



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 535 of 2009

PAUL NGIGI NJUGUNA.....1ST PLAINTIFF/APPLICANT

ESTHER NJERI NGIGI.....2ND PLAINTIFF/APPLICANT

VERSUS

LEMNA INTERNATIONAL INC

& ANOTHERDEFENDANTS/RESPONDENTS

R U L I N G

1. The Plaintiff herein commenced suit by way of a plaint dated 19/10/2009. The plaint was amended on 22/10/2009 and further amended on 27/11/2009. The Plaintiff also filed a Chamber Summons application dated 22/10/2009 under Certificate of Urgency seeking Orders that:-
 1. *THAT this honourable court be pleased to certify the instant application as urgent and the same be heard exparte in the first instance.*
 2. *THAT there be a temporary injunction against the Respondent its employees, servants, officers, agents restraining them from further trespassing into and/or interfering in anyway whatsoever with the Plaintiffs' possession, control, occupation right and or interest in or over all that parcel of land known as L.R. No. 209/12351 situated along Jogoo Road within Nairobi pending hearing and determination of this application.*
 3. *THAT there be a temporary injunction against the Respondent, its employees, servants, officers, agents restraining them from further trespassing into and/or interfering in anyway whatsoever with the Plaintiffs' possession, control, occupation right and or interest in or over all that parcel of land known as L.R. No. 209/12351 situated along Jogoo Road within Nairobi pending hearing and determination of the suit herein.*

4. *THAT the Respondent be compelled to remove all the illegal structures and or material they caused to be placed upon L.R. No. 209/12351 Jogoo Road Nairobi in default of which the Applicants be at liberty to remove the same.*
5. *THAT this honourable court be pleased to grant such other or further orders that it deems just in the circumstances of this case.*
6. *THAT the Respondent be condemned to pay the costs of this application.*

2. The application was premised on grounds that:-

- (a) *The Applicants are the registered owners of the property.*
- (b) *The Respondent has erected upon the property an out-door board indicating an intention to develop the property without the concurrence or consent of the Applicants.*
- (c) *The Respondent's conduct aforesaid is illegal and amounts to unjustifiable interference with the Applicants' peaceful and quiet possession of the property.*
- (d) *The Respondent persists in the aforesaid conduct in blatant disregard and violation of an order by this Honourable Court that has previously decreed that the Applicants are the rightful owners of the suit property.*
- (e) *This court has jurisdiction to grant the orders sought herein.*

3. For one reason or another, the Plaintiffs application did not proceed to hearing until 3/12/2009 when the parties consented to proceeding by way of written submissions. The Plaintiff submissions were filed on 10/12/2009 but the 1st and 2nd Defendants did not file written submissions. The Plaintiffs contend that at all times material to this suit, they sue the registered proprietors of all that parcel of land known as L.R. No. 209/2351 situated along Jogoo Road in Nairobi (the suit property) as per Grant Number IR. 65763 dated 1/05/1994. The Plaintiffs further contend that the validity of the said title was not in issue.

4. The Plaintiffs further contended that in or about June, 2003, the Minister for Housing (the Minister) purported to erect a perimeter wall around the suit property without the consent of the Plaintiffs; that the Minister's decision was quashed vide Misc. HCCC No. 1026 of 2003 and that despite the order made by the court in HCCC Misc. 1026 of 2003, the Minister continued interfering with the suit property. The Plaintiffs contended that it was as a result of the Minister's interference with the suit property that they brought the present suit praying for judgment against the Defendant for:-

- (a) *A declaration that the Plaintiffs are the registered and bona fide proprietors of all that parcel of land known as LR No. 209/12351 situated along Jogoo Road Nairobi.*
- (b) *A permanent injunction against the Defendant either by themselves, their employees, servants, officials, agents restraining them from encroaching and/or interfering in any manner howsoever, with the Plaintiffs peaceful and quiet possession ownership, control and enjoyment of the suit property (L.R> No. 209/12351).*
- (c) *General damages*

(d) Interest on (a) and (b) above

(e) costs

5. In their written submissions, the Plaintiffs contended that the 2nd Defendants' response to the Plaintiffs' application is incurably defective and ought to be struck out so that the Plaintiff's application remains uncontested. The Plaintiff's argument is based on the ground that the 2nd Defendant has opposed the Plaintiff's application by filing both Grounds of Opposition and a Replying Affidavit, an action that is contrary to the provisions of Order 50 Rule 16(1) of the Civil Procedure Rules, which rule reads as follows:-

“16(1) Any Respondent who wishes to oppose any motion or other application shall file and serve on the Applicant a Replying Affidavit OR a statement of Grounds of Opposition if any, not less than three clear days before the date of hearing.” [Emphasis mine].

