



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 89 OF 2019

SAMUEL NJOGU KAMOTHO & 43 OTHERS.....PLAINTIFFS

VERSUS

KENYA AFRICAN NATIONAL UNION (KANU)DEFENDANT

RULING

1. This ruling is in respect of defendant's Notice of Motion dated 17th June 2020, wherein the following orders are sought:

1. *THAT this Honourable Court be pleased to certify the instant application as urgent and service of the same upon the Defendant be dispensed with in the first instance;*
2. *THAT this Honourable Court be pleased to order the hearing and determination of this instant application on or before 25th August 2020 being the completion date for an agreement of sale between the Defendant/Applicant and Shanghai Engineering Company (K) Limited pending the hearing and determination of this application;*
3. *THAT this Honourable Court be pleased to order eviction of the Plaintiffs, their agents and servants from the suit property NAIVASHA MUNICIPALITY BLOCK 5/386 pending the hearing and determination of the suit;*
4. *THAT this Honourable Court be pleased to order the Officer Commanding Station/Ward Commander Naivasha Police Station to enforce compliance of the eviction order; and*
5. *THAT the costs of this application be provided for.*

2. The application is based on a supporting affidavit and further affidavit, both sworn by Nicholas Kiptoo Arap Korir Salat, the Secretary General of the defendant. The plaintiffs opposed it through a replying affidavit and supplementary affidavit, both sworn by Samuel Njogu Kamotho, the first plaintiff. Parties then canvassed the application through written submissions.

3. The applicant contends that it entered into a sale agreement dated 26th August 2019, pursuant to which it sold of the parcel of land known as Naivasha Municipality Block 5/386 (the suit property) to Shanghai Engineering Company (k) Limited and further pursuant to which it is required to give vacant possession of the suit property to the purchaser on 25th August 2020. That failure to give vacant possession will amount to breach of the agreement and will occasion it loss of a significant amount of money. The applicant further argues that the court found in its ruling of 30th April 2020 that the plaintiffs have no *prima facie* case. It also contends that the plaintiffs have conceded that it owns the suit property. That it should therefore be allowed to enjoy vacant possession of its property since the plaintiffs are mere trespassers.

4. On their part, the plaintiffs argue that the sale agreement was entered into in violation of interim orders that were then in force and that the applicant cannot therefore seek the court's aid to get vacant possession pursuant to the said agreement. That the finding that the plaintiffs did not have no *prima facie* case is not the same as a final determination of the suit and that if the court were to grant eviction at this stage, there will be nothing left for determination at trial yet the defendant has a counterclaim.

5. I have considered the application, the affidavits and the submissions. So as to contextualise the overall scenario, I will give a background of the matter so far. The plaintiffs filed this suit on 31st July 2019, seeking in the plaint a permanent injunction to restrain the defendant from disposing of, negotiating for sale or entering into a sale agreement for the sale of the suit property without a resolution of its members approving the intended sale and without full participation by the plaintiffs. Together with the plaint, the plaintiffs also filed, under certificate of urgency, Notice of Motion dated 30th July 2019 in which they sought an interlocutory injunction.

6. The certificate of urgency was placed before the court on 31st July 2019 when the court granted an interim injunction restraining the defendant, its agents and servants from selling, disposing of or entering into any sale agreement for the sale of the suit property without a resolution and concurrence of its members particularly the plaintiffs pending inter parte hearing. The orders remained in force until 30th April 2020 when the application was dismissed following an inter parte hearing.

7. A perusal of the sale agreement exhibited by the applicant shows that it was entered into on 26th August 2019, during the life of the interim injunction. The order specifically restrained the defendant from entering into any agreement for the sale of the suit property. Clearly, the sale agreement dated 26th August 2019 is a violation of the interim orders. The applicant now has the temerity to seek the court's aid to evict the plaintiffs in pursuance of an agreement entered into in violation of the law. This court, and indeed no court, will lend its aid to a litigant in such an endeavour. See **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR**. That alone is enough to sound the death knell of the application.

8. There is more reason why the application must fail. Eviction is an order akin to mandatory injunction since both tend to prematurely determine a suit. A mandatory injunction or indeed eviction should never be granted at an interlocutory stage in the absence of special circumstances which make the case clear and fit for decision at once. See **Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020] eKLR**. No such clear case or circumstances have been disclosed in the application before the court.

9. This suit had a hearing scheduled for 28th October 2020. The plaintiffs were ready to go to hearing. Unfortunately, the defendant insisted on prosecuting the application notwithstanding suggestions from the court that the hearing proceeds since the application was bound to scuttle the hearing. Unfortunately, the defendant did not see sense. Oftentimes, case backlog is created by parties themselves.

10. In view of the foregoing discourse, Notice of Motion dated 17th June 2020 is without merit. I dismiss it with costs to the plaintiffs.

Dated, signed and delivered at Nakuru this 17th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kibet for the defendant/applicant

Mr Ndubi for the plaintiffs/respondents

Court Assistants: B. Jelimo & J. Lotkomoi