REPUBLIC OF KENYA

High Court at Machakos

Civil Case 41 of 2010

1. MARCUS MUTUA MULUVI

2. JANE MUSANGI MUTUA …….PLAINTIFS

VERSUS

1. PHILIP TONUI

2. MAVOKO MUNICIPAL COUNCIL …….....DEFENDANTS

RULING

The application, the subject of this ruling is dated 24th February, 2010. It is filed pursuant to the provisions of section 3A of the Civil Procedure Act, the then Order XXXIX rules 1(a), 2, 3(1) and 9 of the Civil Procedure rules and all other enabling provisions of the law. In the main, the applicants seeks against the Respondents an injunction to restrain them from in whatever infringing on the sanctity of their title in respect of their land parcel, Plot No. 44A/Kasina/Mlolongo *"the suit premises"* pending the hearing and determination of this suit. They also pray for a mandatory injunction to compel the respondents to vacate the suit premises and to remove all their structures and installations therein. Lastly, they pray for costs of the application.

The grounds in support of the application are that the applicants are the registered joint proprietors of the suit premises having been allocated the same by the 2nd respondent. The respondents have no proprietary rights to the suit premises and have not acquired any interest in the suit premises superior or equal to that of the applicants. The respondent had without any lawful justification, encroached on the suit premises and constructed a building and other permanent structures despite the applicants warning the respondents to desist from their acts of trespass. The respondents had, however, adamantly refused, failed and neglected to heed such warnings. In the premises unless they are restrained by an injunction, the applicants will suffer irreparable loss and damage.

In support of the application, the 1st applicant swore an affidavit. In pertinent paragraphs, he deponed that sometime in the year 2003, the 2nd applicant and himself purchased from the 2nd respondent the suit premises. Among the plots adjacent to the suit premises was plot No. 44 registered in the name of one, **Francis Mutua.** By an agreement signed between the 2nd applicant and one, **Patrick Ndaumbuthi** whom **Francis Mutua** had authorised to sell plot No. 44 aforesaid dated 10th January, 2004, the 2nd applicant purchased the plot for a consideration of Kshs. 320,000/= . On 16th February, 2006, the applicants wrote to the 2nd respondent seeking the consolidation of the two (2) plots, 15A and 44 into one, and thereafter be registered in the joint names. The 2nd respondent agreed to the request and the consolidation gave birth to the suit premises. On 14th June, 2006, the applicants applied for approval of the building plans and paid Kshs. 12,000/= on account of approval of the buildings plans and inspection fees. In the meantime the

applicants fenced off the suit premises and commenced work on the septic tank. They also put up a temporary site structure to house a guard and serve as a temporary store for construction materials. However, on the evening of 23rd January, 2010, strangers, descended on the suit premises and commenced construction thereon. They reported the incident to Mlolongo Police Station as what was happening amounted to criminal trespass. Indeed the trespasser had destroyed in the process their sceptic tank and uprooted the fence. The applicants sought an explanation from the 2nd respondent regarding the trespass but none was forthcoming. It then dawned on them that the 2nd respondent had colluded with the trespassers to grab from them the suit premises without due process. The respondents had no excuse whatsoever for this unlawful encroachment on their suit premises and therefore ought to be stopped from continuing with the trespass. The conduct of the 1st respondent was deliberate since he knew or ought to have known that the suit premises were being developed by its lawful owners, the applicants, since there was a dug out sceptic tank and fence around the suit premises. The suit premises had unique manifestations. It is situate a few metres from the Nairobi-Mombasa highway, with a clear and convenient opening into the Highway. Due to these unique qualities, the suit premises has no replacement. Compensation in monetary terms would not be sufficient to redress the wrong, hence the cry for injunction.

When the application was served on the respondents the 1st respondent reacted first by filing a replying affidavit. Where pertinent, the 1st respondent deponed that he was a stranger to the existence of plot No. 15A Mlolongo Ngwata Phase II. The 2nd respondent was not engaged in the business of selling land. In any event there was no sale agreement annexed with regard to the purchase of the suit premises. The law is clear that any contract, dealing in or disposition of land or an interest in land is required to be in writing. As far as he was concerned he was developing his plot number 033 Kasina/Mlolongo and not 15A Phase IIC that the applicants have made reference to. The applicants claim to have bought plot No. 44 from **Francis Mutua** through **Patrick Ndambuthi.** However there is no accompanying power of Attorney donating any power to deal in the plot from the alleged owner. No interest in land could therefore legally pass to the alleged seller of the plot which he could pass to the applicants. He had otherwise acquired plot number 033 Kasina/Mlolongo on 31st August, 2006 after purchasing it from one, **Nicholas Muchene Njau** for Kshs. 150,000/=. Pursuant to the purchase, **Nicholas Muchene Njau** wrote to the chairman of Kasina Housing Development Company requesting him to transfer the said plot to him. Pursuant to the transaction, the Ministry of Lands allocated him the plot by a letter of allotment dated 14th December, 2007. He commenced developing the plot once he received a notification of approval for development permission from the 2nd respondent dated 18th September, 2009. Since then he had dutifully discharged rate payment duties to the 2nd respondent as required. The applicants had not shown any document or laid a claim on plot No. 33 Kasina/Mlolongo. In the premises the applicants had failed to discharge any of the requirements needed for the grant of an injunction. They were totally undeserving of any equitable remedy as their application is not grounded on any legal realm.

