



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 15 OF 2018**

**PAUL PKEMOI KIDE.....PLAINTIFF**

**VERSUS**

**PHILIP KIMUTAI KIBOR.....1<sup>ST</sup> DEFENDANT**

**AGRICULTURAL FINANCE CORPORATION....2<sup>ND</sup> DEFENDANT**

**RODSTAR CONSTRUCTION CO. LTD.....3<sup>RD</sup> DEFENDANT**

**CHELU INVESTMENTS LIMITED.....INTERESTED PARTY**

**RULING**

1. The application dated **6/3/2019** and filed in court on **25/3/2019** has been brought by the interested party seeking the following orders:

- 1. That this matter be certified urgent and the same be heard exparte in the first instance.**
- 2. That this honourable court be pleased to enjoin CHELU INVESTMENTS LIMITED to this suit an Interested Party and the Interested Party be allowed to enter appearance and file defence to the suit.**
- 3. That this honourable court be pleased to set aside the orders of injunction and all its consequential attributes as issued against the defendants in this suit via ruling of the court dated 15/11/2018 in the plaintiff's application dated 8/2/2018.**
- 4. That the costs of this application be in the cause.**

2. The application is premised on the grounds set out in the notice of motion and is supported by a sworn affidavit, also dated **6/3/2019**. It is brought under **Section 1A, 3 and 3A and 63 (e)** of the **Civil Procedure Act and Order 1** of the **Civil Procedure Rules**.

3. The grounds on the face of the application upon which the application is made are that the interested party is the beneficial owner of 100 acres within a parcel of land described as **LR. No. 6125/10** which land the interested party purchased from Rodstar Construction Co. Ltd, the 3<sup>rd</sup> defendant herein; that the **LR. No. 6125/10** has since mutated into **6125/12** now occupied by the interested party; that upon sale the interested party paid off a substantial part of the purchase price and was put in possession of the land and has been using the land; that the said 100 acres has been demarcated and visibly fenced off by the interested party; that title to the said land is in the name of the 3<sup>rd</sup> defendant who is in the process of effecting transfer to the 100 acres to the interested party; that the plaintiff purposely withheld this information from the court in order that he may secure an injunction, and he succeeded in so doing; that the injunction as granted to the plaintiff is prejudicial to the interested party as it concerns land that legally belongs to him; that the injunction as granted to the plaintiff serves no purposes as it concerns parties who have no capacity to freely deal with the suit land in any way whatsoever as they may wish; that the best way to determine a matter especially for a party who has shown the willingness to participate in it is to accord the interested party a hearing on the pleadings as opposed to determining any issue in the absence of the interested party; that the interested party is now exposed without any protective orders and is thus bound to suffer irreparable loss and damage and that the respondents will not suffer any prejudice if the orders prayed for are granted.

4. There was no objection by any party regarding the joinder of **Chelu Investments Ltd** and this court recorded a consent order on **25/4/2019** granting **prayer No. 2**, to wit joinder of **Chelu Investments Ltd** as an interested party and allowing it to enter appearance and filed defence to the suit.

5. However the plaintiff filed grounds of opposition to prayer No. 3 of the interested party's application dated 6/3/2019 dated **13/5/2019** and reiterates the averments on the application.
6. The interested party filed submissions on the lifting of the injunction on **13/5/2019**. The 1<sup>st</sup> defendant filed his on **27/3/2019** and the plaintiff on **13/5/2019**.
7. The question that remains is whether the orders of injunction issued on **15/11/2018** ought to be set aside on the grounds set out in the instant application.
8. The interested party's submission filed on **13/5/2019** focus on alleged material non-disclosure by the plaintiff which purportedly enabled him to obtain the injunctive orders. In particular it is averred that a sale agreement dated **10/10/2017** was executed between the 3<sup>rd</sup> defendant and the interested party and that the interested party has paid a substantial part of the purchase price and that the title to the said land is in the name of the 3<sup>rd</sup> defendant who is in the process of effecting transfer of 100 acres to the interested party.
9. Having perused the application dated **6/3/2019** I find no evidence that the plaintiff withheld information from this court regarding the sale agreement and the payment of part of the purchase price by the interested party.
10. What may be in issue is whether the plaintiff is in occupation of 50 acres out of **LR No. 6125/10**.
11. However I also do note that paragraph 10 of the supporting affidavit imputes non-disclosure of the part of the defendants, and an allegation that non-disclosure contributed to the granting of an injunction with regard to the entire suit land.
12. I would consider that without any registration of transfer into the name of the interested party this court and indeed any other person would not be able to know of the interested party's interest or claim over the suit land or any part thereof.
13. Further the agreement referred to by the interested party was ostensibly entered into in the year **2010** while the plaintiff claims that his agreement with the 1<sup>st</sup> defendant was entered into in the year **2007** and the issue of two competing equities will necessarily come into sharp focus at the main hearing of the suit now that the interested party has been enjoined.
14. Besides the ruling delivered on **15/11/2018** indicated that the interim injunction restrained the 3<sup>rd</sup> defendant from alienating, offering for sale, transferring or excising any part of or in any way dealing with six subdivisions created out of **LR No. 6125/10 Kitale** pending the hearing and determination of the suit yet the applicant has not clearly identified in its supporting affidavit which of those subdivisions cover the acreage it purports to have purchased from the 3<sup>rd</sup> defendant.
15. In my view that disclosure would have made it easier for the court to segregate the portions that are affected by his claim and those that are affected by the plaintiff's claim and make the appropriate orders which would have been in my view, a partial lifting of the injunctive orders to suit the applicant.
16. Nothing would have been easier for the applicant than that identification of the plots that affect his interests in view of the fact that the subdivision was conducted by the 3<sup>rd</sup> defendant with whom he had entered into an agreement. My observation is that in the absence of such disclosure, the applicant's position vis a vis the 3<sup>rd</sup> defendant is similar if not worse than the plaintiff's position vis a vis the 1<sup>st</sup> defendant and both must be treated equally till the end of the proceedings by maintaining the orders of injunction granted earlier on in this suit pending the hearing and determination of the suit.
17. In my view **prayer No. 3** in the application dated **6/3/2019** has no merit. The same is dismissed. Costs of the entire application will be in the cause.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**8/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ambutsi for Applicant

Ms. Ifedha holding brief for Samba for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr. Kitembe holding brief for Teti for Plaintiff

**COURT**

Ruling read in open court.

**MWANGI NJORGE**

**JUDGE**

**8/7/2019**