



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO 331 OF 2019

ANGELA MUSIMBA & 7 OTHERS.....PLAINTIFFS

VERSUS

FRED RABONGO & 8 OTHERS.....DEFENDANTS

RULING

Introduction.

1. This is a ruling in respect of two applications and a preliminary objection. The first application is dated 15th October 2019. It is brought by the Plaintiff and it seeks the following orders:-

1. Spent

2. Spent

3. That the Defendants be jointly and severally restrained either by themselves, their employees, servants and/or agents or by anyone whomsoever from entering upon, constructing upon or in any way interfering with the Plaintiffs' quiet enjoyment, possession and user of the parcels of land more particularly described as land Reference No. 3734/1045 and L R No. 3734/1046 until the hearing and final determination of the suit.

4. That costs of this application be awarded to the Plaintiffs.

2. The second application is dated 17th October 2019. It is brought by the 8th Defendant and it seeks the following orders:-

1. Spent

2. That this Honourable Court be pleased to discharge, vary or set aside the orders of interim injunction given by Honourable Mr Justice Obaga ex parte on 15th October 2019.

3. That the costs of this application be provided for.

3. The preliminary objection is dated 26th November 2019 and filed in Court on the same day. It was raised by the 1st to 6th Defendants and is based on the following grounds:-

1) That the court lacks jurisdiction to hear and/or entertain a matter of this nature, and the Ex parte orders issued are a nullity and void ab initio.

2) That the proceedings by the plaintiffs as taken out are in contravention of section 72, 73, 78, 80, 14 and 15 of the Physical Planning and Land Use Act 2019 Cap laws of Kenya.

3) That the proceedings by the Plaintiffs are breach of the Special Condition 18 of the Agreement of sale in respect of the Sale Agreements which provide for arbitration as the dispute resolution mechanism.

4. The Plaintiffs are owners of Maisonettes which are erected on LR No. 3734/1045. The maisonettes were developed by the 4th Defendant

where the 1st and 2nd Defendants are directors. During the process of sale, the 3rd Defendant who is an advocate of the High Court is the one who acted for the 4th Defendant. The 5th Defendant was incorporated as a management company where the 1st and 3rd Defendants are shareholders despite the fact that the 3rd Defendant does not own any of the nine maisonettes.

5. The 7th and 8th Plaintiffs who are a couple purchased their house from Tabitha Njoki Kimani who was the original purchaser. When the Plaintiffs were entering into sale agreements, they were made to understand that LR No. 3734/1046 was owned by the 4th Defendant and that the two parcels of land were to be amalgamated.

6. The septic tank serving all the nine maisonettes is built on LR No. 3734/1046. At the completion of the maisonettes, a certificate of occupation was issued by Nairobi City Council, the predecessor of the 7th Defendant. This occupation certificate indicated that it had been issued subject to amalgamation of LR No.3734/1045 and LR No. 3734/1046.

7. It is at the tail end of the sale process that some advocates of the purchasers became inquisitive about the amalgamation issue that the 3rd Defendant came out to say that amalgamation was out of question in that the two properties were owned by different entities. It is around this same time that the purchasers realized that the two properties were owned by the 4th Defendant. It dawned on them that LR No. 3734/1046 was owned by the 6th Defendant. It would later be discovered that LR No. 3734/1046 had been transferred to the 8th Defendant.

8. The two properties are separated by a road which serves both of them. A gate had been erected at the entrance of the road serving both properties. This suit was filed after the 7th Defendant issued an enforcement notice requiring removal of the gate by the Plaintiffs as well as a wall which had been erected thereon. The Plaintiffs could not comply with enforcement notice prompting the 7th Defendant to move in to pull down the gate and wall hence the filing of this suit together with the first application. The court, granted temporary injunction halting the intended demolition. It is this injunction which triggered the filing of the second application and the preliminary objection.

9. The parties were directed to file written submissions which were then highlighted orally. I will first deal with the issue of jurisdiction for without jurisdiction; the court has no business to make any further steps.

