



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE 150 OF 2012

NDIBITHI FARMERS COMPANY LIMITED.....PLAINTIFF

VERSUS

MWANA MWIRERI RIRONI AND NAIVASHA FARMERS CO. LTD.....DEFENDANT

RULING

In their Notice of Motion dated and filed on 27th April 2007, the Applicants sought the following prayers -

- (1) This application be certified as urgent and the service thereof be dispensed with in the first instance.***
- (2) A temporary injunction be issued restraining the Defendant/Respondent whether by itself, its servants, agents, representatives interfering in any manner, trespassing or otherwise howsoever from entering upon, crossing, erecting structures upon or in any other manner obstructing and interfering with the plaintiff quiet use, possession, ownership, dealing, surveying and enjoyment of all those parcels of land known as L.R. No. 1695 I.R. 1417 together with all subsequent subdivisions namely Land Reference 1695/3, 1695/4, 1695/5 and 1695/6 pending the hearing and determination of this application, the suit and/or until further orders this honourable court.***
- (3) An order to the Police OCPD Naivasha District to ensure that the defendant/respondent whether by itself, its servants, agents, representatives or otherwise howsoever do not enter upon, cross, erect structures upon and do not obstruct, prevent or stop the plaintiff/Applicant from quiet use, possession, ownership, dealing, surveying and enjoyment of that parcel of land known L.R. No. 1695 I.R. 1417 together with all subsequent subdivisions namely 1695/3, 1695/4, 1695/5 and 1695/6.***
- (4) That the costs of this application be provided for.***

Prayer 1 and 2 were granted by orders of court made on 30th April 2012. This Ruling relates to prayers 3 and 4 of the Motion.

The Motion was supported by the Affidavit of Charles K. Ngethe, a Director of the Applicant and the grounds on the face thereof. It was however opposed by the Respondent through the Replying Affidavit of Naomi Wangui Wambugu the Chair of the Defendant/Respondents Company, sworn on 18th May 2012 and filed on 21st May 2012.

The Applicant's case is that it is the registered owner of all that parcel of land known as L.R. 1695 (I.R. No. 1417) together also with the sub-divisions namely L.R. Nos. 1695/3, 1695/4, 1695/5 and 1695/6 (the suit lands) and that the Respondent has encroached upon the said parcels of land using both the Provincial Administration and the Agricultural Development Corporation to deprive the Applicant of the suit lands. So the Applicant prays for orders of temporary injunction pending the hearing and determination of the suit herein.

On its part the Respondent through the Replying Affidavit of its Chairlady has argued that the original land, LR No. 1695, was sub-divided by the previous owners and that the parcel known as L.R. 1695/5 was bought by them from the Agricultural Development Corporation (ADC) on 27th April 1999, and that the Applicants too bought a portion of it LR 1695, and not the whole of the said parcel of land (LR 1695).

The Respondents also argue that the Applicant's suit is *res judicata*, having brought a similar claim in Nairobi HCCC No. 2366 of 2007 which was on 19th January 2012 for non prosecution, and that following the dismissal of said, the Applicants have laid the same claim in this suit. The Applicants did not disclose this fact in their suit, and are therefore abusing the process of court and that their application should be dismissed and entire suit later be struck out with costs.

In answer to this argument, the Applicants have contended in their counsel's submissions, not Affidavit in Reply/Further Affidavit, that the parties in Nairobi HCCC 2366 of 2007 were different – **Ndabithi Farmers Co. Ltd vs. Mwana Mwireri Co. Ltd & others** whereas this suit is by the same plaintiff against one Defendant Mwana Mwireri Rironi and Naivasha Farmers Company Ltd, and that consequently it is a new and separate suit and is not an abuse of the court process, and that there was no question of non-disclosure of any material fact. Counsel for the Applicants therefore pray that the temporary injunctive orders be granted.

I have considered the respective arguments. Both counsel have placed reliance on the case of **Giella vs. Cassman Brown & Co. Ltd [1973] E. A. 358** – a party seeking injunctive orders -

(a) ***must establish a prima facie case with a probability of success,***

(b) ***that unless injunctive orders are granted, it will suffer irreparable loss and damage which cannot be compensated in damages,***

(c) ***if the court is in doubt it should determine the application on the balance of probability.***

The Applicant has not established any of those principles in its application. **Firstly**, it has not brought any evidence to show that it bought any of the suit lands from Cavilla Limited for the consideration of Ksh 200,000/= or at all. It actually never did. This is why from its own Exhibit CK "2", (the Grant) shows that the original land L.R. 1695, was indeed 2,504.0 acres, approximately, was made to Gilbert De Colville of Gilgil Farm on 29th June 1923.

A Transfer of the said land was made to Colville Limited on 18th August 1951. The said land was leased to Lerimatisha Ltd for a period of 21 years, per lease registered on 23.10.1958.

The said Lease was surrendered on 11.05.1964. A Transfer dated 11.03.1974 to Ndibithi Farmers Co. Ltd an area of Area 606.8 Ha (L.R. No. 1695/1) West of Lake Naivasha was made, vide Certificate of Title I.R. 26876 registered on 12.03.1974. A Transfer to Agricultural Development Corporation of LR No. 1595/2, Area 406.6 Ha was registered on 21.09.1987.

Thereafter ADC sub-divided their parcel of land and sold sub-division L.R. No. 1695/5 to Mwana Mwireri Naivasha and Rironi Company Ltd by Transfer dated 15th February 2008.

From the above there is absolutely no record of any interference by the Respondent with the area purchased by the Applicants from Colville Ltd. Still less, there is absolutely no basis for a claim of

purchase of the entire 2,054.0 acres of the Colvile Ltd land.

Further the Applicants are also guilty of material non-disclosure. Nairobi HCCC No. 2366 of 2007 concerned the same parcel of land, and substantially the same party. It ought to have been disclosed. The Applicants are essentially forum shopping, that is an abuse of the process of court.

In the circumstances the Applicant cannot claim to have any ground or any principle under the case of **Giella vs Cassman Brown & Co. Ltd (supra)** to support the claim for temporary injunction. The claim is, at best based upon poor understanding of the conveyancing sequence and, at worst, upon a naked lie. There is absolutely no basis for the Applicant's claim for an interim injunction and indeed the entire suit could be shaky – but that is not in issue here, and is in any event a question of evidence.

For those reasons, the Applicant's Notice of Motion aforesaid, dated and filed on 27th April 2012 is dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

J. ANYARA EMUKULE

JUDGE