



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 69 OF 2015**

**SAMUEL NJERU M'UTHI.....PLAINTIFF**

**=VERSUS=**

**DEPAK KAMANI.....1<sup>ST</sup> DEFENDANT**

**GEORGE ONER OGALO.....2<sup>ND</sup> DEFENDANT**

**ZARA PROPERTIES LIMITED.....3<sup>RD</sup> DEFENDANT**

**ZAMINA LIMITED.....4<sup>TH</sup> DEFENDANT**

**=AND=**

**YE LAND COMPANY LIMITED.PROPOSED..INTEREESTED PARTY**

**CONSOLIDATED WITH ELC NO. 92 OF 2015**

**ZAMINA LIMITED.....PLAINTIFF**

**=VERSUS=**

**SAMWEL NJERU M'UTHI.....1<sup>ST</sup> DEFENDANT**

**PETER KIMULWO.....2<sup>ND</sup> DEFENDANT**

**AND**

**ELC NO. 183 OF 2011**

**AMCON CONSTRUCTION LTD.....PLAINTIFF**

**=VERSUS=**

**ZARA PROPERTIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**HON.ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is ruling in respect of two applications. The first application is dated 27<sup>th</sup> October 2020. It is brought by Zara Properties Limited (CPR/2010/24490). The second application is dated 14<sup>th</sup> December 2020. It is brought by Zamina properties Limited the Plaintiff in ELC 92 of 2015. The Applicant in the first application made its first appearance in these proceedings when it filed a Notice of Motion dated 10<sup>th</sup> September 2019. This application was heard and was dismissed vide a ruling delivered on 8<sup>th</sup> October 2019.

### **The First Application.**

2. The Applicant in this in this application seeks a review and setting aside of the ruling which was delivered on 8<sup>th</sup> October 2019. The Applicant seeks a review of the Ruling of 8<sup>th</sup> October 2019 on the ground that there is a mistake or error apparent on the face of the record. In trying to point out the alleged error on the record, the Applicant contends that the mistake which is apparent on the record is a finding by the Court that the Zara Proteins Limited which is named in ELC NO.183 of 2011 and ELC 69 of 2015 was not the Applicant herein; that the company named as a defendant in the suits is Zara Properties Limited ( C106174) formerly known as prompt Fire Protection Limited; that Zara Properties ( C106174) was the registered owner of LR No. 209/12261; that he Applicant cannot seek any orders against Ye Land Company Limited; that it was unprocedural for the Applicant to file a defence and raise a defence against Ye Land Company Limited before Ye Land Company Limited could be enjoined in the proceedings and that Ye Land Company limited is currently the registered owner of LR 209/20257 IR No. 70419 having derived its title by way of transfer from Samuel Njeru M'uthi.

3. The Applicant therefore argues that from the court's findings as set out hereinabove, the court made a mistake by stating that the company named as C 106174 was the one named as Defendant in the two suits. The Applicant further argues that the Court's findings were contradictory and contrary to the pleadings, law and the decision in the Court of Appeal in Nairobi Civil Appeal No.216 of 2018.

4. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in ELC 69 of 2015, the Plaintiff in ELC 92 of 2015 and the 1<sup>st</sup> Defendant in ELC 183 of 2011 opposed the Applicant's application based on grounds of opposition dated 16<sup>th</sup> April 2021. These Respondents contend that the Applicant has not met the threshold for grant of review as there is no error on the face of the record to warrant a review.

5. The 3<sup>rd</sup> Defendant in ELC 92 of 2015 has opposed the Applicant's application based on a replying affidavit sworn on 9<sup>th</sup> February 2021. This Respondent contends that the Applicant is not the one which was named as a Defendant in the two suits and that there is no error apparent on the record which will warrant a review.

6. The parties were directed to file written submissions. The Applicant filed submissions dated 4<sup>th</sup> June 2021. The 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants in ELC 69 of 2015, the Plaintiff in ELC 92 of 2015 and the 1<sup>st</sup> Defendant in ELC 183 of 2011 filed their submissions dated 7<sup>th</sup> June 2021. The Plaintiff in ELC 69 of 2015 filed his submissions dated 23<sup>rd</sup> June 2021. The 3<sup>rd</sup> Defendant in ELC 92 of 2015 filed submissions dated 12<sup>th</sup> April 2021. The Plaintiff in ELC 183 of 2011 did not file any submissions.

7. I have considered the Applicant's application as well as the opposition thereto by the Applicants. I have also considered the submissions which were filed by the parties herein. There are only two issue which are for determination. The first is whether the Applicant's application is incompetent. The second is whether the Applicant has met the threshold for review.

