REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 231 OF 2012

FLORENCE CHELANGAT LANGAT.....PLAINTIFF
VERSUS
TIMOI FARMS AND ESTATES LIMITED.....1ST DEFENDANT
ISAYA KIPTONUI KIMEYWO.....2ND DEFENDANT

RULING

On 29th June 2012, this court gave an ex parte order to the Applicant/Respondent – restraining the Applicant (Respondent) in these terms -

"That pending the hearing of the application this Honourable Court be and is hereby pleased to issue an injunctive order restraining the Respondent/Defendant by itself, servants, employees, agents or any other person acting under its instructions or facts interests from entering, interfering with the Applicant\'s/Plaintiff\'s
entry
occupation and possession,
otherwise dealing, entering, remaining, trespassing or in any way dealing, entering, remaining, trespassing or in any other manner interfering with all those parcels of land known as OLENGURUONE/AMOLO/314, OLENGURUONE AMOLO 315, OLENGURUONE/AMOLO/316 and OLENGURUONE/AMOLO/321."

Armed with the said order, Florence Chelangat Langat (the plaintiff/respondent) in the Notice of Motion dated and filed on 4th July 2012, with the assistance of hired hands moved into the lands referred to above (the suit lands) and evicted the Applicants/Respondents in the Notice of Motion of 29th June 2012 (the original Notice of Motion).

In their Notice of Motion of 4th July 2012, the subject of this Ruling, the Defendants/Applicants ask the court -

(a) to vary discharge or set aside the ex parte orders of 29th June, 2012,

(b) to order the plaintiff (Respondent) and her agents to move out of the suit property and to remain out till the two cases in court are heard and decided.

(c) costs of the application be provided for.

The Respondents/Applicants Notice of Motion is based upon the grounds on the face thereof, and the Replying Affidavit of Isaya Kiptorus Kimeiywo sworn on 3rd July 2012.

The Respondent/Applicants case is that before the suit herein was filed, there existed another suit, Nakuru HCCC No. 32 of 2010, between the Respondent/Applicants and one Kipngeno Arap Ngeny the previous registered owner of the suit lands.

The said Kipngeno Arap Ngeny had originally sold the suit lands to the Respondents/Applicants who had taken possession of the lands, and had been on the lands since or from the time of the sale in 2008. The Respondent/Applicants say that upon taking possession they had developed the lands and constructed thereon an office block for the sum of Ksh 2.8 million.

The Respondent/Applicants also say that the said Kipngeno Arap Ngeny, had on 5th May, 2012 filed an application in Nakuru HCCC No. 32 of 2010 claiming that he had already transferred the suit lands to the plaintiff in this suit, and that Ms. Siele – Sigira & Co. Advocates had written to their Advocates in that suit that they effected a Transfer of the suit lands to new buyers.

The Respondents/Applicants claim that the said Advocates acted in the sale, well-knowing that the suit lands were subject of a suit, HCCC No. 32 of 2010.

The Respondents/Applicants also aver that the plaintiff/respondent has been all aware that the Respondents had bought the suit lands, and that they are motivated by greed, they declined to disclose to the court the true position of the land, and that the Plaintiff/Respondents have used fraudulently the court order for injunction to create a status quo which the law does not permit.

The Respondent\'s/Applicant\'s Notice of Motion is brought under Order 50, rule (v) and Order 40 rule (7). Order 50 relates to modes of instituting applications whether by Chamber Summons or by Notice of Motion. Order 40 rule (7) provides -

"(7) any order for injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

I was bombarded with the case law relating to lack of consent under the Land Control Act (Cap. 302, Laws of Kenya) as the reason why Kipngeno Arap Ngeny was unable to complete the transaction to the Respondent/Applicants in this suit, including the decision of the Hon. Lady Justice Wendoh (in HCCC No. 32 of 2012) delivered on 10th December, 2010 declining the grant of an order of injunction because the prayer therefor was not grounded upon the Plaint.

