REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO. 334 OF 2012 (FAST TRACK)

LESSAN HARDWARE LIMITED.....PLAINTIFF

-VERSUS-

SETTLEMENT FUND TRUSTEE.....1ST DEFENDANT

ALICE CHELAGAT TOO.....2ND DEFENDANT

ROBERT KIPKOECH KORIR.....3RD DEFENDANT

RULING

By a Notice of Motion dated 25th April, 2012 brought under Order 40 Rule 1, 2 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act, the Applicant seeks the following orders among others; a temporary injunction against the defendants either by themselves, agents, servants and or employees restraining them from interfering in any way whatsoever with the plaintiff's land known as ADC SIRIKWA PLOT NO. 520 and 521 now known as NAKURU/ SIRIKWA 520 and NAKURU/ SIRIKWA 521(“suit Property”) pending the hearing and determination of the suit.

The Application is supported by the affidavit of Jane Cherotich Chepkwony sworn on 23rd April, 2012 and on her further affidavit sworn on 30th August, 2012. The Applicant through Jane Cherotich Chepkwony, a Director of the Company depones that it bought and was allocated parcels of land known as ADC Sirikwa 514, 515, 516, 517, 518, 519, 520, 521, 528 and 529 by the Agricultural Development Corporation ("A.D.C"). Jane Chepkwony in her own capacity later purchased other parcels numbers 522, 524, 525, 526 and 527(‘‘suit land") from their original allotees. The Applicant, through its Directors/shareholders has been in possession of the suit land from the date of purchase to date. Sometime in the year 2006, the Plaintiff's Director Jane Chepkwong, was sued by some persons who claimed to be the owners of land parcels no. 513, 515, 516, 517, 518, 519, 520, 521, 523, 524, 525, 526, 528, 529 and 530. An order was issued by the Molo Principal Magistrate prohibiting dealings with the said titles pending the hearing and determination of an application pending before the Tribunal. A notice order was issued by the High Court in HCCC NO. 124 of 2006 that the status quo over the properties be maintained pending the hearing and determination of the suit. These orders are still in existence as the appeal has not been concluded nor the suit HCC No.124 of 2006. On 9th April 2012, the 2nd and 3rd Respondents entered into the Plaintiff's property and started erecting fences around land parcels nos. 521 and 522 alleging that they were the bonafide owners. However, these titles were issued after the stay orders had been made. The 1st Respondent knew of the existence of the orders of stay as well as the title of the Plaintiff. The Applicant now is apprehensive that if the orders of injunction sought were not granted, it will be evicted from the property it has occupied for 13 years.

In opposition to the application, the 2nd and 3rd Respondents filed the Replying Affidavit of Alice Chelagat Too, the 2nd Respondent, sworn on 9th July, 2012. The 2nd and 3rd Respondents deny being

aware of any suit relating to the land subject matter hereof or any knowledge of any orders prohibiting dealing with the suit land at all. They claim that they are the registered proprietors of the suit land, since 2006 and exhibit copies of their allotment letters, title deeds, receipts of payment, discharges and transfers for both properties.

The 1st Respondent did not file any document in reply to the application.

Parties herein filed written submission in further support of their cases. I have considered the arguments therein and the pleadings of the parties. I find that the issues for determination are-

1. Whether the suit is defective in the absence of a resolution by the directors/shareholders authorizing the Deponent to file suit and swear pleadings on its behalf.
2. Whether the conditions for grant of an injunction as set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358** have been established.

A party seeking an injunction must establish a prima facie case with a probability of success, that he will suffer irreparable damage if the orders are not granted and where the court is in doubt, it will decide the application on a balance of convenience. This was so held in the landmark case of **Giella vs. Cassman Brown & Co. Ltd [1973] E.A 358.**

