



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

E L C NO. 99 OF 2016

GRACE AKINYI NGOGE.....PLAINTIFF

=VERSUS=

M.N. AND J DEVELOPERS LTD.....DEFENDANT

RULING

1. This is a Ruling in respect of an amended *Notice of Motion* dated **14th October 2016**, which seeks the following reliefs:-

a. Spent

b. That pending the hearing and determination of this application inter-partes , the applicants herein John Abuya Isanda and Mary Njoki Fundi be enjoined in this matter as interested parties.

c. Spent

d. That pending hearing and determination of the suit herein, this Honourable Court do issue an order vacating its earlier order of the 29th July 2016.

e. Spent

f. That the plaintiff herein be called upon by this Honourable court to provide security and undertaking as to damages on the said applicants plot number 81 located at Jamuhuri Phase II within Nairobi County.

g. That the affidavits of service sworn by Bethuel N Ndwiga on the 16th February 2016 and 29th February 2016, be expunged from the court record.

h. That the entire suit herein be struck out as the same is fatally defective non-starter and is an abuse of the court process.

i. That the Honourable court grants any other order that it deems fit in the circumstances to grant.

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

2. The Plaintiff/Respondent had sued a company called M N and J Developers Ltd in respect of a property known as LR No. Nairobi/ Block 63/643 (suitland). The Plaintiff/Respondent contemporaneously filed a Notice of Motion seeking injunctive orders against the company. The company was duly served with the Notice of Motion but did not file any response to the application. In a ruling delivered on 29th July 2016, the Plaintiff/Respondent's application for injunction was allowed as prayed.

3. The applicants who have filed the present application contend that they are the owners of plot No. 81 at Jamuhuri Phase II which they contend that it is the same plot as the suit land. The applicants contend that they bought the suit land on 29th April 2000 from one **David Onsongo Obure** who had purchased it from **Julia Makunda Isoyi** who was the allottee of the same from the City Council of Nairobi.

4. That the applicants took possession and are in the process of putting up flats which have advanced. That there are a lot of building materials on the suit property which are being stolen as works cannot proceed and that there are other materials like cement which is likely to go to waste. This is all because of the injunctive orders granted in favour of the Plaintiff/Respondent.

5. The applicants further contend that the defendant company does not exist and that the affidavits of service which resulted in the granting of orders of 29th July 2016 are false as they were sworn by a person who is not a process server and were purportedly served upon a director of a non-existent company.

6. The applicant's application is opposed by the Plaintiff/Respondent who contends that the same is misconceived and is an abuse of the process of court. That the applicants cannot bring up an application before they are enjoined in this suit. That the Plaintiff/Respondent is the owner of the suit land which is also known as plot number 81. That the applicants are trespassers to the suit land who should not be granted any orders.

7. I have gone through the applicant's application, the opposition thereto by the Plaintiff/Respondent as well as the submissions filed by the parties herein. The issues which emerge for determination are firstly whether the applicants should be enjoined in this suit. Secondly whether there exist grounds for vacation of the orders of **29th July 2017**. Thirdly whether the Plaintiff/Respondent should be ordered to provide security. Lastly whether this suit should be struck out.

Whether the applicant should be enjoined in this suit.

8. In deciding whether a party should be allowed into a suit, the court has to consider whether the presence of that party in a suit would assist the court to effectually and completely adjudicate upon and settle all questions involved in the suit. In the instant application, it is clear that both the applicants and the Plaintiff/Respondent are claiming the suit land.

9. The applicants contend that their plot is No 81 and that they have been pursuing the County Government of Nairobi to issue them with title documents. There is in fact a case in which the applicants have sued the County Government of Nairobi in which they seek the County Government to be compelled to issue them with title documents to enable them to process title .

10. The Plaintiff/Respondent on the other hand contends that she is the owner of the suit land which is the same as plot No. 81 and that she has title to it. The applicants contend that they are in possession of the suit land and that they are in the process of building a block of flats. This being the case, I find that this dispute will only be effectually and completely adjudicated if the applicants are brought in as defendants.

Whether there exists grounds for vacation of the orders of 29th July 2016.

11. From the documents filed herein, it appears that the Plaintiff/ Respondent sued the company because in the sign displayed at the construction site on the suit land, the person said to be putting up the flats was an entity described as M.N and J Developers Ltd. Whether the entity exists or not is not material in this suit. If it turns out that the company does not exist or was wrongly sued, the court can even on its own

motion strike out its name as provided under Order 1 Rule 10 (2) of the Civil Procedure Rules.

12. The Orders of 29th July 2016, were given after the trial judge was satisfied that there was proper service. It has been argued that the initials forming the name of the company belongs to the applicants. This may as well be true but the fact remains that the company in the signage on the suit land is indicated as the one developing the blocks of flats. If the name was displayed to mislead or disguise the true developers, that cannot be used by the applicant to gain advantage to proceed with the construction when the issue of ownership has not been determined.

13. There is no evidence given by the applicants to show that the person who effected service is not a process server and that the directors of the company who are said to have been served were non-existent and there was no service. I therefore find that there are no sufficient grounds to vacate the orders of 29th July 2016.

Whether the Plaintiff/Respondent should be ordered to provide security.

14. The trial judge who heard the Plaintiff/Respondent's application did not order the Plaintiff/Respondent to provide security when granting the injunctive orders. I therefore see no grounds upon which I can impose an order for security when there is no basis for it.

Whether this suit should be struck out.

15. Striking out of a pleading is a drastic step which can only be granted in very clear and exceptional cases. In the present case, the Plaintiff/Respondent has demonstrated that she has a certificate of lease issued on 27th October 2001. She has been paying rates to the City council of Nairobi and recently to City County of Nairobi. Her case is not hopeless as to call for its dismissal. I therefore find that the applicants call for its dismissal is misplaced and cannot be allowed.

16. It is now clear that the applicants have substantially lost their application. The only prayer which is granted is a prayer for them to be enjoined as defendants. The Plaint shall be accordingly amended within 14 days from the date hereof to include them as defendants and pleadings served upon them. Costs in the cause.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this **14th** day of **March 2017**

E.O .OBAGA

JUDGE

In the presence of ;-

Mr Osiemo for Mr Otieno for the Plaintiff/Respondent

Mr Njau for Mr Obare for Interested parties

Court Assistant :Kevin

E.O .OBAGA

JUDGE