8. The 3<sup>rd</sup> Defendant in ELC 92 of 2015 contends that the Applicant's application is incompetent in that the Applicant is pursuing a review when it has already filed a notice of appeal. The 3<sup>rd</sup> Defendant relies on the case of **Majaliwa Estates Limited Vs Jasper Oduor Omondi & 2 Others (2010)e KLR** where Justice Azangalala ( as he then was ) held that a person who has filed a notice of appeal which has not been withdrawn cannot at the same time pursue an application for review . The 3<sup>rd</sup> Defendant also relied in the court of appeal decision in **Otieno Ragot & Co.Advocates Vs National Bank of Kenya Limited (2020) eKLR** where the court quoted the decision in **African Airline International Limited Vs Eastern & Southern Africa Trade bank Limited (2003) EA ( CAL) .**

9. The Applicant argued that though a Notice of Appeal had been filed against the Ruling sought and that the same has not been withdrawn, this is not a bar to its right to pursue a review. In support of this contention, the Applicant relies on the court of appeal decision in **Mutlichoice (Kenya) Limited Wananchi Group ( Kenya) Limited & 2 Others (2020) e KLR** where the court of Appeal agreed with Justice Mumbi Ngugi ( as she then was) who held that the filing of A Notice of Appeal is not a bar for one to pursue a review.

10. I have examined the cases which relied upon by the 3<sup>rd</sup> Defendant in ELC 92 of 2015 and the Applicant. The decision in the case of Multichoice (Kenya) Ltd (supra) was as a result of the contradictory judgements which were coming from both the superior courts and the Court of Appeal regarding where a notice of appeal has been filed and the same litigant pursues an application for review without first withdrawing the notice of appeal. This resulted in the president of the Court of Appeal being asked to constitute a bench of five judges to put to rest the confusion. It is this five judge bench of the Court of Appeal which held that even a case where there is a Notice of Appeal, a litigant can still pursue an application for review.

11. The five judge bench decision was delivered on 22<sup>nd</sup> May 2020 whereas the three judge bench in the Otieno Ragot & Co. Advocates case delivered their judgement on 31<sup>st</sup> January 2020. The position having been clarified by a bench of five Judges, I find that the Applicant's application is not incompetent.

12. On the second issue, the Applicant appears to be complaining about what it calls erroneous findings of the court which were contradictory, misconceived and was contradictory to the decision of the Court of Appeal. The Applicant terms the court's decision draconian and not in keeping with overriding objective of the court which calls for timely conclusion of disputes. If this be the case, then these are not grounds for review on account of error on the record. They are good grounds of Appeal. If I were to proceed to review the ruling based on the grounds raised, I will be sitting on appeal in a matter which I decided.

13. The Applicant appears to conclude that I misapprehended the matter before me and therefore I arrived at wrong conclusions. It has been stated that misconception of the law or evidence is not a ground for review though it might be a good ground for appeal. In the case of **Jameny Mudaki Asava VS Brown Otengo Asava & Another (2015) eKLR**, the Court of Appeal cited the case of **Origo & Another Vs Mungala (2005) eKLR 307** where the Court of Appeal stated as follows:-

***“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end”.***

14. There is no error apparent on the face of the record. In the case of **Nyamogo & Nyamogo Vs Kogo (2001) EA 170**, the Court of Appeal stated as follows:-

***“As was stated in the AIR commentaries on the code of civil procedure by Chitale and Rao (4<sup>th</sup> ed) Volume 3 at page 3227; “a point which may a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is not ground for a review though it may be a good ground for an appeal”.***

15. It is clear that the Applicant has failed to point out any error apparent on the face of the record or any mistake in the ruling of 8<sup>th</sup> October 2019. I therefore find that the Applicants application lacks merit. The same is dismissed with costs to 3<sup>rd</sup> Defendant in ELC 92 of 2015, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in ELC 69 of 2015, the Plaintiff in ELC 92 of 2015 and the 1<sup>st</sup> Defendant in ELC 183 of 2011.

It is so ordered.

#### **The second application.**

16. The Applicant in this application seeks the following orders:

**1) Spent**

**2) Spent**

**3) Spent**

**4) Spent**

**5) THAT the Honourable Court be and is hereby pleased to grant a temporary injunction restraining the Defendants/ Respondents whether by themselves, their servants, agents, representatives, employees and/or anyone claiming under their name or title howsoever from excavating, undertaking dumping, constructing, entering and/or from putting up any structures whether temporary or permanent or otherwise thereon and/or in any manner howsoever interfering with the Suit property being L.R. No 209/12261 (I.R. 123523) as more particularly defined and described and identified/delineated in the Deed Plan No 3030229 dated 26th November, 2009 pending inter-parties hearing and determination of this Suit.**

**6) The Honourable Court be and is hereby pleased to direct that the Ward Commander/Officer Commanding Industrial Area Police Station, supervise the implementation of Order No 2(two) to preserve any further unauthorized ingress, excavation, dumping, construction interference howsoever by the or Defendants/Respondents pending the Hearing and determination of the Suit herewith.**

**7) THAT the this Honourable Court be and is hereby pleased to grant such other Orders as it may deem fit and necessary for the justice of this dispute and to preserve the Subject Matter in this Suit being L.R. No 209/12261 (I.R. 123523) as more particularly defined and described and identified/delineated in the Deed Plan No 3030229 dated 26th November, 2009 and prevent it from wasting.**

**8) THAT the costs of the Application be provided for.**

17. The Applicant contends that it is the registered owner of LR No. 209/12261 IR No. 123523. The Applicant states that it purchased this property from Zara Properties Limited which is named as the 3<sup>rd</sup> Defendant further contends that as there is a dispute over the same with other parties, the court granted orders preserving the property on various dates in the year 2015.

