



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 36 OF 2019**

**THIKA GREENS LIMITED.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**DECKO AFRICA LIMITED.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**SAFARICOM PLC.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**JAMES MBUI**

**CHARLES GACHUHI**

**MUKAMI GATHURI (suing on behalf**

**of WATERFALLS WELFARE GROUP)....PROPOSED INTERESTED PARTY/APPLICANT**

**RULING**

1. It is the Plaintiff's case that it is the registered owner of the property known as LR No 28239 situate in Muranga County, on which it has created a controlled development comprising of 960 residential plots for the development of homes to be sold to desiring members of the public willing to abide by its controlled plan. It averred that the process of selling the plots is still underway with 1/6 of the plots having been sold and some of the proprietors have built homes and reside therein. In addition to the development the Plaintiff has incorporated a management Company namely Waterfalls Country Homes Management Limited to take over the management of the estate on behalf of the home owners upon completion of the development and handover. The Plaintiff contends that it is in control of the development and management of the project pending finalization and handover to the acquiring home owners.

2. The Plaintiff contends that the Defendants without its permission and consent and against their written advice have trespassed onto their property and commenced the construction and installation activities of the fibre network and interfered with the Plaintiff's wayleave plan. It sought the following orders;

a) A Permanent injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves their servants, employees, agents and/or any other person acting in their behalf from trespassing, encroaching, installation of fiber network and/or conducting any works on the Plaintiff's property known as L.R. No. 28239(Original Number 13131) Murang'a County, or any other property belonging to the Plaintiff.

b) A mandatory injunction do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally, their agent, servants and/or employees compelling them to remove all fiber installations and/or any other material erected on the wayleave comprised in the Plaintiff's Phase 1 known as Land Reference Number 28239 (Original Number 13131) Grant Number 132402, situate within Murang'a County.

c) General damages for trespass and violation of property rights.

d) Costs and interest; and

e) Any other or further relief as the Court may deem fit and just to grant.

3. Simultaneously, it sought interalia interim orders restraining the Defendants from entering the suit property, installing the fibre network and or entering any arrangements with the residents in carrying out any activities on the wayleave comprised in the Plaintiffs said property.

4. When the matter came up for hearing on the 14/11/19 the Court granted a temporary injunction pending the hearing of the application on the 21/11/19 which orders were extended up to the 27/2/2020.

5. On the 26/11/2019 the Interested Parties filed a Notice of Motion and sought the following orders;

- a) That this application be certified as urgent and be heard ex-parte and service be dispensed with in the first instance.
- b) That the Applicant Waterfalls Welfare Group, be and is hereby enjoined in the suit as an interested party.
- c) That this Honourable Court be pleased to set aside the orders issued by this Honourable Court on 14/11/2019.
- d) That this Honourable Court be pleased to grant such further orders as it may deem just and expedient in the circumstances of this case.
- e) That the costs of this application be provided for.

6. The application is supported by the grounds annexed thereto as well as the supporting affidavit of Charles Gichuhi sworn on the 26/11/19. In it he deponed that the Interested Party is a self-help group duly registered with the relevant Government Ministry and is incorporated by the residents of Waterfalls Country Homes Estate to represent their interests pending the issuance of the shares in the management company. That the members of the welfare are fully paid purchasers of the individual plots in the development.

7. That in June 2019 the residents engaged the 2<sup>nd</sup> Respondent to supply internet fibre connection to their homes which they commenced to do so in the month of October with the full knowledge and participation of the Plaintiffs project manager. Barely two weeks into the construction, the Plaintiff denied the 2<sup>nd</sup> Defendants workers access into the estate to continue the said works ostensibly on grounds that it had not approved the same in full knowledge that the residents had engaged the 2<sup>nd</sup> Defendant for its services.

8. Further that the temporary injunction issued by this honourable Court stopping the works has adversely affected the enjoyment of their proprietary rights. That they are prejudiced by the said orders hence the prayer to be enjoined in the suit to enable the Court to effectively and completely adjudicate upon all the matters arising out of the suit before it. That no prejudice shall be visited to the Applicant that cannot be compensated with costs.

9. The Applicant has annexed the copy of the certificate of registration of the Waterfalls Welfare Group issued on the 24/1/18 and a draft sample of the sublease agreement.

10. In opposing the application aforesaid, the Plaintiff Respondent filed a Preliminary Objection on the grounds expressed as follows;

- a) The Applicants are an amorphous group that is unknown to the Plaintiff.
- b) That the Applicant has no capacity to sue or be sued in its own name making its application incurably defective and must be struck of.
- c) That in the alternative and without prejudice to grounds a and b and if the group purports to represent proprietors who entered into individual contracts of sublease with the Plaintiff/Applicant by virtue of clause 4 (vii) of the individual subleases all disputes between the parties are the exclusive jurisdiction of arbitration hence the Court lacks jurisdiction between the Plaintiff and the Applicants.