As for the 2nd respondent, it deponed through one, **Joshna Sitienei**, the Town Clerk that according to its records, the applicants have no registered title over the suit premises. The letter of allotment dated 6th May, 2004 to the applicants neither granted them exclusive possession of the suit premises nor conferred proprietary rights. In any event the letter of allotment was conditional and the applicant never complied with the special conditions of the said letter of allotment. Further no development permission or any approval thereof was sought and or granted to the applicants to commence construction on the suit premises nor were any plans submitted to the 2nd respondent for approval by the applicants. Nobody can carry out development within the area of a local authority without obtaining development permission from the Local Authority within the area. Further it is a criminal office punishable by law for any person to commence construction of any building and or structures without obtaining the prior approval of the local authority within the area and that such a local authority has powers to demolish such illegal development and restore the property to the original condition. The 2nd respondent had already taken measures to arraign the applicants in court for the disclosed and recognizable criminal offences. As at the time of filing of this suit until now, no approval had been obtained by the applicants allowing them to carry out construction works on the suit premises and the construction activities undertaken on the suit premises were therefore illegal. No injunction interim or otherwise can issue in the circumstances. A

court of equity cannot aid a party who comes to court with unclean hands. Again on what is on record so far, the applicant's case does not disclose a *prima facie case* with probability of success and therefore an order of injunction should not issue. The applicant would be adequately compensated in damages if at all they succeed in their claim and that this is not a proper case for any court to issue an interim injunction or at all. The value of the building is quantifiable.

When the application came before me for *inter-parties* hearing on 30th January, 2012, **Mr. Mulei, Mr. Kimathi** for **Mr. Kahonge** and **Mr. Kimani,** learned counsel for the applicants and respondents respectively agreed to canvass the application by way of written submission. However, it was not until 16th July, 2012 that the written submissions by the parties were on board. It appears however, that the 1st respondent did not bother to file his submissions. I have carefully read and considered the respective submissions and the authorities cited.

From the pleadings so far filed, the following facts emerge;-

- The applicants bought and were allocated by the 2nd respondent plot no. 15A situate at Mlolongo Ngwata Phase IIC. They met the conditions stipulated in the letter of allotment.

- They later bought plot no. 44 which was adjacent to plot No. 15A.

- Subsequently, they applied for the amalgamation of the 2 plots which application was accepted.

- The applicants then applied for approval of their building plans and paid the necessary fees.

- However, before they could obtain the approval they commenced developing the suit premises by fencing it off and building a sceptic tank.

- On 23rd January, 2010, the applicants came across the defendants developing the suit premises

- No explanation was forthcoming from the 2nd respondent with regard to the turn of events despite the same having been sought by the applicants.

- The 1st respondent has taken the position that he does not know nor does he have any proprietary interest in plot no. 15A or 44A as he has title documents to plot No. 033 Kasina/Mlolongo which he is developing.

- As for the 2nd respondent, the applicants have no title to the suit premises.

- The applicants are basing their claim on a letter of allotment which does not confer title

- In any event, the letter of allotment was conditional and the applicants did not meet the conditions.

- Having commenced developments on the suit premises without the approval of plans by the 2nd respondent, it was duty bound to prohibit the construction, hence the demolition of the sceptic tank as well as putting down the fence.

- In commencing to develop the suit premises without obtaining the prior approval of the 2nd respondent, the applicants committed a criminal offence.

- The 2nd respondent had by notices published in the Nation Newspaper on 16th March, 2007, October 2008 and 15th February, 2009 informed the general public, investors, rate payers and all persons residing within its municipality that illegal structures erected without obtaining its prior approval would be demolished.

- To-date the applicants have yet to obtain such approval.

- In those circumstances injunction as a remedy is not available to the applicant.

From all the foregoing, can it be said that the applicants are entitled to the equitable remedy of interlocutory injunction? I do not think so.

The principles which guide the courts in deciding an interlocutory injunction application are well settled. In **Giella vs Cassman Brown & Company Limited [1973] E.A. 361**, the Court of Appeal for Eastern Africa summarised them as follows"-

"***First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience …"***

Over and above the foregoing, an interlocutory injunction is basically a discretionary and equitable relief. It therefore behoves an applicant seeking such remedy to come to court with clean hands and make full and frank disclosure. It is an inexorable rule that in matters of interlocutory injunction there must be full and frank disclosure to the courts of facts known to the applicant, and that failure to make such disclosure may lead to the denial of the injunction.