18. When the 3<sup>rd</sup> Defendant in ELC 92 of 2015 moved to the suit property and started construction, the Applicant moved to court and filed a notice of motion dated 3<sup>rd</sup> August 2018 but this application could not be heard as the court files went missing. The Applicant argues that its ownership has been confirmed by officials of the Lands Office including the office of the Attorney General. It is on this basis that the Applicant seeks injunctive orders in order to preserve the suit property.

19. The Applicant's application is opposed by the Plaintiff in ELC 69 of 2015 through a replying affidavit sworn on 19<sup>th</sup> April 2021. This Respondent contends that the property which the Applicant claims is totally different from the property which he owned and which he has since sold to the 3<sup>rd</sup> Defendant in ELC 92 of 2015. The Respondent argues that there is no way the company which transferred the suit property to the Applicant would have owned the property even before it was incorporated. The Respondent further argues that the company which sold the suit property to the Applicant had no better title to pass to the Applicant.

20. The Applicant's application has also been opposed by the 3<sup>rd</sup> Defendant in ELC 92 of 2015 through replying affidavit sworn on 4<sup>th</sup> march 2021. This affidavit is so detailed and has demonstrated that as at the time of allotment letter the basis of which title was issued to the 3<sup>rd</sup> Defendant in ELC 69 of 2015, the company had not changed its name from prompt Fire Protection Services Ltd to Zara properties Ltd. This Respondent also demonstrated that Zara Properties ltd which was found to be the genuine one had not been incorporated and was therefore not in a position to have any title in its name.

21. This Respondent went on to point out blow by blow on ow the title held by the 3<sup>rd</sup> Defendant in ELC 69 of 2015 was fraudulently acquired hence it did not have any good title which it would have passed to the Applicant.

22. The parties were directed to put in written submissions. The Applicant filed submissions dated 7<sup>th</sup> June 2021. The 3<sup>rd</sup> Defendant in ELC 92 of 2015 filed submissions dated 12<sup>th</sup> April 2021. The Plaintiff in ELC 69 of 2015 filed his submissions dated 23<sup>rd</sup> June 2021. I have carefully gone through the Applicant's application as well as the opposition to the same by the Plaintiff in ELC 69 of 2015 and the 3<sup>rd</sup> Defendant in ELC 92 of 2015. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicant has demonstrated that it has a prima facie case to warrant issuance of an injunction.

23. The principles for grant of an injunction were well captured in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**. Firstly, an Applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not issue if the injury suffered will adequately be compensated in damages. Thirdly, if the court is in doubt, it will decide the case on a balance of convenience.

24. A prima facie case was described in the case of **Mrao Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows:

***“It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.***

25. The Court of Appeal has set out the boundaries within which a court should operate when considering whether or not a prima facie case has been established. This was well captured in the case of **Nguruman Limited Vs Jande Bonde Nielson & 2 others (20140 eKLR** as follows:-

***“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation”.***

26. It is in light of the above three cases that I will proceed to determine whether the Applicant has established a prima facie case. I have looked at the documents relied on by the Applicant Vis-a vis the replying affidavit sworn by the 3<sup>rd</sup> Defendant in ELC 92 of 2015. I have no doubt in view of the materials placed before me that the Applicant has not demonstrated a prima facie case with probability of success. I do not wish to state the reasons for this for I do not want to go beyond the boundaries set out in the Ngurumani Ltd (supra) . The reasons are well left for the full hearing.

27. On whether the Applicant will suffer injury which will not be compensated in damages, I notice that the 3<sup>rd</sup> Defendant in ELC 92 of 2015 is in possession of the suit property. This is a property which can be valued and if it turns out that it belongs to the Applicant, the Applicant can always be compensated in damages or the 3<sup>rd</sup> Defendant in ELC 92 of 2015 , can always be asked to demolish its structures and move out .

28. The 3<sup>rd</sup> Defendant in ELC 92 of 2015 has been in possession since 2015. To grant an injunction in the manner prayed for will mean that it will be evicted from the suit property. This is not the function of an interlocutory injunction. It is therefore clear that the Applicant's application cannot be granted. The Applicants' application is dismissed with costs to the Plaintiff in ELC 69 of 2015 and 3<sup>rd</sup> Defendant in ELC 92 of 2015.

It is so ordered.

29. In summary thereof, the Notice of Motion dated 27<sup>th</sup> October 2020 is dismissed with costs to the 3<sup>rd</sup> Defendant in ELC 92 of 2015, the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants in ELC 69 of 2015, the Plaintiff in ELC 92 of 2015 and 1<sup>st</sup> Defendant in ELC 183 of 2011. The Notice of Motion dated 14<sup>th</sup> December 2020 is dismissed with costs to the Plaintiff in ELC 69 of 2015 and the 3<sup>rd</sup> Defendant in ELC 92 of 2015.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual absence of parties who had been informed of the date of delivery of Ruling.

Court Assistant:

**E.O. OBAGA**

**JUDGE**