



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 263 OF 2018

FIONA J. WANGARI.....PLAINTIFF/APPLICANT

VERUS

BENSON GACHUHI MAINA

JAMES KARURI KAMAU

DANIEL KARANI GICHUKI

JAMES KAMAU MUTUURA (BEING THE OFFICIALS OF

CLASSIC COMRADES WELFARE GROUP).....1ST DEFENDANT/RESPONDENT

EMBAKASI RANCHING COMPANY

LIMITED.....2ND DEFENDANT/ RESPONDENT

RULING

1. This is the notice of motion dated 15th January 2019 brought under order 40 rules 1a, 2, 3 and 4 of the Civil Procedure Rules 2010, section 1A, 1B, 3, 3A and Section 63 of the Civil Procedure Act and all the enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) That this honourable court be pleased to stay further proceedings in CMCC No. 10574 of 2018- Milimani, Benson Gachuhi Maina, James Karuri Kamau, Daniel Karani Gichuki, James Kamau Mutuura (suing as officials of Classic Comrades Welfare Group)-vs Embakasi Ranching Company Limited.

(3) Spent.

(4) That pending the hearing and determination of the main suit, this honourable court be pleased to restraint he defendants/respondents by themselves, their servants, agents and or whomsoever in any means howsoever from continuing encroaching, invading, constructing, alienating, disposing off and/or in any manner interfering with the parcels of land known as Plot No. V.13104 and V.13105 situate in Ruai within Embakasi Ranching Scheme depicted on the ground as Plot No. V.17505 and further from evicting the plaintiff/applicant therefrom.

(5) That the OCPD, Njiru area do oversee the enforcement of court orders issued.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 15.

4. The application is supported by the affidavit of Fiona J Wangari, the plaintiff/applicant herein sworn on the 15th January 2019.

5. The application is opposed. There is a replying affidavit sworn by Benson Gachuhi Maina, Chairman of the 1st defendant/respondent

sworn on the 11th February 2019.

It appears the 2nd defendant did not file any response to the application.

6. The court on the 29th April 2019 with the consent of the parties directed that the application be canvassed by way of written submissions.

The Plaintiff's submissions

7. They are dated 6th June 2019. The plaintiff is greatly aggrieved by the 2nd defendant's acts of demolishing the perimeter fence, digging trenches for development and erecting a signboard inviting potential purchasers to visit the plaintiff's duly purchased properties being Plot Nos V13104 and V13105. The plaintiff is the beneficial owner of the two plots having purchased the same from the 2nd defendant through Samuel Thuita Mwangi, the Chairman of the 2nd defendant. She was issued with a non member certificates of Plot ownership No 022146 and 022149 respectively. The 1st defendant has filed a separate suit being CMCC No. 10574 of 2018 Milimani against Embakasi Ranching Co. Ltd (the 2nd defendant) herein. They sought and obtained orders of permanent injunction against the 2nd defendant.

8. The subject property in this instant suit is plot Nos V13104 and V13105 which on the ground are now depicted as Plot No. V17505 in which the 1st defendant is alleged to have purchased from the 2nd defendant. She has put forward the case of **Mistry Valji Naran Murji vs Janendra Raichand Shah & 3 Others [2002] eKLR**. She prays that the plaintiff's suit which was instituted first be heard and the 1st defendant's be stayed. The 1st defendant's suit as against the 2nd defendant is subjudice as the issues are also directly substantially in issue in the instant suit.

9. The plaintiff has established her ownership to her respective plots and hence a prima facie case with high chances of success. She has explained how she spent a lot of money in rehabilitating the said plots by removing cotton soil, levelling the site which was an old quarry and fencing the plots. It was her intention to settle on her plots only for the same to be invaded by the defendants.

10. The plaintiff is faced with high risk of losing her plots if the orders sought are not granted as the 1st defendant continues with its development of the plots. She stands to suffer irreparable loss. The balance of convenience tilts in favour of the plaintiff who has demonstrated that she purchased the two plots from the 2nd defendant.

The 1st defendant's submissions

11. They are dated 25th October 2019. The plaintiff/applicant is not sure which parcel of land belongs to her. Both the plaintiff and the 1st defendant have certificates of ownership indicating that they own different parcels of land allocated by the 2nd defendant. The plaintiff/applicant ought to pursue her claim against the 2nd defendant so that she is shown the exact location of her plot on the ground. The 1st defendant is in possession of its plot and has already developed. The plaintiff/applicant has not made out a prima facie case and her application ought to fail.

12. The 2nd defendant owns huge tracts of land in Nairobi and therefore have the financial ability to compensate the plaintiff/applicant by way of damages should the plaintiff succeed in her claim. Damages is therefore an adequate remedy. It has put forward the case of **Vivo Energy Ltd vs Malaba Petrol station Ltd & 3 Others [2015] eKLR**.

13. The balance of convenience tilts in favour of the 1st defendant.

14. The magistrates court has jurisdiction to hear and determine this matter. This honourable court on its own motion ought to transfer it to the lower court for hearing and determination. It has relied on Section 18 of the Civil Procedure Act. It prays that the application be dismissed with costs to the 1st defendant/respondent.

15. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether the plaintiff has established sufficient grounds to stay further proceedings in CMCC No. 10574 of 2018, Milimani; Benson Gachuhi Maina, James Karuri Kamau, Daniel Karani Gichuki, James Kamau Mutuura (suing as officials of Classic Comrades Welfare Group) vs Embakasi Ranching Company Limited..

