



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 811 OF 2017

ADVANCING HIS KINGDOM INTERNATIONAL.....PLAINTIFF

VERSUS

NYALA ESTATE LIMITED.....1ST DEFENDANT

SWAGG LIMITE.....2ND DEFENDANT

KAMITI PROPERTIES LTD.....3RD DEFENDANT

JUDGMENT

By a Plaint dated **31st October 2017**, the Plaintiff herein sought for the following orders against the Defendants jointly and severally:-

1. A permanent injunction to restrain the 1st, 2nd and 3rd Defendants, their duly authorized agents, servants, employees, officers, managers, successors, and /or assigns from removing, dispossessing and/ or interfering with the Plaintiff's possession, grant or license to occupy and use a portion of the suit property known as Nyala Estate within Anmer Tinganga Ward in Ruiru within Kiambu County.

2. Costs of this suit

3. Interest on prayer 2 above at Court rates.

In its statement of Claim, the Plaintiff averred that by a letter of offer executed and dated on **3rd November 2014**, the 1st Defendant licensed it a portion of the suit property known as **Nyala Estate Anmer Tinganga Ward in Ruiru within Kiambu County**, for a period of 10 years with an option of renewal. That in consideration of the license, the Plaintiff provided subsidized education services to the 1st Defendant's employees children as well as the community around Nyala Estate.

It was further averred that the Plaintiff has invested colossal sums to construct and operate a Nursery school and lower Primary Schools and related facilities, and its requests to have the parties execute a formal agreement have been neglected by the 1st Defendant. That around the **12th April 2016**, the 1st Defendant informed it that its lawyers will send a lease agreement thereby imputing payment of rent for use of the suit property contrary to the letter of offer executed on **3rd November 2014**. That on **4th May 2016**, the 1st Defendant convened a meeting with the Plaintiff and presented an agreement whose terms provided for a lease of 5 years contrary to the agreed terms. Further that vide an email dated **5th May 2016**, the 1st Defendant stipulated monthly rent of **kshs. 150,000/=** out of which the Plaintiff shall retain **Kshs.100,000/=** to defray the total sum of **kshs.22,000,000/=** it invested in the project.

Further that by an email dated **5th May 2016**, the 1st Defendant appointed the 3rd Defendant as the Management Company of the suit property and by a letter dated **27th September 2017**, the 2nd Defendant demanded for the Plaintiff's information as a follow up to the email dated **5th May 2016**. It is the Plaintiff's contention that it took possession of the suit property in **December 2014** and has constructed and operates a **Nursery and Lower Primary Schools** that benefits the 1st Defendant's employees and they are therefore estopped from varying the terms of the license issued to it to occupy the suit property for charitable provision of early childhood education.

The suit is contested and the 1st Defendant filed a Defence dated **19th February 2018**, and denied all the allegations made in the Plaint. It contended that the suit is bad in law, incompetent and an abuse of the Court process. It denied threatening to evict the Plaintiff from the suit property and further averred that the purported **letter of offer** does not indicate that the 1st Defendant authorized, granted and or licensed a portion of the suit property to the Plaintiff. That there was an inference that the tenancy would commence upon completion of the

construction that the Plaintiff intended to erect on the suit land and that the 1st Defendant drafted a tenancy agreement through its agent and submitted the said agreement to the 1st Defendant which tenancy agreement is pending for execution. It further contended that the Plaintiff's claim lacks merit and it should be dismissed.

The 2nd Defendant also filed its Defence sated **19th February 2018**, and denied all the allegations made in the Plaintiff. It contended that it has been wrongly enjoined to the suit and averred that the Plaintiff has no reasonable cause of action against it. Further that it is not privy to the dealings between the Plaintiff and the 1st Defendant, save that it only acts as an agent of **Nyala Holdings Limited**. It urged the Court to dismiss the Claim.

Further the 3rd Defendant also filed its statement of Defence on **19th February 2018**, and denied all the allegations in the Plaintiff. It averred that it has been wrongly enjoined in the suit and averred that the Plaintiff had no reasonable cause of action against it. That it is not privy to the dealings between the parties.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness and the Defendants also called one witness.

