



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 212 of 2011

DUNCAN NDEGWA WAURI1ST PLAINTIFF

AGNES NDUTA.....2ND PLAINTIFF

JOSEPH CHEGE.....3RD PLAINTIFF

RICHARD MBUGUA.....4TH PLAINTIFF

EDWARD KOGI KARANJA.....5TH PLAINTIFF

PHILIP MAINA.....6TH PLAINTIFF

NJAU NGENDO.....7TH PLAINTIFF

GEORGE MAINA.....8TH PLAINTIFF

STANLEY GITAU.....9TH PLAINTIFF

JAMES MWANGI MAINA.....10TH PLAINTIFF

CECILIA WANJIKU KIMANI.....11TH PLAINTIFF

MERCY WANGARI.....12TH PLAINTIFF

KENNEDY MUTURA.....13TH PLAINTIFF

BENSON MACHARIA.....14TH PLAINTIFF

FREDRICK MWANGI MAINA.....15TH PLAINTIFF

NANCY WAICHE NDUNGU.....16TH PLAINTIFF

FRANCIS MUTURI NJUGUNA.....17TH PLAINTIFF

VERSUS

BENARD KARIUKI MWANGI.....1ST DEFENDANT

JOHN GITAU NJAU.....2ND DEFENDANT

MICHAEL KARIUKI NGANGA.....3RD DEFENDANT

JAMES GITHINJI WAMBUGU.....4TH DEFENDANT

ANNE NJOKI GITHIEYA5TH DEFENDANT

EVANS MWANGI GACHOMO.....6TH DEFENDANT

KAMUINGI HOUSING COMPANY LTD.....7TH DEFENDANT

RULING

This ruling is with regard to two applications. The first is by the Plaintiffs which is by way of a Notice of Motion dated 12th May 2011 as amended on 24th June 2011, while the second is a Notice of Motion by the Defendants dated 1st July 2011. The Plaintiffs are seeking various orders in their application, as follows:

1. That a temporary injunction do issue against the Defendants by themselves, their servants and/or agents or otherwise however, restraining them from transacting, dealing and/or acting on behalf of Kamuingi Housing Company Limited and/or interfering with Land Reference Number 36/V/I and Land Reference Number 6824 pending the determination of this suit or further orders of this Honourable Court.
2. That a permanent mandatory injunction do issue against the Defendants, their servants and/or agents or otherwise however, restraining them from transacting, dealing and/or acting on behalf of Kamuingi Housing Company Limited and/or interfering with Land Reference Number 36/V/1 and Land Reference Number 6824 pending the determination of this suit.
3. That the purported election conducted by the Defendants on 25th February, 2011 be declared null and void.
4. That a twenty one (21) days notice be issued for all members and/or shareholders of Kamuingi Housing Company Limited for an Annual General Meeting to be held for conduction(sic) of free and fare (sic) election of the Company's directors.

The background to and grounds for the Plaintiffs' application are detailed out in the supporting affidavit and supplementary affidavit sworn by the 1st Plaintiff on 24th June 2011 and 4th July 2011 respectively. In summary, the Plaintiffs claim that they together with the Defendants are members/shareholders of Kamuingi Housing Company Limited which is the 7th Defendant herein, and that the Plaintiffs have been locked out by the Defendants in the dealings of the said company.

The history of conflict between the members for control of the company in various court cases is given in the Plaintiffs' supporting affidavit, culminating in a contested meeting and elections held on 25th February 2011 at which the 1st to 6th Defendants were elected as Directors of the company. Copies of the court rulings and correspondence with the Registrar of Companies in this regard are attached by the Plaintiffs as evidence.

The Plaintiffs further claim that the Defendants are unlawfully wasting, interfering and/or intermeddling with the assets of the said company without the consent of the members. The Plaintiffs have attached as evidence letters purported to have been written by the Defendants to Nairobi City Council for change of ownership of plots belonging to the company and to some Plaintiffs, and for sub-division of the suit properties.

The Defendants opposed the application in a Replying affidavit sworn by the 1st Defendant on 30th May 2011, wherein he stated that the election of the 1st-6th Defendants as directors of the 7th Defendant were conducted in compliance with the law and rules of the 7th Defendant, and that the Plaintiffs have not disclosed any evidence to show that they are members of the 7th Defendant.

The Defendants then filed their application dated 1st July 2011 wherein they pray that the order issued on 24th May, 2011 by this Court restraining the Defendants from selling or transferring land parcels known as L. R. numbers 6824/184 be discharged, varied or set aside. The main ground for their application is that the consent giving the basis to the order was given in error and based on insufficient material at the time.

