



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 1 OF 2013

1. LEONARD MWASIMANGELI
2. TOBAIS AGUKO
3. CHARLES WAMWANGI
4. CHARLES MWORIA
5. FREDRICK MUTHANJA (*SUING ON THEIR BEHALF AS ORGANIZING OFFICIALS AND OF MERA WELFARE GROUP*).....PLAINTIFFS

- V E R S U S -

1. FORT PROPERTIES LIMITED COMPANY
2. MUNICIPAL COUNCIL OF MOMBASADEFENDANTS

RULING

[1] The applicants seeks an order for temporary injunction to restrain the 2nd defendant, its agents, assigns or anybody authorized by it from arresting detaining, interfering with plaintiffs peaceful occupation, enjoyment and possession of their houses at Mtopanga Estate pending the hearing of this suit.

[2] This matter came before the Court under certificate of urgency on 19th February 2013 and the court gave temporary orders ending the hearing of this application inter partes. The parties herein filed written submissions to the application dated 15th February 2013.

[3] The applicants in their submissions filed on 8th July, 2013 state that the applicants are the legal owners of the houses within Mtopanga estate. That they purchased those houses from the 1st defendant who was a developer. That the 1st defendant developed the houses with a one way sewage system, which served the entire estate. The applicants aver that in the agreement for sale between themselves and the first defendant, there was a clear provision that the plaintiffs were to pay the 2nd defendant for the maintenance of the sewage system. They averred that inspite of the clause, the sewage system had only been maintained by the first defendant alone. They argue that since they purchased the houses and despite the clause for the maintenance of the sewage by the 2nd defendant, the 1st defendants never officially commissioned the sewage todate.

They further aver that up to the time the houses were surrendered to the plaintiffs the plaintiff's signed

an undertaking with the 1st defendant that the sewage was to be maintained by the 2nd defendant. The applicants argue that the houses were built pursuant to the 2nd defendant by laws of Local Government No. 16/4 which were ratified by the Chief Inspector (Municipal Engineer) and that therefore the 2nd defendant was always aware of the fact that he was to maintain the said sewage system since it approved the building plan.

They therefore contest the fact that 2nd defendant is now forcing them vide its notices to them to build separate soak pits for sewage instead of the 2nd defendant maintaining the sewage system aforesaid. The first defendant opposes this application. It admits it developed the Mtopanga Houses. It also admits that there was a contract whereby the plaintiffs signed that the sewage would be maintained by the 2nd defendants. It argued that it emptied the soak pit as a request from the plaintiffs and as an act of charity. It argued that it did its part in the interim period and that it is now the obligation of the 2nd defendant to take over their obligation as per agreement. It argues that it should not be held responsible to carry out the maintenance of the sewage any longer.

[4] The second defendant annexed an agreement for sale which was signed by it and the purchaser in which there was a clause which stated;

"I would like to confirm that I would have no objection in Municipal Council of Mombasa registering a way leave caveat on my title for the purpose of maintenance of sewage line in my plot. I would also agree to pay monthly sewage charges included in my water bill. I confirm the above condition.

Signed"

The second defendant then filed grounds of objections generally denying responsibility of removing human waste from private premises. It avered that it had a constitutional right to enforce omissions regarding article 42, 69 and 70 of the Constitution. It denies that the orders sought cannot be granted as the 2nd defendant does not exist and that the Cabinet Secretary in charge of County Assemblies has not made regulations under Section 135 (1) of County Government Act 2012 and that the Town Clerks office is no longer in existence and that the 2nd defendant was not a party to the alleged contract.

[5] There is no doubt that there was a contract of sale of houses between the plaintiffs and the defendants. That there was a specific provision as to maintenance of sewage by the 2nd defendant on payment of the prescribed fees by the plaintiffs.

[6] The 1st defendant admits it has previously maintained the sewage, though it alleges that, that was done on humanitarian grounds. The 2nd defendant does not appear to have signed that agreement although it is alleged to have approved the plans. There was no evidence exhibited for payment of sewage charges by the applicants. The nexus between the 1st and 2nd defendant on maintenance of sewage has not been well explained in the submissions.

[7] No doubt all these issues shall be well canvassed at the hearing hereof. There is no doubt that between the 1st defendant and 2nd defendant one of them if not either of them was supposed to maintain the sewage on payment. The plaintiffs are guaranteed a clean and health Environment under Article 4 of the Constitution. The enjoyment of such Constitution right cannot be guaranteed when sewage lies around their homestead particularly when they are ready to pay for such service.

[8] All these issues cannot be determined at these preliminary stage of the proceedings. I, therefore, order that the 1st defendant shall continue to maintain the sewage of Mtopanga Estate until the issue of whose responsibility it is, is determined. The owner of the houses must pay for such service as per the contract of sale with the 1st plaintiff.

There shall be no order as to costs.

Dated and delivered in open court at Mombasa this 28th day of February, 2014.

S.N. MUKUNYA

JUDGE

28.2.2014

In the presence of:

Mbaru Advocate for Musinga & Co. Advocates