PLAINTIFF'S CASE

PW1 William Glen Hoan, testified that he is the Director and Chairman of the Plaintiff Company. He adopted his witness statement dated **31st October 2017**. It was his testimony that the Plaintiff is running a Nursery school within a primary school and that the nursery school was in a different area. That the Plaintiff initiated communication with the Defendants and he talked to **Sylvester Kennedy** and **Josephine Wanjira Mbugua**, who was the Manager and Director of Nyala Estate. That Sylvester was a manager and one Gerald was also a coffee manager.

He told the Court that he gave them a proposal to build a school in which they were to occupy the property for 10 years with an option of renewal. That the Plaintiff was building the school for the Community and the beneficiaries were children from Nyala Estate and other coffee estates and that there were about 150 children in the school. That the agreement was that the Plaintiff was to pay rent as it did not derive any benefit from running of the school. He further told the Court that the parties met on **3rd November 2014**, and agreed on the terms and **Sylvester** signed on behalf of **Josephine** and there was no discussion on rent. That **Josephine** had stated that the Plaintiff could not pay rent while it was putting up all the buildings for the benefit of the community. Further that 16 months later, the 1st Defendant gave him a document to sign and that there was no rent payable. However, he received a letter from the 3rd Defendant indicating that it was working on their proposal and that they further received a lease agreement indicating that they were to pay rent and the property manager later informed them that they were to pay **Kshs. 150,000/=** per month as rent. It was his evidence that they were spending about **Kshs. 230,000/=** per month to run the school. That the agreed rent was **Kshs. 150,000/=** and Plaintiff was to pay **Kshs. 50,000** and **Kshs. 100,000/=** was the reimbursement for building the school. He produced his list of documents as Exhibit 1.

He confirmed that Plaintiff is a tenant on the suit property and that there was no license in form of a document to show that the Plaintiff was using the land. He further testified that though the Plaintiff gave the Defendants a proposal dated **3rd November 2014**, there was no acceptance by the 1st Defendant. It was his evidence that the Plaintiff started construction in **December 2014**, though there was no formal agreement yet. He acknowledged that the Defendants have never threatened to evict the Plaintiff from the suit property. That he demanded for a signed agreement, but was informed that the lawyers were working on it. That though the land is in an agricultural area, he did not do change of user. Further that there was a meeting on **4th August 2015**, to shed light on the contract agreement, but it was one year after they had given their proposal.

He further testified that on **3rd November 2014**, he was given a go ahead on the basis of the smses that followed and that there was part performance on the part of the Defendants. He stated that he signed the proposal agreement on the basis that the school would occupy the said land and he was never told to hold construction until the valuation was done.

DEFENCE CASE

DW1 Sylvester Kyendi, testified that he was the group manager of the 1st Defendant. He adopted his witness statement and testified that PW1 was one of the tenants within the Estate He confirmed that he signed the proposal on **3rd November 2014**, on behalf of the Company. It was his testimony that the negotiations were ongoing and that they had text communication to show that it was just a document. He further testified that they had agreed that PW1 would pay rent from the beginning of their negotiations and a proposal of **Kshs. 150,000/=** and **Kshs. 100,000/=** was to recoup its costs. He further confirmed that they intend to charge the **Kshs. 150,000/=** but that it was not effected as the Plaintiff went to Court.

He testified that Nyala Estate Limited was to obtain approval for change of user. That the Plaintiff was never given the reference number for the suit property and that the lawyer was to hive off the portion that had structures and the amount of rent was to recoup some of the expenses. He confirmed that he was authorised by **Josephine** to sign the document and that he never indicated that it was a temporary one. He further testified that the 1st Defendant has done part performance of his terms and that there was a lease agreement to be signed and that they were to lease the property, though the Plaintiff had constructed on the property. He further testified that they never asked the Plaintiff to pay rent for occupying the premises and that they agreed with the proposed agreement.

It was his evidence that the document is a draft and not the final lease. He further testified that he was allowed to sign the document because PW1 and his wife were leaving for America and that they needed the document to show that they were discussing with Nyala Estate over the piece of land.

After the close of the viva voce evidence, parties were directed to file written submissions and in compliance with the said directives the

parties filed the said written submissions which the Court has now carefully read and considered. The issue for determination is whether the Plaintiff is entitled to the orders sought.

