



**Home Owners of Eden Park Estate c/o Edpark Estate Management Limited v Serem & another
(Environment & Land Case E202 of 2021) [2022] KEELC 2582 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E202 OF 2021**

**MD MWANGI, J
JULY 12, 2022**

BETWEEN

**HOME OWNERS OF EDEN PARK ESTATE C/O EDPARK ESTATE
MANAGEMENT LIMITED PLAINTIFF**

AND

**KIPKOGEI SEREM 1ST DEFENDANT
DIAMOND PROPERTY MERCHANTS 2ND DEFENDANT**

RULING

(In respect of the Notice of Motion Application dated 2nd June,
2021 and amended on the 10th February, 2022 and the
Preliminary Objection dated the 18th March, 2022)

Background

1. The Plaintiff moved this Court by way of the application amended on the 18th March, 2022. It was brought under Sections 3, 13 (2), 13 (7) of the *Environment and Land Court Act*, Sections 3A and 63 (e) of the *Civil Procedure Act* and Order 40 of the *Civil Procedure Rules* and “all other enabling provisions of the law.” The Plaintiff prays for the following orders, that: -
 - a. Spent
 - b. Spent
 - c. This Honourable Court be pleased to order the removal of the inhibition registered against the Plaintiff’s Land Parcel Number Nairobi/Block 126/246 pending the hearing and determination of this suit.



- d. The costs of the application be provided for.
2. The Application is based on the grounds on the face of it and further supported by the Affidavit of Calvince Omondi Owuor deponed on the 10th February, 2022. The grounds in support of the application are that the Plaintiff/Applicant is the bona fide owner of the suit premises and the 1st Defendant/Respondent has no proprietary interest in the suit land. Further that the 1st Defendant/Respondent's purported interests cannot be secured by placing an inhibition against the title to the suit property in perpetuity or at all. Finally, that the inhibition was lodged in bad faith without informing the Plaintiff/Applicant. It is therefore just and reasonable that the inhibition be removed.
 3. The deponent, Calvince Omondi Owuor avers that he is competent swear this Affidavit. In summary, he depones that in the year 2016, Diamond Property Merchants Limited, the 2nd Defendant herein, sub-divided the suit land into 56 plots including roads and common areas comprising the estate known as Eden Part Estate which they then sold to various purchasers.
 4. The deponent was among the first purchasers. The Purchasers thereafter registered, Eden Park Estate Management Company and started processing their individual titles. The first lot were issued with titles. However, due to new costs not factored in, the owners delayed payment for title processing charges, the digitization of records at the Ministry of Lands as well as the outbreak of Covid-19, there was delay in processing of the titles for the remaining batch.
 5. That sometimes in 2020, the 1st Defendant/Respondent wrongly lodged an inhibition against the title to the suit property claiming 'beneficiary interests'. The inhibition was lodged without informing or involving the home owners despite the owners having vested interest in the suit property. The deponent avers that the inhibition was wrongly registered and unlawfully maintained on the title to the suit property.
 6. The Application is vehemently opposed by the 1st Defendant/Respondent who filed a Replying Affidavit in response to the application as well as a preliminary objection.

Replying Affidavit

7. The Preliminary Objection seeks to have the suit and the application dated 2nd June, 2021 dismissed and/or struck out with costs for being incompetent in limine on grounds that: -
 - a. The Plaintiff is a non-existent entity and therefore has no *locus standi* to bring the current proceedings before this Honourable Court.
 - b. This suit is therefore defective, a non-starter, bad in law, incompetent and the same ought to be struck out with costs.
8. The 1st Defendant, Kipkogei Serem, further swore a replying affidavit on the 17th February, 2022. He contends that the pleadings as drawn and by extension the suit in its entirety cannot be sustained as the Plaintiff is a non-existent entity and therefore has no *locus standi* to bring the current suit. The suit is defective, a non-starter, bad in law and incompetent and the same ought to be struck out on that basis.
9. On the other hand, Edpark Estate Management Limited has no legal or beneficial interest over the suit property and thus lacks the *locus standi* to institute the proceedings herein since no reversionary interest has been registered in its favour. The 56 alleged owners ought to file suit in their own individual capacities.
10. On ownership, the 1st Defendant avers that the Plaintiff/Applicant is not a registered owner of the suit premises since the Certificate of Lease is still registered in the name of Diamond Property Merchants



Limited, the 2nd Defendant herein. The said Certificate of Title is yet to be cancelled or transferred to the alleged owners. A Certificate of Title is a *prima facie* proof of ownership and until the alleged owners of Eden Park Estate acquire their individual titles, they only hold a beneficial interest in the suit property and not proprietary rights.