In this case, the respondents and in particular the 2nd respondent have accused the applicants of developing the suit premises to which they have no registered title, they have done so without even bothering to obtain the prior approval of the 2nd respondent and in so doing they have committed a criminal offence. It is instructive that the above complaints have not been met with any rebuttal from the applicants. All that the applicants have said is that pursuant to letters of allotment, they have proprietary interest in the suit premises, that they applied on 14th June, 2006 for approval of their building plans by the 2nd respondent and paid the requisite fees. Thereafter as owners of the suit premises they started work thereon. From the foregoing it is quite apparent that the applicants' claim to ownership of the suit premises is vide letter of allotment. As we shall presently see, a letter of allotment *per se* does not confer title or proprietary interest in land. The applicants too commenced development of the suit premises without the necessary approval of their building plans from 2nd respondent and despite the warning not to do so. Such warning had been advertised in the local media. The applicant may have applied for the approvals. However as long as the approvals had not been granted, they were not entitled to commence the developments. The applicants knew that of the impending demolition of all illegal structures erected within the 2nd respondent's municipality without obtaining its prior approval. The applicant's developments were subsequently demolished by the 2nd respondent. The applicants knew this fact yet they chose to plead that strangers invaded their suit premises and destroyed developments on their suit premises. This clearly was not correct. I do not think that applicants who openly lie should be entitled to the equitable remedy of equity. They have also alluded to the 1st defendant encroaching on the suit premises without any *iota* of evidence. It is only in their written submissions that they allude to double allocation. However, written submissions are not evidence. If the applicants knew all along that this was a case of double allocation, why did they not say so in their pleadings? This is yet another case of non-disclosure of material facts. In any event the case of the respondent, his parcel of land that he is developing has no connection whatsoever with the applicants' suit premises.

Because of the applicants' singular lack of candour and on this basis alone, this court will be inclined to grant the injunction sought as the applicants have come to court with unclean hands.

Equity follows the law and as such the applicants having committed an illegality cannot enjoy fruits from such illegality which even borders on criminality. The applicants despite the express requirement that they obtain prior approval of their building plans before commencing developments on the suit premises failed to do so. This disobedience of course attracts suctions. Lastly and as correctly deponed to by the 2nd respondent, the interest of public as vested in trust in the 2nd respondent must be protected and the

same overrides the interests of the applicants. He who seeks equity, must do equity.

Coming back to the first principle that governs the grant of interlocutory injunction, I am satisfied that the applicants have not made out a *prima facie case* with probability of success. The term *prima facie case* was defined by the Court of Appeal in the case of **Mrao Ltd vs First American Bank of Kenya Ltd [2003] KLR 125** as –

"…a case in which on the material available to a court, it can be concluded that the applicant's rights appear to have been infringed by the respondent as to require the latter to explain or rebut the allegation.."

On the material placed before me, the applicants have failed to demonstrate to my satisfaction the foregoing. The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the respondent. Their claim to the suit premises is anchored on letters of allotment and subsequent agreement of sale between them and one, **Patrick Ndambuthi** on behalf of **Francis Mutua.**

The letter of allotment dated 6th May, 2004 did not confer on the applicants title or proprietary interest over the suit premises. It has been severally held that a letter of allotment *perse* and without more does not confer title to the allottee. Neither does it pass proprietary interest. Such interest or title can only pass once the allotee has complied with the terms in the letter of allotment and is subsequently issued with documents of title. *See* the case of **Lilian Waithera Gachuhi vs David Shikuku Mzee [2005] eKLR** where it was held thus;-

"I have considered the application and submissions of counsel for the applicant. I have no doubt that, legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor land."

And also **Shiva Mombasa Ltd vs Kenya Revenue Authority [2005] eKLR**, where again it was held;-

"***The (1st defendant) Kenya Revenue Authority only holds a letter of reservation/allotment from the very Commissioner of Lands (strange) but as we all known, such letters do not signify having a registrative interest in land. It is no matter that the defendant has been in occupation for a long time by utilising a section of the fenced larger property. The plaintiff's portion though enclosed in that wall is not built up."***

This same case applies here. Again unlike the 1st respondent, the applicants have not demonstrated that they have been paying rates to the 2nd respondent. Perhaps the applicants would have stood better chance if they demonstrated such payments with regard to the suit premises. They did no such thing. But the the 1st defendant for what is worthy has shown he pays rates for the plot in his possession.

With regard to their acquisition of part of the suit premises from **Patrick Ndamuthi** on behalf of **Francis Mutua,** that assertion actually defeats the entire application. Much as the applicants claim that the sale agreement was entered into between **Patrick Ndambuthi** and themselves, **Patrick Ndambuthi** was not the owner of the plot. As correctly deponed to by the 1st respondent, there is no accompanying power of attorney or any other instrument donating any power to deal in the plot from the alleged absentee owner, **Francis Mutua.** No interest in land could therefore have legally passed to the said **Patrick Ndambuthi.**

On the whole, the applicants have not exhibited proprietary interest in the suit premises capable of being protected by an order of interlocutory injunction and which the respondents have allegedly trespassed upon. The short of it is that the applicants have not shown a *prima facie case* with a likelihood of success. Having so found, it is not necessary for me to consider the other conditions set out in **Giella vs cassman Brown** (*supra)* for the grant of interlocutory injunction.

The application therefore fails and is accordingly dismissed with costs to the respondent.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** dayof **OCTOBER, 2012.**

ASIKE-MAKHANDIA
JUDGE