It is not in doubt that the Plaintiff, a **Non-Governmental Organisation (NGO)** was given permission to use the suit property by the 1st Defendant. Further that the 1st Defendant also allowed the Plaintiff to construct on the suit property and in doing so, the parties had to come into an agreement. The Plaintiff would then give a proposal dated **3rd November 2013**. Further it is not in doubt that the said proposal was signed by DW1 with the instruction and consent of the Director and Manager of the 1st Defendant. The Court has carefully gone through the said proposal by the Plaintiff. While DW1 contended that the document was only temporary, he has not provided any evidence to prove that the said document was temporary. Further in his evidence, DW1 acknowledged that he signed the document and that meant that he was in agreement with the proposal.

Having gone through the said proposal, there are various factors that come into play. Firstly, that the Plaintiff proposed that having been given the land to use, the 1st Defendant would draft an agreement that would allow the Plaintiff to use the land and further that the 1st Defendant also undertook to take care of certain aspects. While the proposal is not the license used, in the Court's considered view, it embodies the terms of reference that were to guide the parties into entering into their Contract.

The major bone of contention in this suit seems to be whether or not the Plaintiff had an obligation to pay rent to the 1st Defendant. While the Plaintiff contends that their agreement was that the Plaintiff was to use the land, without paying any rent, the 1st Defendant has contended that the issue of payment of rent has always been on the table. The Court must therefore determine whether the use of the land is different from leasing the land.

To **use** has been defined as **to put something such as a tool, skill or building to a particular purpose**. On the hand **Black's Law Dictionary: 2nd Edition. Defines a lease as A conveyance of lands or tenements to a person for life, for a term of years or at will, in consideration of a return of rent or some other recompense.**

From the above definition, it is the Court's considered view that to **use** would mean to put something into a particular purpose while to **lease** would require that there is rent payable. In the proposal which DW1 acknowledged having signed and agreed with on behalf of the 1st Defendant, the Plaintiff was given the land to **use** and in essence the Plaintiff was given the land to put to a particular purpose in this instant, to construct the school. However, the 1st Defendant has presented a lease agreement which in essence would require the Plaintiff to pay the rent. The Court concurs with the Plaintiff that if in any case there was an agreement that the Plaintiff was to pay rent, there was nothing that barred the 1st Defendant from indicating the same. There is no evidence by the 1st Defendant that proved that there was any agreement with regards to payment of rent.

While a person may want to ask and inquire how someone would just give land to a person without requiring the person to pay rent, it is clear that in his cross examination, DW1 acknowledged that parties never had any conversation on the payment of rent. Further the Court is cognisant of the circumstances of the case, in that the Plaintiff is a **Non-Governmental Organisation (NGO)** and a religious one. Further that the 1st Defendant allowed the Plaintiff to **use** the property for the benefit of its employees and the community members, facts which have not been dispute by the 1st Defendant. Further the Court also acknowledges that the Plaintiff did build on the suit property without having the proprietorship of the property and of course those are factors that the Court cannot turn a blind eye to. Further the Plaintiff has used the suit property for over a year without paying any rent. That factor is also a persuasive one.

It is the Court's considered view that there was no requirement by the 1st Defendant to the Plaintiff to pay rent. The Plaintiff has sought for a permanent injunction to restrain the Defendants from interfering with their **use** of the property. However, the 1st Defendant has contended that at no time did they seek to evict the Plaintiff, a fact that has not been disputed by the Plaintiff.

An injunction is a judicial order restraining a person from beginning or continuing an action threatening or invading the legal right of another. From the letter of offer and the subsequent conduct of the 1st Defendant, it is clear that the 1st Defendant granted the Plaintiff rights to use the land and therefore the same being an understanding, the 1st Defendant should be barred from interfering with its use. However, the conditions set out in the proposal should be adhered to.

Having now carefully considered the available evidence and the written submissions, the Court finds that the Plaintiff has proved its case on the required standard of balance of probabilities and consequently it is entitled to the prayers as sought in the plaint. Taking into account the available evidence, the court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint dated **31st October 2017**, with costs.

For the avoidance of doubt the entry of this Judgment does not stop the parties from fulfilling their obligations under the **proposal** dated **3rd November 2014**.

It is so ordered.

Dated, signed and Delivered at Thika this 4th day of June 2020

L. GACHERU

JUDGE

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

.....for the Plaintiff

M/s Mungu and company advocates for the Defendants

L. GACHERU

JUDGE