11. The Defendants did not oppose the application of the Applicants.

12. By consent of the parties the Preliminary Objection and the Notice of Motion were argued by the Applicants and the Plaintiff on the 2/12/2020. The Plaintiff abandoned prayer No b and proceeded to canvass prayers a and c.

13. The Plaintiff maintained that it has contracted 192 individuals through sub lease agreements for the sale of the plots on the project in Phase 1 and not the Applicant Welfare. That the Applicant is a stranger to it and neither are its interests in the suit disclosed.

14. Further it argued that if indeed the Applicant comprises of the 192 sub leasees then the Court does not have jurisdiction to entertain any dispute in the face of the arbitral clause found in clause 4(vii) of the sub lease agreement entered between the Plaintiff and the 192 or so buyers/subleases. That the parties voluntarily agreed to submit their disputes in respect to their contract to a single arbitrator and that is the route available to the Applicant. Further it maintained that the Applicants are not before this Court to provide information to the Court as they have averred. Referring the Court to paras 14,15,17 18 20 and 21, the Plaintiff pointed out that the Applicant has contended that their proprietary rights have been adversely affected by the stoppage of the installation of the fibre cables as well as the interim orders issued by this Court. That therefore their presence in the suit is not that of a benevolent bystander out to assist the Court. Be that as may be, the Plaintiff argued that clearly there is a dispute which will call upon the Court to adjudicate as to the rights obligations and interests between the Plaintiff and the Applicants. That the question as to who has the obligation to manage the wayleaves becomes pertinent between the Plaintiff and the Applicants.

15. Contrary to the Applicants claim as contained in their supporting affidavit that they gave authority to the Defendants to install the fibre cables in Phase 1 of the project, the Plaintiff is categorical that it is not true. That the authority to give approval/consent is repositied with the Plaintiff and not the Applicants. That this therefore raises a question of interpretation and construction of the meaning and import of the sub

lease agreement as between the contracting parties, which in any event is contemplated by the arbitration clause provided for in the agreement.

16. In summation, he urged that the Applicant should not be enjoined into the suit. He relied on the case in **Adrec Limited Vs Nation Media Group Limited CA (2017) EKL**R where the Court held that where parties agree to refer a dispute to arbitration, and, on application of a party, before filing a defense, the Court should refer the matter for arbitration.

17. Ms Nderu for the Applicants argued that members of the welfare are proprietors of the plots in Thika Green project- Phase 1. That since the Defendants are not parties to the sub lease agreements, they cannot be bound by the arbitration clause alluded to by the Plaintiffs. That the Applicants have been adversely mentioned as the persons who entered into an agreement to procure the services of the 2<sup>nd</sup> Defendant, which services have formed the bedrock of the suit. It is the Plaintiffs claim that the Defendants have trespassed onto the property. The Applicants argue that they have a direct interest and enjoinder in the suit so that they may protect their proprietary rights in their enjoyment of ownership and user rights in the project.

18. Citing the case of **Francis Muruatetu Vs The Republic & 5 others**, the Applicant stated that as long as it is not introducing a new cause of action to the suit, it ought to be enjoined in the suit. Further that in the case of **Lukas Kabobia Njuguna Vs Consolidated Bank Limited (2005) KLR** the Court allowed joinder of a party on the grounds that he was a purchaser.

19. The Applicant argued that based on its direct interest in the suit land, it is neither a Defendant nor a Plaintiff. That the argument that it should pursue arbitration is not tenable. The Plaintiff is the developer. The Applicants are the owners of the plots in Phase 1 who have titles to their plots.

20. In a rejoinder the Plaintiff stated that there is no dispute in this suit between the Plaintiff and the Applicants. The issue is between the Plaintiff and the Defendants for trespass on the suit land comprising phase 1 of the project. It maintained that the Court has no jurisdiction to determine any dispute between the Plaintiff and the Applicants in view of the arbitration clause in the sub lease agreement.

21. I have been called upon to determine the Preliminary Objection first. If the Preliminary Objection succeeds than the Notice of Motion will be spent but if it fails, I shall proceed to determine the Notice of Motion in that order.

22. I wish to give the definition of a Preliminary Objection as stated in the case of **Mukisa Biscuit Company Vs Westend Distributors Limited (1969) EA 696** and **Oraro vs. Mbaja [2005] 1 KLR 141**. For a Preliminary Objection to succeed it must be a pure point of law that has been pleaded and agreed by both sides. Secondly, it should not require the Court to call for evidence of facts to prove the same. Thirdly, it should not be one which requires the Court to exercise discretion.