What the plaintiffs/respondent has not done in this suit, is also to disclose the Ruling dated 17th June 2011 in the same suit in which the same learned judge observed – at p. 16 -

"It is true that this court did consider an application for injunction and declined to grant the same; The facts which have been disclosed by the affidavit filed by the plaintiff were not available then. In light of the letter from the Office of the President, I find that it would be unfair to strike out the plaintiff\'s suit because there seems to be good reason for failure to comply with the provisions of Land Control Act, which can only be adduced and determined at a full hearing. The plaintiff claims to have paid the defendant a total of Kshs. 8.7 million as part of the purchase price and carried out substantial developments on the land and has been in possession. The court cannot ignore that and strike out the suit before allowing the plaintiff to have its day in court. Striking out is a draconian measure and must be exercised sparingly. In this case, I will decline to take such a drastic action and allow the plaintiff a chance to present its case. I hereby dismiss the application dated 29th October, 2010 with costs being in the cause."

This was material non-disclosure on the part of the plaintiffs/respondent in this application. It is a matter which ought to have been brought to the court\'s attention because grant of an ex parte injunction is a matter done in good faith, and upon disclosure of all information on the subject, in this case, the suit lands. Because an injunction is an equitable order and whoever seeks equity must do equity, he must disclose all information on the subject matter in this case, the suit lands. Such non-disclosure is one good reason for setting aside the ex parte order.

There is however one more fundamental reason for setting aside the order and restoring the status quo ante to the Defendants/Applicants. It is that the order of injunction granted on 29th June 2012 was not a mandatory injunction. It was an injunction in the words of Order 40, rule (1)(a) to restrain the Defendants/Applicants from wasting, damaging, alienating, sale, removal or disposition of the suit lands. In other words there was no order for eviction.

The prayers sought and granted restraining the Respondent/Defendant (now Respondent/Applicant) by itself, servants, employees, agents or any other person acting under its instructions or for its interests – from entering, interfering with the Applicants/Plaintiff\'s entry, occupation and possession, otherwise dealing with, entering, remaining, trespassing or in any other manner interfering with the suit lands, "did not and cannot be understood to mean that the Defendant/Respondent was to be "evicted from the suit premises."

Although the courts regularly grant such order, they are usually premised upon an Applicant being in possession of the suit lands. It is not enough that the Applicant is the registered owner or proprietor of the suit lands. Inquiry needs to be made why any other person, other than the registered proprietor is in occupation or possession before orders of eviction can be granted.

I am satisfied that in this case, the Plaintiff/Respondent not only failed to disclose to the court the true nature of the application and her proprietorship of the suit land, but also fraudulently misinterpreted and misapplied the orders of injunction which were premised upon the facts that the Plaintiff/Respondent was not only the registered proprietor, but also the person in possession. It turns out the Defendants/Respondents were actually the persons in possession but for whatever reason, not the registered proprietors of the suit lands. There was no order for eviction or forceful entry into the suit

lands by the plaintiffs/respondents. They indeed used the injunction order to create a new status quo which the law does not permit. It is an abuse of the court process.

The court jealously guard its process, and it cannot be abused by either the lowly or the mighty. When an abuse occurs the perpetrators of the abuse must be woken up and brought to the altar of the law. It is the shield and defender of us all.

For those reasons, the order made and granted ex parte by this court on 29th June 2012 are hereby set aside, discharged and vacated.

The Plaintiff/Respondent is directed/ordered to vacate peaceably, the suit lands together with all her agents, servants or employees forthwith and in any event, within SEVEN (7) days of the date hereof, and hand over the suit lands in their former estate to the Defendants/Applicants, pending the hearing and determination of the Nakuru HCCC No. 32 of 2010, and Nakuru HCCC 231 of 2012 (Fast Track). Costs in the cause.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 19th day of July, 2012

M. J. ANYARA EMUKULE
JUDGE