REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 547 OF 2010

JOSE JULIA ROSARIO D'SOUZA.....PLAINTIFF

MARY ANNE FILOMENA D'SOUZA.....PLAINTIFF

VERSUS

LEO INVESTMENT LIMITED.....DEFENDANT

RULING

1) On the 4th February 2011 Justice Okwengu gave a ruling in an application 15/11/2010 where the plaintiffs had sought order of mandatory injunction and prohibition. In her ruling Justice Okwengu considered the affidavits of the parties and ruled that the plaintiffs/applicants were entitled to orders of temporary injunction and a prohibition order as sought in the prayers 3 and 4. After the ruling was delivered the plaintiffs have now come to Court by way of Notice of Motion dated 15/3/11, under Order 45 Rules 1,5 of the Civil procedure Rules, section 3A, 63 (e), 80 and of the Civil Procedure Act, and all enabling provisions of the law, seeking the following orders.

1. This Honourable Court be pleased to review its ruling of 4th February 2011 by varying, reversing and/or otherwise setting aside the same.

2. The costs of this application be provided for.

The application is based on the following grounds:-

a) This Honourable Court delivered a ruling on 4th February 2011 whereby it inter alia granted temporary orders of injunction restraining the defendant from alienating, wasting, selling, altering, or dealing and interfering with the plaintiffs quiet possession or occupation of all that piece of land known as L.R. No. Nairobi/Block 94/158 pending the hearing of this suit and further prohibited any registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or any kind of title or interest by the defendant or its agents.

b) In its replying affidavit at paragraph 5 and 6, the defendant purported that the suit property belongs to one Satish Patel Gansayambai.

c) In its replying affidavit at paragraph 8, the defendant alleged that when it was served with the pleadings in this suit a search *conducted and the defendant and* a purported certificate of official search dated 17th November 2010 was exhibited thereof as proof.

d) Based on the above deposed facts and documents, the Court ruled that " Although the defendants exhibited a copy of certificate of search, and a certificate of lease, it is clear that these documents will need to be verified during the hearing of the suit".

e) There is discovery of new and important evidence which, after the exercise of due diligence, could not be produced by plaintiff at the time when the order was made. The new and important evidence proves beyond doubt that the suit property belongs to the plaintiffs and that the purported certificate of lease and search used by the defendant to hoodwink the Court were forged and not genuine documents:-

i. The District Land Registrar, Nairobi has confirmed that he suit property belongs to none other than the plaintiffs/applicants.

ii. The District Land Registrar, Nairobi has confirmed that any certificate of lease in the name of a person other than the plaintiffs is a forgery and not genuine.

iii. A search conducted on 6th December 2010, after the purported search produced in Court by the defendant; show that the property belongs to the plaintiffs.

iv. During the dependency of the said ruling sought to be reviewed, the defendant made several offers (orally and in writing) to the plaintiffs, to purchase the suit property; an act inconsistent and contradictory to its own pleadings in the suit that the suit property did not belong to the plaintiffs.

f) It is evident that the presence of the forged Certificate of lease and search influenced the mind of the Court to decline to grant mandatory injunction compelling the defendant to deliver possession of the suit property unlawfully trespassed and occupied by it.

g) The documents were illegally manufactured in order to influence the mind of the Court not to grant mandatory injunction.

h) With or without the forged certificate of lease and search, this is a clear case where mandatory injunction ought to be granted as the defendant cannot demonstrate any right to trespass, take over and occupy the suit property or at all.

i) There is some mistake or error apparent on the face of the record:-

i. The Court having held that "*in this case it is clear that the defendants have no proprietary rights over the suit property, nor do the circumstances in which it alleges to be in possession of the suit premises justify the applicants being denied access into the premises"* should have proceeded to grant the plaintiffs order to access the property by ordering the defendant to vacate the property or be evicted.

ii. By restraining the defendant from dealing with or interfering with the '*plaintiffs quiet possession of the suit property'* when the possession was in the defendant's hands was clearly an error; and the Court did not mean to achieve this contradictory effect.

iii. Further, the holding that *"an order of interlocutory injunction restraining the defendants from inter alia dealing with or interfering with the applicants quite possession of the suit property would achieve the desired purpose of protecting the applicants interest.."is contradicting and a complete opposite of the holding that, "a mandatory interlocutory order for vacant possession of the suit property… would prematurely determine the issues before the suit is heard." The Court could not have*

meant to grant the plaintiffs access into the property, quiet possession' and take it away with another hand by denying them vacant possession.

j) The effect of the error which manifested in the order was to allow the status quo; the defendant remains in the suit property illegally and consequently continuing with erecting structures thereon, interfering with the topography of the property, digging trenches, hipping mounds of soils and generally dealing with the property in a manner injurious, prejudicial and inconsistent with the constitutional and proprietary rights and interests of the owners.

k) The Court ought not to sanction, abet, aid or be seen to promote illegalities by allowing persons with no legal right whatsoever to abuse, curtail, trample upon and deny the rightful owners of a property their rights to the same on the basis of forged documents.

l) The defendant, as demonstrated and as already found by Court, does not have any legal right to the possession and use (as currently is) of the property and the allegation of a license from the purported illegal "owner" is just but a smokescreen to its continued invasion, violation and abuse of the constitutional rights to property of the plaintiffs.

m)The continued possession, occupation and use of the suit property by the defendant has and will deny the plaintiffs their right to the immediate use of the property and has and continues to subject them to loss, damage and prejudice and this application ought to be granted.

n) The 2nd plaintiff is terminally ill from 3 types of cancers affecting her lungs, colon and bones; she has and continues to undergo extensive and expensive radio and chemotherapy. They have already exhausted their finances and intend to dispose off the suit property immediately to raise funds for the further treatments at royal Marsden Cancer Hospital in London and any delay in dealing with this matter poses imminent peril to her live.

o) It is only fair and just that this application be granted as prayed.

