th October 2012, M/S Joseph Munyithya & Co Advocates filed a Plaint and Notice of Motion application dated 1st October 2012 on behalf of the Plaintiff. The said application, which was brought under the provisions of Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and Articles 40 and Article 165 (6) of the Constitution of Kenya, sought the following orders:-
 - a. **THAT the matter be certified as urgent.**
 - b. **THAT the Honourable Court be pleased to make an inquiry as to damages over the property known as L.R. No 209/7383/356 resulting from the statutory status quo under Section 129 (4) of the Environmental Management and Coordination Act, 1999 in relation to NET/83/2011.**
 - c. **THAT the Honourable Court do direct the Defendants to provide security for damages over the property known as L.R. No 209/7383/356 in the sum of Kshs 100,000,000/= or its equivalent pending the hearing and determination of NET/83/2011 and in default the Plaintiff/Applicant be allowed to continue with the development.**
 - d. **THAT the costs of the application and the entire suit be borne by the Respondents.**
2. One of the grounds, amongst others that the Plaintiff relied in support of its application was that the Defendants had filed Appeal No 83 of 2011 and Appeal No 96 of 2012 at the National Environmental Tribunal which would take a while before being finalised.
3. The Plaintiff sought judgment against the Defendants jointly and severally for:-

- a. **A declaration that the National Environmental Tribunal had no jurisdiction to award damages and or compensation to developers upon dismissal of an appeal by that Tribunal under Section 129 of EMCA.**
 - b. **A declaration that this court had jurisdiction to award damages and compensation to a developer incurred pursuant to an injunction issued by the National Environmental Tribunal under Section 129 (4) of EMCA.**
 - c. **A declaration that the Defendants should pay all the damages incurred by the Plaintiff for the period the status quo was in place in NET/83/2011 and NET/96/2012**
 - d. **An order for assignment of and payment of damages.**
 - e. **Interests on (c) above at commercial rates.**
 - f. **Costs of the suit.**
4. In the Verification Affidavit sworn by Vittorio Veneziani on 1st October 2012, the Plaintiff disclosed that ELC No 495 of 2009 and ELC 55 of 2012 between itself and the Defendants were pending determination by the court.
5. On 12th November 2012, the Defendants filed a Chamber Summons application dated 8th November 2012 that had been brought under Section 57 of the Registration of Titles Act and Order 37 Rule 5 of the Civil Procedure Rules. It sought the following orders:-
1. **THAT the Honourable Court be pleased to grant an order directing the Commissioner of Lands to register a caveat prohibiting all dealings and transaction in respect of Title No L.R. No 209/7383/R (F/R 302/126) A.K.A.L.R 209/7383/356 I.R. No 70466 pending the hearing of the suit and the National Environmental Tribunal Appeal No 83 of 2011.**
 2. **THAT the costs of the application and the entire Counter-claim be met by the Plaintiff.**
6. The said application was basically premised on the grounds that the Plaintiff had fraudulently obtained from George Kiarie Ng'ang'a an expired and/or obsolete Environmental Impact Assessment License No 0003414 which the National Environment Tribunal had declared invalid and that the Plaintiff had purchased the suit premises from the said George Kiarie Ng'ang'a on the strength of a ruling rather than a decree in HC ELC 495 of 2009.
7. On 22nd January 2013, the Plaintiff's advocates filed undated Grounds of Opposition to oppose the Defendants' said Chamber Summons application on the basis that:-
- a. **Application sought orders against parties not party to the suit.**
 - b. **Application sought orders that were the mandate if the Land and Environmental Court and that this court had no jurisdiction to issue the same.**
 - c. **Application relied on affidavits that were incompetent and irregular, not in conformity with the provisions of the Advocates Act and same should be struck out.**
8. Both parties filed their written submissions in respect of the two (2) applications.
9. On 28th March 2013, the Defendants filed a Notice of Intention to raise a Preliminary Objection under the provisions of Order 4 and 5 of the Civil Procedure Rules dated 25th March 2013 indicating that at the time of highlighting the submissions in respect of the said two (2) applications, they would raise the following issues:-
- a. **That the suit and the Application therefrom were fatally defective and incurably defective in that the Plaintiff failed and/or refused to comply with the provisions of Order 4 and 5 of the Civil Procedure Rules.**
 - b. **That the Application and the Suit were incompetent, illegal, untenable in law and a nullity in that they were grounded on falsehoods and accompanied by false affidavits.**
 - c. **That the Application was illegal, fraudulent and null and void in that it was irrelevant and immaterial to the suit premises.**
10. When the matter came up in court on 28th May 2013, both parties agreed that the said Notice of Preliminary Objection should be heard first. Upon filing their respective written submissions, on

28th June 2013, both parties again requested the court to give a ruling based on the written submissions in the file as has been provided in Order 51 Rule 16 of the Civil Procedure Rules Cap 21 (of the laws of Kenya) which stipulates as follows:-

“ The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written submissions.”

- 11.The court allowed the said application. The ruling herein is therefore based on the said written submissions.
- 12.This matter was assigned to this court after Mutava J was transferred from the Commercial and Admiralty Division. At the time of writing the ruling, it came to the court’s attention that the claim herein ought not to have been filed in the Commercial and Admiralty Division at all. There is no commercial element in this matter at all. It ought to have been properly filed at the High Court of Kenya Environment Land Court. Evidently, the prayers in the Plaintiff and the applications by both the Plaintiff and the Defendants all seek remedies that should ideally be given by that court. There are also other matters between the same parties pending before the said court Environmental Land Court.
- 13.It is the view of the court that the best course of action would be for the matter to be referred to the High Court of Kenya Environmental and Land Court Division without making any substantive orders herein. This is to avoid the possibility of this court making decisions that would be in conflict with the decisions of a judge who would be properly seized of the matter in that Division would have made thus complicating the resolution of the matter herein. Disputes between the parties herein have also been handled by the National Environmental Tribunal. There are also questions relating to the title of the suit premises making the High Court Environmental and Land Court Division the most suitable for hearing the matters herein.
- 14.For the reasons foregoing, this court hereby directs that the file herein be transferred to the High Court Environmental and Land Court Division Milimani Law Courts and that the same be placed before the Presiding Judge of the said Division on a mention date to be taken at the registry, for her further orders and/or directions.
- 15.Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of August 2013

J. KAMAU

JUDGE