



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 503 OF 2012

ANASTACIA GATHONI NDIRITU.....1ST PLAINTIF/APPLICANT

VERSUS

JOHN NJOROGE KEIGE1ST DEFENDANT/RESPONDENT

JOSEPH NGAINE 2ND DEFENDANT/RESPONDENT

RULING

A Notice of Motion dated 19/9/2011 has been filed by the Plaintiff/Applicant (hereinafter referred to as an applicant) under Order 40 Rules 2(1), and 4(1), Order 51 Rule 1 of the Civil Procedure Rules (2010) revised, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, and all other enabling provisions of the Law. The applicant seeks the following prayers:

1. THAT pending the hearing and determination of this Application the 2nd Defendant/Respondent by himself, his servants, agents, employees and/or assigns be restrained by an order of Temporary Injunction from excavating stones from or interfering in any manner whatsoever with all that property described as plot no 83 situated at Juja.
2. THAT this Honourable Court be pleased to issue an Order compelling the 2nd Defendant/Respondent to render a true and proper account of all stones so far excavated and/or sold from Plot No. 83 from November 2009 to date.
3. THAT the Honourable Court be pleased to issue a mandatory injunction directed against the 1st Defendant/Respondent compelling him to refund the overpayment received on account of the 2nd Lease from Pemuga Auto Spares Limited before the abandonment of the site.
4. THAT the Honourable Court be pleased to issue a mandatory injunction against the 1st Defendant/Respondent compelling him to jointly execute a Lease Agreement with the Plaintiff/Applicant relating to further excavation of stones from plot no. 83 pursuant to previous Memoranda of Agreements entered into between the Plaintiff/Applicant and the 1st Defendant/Respondent's father Joseph Keige Muiniu (deceased).
5. THAT the costs of this Application be borne by the Defendants/Respondents in any event.

The application is based on the following grounds.

a. That the Plaintiff/Applicant's suit relates to the property; known as plot no. 83 (the suit property) situated at Juja.

b. THAT by two separate Memoranda of Agreements one dated 15/09/2006 and the other dated 24/9/2007 the Plaintiff/Applicant jointly with the 1st Defendant/Respondent's father Joseph Keige Muniu(deceased) leased out the suit property to Rajani Ruda Premji and Shanti Rajani and Pemuga Auto Spares Limited respectively.

c. THAT pursuant to the aforesated Agreements excavation of stones was to be conducted simultaneously on properties and the proceeds shared equally between the Lessees, the Plaintiff/Applicant herein and Joseph Keige Muniu (deceased), the 1st Defendant/Respondent's father. However for convenience and ease of access into the suit property the Lessees began excavating the Plaintiff/Applicant's portion.

d. THAT in or about the month of November 2009 Joseph keige Muniu passed on and his son John Njoroge Keige, the 1st Defendant/Respondent herein took over from him.

e. THAT as at the time the 1st Defendant/Respondent took over from his father a third of Joseph Keige Muniu's (deceased) portion of land remained unquarried.

f. THAT on diverse dates and periods unknown to the Plaintiff/Applicant, the 1st Defendant/Respondent leased out the remaining portion of the suit property to the 2nd Defendant/Respondent for excavation of stones thereon in total disregard of the previous Memoranda of Agreements between the Plaintiff/Applicant and the deceased, and without involving or paying the plaintiff/Applicant.

The application is supported by the plaintiff's affidavits dated 19th September 2011 and a supplementary affidavit dated 18th October 2011. The 1st Defendant DR. John Njoroge Keige filed the replying affidavit on the 14th of October 2011. The 2nd Defendant Mr. Joseph Ngaine filed a replying affidavit dated 10th October 2011.

A summary of the facts in this matter is that the Plaintiff/Applicant owns Juja/Kiaura/Block/1/50 plot No. 82. In 2006 the applicant entered into memoranda of agreement with the 1st Defendant's father, John Njoroge Keige, who is now deceased to lease out plot No. 82 and 83 Rajani Ruda Premji and Shanti Rajani. Plot No. 83 belongs to the 1st Defendant's father. After termination of the said lease the parties had a subsequent lease agreement on the 24th of September 2007 with Pemuga Auto Spares Ltd. This agreement was terminated in 2010. The 1st Defendant's father passed on in November 2009 and the 1st Defendant took over. After Pemuga Auto Spares Ltd terminated the lease the 1st Defendant entered into a lease with the 2nd defendant for excavation of stones.