2) The applicants filed a Supporting affidavit sworn by Jose Julia Rosario D'Souza the 1st plaintiff dated 15/3/2011. The respondents in opposing the application filed a replying affidavit sworn by Rahim Chatur the property manager of the defendant company dated 14th June 2011. The grounds stated by the applicants are quite exhaustive and they lay out the basis of the review the applicants seeks. At paragraph 6 of the supporting affidavit the applicants states There is discovery of new and important evidence which, after the exercise of due diligence, they could not produce at the time of the hearing of the application. During the pendency of the ruling sought to be reviewed, they had, vide letter dated 28th January 2011, pointed to the Court that new and important facts had emerged and required the Court to give direction on the same before it could give its ruling; the court directed that the new facts could be addressed by way of a review application. At paragraphs 7 to 11 the applicants state the importance of the new and important evidence that demonstrate that the property belongs to them. At paragraphs 12 to 20 the applicants state why the mandatory injunction order should be given.

3) The defendant in their replying affidavit avers that the defendant Company was under the impression that Satish Patel Gansayambai was the proprietor of the suit property as genuine documents were furnished by Satish to confirm his averment, that the defendant company is conflicted because being a bona fide licensee after proof from Satish evidencing ownership, doubt has been cast on who the real owner of the suit property. That the documents annexed to the plaintiffs supporting affidavit need to be produced by the makers to afford the defendant an opportunity to cross examine the makers. That they have been advised by their counsel on record that the Kenya Anti-corruption Commission chairman, being a partner in the plaintiffs Advocates firm may be biased as the said annexure, which they aver is not confirmation that the defendant company is corrupt but is a directive for the investigation into the defendant company, concerning this matter which is already in Court and the defendant denies all allegations of corruption. That the ruling delivered by this Honourable Court be upheld, in the interest of justice, so that this matter is determined on its merits at the full hearing.

4) Counsels filed written submissions which I have read and considered. The respondent cite two authorities namely ***Civil Appeal No. 322 of 2000 of Kenya Breweries Limited and another Vs. Washington O. Okeyo and Civil Suit No. 534 of 2009 Chambeke investment Ltd Vs. Joan Abila Obala & 4 others.*** I have also perused the Court file and I note the following; when Justice Okwengu heard the application dated 15/11/2011 on the 24/11/2011 she gave a ruling dated of 28/1/2011. The ruling was delivered on the 4th February 2011. The applicants state that during the pendency of the ruling they wrote a letter dated 18/1/2011 to the Registrar. In the letter they sought to have the matter mentioned before Justice Okwengu for purposes of pointing out the new and important facts that had emerged and they required the Court to give direction. The Court file does not have a copy of the said letter. There is nothing to show that this letter was drawn to the attention of the Hon.Judge. I note that the letter was received at the Court registry on the 20/1/2011.

5) Order 45 of the Civil Procedure Rules deals with review. Order 45 rule 1 provides that:

" 1 (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but form which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to Court which passed the decree or made the order without unreasonable delay.

5. When an application for review is granted, a note thereof shall be made in the register, and the Court may at once re-hear the case or make such order in regard to the re-hearing as it things fit".

6) During the hearing of the application Mr. Benard Leitich Kipkemoi was the District Land Registrar testified on the Certificate of Title for Nairobi/Block 19/158. The applicants argue that they discovered new and important evidence which they did not adduce at the time of hearing. Under order 45 an order can be reviewed if an applicant discovers new and important evidence that was not within their knowledge or could not be produced at the time when the order was made. This evidence which the applicant calls as new is evidence that ought to have tendered at the time the application was heard. The applicant ought to have exercised due diligence at the time the application was heard. There is nothing on record that shows that this was drawn to the judge's attention or the letter of 18/1/2011. The applicants other reason for seeking a review is the mistake or error they point in the order granted by Justice Okwengu, which the applicant explains at grounds (i) and (j) and paragraph 15 and 16 of the supporting affidavit. If I were to consider the issues raised on what they call mistake or error I would be sitting on appeal on decision given by Justice Okwengu. What the applicants state in the said paragraph is not a mistake or error on the face of the record but the reasoning of the Judge on how she reached the decision. I agree with the respondents counsel that this is a matter that should go for full hearing so that evidence can be adduced on the issues before the parties. Lastly if I were to review the orders on the evidence of Benard Kipkomei Leitich I will have partly heard the matter at the interlocutory stage without giving the parties the benefit of adducing evidence on the issues raised. I therefore decline to grant the orders sought on the application dated 15/3/2011. I order that the parties prepare this matter for hearing at the earliest opportunity in light of what is stated at paragraph n of the grounds. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 25th June 2012

R. OUGO
JUDGE

In the Presence of:-

…….. For the Applicants

…… For the Respondent

…… Court Clerk