It is the Respondent's case that there are unclear facts which disentitle the Applicant to the orders sought. Firstly, Jane Cherotich Chepkwony, who swore the supporting and further affidavits on behalf of the Applicant, deponed that she was the legal and bona fide owner of the suit land, having purchased them through the Applicant whereas she is not a party to the suit. In addition, although she alleges that she is a director of the Applicant she has not exhibited a certificate of search from the Registrar of Companies detailing the directors of the applicant at the time of filing the suit to prove the same. Further the Company's resolution authorising her to conduct the suit on its behalf is also missing. In short, she has contravened Order 9 Rule 2 (c) of the Civil procedure Rules. From the affidavit evidence, it is clear that Jane Cherotich Chepkowny is one of the two shareholders of the Applicant which is a private Company as exhibited in the Memorandum and Articles of Association of the Company. The Company appears to be owned by her and another family member where in she is a 50 % shareholder. She is therefore an authorized agent of the Applicant and has the capacity to depone on any facts relating to the company and to swear affidavits on its behalf. Although, a Company resolution should ordinarily be presented authorizing the deponent to swear documents on its behalf, I find that the absence of one is not fatally defective in the instant case. There is evidence that she is a 50% shareholder of the company and that she is the one who has been actively involved in matters relating to the suit land. In addition, the property which is the subject matter of the suit is registered in the name of the Applicant and not in Jane's name and the orders sought are in relation to these two parcels of land. I do not see what prejudice the respondents stand to suffer by the failure to avail the company's resolution.

On to the second issue; has the applicant met the threshold to be granted an injuction?

By a letter dated 18th January, 1999 the Applicant was allocated 50 acres of land by A.D.C. It was informed that each acre was going for 15,000/= and was requested to make payment to Lands Limited a subsidiary company of A.D.C. The Applicant then made payments as instructed and has annexed copies of receipts "**JCIII".** It subsequently took possession and is currently in occupation of the suit land, has carried out developments on it by planting crops thereon.The issue raised of rightful ownership of the suit land is one which should be determined by the trial court after full hearing and examination of documentary evidence presented to it. At this juncture the Applicant needs only to demonstrate that she has an interest in the suit land which should be protected by this court pending the hearing and final determination of the matter in order to establish a prima facie case. The court should not make any determinations on questions of fact, which may be prejudicial to the trial.

It was also argued that the prayer of injunction is not anchored in the plaint as there is no prayer for perpetual injunction therein; That the court should not issue temporary orders which are terminated at the conclusion of the case. I agree that a party should not seek new orders in an application which are

inconsistent with the prayers sought in the plaint. This is prohibited by Order 2, rule 6 which provides-

No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

Any such prayers sought in an application should flow from the plaint and the particulars thereof provided therein. This is to enable the other party adequately prepare its case and any fresh grounds raised or prayers sought which are not contained in the pleadings amount to a departure from the plaint and it is not open for the court to grant the same. In this case, although the plaintiff did not seek for a temporary injunction in the plaint, prayer (b) in the plaint does seek for an injunction. I find that the prayers sought in the application are consistent with those sought in the plaint.

Finally **Order 40 Rule 1 (a)** states that the court should always aim at preserving land in danger of being wasted, damaged or alienated.

In the present case there is evidence that the Applicant will be evicted if the orders sought are not granted. It's directors/shareholders will be adversely affected having carried out developments on the suit land. The interest of justice therefore dictates that the status quo on the suit land should be maintained pending the hearing and determination of the suit. I have also taken the liberty to peruse H.C.C Civil suit NO. 124 of 2006. It is true that the subject is the same. In that case an order of status quo is in place pending the Hearing and determination of that suit. Issuing contrary orders will only cause confusion and chaos on the ground.

For the above reasons, I find that the Applicant herein has established a prima facie case with a probability of success, it has demonstrated that it stands to suffer injury which would not be adequately compensated by an award of damages. The balance of convenience also tilt in its favour. In the circumstances, I will allow the Application dated 25th April, 2012 in terms of prayer 3 with costs.

I also direct that H.C.C 124 of 2006 be mentioned together with this file for directions after 30 days and that parties in E.L.C 334 of 2012 do comply with order 11 within 30 days.

Dated, signed and delivered on this 4th day of October 2013.

L N WAITHAKA

JUDGE.

PRESENT

Mrs Gatei for the Plaintiff/Applicants

Mr Njuguna for 1st Respondent

N/A for the 1st & 2nd Respondents

Stephen Mwangi: Court Clerk