The preliminary objection

10. The 1st to 6th Defendants contend that this court has no jurisdiction to handle this case in view of the provisions of the Physical and Land use Planning Act No. 13 of 2019. The 1st to 6th Defendants argue that if the Plaintiffs were aggrieved by the enforcement notice issued by the 7th Defendant, they should have appealed against that to the County Physical and Land Use Planning Liaison Committee. The 1st to 6th Defendants further argue that the Plaintiffs should have referred the matter to arbitration as per clause 18 of the sale agreements which they signed.

11. In support of their arguments on jurisdiction under the Physical and Land Use Planning Act No. 13 of 2019, the 1s to 6th Defendants relied on the Court of Appeal decision in **Whitehorse Investments Limited Vs Nairobi City County (2019) eKLR** in which the Court of Appeal agreed with Justice Eboso who had declined to entertain a Judicial Review matter where the appellant had not exhausted the mechanism provided under the Physical Planning Act (Now repealed).

12. In support of the argument that this matter should be referred to arbitration, the 1st to 6th Defendants' counsel relied on the provisions of section 6 of the Arbitration Act.

13. The 7th Defendant associated itself with the submissions of the 1st to 6th Defendants in as far as the provisions of the Physical and Land Use Planning Act No. 13 of 2019 are concerned.

14. The Plaintiffs never came out clearly in answer to the issue of jurisdiction as regards the Physical and Land Use Planning Act No. 13 of 2019. Mr Nderitu argued in passing that there was an earlier preliminary objection which the 1st to 6th Defendants had filed but which was later withdrawn and a fresh one filed after the court had given directions that the only pending issues were the two applications. On the issue of arbitration, Mr Nderitu argued that the matter would not be referred to arbitration as some Plaintiffs were not party to the sale agreements and that in any case the parties are past the agreement stage and that the leases are the ones now governing the relationship between the parties.

15. I have considered the arguments raised by both the 1st to 6th Defendants and the 7th Defendant on the one part as well as the arguments raised by Mr Nderitu for the Plaintiffs. There was no evidence adduced that the County Physical and Land Use Planning Liaison Committee of the 7th Defendant had been established for the Plaintiffs to have Appealed to it. **Section 93 of the Physical and Land Use Planning Act No. 13 of 2019** which came into force on 5th August 2019, provides as follows:-

“All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court”

It is therefore clear that as the committee envisaged under Section 76 had not been established as at the time the enforcement notice was issued, this court has jurisdiction to entertain this case. The Court of Appeal Decision in Whitehorse case (supra) was decided on 6th December 2019 but was based on the Physical Planning Act (Now repealed) and it is common knowledge that though the Liaison Committees were provided for in that Act, none was actually established and operated.

16. As regards the issue of referring this matter to arbitration, this issue cannot be raised now. Section 6 of the Arbitration Act is clear that if

a party wishes to have a matter referred to arbitration, he should do so soon after filing appearance but before filing any pleadings. In this case, the 1st to 6th Defendants have already filed pleadings and they cannot be heard to urge the court to invoke the provisions of Section 6 of the Arbitration Act. I therefore find no merit in the preliminary objection which is hereby dismissed with costs to the Plaintiffs.

It is so ordered.

The first application

17. The Plaintiffs contend that when they were purchasing their respective maisonettes which were collectively described as Oryx Villas, they were made to understand that the maisonettes were to have facilities including a gymnasium, gardens, pathways, driveways and other usual amenities. They were also made to understand that LR No. 3734/1045 was to be amalgamated with LR No. 3734/1046 and that the facilities like gymnasium, gardens, pathways and driveways were to be constructed on LR No. 3734/1046. The Septic tank which serves all the nine maisonettes is on LR No. 3734/1046. This is what made the Plaintiffs to believe that the other facilities were to be put up in the other plot as the nine maisonettes had taken up the entire space and there was no space left for the facilities mentioned in the leases.