The Applicant claims that the 1st Defendant entered into an agreement with the 2nd defendant in total disregard of the previous agreement entered into with his late father without involving or paying her. The applicant annexed the agreements the parties had with the two lessees and evidence of payment of the excavated stones. She denied that the 1st defendant approached her with the proposition to jointly execute an agreement for excavation of the residue portion of land with the 2nd Respondent and that the 1st respondent has been promising that he would execute a joint contract with her. She avers that the 1st Defendants acts of issuing the cheque of 100,000/- demonstrates that he felt he owes her and that the 1st defendant is bound by the terms of the previous memorandum of agreements executed between her and the late father.

The 1st Defendant acknowledges the agreements that his father had with the applicant in 2007. On the agreement he had with the 2nd Defendant he states that after the applicant terminated the agreement with Pemuga Auto Spares Ltd he approached the applicant to enter into another agreement with the 2nd

defendant but she made unrealistic demands. He went ahead and entered into a memorandum of understanding on behalf of the estate of Joseph Keige Muniu (deceased) for excavation of building stones on Plot No.83. The Applicant did not raise any claim at the time the contract was terminated by Pemuga Auto Spares Ltd. The 1st Defendant stated that he aware that the applicant was invited to lay claim on whether she was entitled to any sums of money but she declined and on humanitarian grounds he paid her 100,000/- she later demanded compensation. He asked the court to dismiss the applicant's application as the applicant has failed to demonstrate her interest in plot No. 83 and further she has failed established a prima facie case with a probability of success nor the loss she will suffer if the orders are declined.

The 2nd Defendant stated that he entered into a memorandum of understanding with the 1st Respondent on the 23rd February 2011 to lease plot No. 83 for a consideration of Ksh. 800,000/=. He has since then been harvesting stones with interference from the applicant. That the applicant's remedy is to file suit for any claim she has. At paragraph 7 to 10 he gives details of his investment in the said plot. He asked the court to dismiss the applicant's application.

Parties filed written submissions which I have carefully read and considered together with the affidavits and annexures filed and I find as follows:-

The applicant is seeking a permanent injunction in prayer 3 and mandatory orders in prayers 5 and 6 and an order to compel the 2nd defendant to render accounts. The law on the order sought are as follows, for an injunction, the applicant must show that she has complied with the principles set out in the case of *Geilla Vs Cassman Brown & Company Ltd (1973) EA*.

- i. She has a prima facie case with the probability of success.
- ii. That she will suffer irreparable injury if the injunction is not granted.
- iii. When the court is in doubt it will decide the application on the balance of convenience.

For mandatory injunction the applicant has to show that her case falls under special circumstance. The test of granting such an injunction was set out in the case of *Kenya Breweries Ltd. Vs. Washington Okeyo Nairobi Civil Appeal 332 of 2000* where the court held that

“ A mandatory injunction on ought not be granted on an interlocutory application in the absence of special circumstances, if the case is clear and one which the court thinks it out to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application”

Having carefully considered the facts in this case I find as follows; the applicant is seeking to stop excavation from plot No. 83 which does not belong to her. It is not in dispute that there were previous agreements which have been terminated. There is an agreement between the 1st & 2nd defendants of which the applicant is not a party. In prayer 3 the applicant seeks a permanent injunction to restrain the 2nd defendant for excavating stones. Her relief if any is in suing for the sum she claims she is entitled to. I therefore find that she has failed to show that she has prima facie case with a probability of success. I also find that she has not shown what irreparable damage she will suffer as she can be easily be compensated for any loss suffered. I therefore decline to grant prayer 3. On prayer 4 I find that this is not an order that the court can issue at this interlocutory stage. It requires evidence to be adduced at a full hearing. I therefore decline to grant the said order.

On prayers 5 and 6 I find that the applicant has failed to show that her case is a special case that warrants a mandatory injunction. She can file suit for the refund that seeks at prayer 5 and the court cannot compel the 1st defendant at this interlocutory stage to execute a joint lease agreement relating to the excavation of plot No. 83 pursuant to previous memorandum of agreement entered into between the Applicant and the 1st Defendant's deceased father. The said agreements were terminated and were not subject to any subsequent agreement reached by any of the parties. Her relief lies in claiming any sums due to her.