11. The 1st Defendant further stated that official land searches conducted on the 15th October, 2020 and 29th October, 2020 indicated that the suit property was in the name of Diamond Property Merchants Limited, the 2nd Defendant herein free from any encumbrances save for the inhibition registered over the title on the 16th October, 2020.
12. Regarding his interest in the suit property, the 1st Defendant avers that Diamond Property Merchants Limited are indebted to him to the tune of Kshs. 2,150,000/= for breach of contract for the sale of 2 Plots and 4 greenhouses, pursuant to an Arbitration Award adopted as an order of court in HCOM Arbitration No. 006/ 2020; *Henry Kipkogei Serem -vs- Diamond Property Merchants Limited*.
13. That while executing the Decree extracted therein, the investigators identified the suit property herein as the property belonging to the 2nd Defendant. He instructed Auctioneers to attach the suit property as the same was free from any encumbrances at that time. He then moved the Court for an order of prohibition, which order was granted, restraining any further dealings in the suit property herein. The Prohibition was thereafter registered against the Title of the suit property.
14. That it was only upon advertisement for sale of the suit property that the 2nd Defendant informed the 1st Defendant that the suit property had been sub-divided into 56 individual plots and sold to third-party purchasers. Out of the 56, 19 Plots had already been registered on the title instrument of the suit property herein in favour of the purchasers.
15. The 1st Defendant avers that with a valid Decree which has not been satisfied, he is entitled to attach any property owned by the 2nd Defendant. That in any event, the alleged owners of Eden Park do not have individual titles for the plots emanating from the suit property herein. The Plaintiff/Applicant has therefore not made a *prima facie* case for orders to lift the Prohibition Order registered over the title to the suit property.

Court's Directions

16. The Court's directions on the 4th April, 2022 were that the application and the Preliminary Objection be dealt with together and by way of written submissions. Parties were further directed to file their respective submissions to both the application and the Preliminary Objection.

Submissions

17. Both parties complied with the Court's directions and filed their respective submissions. The Plaintiff filed its submissions dated 19th April, 2022 whereas the 1st Defendant filed his submissions dated the 26th April, 2022.

Issues for Determination

18. From my scrutiny of the Preliminary Objection by the 1st Defendant and the Application by the Plaintiff, two issues present themselves for determination, namely: -
 - a) Who the Plaintiff in this suit is.
 - b) Subject to the finding in (a) above, whether the Plaintiff is entitled to the order of removal of the inhibition registered against Land Parcel Number Nairobi /Block 126/246.



Analysis and Determination

A . Who is the Plaintiff in this suit?

19. While the answer to this issue should be clearly discernible from the plaint, in this matter it is not. On the title of the suit, the Plaintiff is described as “Homeowners of Eden Park Estate C/O Edpark Estate Management Ltd’. This description is actually what gave rise to the Preliminary Objection herein. Part (a) of the Preliminary Objection was to the effect that the Plaintiff is a non-existent entity and therefore has no locus standi to bring the proceedings before this Honourable Court.
20. In the Plaint however, at paragraph 1 thereof, the Plaintiff is identified as a private limited company incorporated under the provisions of the [Companies Act](#) – Laws of Kenya, in the Republic of Kenya.
21. I have gone further to look at the verifying affidavit filed alongside the plaint. The verifying affidavit is sworn by one Calvince Omondi Owuor, a director of Edpark Estate Management Ltd. He confirms that Edpark Estate Management ltd is the one that has instructed their lawyers to file the suit.
22. So, on the issue of who the Plaintiff in this matter is, the court’s finding is that the Plaintiff is a private limited liability company known as Edpark Estate Management Limited. The Plaintiff at paragraphs 3 and 4 of the plaint elaborates that in the year 2006, it purchased the suit property – L.R. Nairobi/Block 126/246 from Diamond Property Merchants, from its own sources.
23. To that extent, the Plaintiff being a limited liability company has the legal capacity to sue on its own behalf.
24. I wish to emphasize that from my reading of the plaint, the company is suing on its own behalf as the owner of the suit property – L.R. Nairobi/Block 126/246. It is not suing on behalf of the home owners of Eden Park Estate neither on behalf of its shareholders.
25. There is a principle of company law, as old as antiquity and known by every student of law that was pronounced by the House of Lords in the famous case of *Salomon – Vs- A. Salomon & Company Ltd* (1897) AC, to the effect that a Limited Company has a legal existence of its own independent of its members and that such a company is not an agent of its members or shareholders.

B. Whether the Plaintiff is entitled to the order of removal of the order of inhibition registered against L.R. Nairobi/Block 126/246

26. It now a well settled principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded as pronounced in the case of Supreme Court of Nigeria in *Adetown Oladeji (NIG) – Vs- Nigeria Breweries PLC* SC a11 2002 quoted with approval in the case of [Raila Amolo Odinga & Another – Vs- IEBC & 2 others](#) (2017) eKLR where the court stated that,

“ in fact, the parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”
27. Having already made a finding to the effect that the Plaintiff in this matter is Edpark Estate Management Ltd, the next question that I must ask myself is whether the Plaintiff then is the owner of the parcel of land L.R. Nairobi Block 126/246.



28. In that aspect, I find no evidence to support that proposition. The replying affidavit by the 1st Defendant is categorical that no reversionary interest has been registered in the name of the Plaintiff company; hence, the company has neither legal nor beneficial interest in the property. The certificate of lease is still in the name of the 2nd Defendant company I.e. Diamond Property Merchants Ltd.
29. Secondly, the 1st Defendant in his affidavit deposed that the order of prohibition that was registered against the title to the suit property was issued by a court of law. That averment was not contradicted by the Plaintiff. If that is so, only that court can lift or remove that order of prohibition. What is before me is not an appeal, neither an application for review nor an application for judicial review.
30. The long and short of it is that the Plaintiff has not established the basis for the grant of the order sought in its application. The application is hereby dismissed with costs to the 1st Defendant.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 12 DAY OF JULY 2022

M. D. MWANGI

JUDGE

In the virtual presence of:

Ms. Wangari for the 1st Defendant/Respondent.

No appearance for the Plaintiff

No appearance for the 2nd Defendant

Court Assistant - Hilda

M. D. MWANGI

JUDGE