18. The Plaintiffs further argue that through various correspondence by the Firm of Ogola Okello & Co. Advocates where the 3rd Defendant is a partner, they were promised that LR No.3734/1045 and LR No.3734/1046 were to be amalgamated. It is only on 27th July 2018 that the 3rd Defendant's firm wrote to state that the two properties could not be amalgamated as the two were not owned by the same person.

19. The Plaintiffs therefore argue that the conduct of the 1st, 3rd and 4th Defendants of moving on with the sale transaction as though the two properties were owned by the 4th Defendant and more particularly when certificate of occupation which was obtained by the 3rd Defendant with knowledge of 1st Defendant was clear that amalgamation was to be done was the height of deceit and should not be let to go. The Plaintiffs argue that if the Septic tank which is on LR 3734/1046 was dismantled, the maisonettes will be rendered uninhabitable and they will be condemned.

20. The Plaintiffs further argue that the 9th Defendant who is the wife of the 1st Defendant and is the majority shareholder in the 8th Defendant company which now owns LR No. 3734/1046 was once occupying maisonette No. 3 and was therefore aware that facilities like a gymnasium, driveways and pathways were to be constructed on LR No.3734/1046. This is because maisonette No.3 is owned by 1st Defendant who is her husband and when she was purchasing LR No. 3734/1046 from the 6th Defendant, she must have known that the maisonettes were bought on the understanding that LR No.3734/1046 was to house a gymnasium and other facilities mentioned in the leases.

21. The Plaintiffs therefore argue that the 8th Defendant cannot claim to be a purchaser for value without notice. They argue that if the injunction is not granted, they will suffer irreparable damage. It will be a nightmare to relocate their school going children when the septic tank which is on LR No.3734/1046 will be removed rendering their houses uninhabitable.

22. The 1st to 6th Defendants in their replying affidavit contend that an injunction should not be issued as to do so will be a nullity as the Plaintiffs have no interest in LR No. 3734/1046. On the Plaintiffs' contention that the 3rd Defendant is a director in the 5th Defendant Company yet he does not own a maisonette, the 1st to 6th Defendants argue that the 3rd Defendant has written to explain why he is a director and shareholder and that the management company has not been operationalized due to the arrogance and non-cooperation of the Plaintiffs.

23. The 1st to 6th Defendants further argue that the mere fact that the certificate of occupation was given subject to amalgamation of the two properties cannot serve to re-write the contract and that in any case, the Plaintiffs have claimed that the said occupation certificate was fraudulent and cannot therefore rely on it. They also argue that there is no one who has threatened to bring down the Septic tank on LR No 3734/1046.

24. On its part the 7th Defendant has opposed the application by the Plaintiffs by arguing that it merely acted upon a complaint by the 8th Defendant whose property had been blocked. It denies that it has anything to do with amalgamation of properties. Its duty is on Physical Planning and Change of User.

25. The 8th and 9th Defendants on their part opposed the Plaintiff's application by contending that the 8th Defendant was incorporated in May 2019 and that it is the registered owner of LR No.3734/1046. The 8th and 9th Respondents argue that they mobilized materials ready to start construction on their property but were only stopped when this court issued injunctive orders stopping them from accessing their own property. The 9th Defendant who is a director in the 8th Defendant Company argues that the 8th Defendant is not privy to the promises made by the 1st and 4th Defendants to the Plaintiffs and that she cannot be enjoined from her own property. She argues that the only relationship with the Plaintiff is that they share a common boundary and an access road.

26. The 8th and 9th Defendants argue that they had entered into contact with third parties who might start suing them and that they are incurring losses due to the injunction which was granted. They therefore argue that the injunction should not be confirmed.

27. I have carefully considered the Plaintiffs application as well as the opposition thereto by the Defendants. I must say at the outset that this is an interesting case. The Plaintiffs while purchasing their respective maisonettes were made to understand that the maisonettes would include facilities like gymnasium, pathways, driveways and other associate amenities. When the construction was complete, there was no space left for the facilities. The septic tank had to be constructed on LR No.3734/1046.

