



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO. E 223 OF 2020

JC.....1ST PLAINTIFF/APPLICANT
 EVANS KIPROP.....2ND PLAINTIFF/APPLICANT
 ALICE CHEBET.....3RD PLAINTIFF/APPLICANT
 KEVIN KIPNGETICH.....4TH PLAINTIFF/APPLICANT
 VIVIAN JEPKEMBOI.....5TH PLAINTIFF/APPLICANT
 FAITH JEROTICH.....6TH PLAINTIFF/APPLICANT
 JC (*Suing on behalf of LK (Minor) As a parent and next friend*).....7TH PLAINTIFF/APPLICANT
 JC (*suing on behalf of BC (minor) As a parent and next of friend*).....8TH PLAINTIFF/APPLICANT
 JC (*suing on behalf of JK (minor) As a parent and next of friend*).....9TH PLAINTIFF/APPLICANT

=VERSUS=

NATIONAL SOCIAL SECURITY FUND (NSSF).....1ST DEFENDANT/RESPONDENT
 DAVID GACHONDE.....2ND DEFENDANT/RESPONDENT
 REBECCA JEPCHUMBA BOIT.....3RD DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 9th November 2020 brought under article 31, 40, 53 and 159 of the Constitution of Kenya 2010, order 31 rule 1, order 40, rule 1, 2, 3, 4 and 10, Order 51 of the Civil Procedure Rules 2010, section 1A, 1B and 63 of the Civil Procedure Act, Cap 21 and all other enabling provisions of the Law).

2. It seeks:-

1. Spent.

2. Spent.

3. That pending the hearing and determination of the main suit filed herewith, the court be pleased to issue interim orders of injunction restraining the defendants/respondents from processing and or issuing title certificate/deed and or lease certificate to Land Parcel No. LR 97/0720/554 (hereinafter referred to as the “suit property”) in favour of the 2nd Defendant and or any other party and or creating any interest on the parcel of any other party.

4. Spent.

5. That pending the hearing and determination of the suit, this court be pleased to issue interim orders of injunction restraining the respondents by themselves, servants, employees, agents, representatives or any other persons acting under their instructions or their interests from evicting, demolishing, entering, interfering, threatening the plaintiffs/applicants with entry, peaceful occupation and possession, and from otherwise dealing, entering, remaining in, trespassing or in any other manner whatsoever interfering with the plaintiffs'/applicants' peaceful occupation, possession and use of the parcel of land known as LR 97/0720/554.

6. That in the alternative and without prejudice to any other prayer the current status quo, obtaining as at 9th November 2020 be preserved.

7. That the court be pleased to issue any other and or further orders and or directions it may deem fit and just to issue.

8. That the defendants/respondents do pay costs for this application.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 28.

4. The application is supported by the affidavit of JC, the 1st plaintiff/applicant herein sworn on the 9th November 2020 and a further affidavit sworn on 15th December 2020.

5. The application is opposed. There is a replying affidavit sworn by Klein Munene, an accountant with the 1st defendant/respondent sworn on the 20th November 2020.

6. There is also a replying affidavit sworn by David Gachonde, the 2nd defendant/respondent sworn on the 13th December 2020. He has also filed a notice of preliminary objection dated 30th November 2020.

7. There is also a replying affidavit by Rebecca Boit, the 3rd defendant/respondent sworn on the 14th December 2020.

8. The application was canvassed by oral submissions on the 16th December 2020.

9. I have considered the notice of motion, the affidavits in support and the annexures. I have considered the affidavits in response, and the annexures. I have also considered the preliminary objection by the 2nd defendant/respondent, and the oral submissions by counsel for the respective parties. The issues for determination are:-

(i) Whether the preliminary objection is merited.

(ii) Whether the plaintiffs'/applicants' application meets the threshold for grant of temporary injunction.

(iii) Who should bear costs?

10. The main ground in the 2nd defendant's/respondent's preliminary objection dated 30th November 2020 is that the suit herein is res judicata in view of **Milimani ELC No 939 of 2016, Joseph Cheptoo vs NSSF, David Gachonde and Rebecca Jepchumba Boit.**

Section (7) of the Civil Procedure Act provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is not in dispute that the said suit ELC 939 of 2016 was dismissed for want of prosecution on 18th September 2017. The issues raised therein were not heard and a final decision rendered. I therefore find that this suit is not res judicata. The preliminary objection is found to be unmerited and the same is dismissed.

11. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal set out what amounts to a prima facie case.

12. It is the 1st plaintiff's/applicant's case that he is the beneficial owner of the suit property having purchased it from the 1st defendant/respondent. He stated that he made payments by instalments. He has annexed the receipts showing some payments.

13. The 1st defendant/respondent, on the other hand states that the suit property belongs to the 2nd defendant/respondent. That there is no evidence of any sale agreement between the 1st plaintiff and the 1st defendant. There is no offer addressed to the 1st plaintiff/applicant informing him; that the suit property was available for sale. Further that there is no privity of contract between the 1st plaintiff/applicant and the 1st defendant/respondent.

14. The 2nd defendant/respondent's case is that the 3rd defendant was given an offer to purchase the suit property but she failed to pay for it. It was then sold to the 2nd defendant. The 2nd defendant/respondent has annexed all the receipts for payments as annexures "DG1 –DG5" respectively. There is a letter by the 1st defendant/respondent confirming the 2nd defendant/respondent to be the owner of the suit property.

15. I have considered the documents relied on by the 2nd defendant. he appears to have acquired the suit property from the 1st defendant lawfully and procedurally. He is the registered owner of the suit property.

16. The 3rd defendant/respondent has sworn an affidavit, stating that she did not pay fully for the suit property and that she lost interest in it when she separated from the 1st plaintiff. She denied that she held the suit property in trust for the plaintiffs. She stated that she has been sued wrongly.

17. From the foregoing, I find that the plaintiffs have not established a prima facie case with a probability of success at the trial.

18. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was) stated that:-**

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

I am not satisfied that the plaintiffs/applicants deserve this kind of protection.

19. The plaintiffs/applicants have failed to demonstrate that they will suffer irreparable loss that cannot be compensated by an award of damages if these orders are not granted. I am guided by the case of **Oloo vs Barclays Bank of Kenya Ltd [2002] KLR 394**.

20. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28th day of January 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Waweru for Mr. Katw Kigen advocate for the plaintiffs/applicants

Mrs. Mbaabu advocate for the 1st defendant/respondent

Mr. Wambugu for Mrs Abong'o advocate for the 3rd defendant/respondent

Phyllis Court Assistant