23. It is the Plaintiffs case that the Applicants are strangers to the Plaintiff and its development. The Applicants have contended that to the contrary they are proprietors of the Plots in Phase 1 of the project having acquired them through purchase. For the Court to determine the identity of the Applicants it will require to call evidence. The question of arbitration similarly will require the Court to inquire as to the contractual documents between the disclosed parties. The inquiry in the circumstance will oust the principles of a Preliminary Objection.

24. It is the finding of the Court that the Preliminary Objection fails. It is dismissed with costs to the Applicants.

25. I shall now turn to the Notice of Motion dated the 26/11/2019. The Applicant argued and reiterated its submission made in respect to the Preliminary Objection. It stated that Phase 1 of Thika Green is fully sold to the Applicants and what is pending is the issuance of shares in the management company by the Plaintiff to the individual owners. It argued that it is the Applicants who engaged the services of the Defendants in the provision of the fibre cable in the estate as the Applicant has a stake in the property.

26. In response the Plaintiff filed grounds of opposition dated the 26/11/19 in which it contended that the application is misconceived and bad in law, defective untenable and that the Court lacks jurisdiction to hear and determine the matter.

27. At the hearing of the Application, the learned counsel for the Plaintiff, Mr Manyara argued that the Applicant is not a party to the sub leases between the Plaintiff and the individual plot owners. That the Applicant is a creation post contract and it cannot bind the Plaintiffs nor can it benefit from a contract that is not a party to. In any event, he contended the Applicant could not be said to be an impartial party in the suit so as to be an interested party. That the Applicants gave authority to the Defendants pursuant to the sub leases for which they are not a party at all. Further that should the Applicant be comprised of the individual plot owners then they retain the liberty to refer any dispute to a single arbitrator pursuant to the sub lease agreements they have executed.

28. Black's Law Dictionary 9th Edition at page 1232 defines an interested party as;

“a party who has a recognizable stake (and therefore standing) in a matter”.

29. The provisions of Order I Rule 10(2) of the Civil Procedure Rules, 2010 states as follows;

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, Order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in Order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

30. Courts have taken a liberal application to joinder of parties. In the case of **Kingori vs. Chege (2002) 2 KLR 243, Warsame J** had this to

say;

“In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however the Court must guard against the frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before Court for determination”.

31. The threshold of joinder was set out in the case of **Francis Kariuki Muruatetu & Anor. Vs Republic & 5 Others (2016) eKLR** where the Court held that the Applicant must demonstrate the personal interest that it has in the matter by laying sufficient grounds before the Court; the prejudice it would suffer if it is not enjoined as an interested party; set out the case that it intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy.

32. In the case at hand, the Applicants have urged the Court to enjoin them in the case on the basis that they are the proprietors of the individual plots in Phase 1. That they indeed engaged the Defendants to provide the fibre cable services with the collaboration and consent of the Plaintiff, the developer. They have argued that the orders issued by the Court are adverse and prejudicial to their ownership and enjoyment of proprietary rights thereon. They argue that enjoining them will assist the Court to determine the matter judiciously. That the stoppage of the installation of the fibre cable is adversely affecting them as well.

33. The Plaintiff has argued rather vaguely that the Applicants are strangers and in the alternative if they should turn out to be the proprietors of the plots in the project then they have no forum in Court as the sub lease agreements contracted between the individual plot owners and the Plaintiff have provided for a dispute resolution through a single arbitrator which they are open to pursue.

34. It is to be noted that despite the averments of the Applicants as to the ownership of the plots in phase 1, they have not annexed any documents to support their claim. It is unfortunate that the Applicants missed this crucial step. They could as well be owners but the Court is unable to make that finding in the absence of any documentary evidence. Such evidence would have been in form of a letter of offer, a lease, a transfer or such other documents that would sufficiently create a nexus between the Applicants and the Plots for which the Plaintiff is the developer. I have seen a list of about 167 waterfalls country homes residents in support of the installation of the fibre cable in the estate by the 2<sup>nd</sup> Defendant. Though James Mbuji is listed, his plot number is not disclosed. Neither Charles Gichuhi nor Mukami Gathuri appear on the list. These three aver to be the officials of the Waterfall Welfare Group, the Applicant herein. It can be deduced from the list that the residents are desirous of the fibre cable services to their properties in the Project. The list on record shows names and plot Nos. What is not disclosed is whether they are owners /or occupiers of the Plots. The sample lease agreement on record does not disclose any form of ownership by any or all of the officials of the Applicant welfare Group. The interests of the Applicants therefore remain undisclosed to the Court.

35. In the absence of a disclosed interest, it is not clear what prejudice the Applicants stand to suffer if their application of joinder is declined.

36. In the end the application is dismissed with costs to the Plaintiff/Respondent.

37. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12<sup>TH</sup> DAY OF MARCH 2020.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Manyara for the Plaintiff/Respondent

1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Respondents – Absent

Ndwiga HB for Ms Nderu for the Proposed Interested Party

Irene and Njeri, Court Assistants