(ii) Whether this suit ought to be transferred to CM's court Milimani to be consolidated with CMCC 10574 of 2018.

(iii) Whether the plaintiff/applicant's application meets the threshold for grant of temporary injunctions.

(iv) Who should bear costs?

16. CMCC 10574 of 2018 was field on 30th November 2018. The 1st defendant herein has sued the 2nd defendant seeking the following prayers:-

"1. That the defendant do give to the plaintiff immediate exclusive possession of Plot No. V.17505.

2. That an order be issued against the defendant to allow the plaintiff to have entry to Plot No. V17505 and not to interfere with the use of this property by the plaintiff.

3. Costs of this suit.

4. Interest in 3 above.

5. Any other further orders that this Honourable court may deem fit and just to grant”.

The plaintiff in this suit seeks orders against the 1st and 2nd defendants jointly and severally for orders:-

“1. That there be a declaration that:-

(a) The plaintiff is the lawful owner/allottee of parcelsof and known as Plot No. V13104 and V13105 Map 4A Embakasi Ranching depicted on the ground as Plot No. V.17505.

(b) A permanent injunction does issue against the defendants, their agents and/or servants from trespassing, constructing, developing, alienating, damaging, evicting the plaintiff from parcels of land known as Plot No. V13104 and V13105 Map Number 4A Embakasi Ranching depicted on the ground as Plot No. V17505 and/or otherwise from interfering with the suit plots.

(c) An order compelling the 2nd defendant to transfer the suit plots known as Plot No. V13104 and V13105; Embakasi Ranching depicted on the ground as Plot No. V17505 to the plaintiff.

(d) An order compelling the 1st defendant, to forthwith demolish any and/or all structures within Plot NO. V.13104 and V.13105 Embakasi Ranching depicted on the ground as Plot No. 17505 and forthwith vacate the said plots in default thereof be forcefully evicted and the structures therein demolished at the 1st defendant’s costs.

(e) Costs and interest”

17. It is clear from the two suits that the parties are the same except that the plaintiff is not a party in the CMCC 10574 of 2018. The 2nd defendant has been sued in the two suits in its capacity as the allocating authority. The plaintiff herein claims V13104 and V13105 while the 1st defendant claims V17505. It is however clear that the subject plot in dispute is the same on the ground. Both claim to have bought from the 2nd defendant. These two suits relate to the same subject matter and are between the same parties.

18. Section 6 of the Civil Procedure Act, provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

It is not in dispute that the plaintiff’s suit was filed before CMCC 10574 of 2018 Milimani. It would have been in order to have that suit stayed pending the hearing and determination of the instant suit. However, I note that the diary in this court is quite full. The earliest date this matter can be heard is in the year 2021. The magistrate’s court has jurisdiction to hear and determine this matter. I am guided by the overriding objective in transferring this suit to the Chief Magistrate’s court. The same to be consolidated with CMCC 10574 of 2018. I find that this dispute will be resolved faster if this suit is transferred to the Chief Magistrate’s Court. I am guided by Section 18 of the Civil Procedure Act Cap 21 Laws of Kenya.

19. At this juncture it is necessary to briefly examine the legal principles governing the application for temporary injunctions. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 135** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

20. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

21. I find that the plaintiff/applicant has demonstrated that she bought the two plots from the 2nd defendant and was issued with a non member certificates of plot ownership Nos 022146 and 022149 for Plot Nos V13104 and V 13105 respectively. The 2nd defendant confirms that the plaintiff wrote the bankers cheque in its name. The plaintiff took possession of the plots and rehabilitated the same by removing cotton soil and levelled the site which was an old quarry. She later fenced the plots. All these has not been challenged by the defendants. I

find that she has demonstrated ownership of the two plots. I find that she has a prima facie case with high chances of success in the main suit.

She deserves this court's protection. The defendants have failed to demonstrate how the plots belonging to the plaintiff ended up on the hands of the 1st defendant and with a different plot number yet the plaintiff was already in possession.

In my view, without going into the merits of the case, the 1st defendant failed and/or neglected to do due diligence before purchasing the plot from the 2nd defendant.

22. I find that the plaintiff risks losing her two plots if these orders are not granted. The 1st defendant is on record as stating that they had commenced development before they were stopped by the 2nd defendant. I find that the plaintiff will suffer irreparable loss which cannot be compensated by an award of damages. The balance of convenience tilts in favour of the plaintiff/applicant who purchased the plots earlier than the 1st defendant.

23. In conclusion, I find merit in this application and I grant the orders sought namely:-

(a) That this suit is hereby transferred to the Chief Magistrate's Court Milimani to be consolidated with CMCC 10574 of 2018 and upon consolidation to be heard and determined expeditiously.

(b) That an order of temporary injunction is hereby issued restraining the defendant/respondents by themselves, their servants, agents from continuing encroaching, invading, constructing, alienating, disposing off and/or in any manner interfering with the parcels of land known as Plot Nos. 13104 and V.13105 situate in Ruai within Embakasi Ranching scheme depicted on the ground as Plot No. V17505 and further from evicting the plaintiff/applicant therefrom.

(c) That the OCPD Kayole area do ensure compliance of the order issued in (b) above.

(d) That costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9th day of July 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. G. Kariuki for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd defendant

Kajuju - Court Assistant