6. Counsel for Plaintiffs relied on the case of ***National Industrial Credit Bank Ltd. –vs- Gituko Ngethe Gathuku*** (Milimani HCCC No. 1628 of 2000) (unreported) in which it was held that a Defendant is entitled to file either a Replying Affidavit or Grounds of Opposition and not both and where a Respondent chooses to file both and fails to make an election to rely on only one of the documents, both the Replying Affidavit and Grounds of Opposition are considered incompetent and must be struck out. The holding in the ***National Industrial Credit case*** (above) was applied by Osiemo J in the case of ***J.P. Machira t/a Machira & Co. Advocates –vs- Gitobu Imanyara t/a Gitobu Imanyara & Co. Advocates [2006]e KLR***. In the ***Machira*** case the Respondent had filed both Replying Affidavit and Grounds of Opposition in opposition to the Plaintiffs application. The court held that order 50 Rule 16(1) prohibits a Respondent from *“filing both the grounds of opposition and a replying affidavit as the two documents have different objectives and therefore one cannot substitute the other.”* Though the decisions above cited were made by courts of concurrent jurisdiction, they both state the correct position of the law and I shall be guided by them.
7. Regarding the proprietorship of the suit property, counsel for the Plaintiffs contended that there is no dispute that the Plaintiffs are the registered proprietors thereof for a term of 99 years from 1994; that at no time has the title to the suit property reverted to the Government; that the 2nd Defendant has not produced any contrary evidence challenging the Plaintiffs' title to the suit property nor has any evidence been adduced by any of the Defendants to show that the suit property was hived off from an unalienated government land. The Plaintiffs have challenged the Defendants to adduce evidence to show that title to the suit property was obtained either fraudulently or wrongfully as provided by Section 60(1) of the Registration of Titles Act (RTA). The said section reads:-

“60(1) where it appears to the satisfaction of the Registrar that any grant certificate of title or other instrument is fraudulently or wrongfully obtained, ---- he may summons the person to whom the grant, certificate of title instrument has been so issued ---- to deliver it up for the purposes of being corrected.”

8. The Plaintiffs counsel submitted that since 2003 when the dispute over the suit property arose, the Plaintiffs have never been summoned by the Registrar to answer claims of fraudulent or wrongful obtainment of the Certificate of title to the suit property and that in the circumstances, the 2nd Defendant's claim to the suit property has no basis, and that indeed the fact that the Plaintiffs have committed no wrong informed this court's decision in

HCCC Misc. 1026 of 2003 by which decision the 2nd Defendant was barred from interfering with the Plaintiffs' title to the suit property.

9. The Plaintiffs submitted further that despite the court orders barring the 1st Defendant from interfering with the Plaintiffs' peaceful enjoyment and quiet possession of the suit premises, the 1st Defendant has interfered with the Plaintiff's peaceful enjoyment and quiet possession of the suit property in LR No. 209/12351. The Plaintiffs allege that on or about 2/10/2009 or thereabouts, they noticed an out-door development board erected upon the property indicating an intention on the 1st Defendant's part to develop the suit property in the form of a civil servants housing scheme. It was because of this alleged interference that the Plaintiffs commenced suit and also prayed for and obtained some interim injunctive orders on 22/10/2009.
10. In response to the 2nd Defendant's contention that the 2nd Defendant ought to have been enjoined as a party right from the beginning, counsel for the Plaintiffs submitted that there is no hard and fast rule requiring joinder of the 2nd Defendant in all suits and that in any event, if the 2nd Defendant had been enjoined right from the start, it would not have been possible for the Plaintiff to get an injunctive order against the Government. The Plaintiff's counsel argued further that the 2nd Defendant has always disobeyed the orders issued in **HCCC Misc. Application No. 1026 of 2003 – R. –vs- Permanent Secretary Ministry of Lands & Public Works and Housing, Paul Ngigi Njuguna & Another**. Counsel for the Plaintiffs also submitted that the 2nd Defendant has not placed any evidence before this court to demonstrate or show that the 2nd Defendant will lose the alleged Kshs.1.7 Billion. Counsel submitted that quoting these time figures was a way of justifying the illegal activities being undertaken by the Defendants without following the due process of law.
11. Regarding the relationship between the 1st and 2nd Defendants, counsel for the Plaintiffs says that whatever relationship exists between the two Defendants is unknown to the Plaintiffs, and particularly because there are no documents to show that a contract exists between the 1st and 2nd Defendants. Counsel also submitted that contract or no contract between the 1st and 2nd Defendants, it is only the 2nd Defendant who is protected against injunctive orders and not other third parties, though such parties may have other relationships with the 2nd Defendant. Counsel cited the case of **Joseph Kiai Cherotich –vs- Tinisales Ltd. [2004]e KLR** and urged the court to find that the Plaintiffs are right in seeking injunctive orders against the 1st Defendant/Respondent for interfering with the Plaintiffs' rights to private property.
12. The 1st and 2nd Defendants/Respondents did not file written submissions but made oral submissions based on the Replying Affidavit filed in court on behalf of the 1st Defendant and the Grounds of Opposition filed on behalf of the 2nd Defendant respectively. Mr. Ongoto advocate ventilated the 1st Defendant's case. He relied on the Replying Affidavit sworn by Joash Maangi, on 2/12/2009 and filed in court on the same day. Counsel submitted that when the Plaintiffs first came to court, they failed to disclose to the court that there were pending proceedings affecting the suit property, namely Judicial Review application number 1026 of 2003. Counsel submitted that in light of the Judicial Review proceedings, this suit is an abuse of the court process and contrary to section 6 of the Civil Procedure Act; and that the Judicial Review Proceedings should take precedence over this suit. Section 6 of the Civil Procedure Act provides:-