28. The 3rd Defendant kept promising the Plaintiffs that the two properties were to be amalgamated. There were correspondences to this effect such as the one dated 30/5/2008, 18/6/2008, 3/4/2009, 30/7/2009, 22/10/2009, 24/11/2009 and 6/7/2018 . Despite all these letters in

which amalgamation was being alluded to, the 3rd Defendant made a complete aboutturn in his letter of 25th July 2018 in which he said that amalgamation cannot occur where two properties do not belong to the same person. This is despite having early on procured an occupation certificate which granted occupation subject to amalgamation of the two properties.

29. The 9th Defendant who is said to be the wife of 1st Respondent and who at one time occupied maisonette No.3 which belongs to her husband then went on to purchase LR No.3734/1046 which was registered in the name of the 8th Defendant company where she is a majority shareholder . After all this, the Plaintiffs are now being told that they have no business to do with LR No. 3734/1046 as ownership is now with the 8th Defendant.

30. The Plaintiffs are now being told that they can as well put up a septic tank on LR No. 3734/1045 when already there is no space for it leave alone the other facilities promised in the lease. The 1st to 6th Defendants are now saying that if the court were to grant an injunction, it would amount to a nullity as the certificate of occupation cannot be used to re-write a contract between parties. In the circumstances, the only issue for determination is whether the Plaintiffs have made out a case for grant of an injunction.

31. The Principles for grant of an injunction are now well settled. Like it was stated in the famous case of **Giella Vs Cassman Brown Co.Ltd (1973) EA 358**, one has to show that he has a prima facie case with probability of success. If damages will be adequate, no injunction can be given. If the court is in doubt, it will decide the matter on a balance of probabilities.

32. In the Instant case, there is no contention that the Septic tank serving the nine maisonettes is constructed on LR No.3734/1046 when the 4th Defendant was developing the maisonettes , its Directors who include the 1st Defendant were aware about the fact that the property was owned by the 6th Defendant. After the maisonettes were sold out, the 4th Defendant through its lawyer , the 3rd Defendant stated that the property was not owned by the 4th Defendant but by the 6th Defendant and no amalgamation could be done . This action was clearly an infringement of the rights of the Plaintiffs which calls for grant of injunction for the court to interrogate how the Plaintiffs were treated.

33. The Septic tank is on LR No.3734/1046. The counsel for the 8th and 9th Defendant submitted that the Plaintiffs can relocate the Septic tank to LR No. 3734/1045. This clearly shows that if this were to happen, the nine maisonettes would be rendered uninhabitable. There is no amount of damages which will compensate the Plaintiffs. Even if the balance of convenience was to be considered, it will tilt in favour of the Plaintiffs who are staring at the possibility of their houses being rendered useless. It has been said that there is no space left where the septic tank and the other facilities will be put up. The 8th and 9th Defendants have clearly said that the septic tank can be re-located to LR No. 3734/1045 to pave way for them to build on LR No.3734/1046.

34. I have considered these peculiar circumstances and have reached a conclusion that an injunction is justified. I therefore allow the Plaintiff's application in terms of prayers (3) and (4) of the Notice of Motion dated 15th October 2019.

It is so ordered.

The Second application.

35. The second application was seeking discharge of the injunction orders granted on 15th October 2019 which have now been confirmed. While dealing with the first application, I have given the reasons why I have granted an injunction even though LR No. 3734/1046 is registered in the name of the 8th Defendant. It will therefore be superfluous to address the second application at length. I do not find any merit in the same. I proceed to dismiss it with costs to the Plaintiffs.

It is so ordered.

Dated, signed and delivered at Nairobi on this 23rd day of January 2020

E.O.OBAGA

JUDGE

In the presence of:-

Mr Muite and Mr Nderitu for Applicants,

Mr Ochieng for 1st and 6th Respondents Mr Kairu for 7th Respondents and Mr Mwenda for 8th and 9th Respondent.

Court Assistant: Hilda

E.O.OBAGA

JUDGE