



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Environmental & Land Case 2163 of 2001

THINDIGUA COMPANY LTD.....PLAINTIFF

VERSUS

FRANCIS P. GITAU NJUNGE.....1ST DEFENDANT

JOSEPH KIMANI.....2ND DEFENDANT

NDAGWATHA KIARIE.....3RD DEFENDANT

BERNARD KARANJA NDUNGU.....INTERESTED PARTY

BERNARD KINYANJUI PETER.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 24/2/11 brought under Order 40 rules 1(a) and (b), 2,3,4 and 5 of the Civil Procedure rules Section 3A and 63 (E) of the Civil Procedure Act the 3rd defendant applicant is seeking the following orders;

i. That the plaintiff be restrained by an order of injunction either by itself and or its agents, employees and or servants or through Simon Mwangi Ngeru or Paul Githuku Gitau as its directors, agents or servants or otherwise whatsoever from trespassing, occupying, alienating, building, constructing, alienating, selling, transferring or in any manner interfering or dealing with all those Land parcels known as Plot Number L.R. No. 76/397 and L.R No. 76/398 formerly plot Number 314 pending the hearing and determination of this suit and the counter claim.

ii. That costs for this application be provided for.

The application is supported by the affidavit of Ndagwatha Kiarie and is based on the following grounds.

- a) That there is a dispute over the ownership of the said plot between the plaintiff and the 3rd defendant pending in this honourable court.
- b) That the plaintiff through its directors Simon Mwangi Ngeru and Paul Githuku Gitau, its agents, servants or employees has started illegally constructing a green house and permanent house in the said parcels of land without the applicants consent permission or approval.
- c) That the continued acts of the plaintiff shall greatly affect the applicant negatively and disentitle him from the plots in issue.
- d) That if the plaintiff is not restrained, it shall put the applicant into irreparable loss and damages.
- e) That the 3rd defendant applicant is the sole entitled owner and beneficiary of the suit plots.
- f) That no party should be allowed to continued using or developing the suit plots during the pendency of this suit or dispute and without the 3rd defendant's consent and or approval.

2. The 3rd defendant filed a supporting affidavit dated the 24th of February 2011. These are the facts of his case from his affidavit which lay out the basis of his case for the injunctive orders sought. That on or around 4th day of May 1973 he and other share holders participated in a ballot picking exercise for allocation of plots measuring about $\frac{3}{4}$ or thereabout of an acre in the grazing area of the plaintiff's parcel each plot measuring approximately $\frac{3}{4}$ acres in Thindigua area of Kiambu for each member wherein he was allotted number 314. That he took possession of the allotted parcel which retained the number 314 from the year 1973 which plot he cultivated by planting subsistence crops and trees. That his plot 314 was later officially resurveyed to produce 2 parcels being L.R No. 76/397 and L.R 76/398 but on the ground it remained the same as ballot plot 314 and as allotted to him. That he retained possession and occupation all through and carried out developments therein uprooting and clearing bushes and tree logs.

3. That on or around 30th August 2007 the plaintiff, its directors and or servants accompanied by strangers intruded the suit plot and cut down his banana plants, coffee trees, Napier grass and purported to erect a fence around his parcels and forcefully deny him access to the suit parcels. He immediately took action by filing Nairobi HCCC No. 2358 of 2007 against the plaintiff and two of its directors namely Simon Mwangi Ngeru and Paul Githuku Gitau and two others. That the said suit was struck out on a technicality and he appealed against the decision. That he learnt the existence of this suit which had similar issues as the one struck out and he sought to be enjoined as a defendant as the pleadings as in this suit were touching on himself and ownership of the suit plots. That he filed his pleadings and thereafter the plaintiff on or about 14/2/2011 illegally and unlawfully and without any consent embarked on very aggressive, belligerent, bold and assertive acts of aggression and trespass by starting to lay out foundations for permanent houses and constructing Green Houses in his two plots. That the plaintiff has also fenced off the subject parcels of Land with a view to blocking and excluding him from accessing his parcels of land although since and between filing and striking of Nairobi HCCC No. 2358 of 2007, its activities on the suit plots were lull and not noticeable.

4. That unless the plaintiff is restrained by an order of this Honourable Court, it shall continue with its acts of transgression and trespass in his plots to his detriment. That the plaintiff is carrying on its activities through its agent's servants and employees under the full command and directions of the directors/managers known as Simon Mwangi Ngeru and Paul Githuku Gitau. That the plaintiff has failed to heed his notices or warnings to cease or stop from meddling with his plots or trespassing thereon or interfering with any peaceful possession or occupation thereon. That if the plaintiff is allowed to put permanent houses in the suit plots, it shall alter his plans of developing the same, expose him to loss and damages in pulling them down and returning the same to their original shape and look. That by electing the said green houses in the suit plots the plaintiff is also endangering the environment of the suit plot and neighboring plots their occupants and their animals by exposing them and his plot to toxic and poisonous chemicals emanating and consequent to the said illegal green houses being put there.

5. The 1st defendant filed an affidavit dated the 8th November 2011. In his affidavit he depones that he is not opposed to the 3rd defendant's application, that he is not the registered proprietor of L.R. No. 76/397 neither has he sold the said plot to the 2nd or 3rd defendant as alleged by the plaintiff in its affidavit dated the 24th of October 2011. That the plot L.R. No. 76/396 is the subject matter of HCC 560 of 2002. That he has been in possession of plot no. 76/396. That the 3rd defendant's claims of fraud on the part of the plaintiff's directors are real as though the plaintiff allocated plot no. 76/396 to him, they substituted his name and that of the 3rd defendant during the registration process, which is now the subject matter in HCC 560 of 2002. That Simon Njeru Mwangi the chairman of the Plaintiff Company and Paul Githuku Gitau in conspiracy and collaboration of the former directors took possession of the 3rd defendant's land parcels L.R. 76/397 and 76/398.