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue, in a previously instituted suit or

proceeding between the same parties, or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending, in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

13. Counsel for the 1st Defendant also submitted that the Plaintiffs amended pleadings of November 2009 were silent on the existence of the Judicial Review application number 1026/2003 and the outcome therefrom. Counsel also submitted that the instant application does not disclose that there is a dispute as to ownership of the suit property. In this regard, counsel for the 1st Defendant submitted that the Plaintiffs have not come to court with clean hands to warrant the exercise of this court’s discretion in their favour.
14. Further, counsel for the 1st Defendant submitted that the Plaintiffs have not demonstrated what damage, if any, they are likely to suffer if the orders sought are not granted; and therefore that the principles for the granting of injunctions as set out in *Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358* have not been satisfied by the Plaintiffs. Mr. Ongoto also submitted that the Replying affidavit sworn by Joash Maangi on 2/12/2009 confirms that the 1st Defendant is a mere agent of the 2nd Defendant and that any loss that is likely to be suffered by the Plaintiffs can be adequately compensated in damages. Counsel urged the court to find that the Plaintiff’s application is frivolous and an abuse of the court process.
15. Mr. Waigi Kamau for the 2nd Defendant associated himself with the submissions made by counsel for the 1st Defendant. Though the 2nd Defendant had filed both Grounds of Opposition and a Replying Affidavit, Mr. Kamau based his submissions on the grounds of opposition, namely, that:-(a) the orders sought cannot be granted; (b) the Applicant has obtained orders by concealing material facts and (c) the Applicant has not met the threshold required by court to grant the orders sought.
16. On the first ground, counsel for the 2nd Defendant argued that the orders sought cannot be granted because of section 16(1) of the Government Proceedings Act, Cap 40 Laws of Kenya. This section prohibits the issuance of orders of injunction or specific performance against the Government and provides that a court faced with an application in which such orders could be issued as between subjects, can only make an order declaratory of the rights of the parties. Mr. Kamau, relied on *Matalangi & Others –vs- Attorney General [1972] EA 518*. The Plaintiffs in the **Matalinga** suit were representatives of an unincorporated association. They sued the Defendant for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the director of personnel review and rectify salary structures. The Defendant applied to strike out the plaint on the grounds that the claim for a declaration was not warranted and that the order sought was in the form of a mandatory injunction which could not be granted. It was held, inter alia, that a mandatory injunction cannot issue to a government official and therefore could be made against the Defendant. The court stated at p. 521 of the report that section 16 of the Government Proceedings Act, Cap 40 –

“--- restricts the court to making declarations only in proceedings against the Government where it might otherwise grant injunctions and prohibits the court from granting any injunction or making any order against any officer of the Government the effect of which would be to give any relief against the Government which could not have been obtained in proceedings against the government.”

The above statement is the law and this court is persuaded by it and will apply it in considering the instant application.

17. Counsel for the 2nd Defendant also submitted that the Plaintiffs obtained the interim orders of injunction by concealing material facts from the court. Counsel submitted that it was wrong for the plaintiffs to tell Msagha J

as the ex parte hearing of the plaintiff's application that the developer was the 1st defendant. It was submitted that the failure by the plaintiff's to disclose all relevant facts pertaining to this case should deprive them of the exercise of this court's discretion in their favour, since the plaintiff's are said to have come to court with unclean hands.