The Defendants in a supporting affidavit sworn by the 1st Defendant on 1st July 2011 explained that the advocate for the Defendants attended Court on 24th May 2011 for the hearing of the Plaintiff's Notice of Motion dated 16th May 2011, and agreed to record a consent with the Plaintiffs relating to Land Reference Numbers 6824/183 and 6824/184 until 27th June 2011 when the Application was scheduled to be heard. Further, that there is no dispute with regard to Land Reference Numbers 6824/183 and 6824/184 and the Notice of Motion dated 16th May 2011 and the Plaintiff were premised on a parcel of land known as Land Reference Number 36/V/1. The Defendants argue that the consent order is thus not supported by the pleadings and Affidavit filed in court and not merited as it does not have a legal basis.

Learned Counsel for the Plaintiffs and Defendants filed written submissions with respect to the two applications under consideration. The Plaintiffs' Counsel in submissions dated 25th January 2012 contended that they had demonstrated that they were shareholders, members and beneficiaries of the 7th Defendant company and registered proprietors of various parcels of land. Further, that the balance of convenience tilted in their favour as they were in occupation of the said land. The Plaintiffs also submitted relying on the Court of Appeal decision in **Diamond Trust Bank of Kenya Ltd vs Ply and Panels Ltd and 5 Others, Nakuru Civil Appeal No 243 of 2002**, that consent order recorded by the parties could not be varied or discharged as the Defendants had not shown that there was no fraud or collusion by the parties.

The Defendants' Counsel in submissions dated 21st February 2011 on his part argued that the threshold for the issuance of an injunction had not been met as the Plaintiffs had not shown a *prima facie* case. This was for the reasons that the Plaintiffs had not identified which specific property belonging to them, either legally or beneficially is threatened with interference by the Defendants. Further, that the Defendants had not threatened to evict or demolish any property of members of the 7th Defendant Company and no irreparable loss would therefore be suffered. It was also argued that the balance of convenience tilted in favour of the said company as the interests of its 270 members override those of the Plaintiffs.

The Defendants' Counsel cited various judicial authorities in support of the application to set aside the consent order on the grounds that the said consent was based on immaterial facts and material non-disclosure and misrepresentation. The authorities relied upon were **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another, Nairobi Civil Appeal No. 276 of 1997** and **Ruth Mbondo vs Richard Mbondoh, Machakos H.C.C.C 317 of 1998**.

I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to the two applications. It appears to the Court that there is a duplication between the first two prayers sought by the Plaintiffs, as the second prayer although described as a permanent mandatory injunction is worded in the nature of a temporary injunction pending the determination of the suit, and on the same terms as the first prayer. In any event the Court cannot grant a permanent injunction in the terms sought at this stage as that would finally determine the suit herein.

What I am therefore required to do is to determine the Plaintiffs' application on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and to determine if they have shown any special circumstance to entitle them to the mandatory injunction sought. The first issue to

be addressed is whether the Plaintiffs have established a *prima facie* case. The first observation made by the Court in this regard is that the Plaintiffs have not produced any evidence of shareholding or membership of Kamuingi Housing Company Limited, which is the 7th Defendant herein.

In addition, the evidence produced by the Plaintiffs in support of their application are conveyances entered into with the 7th Defendant by three of them, namely Edward Kogi Karanja, Stanley Muriithi Mbuti and Duncan Ndegwa Warui, with respect to three parcels of land, namely LR 36/V/286, LR 36/V/1 and LR 36/V/204. Furthermore, the Plaintiffs have not produced any evidence to show the Defendants' alleged wrongdoing with regard to the said three parcels of land. To this extent I find that the Plaintiffs have not established a *prima facie* case with respect to the prayers they seek in their application and suit.

Since no *prima facie* case has been established by the Plaintiffs, this Court cannot proceed to consider the second question as to whether the Plaintiffs are entitled to the two mandatory injunctions sought with respect to the election of the 1st – 6th Defendants as directors of the 7th Defendant. The Court of Appeal held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. Arising from the findings in the foregoing, the suit filed herein is clearly not a clear case to warrant the mandatory injunctions.

It is also the finding of this Court that from an examination of the evidence presented by the Plaintiff it is possible that the Defendants' Counsel may not have been aware of all the material facts as is pleaded. This is a ground for setting aside a consent order as held in the various judicial authorities relied upon by the Defendants. It is also clear from the court record of 24th May 2011 that the Plaintiff's Counsel did acknowledge that he had just been served with the notice of appointment of the Defendants' Counsel which had been filed on the same date, which was also the date the said consent was recorded.

This Court has no reason to doubt the Defendant's Counsel's submissions that they were at that date not well versed with the material facts of the application. This is reinforced by the finding that the Plaintiffs have not produced any evidence to show ownership or rights over the parcel of lands that were the subject of the consent order. The Defendants application dated 1st July 2011 is therefore allowed and it is hereby ordered that consent order issued on 24th May, 2011 by this Court restraining the Defendants from selling or transferring land parcels known as Land Reference Numbers 6824/183 and 6824/184 be set aside.

The costs of the two applications dated 12th May 2011 as amended on 24th June 2011) and 1st July 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____10th____ day of ____October____, 2012.

P. NYAMWEYA
JUDGE