6. The plaintiff filed grounds of opposition dated the 21st March 2011 and a replying affidavit dated the 24th of October 2011. The plaintiff's grounds are that:

i. The 3rd defendant's application and counterclaim are misconceived, incompetent, fatally defective and bad in law as it is between a shareholder/ contributory of a company and a company and should be under the Company Act Cap 486 Laws of Kenya or the Companies (Winding up) Rules and is therefore wrongly instituted.

ii. That the plaintiff avers that the 3rd defendant application is res judicata and shall pray that it be struck off.

iii. That the suit is an abuse of the Court process and the same should be struck out with costs.

Mr. Simon Njeru Mwangi the chairman of the plaintiff company swore a replying affidavit dated the 24th October 2011 and a further affidavit dated the 5th December 2011. He depones that the 3rd defendant applicant is the registered proprietor of L.R. 76/396. That the respondent is not the registered proprietor of L.R. 76/397 and 76/398. That the applicant should join the owners of the said plots in this application as the orders will operate against persons who are not parties to the application. He denies the allegation of fraud and trespass as alleged and that the applicant is seeking orders against persons Simon Mwangi Ngeru and Paul Githuku Gitau who are not parties in the suit. He seeks a dismissal of the application as it incurably defective and an abuse of the Court process.

7. The plaintiff and the 3rd defendant filed written submission. Counsels for the said parties highlighted the said submissions in Court. I have carefully considered the affidavits filed together with the annexures and the submissions made and I find as follows. The applicant in this case filed ELC 2358 of 2007 where he sought injunctive orders against the plaintiff who is the 4th defendant over parcels of land L.R. 76/397 and 76/398 together with other defendants. The application was heard and Justice Muchelule gave a ruling dated 10th May 2010. In the said ruling Justice Muchelule considered whether the applicant had a prima facie case on whether he was the owner of these two parcels of land. The application was considered on merit and in his ruling Justice Muchelule said that and I quote;-

“The parcel L.R. No. 76/397 is registered in the name of the 1st defendant who has sold it to the 2nd and 3rd defendants. L. R. No. 76/398 was registered in the name to the 4th defendant who has sold it to the 5th defendant. The defendants have pleaded that the plaintiff has never had any legal or equitable interest in the land parcels in respect of which he is seeking a temporary injunction. Other than the claim for possession and actual occupation, the plaintiff has not shown evidence of registration in regard to the parcels. On the face, the defendants have better claim to the parcels. This means that he plaintiff has not demonstrated a prima facie case with a probability of success. (See Geilla Vs. Cassman Brown & Co. Ltd (1973) EA 358). It is necessary incident of ownership of property to have full and exclusive possession of the same. The balance of convenience would usually tilt in favour of the registered owners. The result is that the application is not merited”.

In ELC Civil Suit No. 2358 of 2007 the applicant was the plaintiff, the 1st defendant was Joan Nduta Mbachii, the 2nd defendant was Paul Githuku Gitau, the 3rd defendant was Peter Kimani Mungai, the 4th defendant was Thindigua Company Limited and the 5th defendant was Simon Mwangi Ngeru. The orders the plaintiff sought were;

i. *That pending the hearing and determination of the suit, this Honourable Court be pleased to direct the Registrar of Titles to register a Government caution on L.R. Numbers 73/397 and 76/398 prohibiting any dealings with the said property.*

ii. *That pending the hearing and determination of this suit, there be a temporary injunction restraining the defendants from any further dealings with L. R. Number 73/397 and 398 and in particular restraining the said defendants from disposing off and/or constructing thereon any structure of permanent nature*

In the current application the applicant is seeking injunctive orders to restrain the plaintiff, its agents, Simon Mwangi Ngeru or Paul Githuku Gitau from trespassing, occupying, alienating, building, constructing, selling, transferring or in any manner interfering or dealing with all those Land parcels known as Plot Number L.R. No. 76/397 and L.R No. 76/398 formerly plot Number 314 pending the hearing and determination of this suit and the counter claim. It is the same parcels of land. I agree with the plaintiff's counsel that this matter is res judicata as Justice Muchelule gave a ruling on whether the plaintiff is entitled to injunction on the same properties. I find that the applicant has come to Court again seeking injunctive orders which were not granted. There is nothing new to show that he is entitled to the injunctive orders. I would again repeat that he is not the proprietor of the two parcels of land the subject of this application. The plaintiff has correctly out that the applicant should have joined the registered owners of L. R 76/397 & 76/398 as the orders sought will operate against persons who are not parties to the application and they would in vain. I agree with the plaintiff's counsel that the 3rd defendant application is abuse of Court process and the same is struck off with costs to the respondents. The application was not just dismissed on a technicality but the Judge considered the merits of the application before him. The applicant should pursue the appeal he filed. I note that Justice Muchelule did rule on the issue on how the applicant should complain in this matter. There is a further ruling by Justice Okwengu dated 3rd June 2011 where she stated that in order to determine whether the dispute between the plaintiff and the defendants falls within the ambit of a commercial dispute involving the business of a company, there will be need for ascertainment of facts. I agree with what she stated. As already stated I find no merit in the application is an abuse of the Court process and dismiss with costs to the plaintiff/respondent.

Orders accordingly.

Dated, signed and delivered this 5th day of June 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant/3rd Defendant

..... For the 1st Respondents/Plaintiff

.....For 2nd Respondents/1st defendant

.....For 3rd Respondents/Interested party

.....For 4th Respondents/Interested party

..... Court Clerk