18. On ground 3, Mr. Kamau submitted that even if the injunction could issue against the defendants as prayed by the plaintiff, the application does not pass the threshold for the granting of injunctions, and that any loss that may be suffered by the plaintiffs can be made good in payment of damages.
19. In reply to submissions by counsel for the 1st and 2nd defendants, Mr. Omoti, counsel for the plaintiffs submitted that the Misc. application number 1026 of 2003 involved different parties, namely the plaintiffs and the 2nd defendant only and that in any event that suit was concluded on the 29th September, 2003 though admittedly, the court file is still alive with the applications. Counsel denied the defendant's allegations that the plaintiffs are guilty of material non-disclosure since paragraph 14 and 14A of the Further Amended Plaint, disclose the existence of the Misc. application No. 1026/2003. Counsel also submitted that since ownership of the suit property is not disputed, and since the suit property is registered under the Registration of Titles Act (RTA) Cap 281 Laws of Kenya, the defendants have no business developing the plaintiff's property without the plaintiff's consent.
20. On the question of the *Giella* principles counsel for the plaintiffs submitted that the plaintiff's have shown that they will suffer irreparable damage unless the orders sought are granted. Counsel also submitted that Section 16 of Cap 40 is not applicable in the circumstances of this case for the reasons that it is only an injunction against a Government Officer that is not permissible under the said Section.
21. I have now considered all the issues raised by all the parties. I have also considered the submissions and the law. All parties are agreed that the suit property is registered under the (RTA) and that the plaintiffs herein are the grantees as tenants in common of all that piece of land in the City of Nairobi known as LR.No.209/12351 for a term of Ninety Nine (99) years from 1st May, 1994. It is also not in dispute that HCCC No. Misc. Application No. 1026 of 2003 was in respect of the same suit premises and litigated between the plaintiffs and the 2nd defendant herein. The said application was a Judicial Review application. It is also admitted that the plaintiff's Further Amended Plaint brings the 2nd defendant on board, hence the presence of the Attorney General in these proceedings. In light of the admission that the plaintiffs are the registered property of the suit property, I do not think, that either of the defendants can question the plaintiff's title.
22. The real question for determination is whether the plaintiffs have satisfied the conditions for the granting of the injunction sought. From the facts before me, the plaintiff's aim in this case is to injunct the 2nd defendant for the reason that the 1st defendant is a mere agent of the 2nd defendant. Contrary to what counsel for the plaintiff's contends, Section 16 of Cap 40 bars the court from granting the orders of injunction sought in this case. I note that the submission made by counsel for the plaintiff's to the effect that Section 16 of Cap 40 only bars the granting of injunction against officers of the Government does not hold water since Government operates and functions through its officers. For the above reasons the Plaintiff's application for injunction must fail.
23. I am also of the view and I agree with counsel for the 2nd defendant that the plaintiff's are guilty of material non disclosure which disentitles them to the discretionary reliefs sought. Equity demands all those who seek equity

to do equity. In my considered view, withholding vital information from the court at the early initial stages when a party comes to court is not doing equity. In the amended plaint dated 22nd October, 2009, the plaintiffs deleted any reference to the Misc. Cause No.1026/2003, which means that the plaintiffs did not want the court to know that such a cause was pending before this court. In this regard also, and in view of the pending cause 1026/2003, Section 6 of the Civil Procedure Act would come into play in this case.

24. Finally, I do not think that the plaintiffs have laid before me a *prima facie* case with the probability of success. The plaintiffs have not shown what damage if any they will suffer if the orders sought are not granted. In the Supporting Affidavit sworn by **Esther Njeri Ngigi** on 22nd October, 2009, the plaintiffs do not say in any of the 11 (eleven) paragraphs that they will suffer any irreparable loss and damages if the orders sought are not granted. All that the plaintiffs allege is that the defendants' acts are illegal and amount to unjustifiable interference with the Plaintiffs right to peaceful and quiet possession of private property. The deponent of the Supporting Affidavit further states in her affidavit that the plaintiff are reasonably apprehensive that the respondent shall proceed to develop and or further encroach upon the property to the detriment of the applicants. The plaintiff's statement is a mere statement which does not say what the detriment to be suffered by them is and whether such detriment will result in irreparable loss and damage.
25. For the above reasons, the Plaintiff's Chamber Summons application dated 22nd October, 2009 be and is hereby dismissed. The interim orders of injunction granted to the plaintiffs on 22nd October, 2009 be and are hereby discharged. Costs of this application shall be paid to the defendants.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of February, 2010

R. SITATI

JUDGE

Delivered in the presence of:-

Mr. Odede for Omotii (present) for the Plaintiffs/Applicants

Mr. Ongoto (present) for the 1st Defendant/Respondent

Mr. Momanyi for W. Kamau (present) for 2nd Defendant/Respondent

Weche - Court clerk