



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 108 OF 2019

ESTATE OF PIERINA NYOKABI KINYANJUI & 2 OTHERS.....APPLICANTS

=VERSUS=

JORETH LIMITED & 2 OTHERS.....RESPONDENTS

RULING

Introduction

1. This is a Ruling in respect of two applications. The first application is dated 22nd March 2019. It is brought by the Plaintiffs/Applicants. It seeks the following orders:-

1) Spent

2) Spent

3) Spent

4) That this Honourable Court be pleased to issues orders restraining the 3rd Respondent from excavating, demolishing, building, constructing, taking possession, trespassing, selling, leasing, transferring, or in any other way interfering with the Applicants enjoyment of the property Land Reference No.13330/527 pending hearing and determination of the suit filed herewith.

5) That this Honourable Court do award any other orders it may deem just, fit and expedient to award in the interests of justice.

6) That the cost of this Application be provided for

2. The second application is dated 1st April 2019. It is brought by the 3rd Defendant/Applicant. It seeks the following orders :-

1. Spent

2. Spent

3. That pending the hearing and determination of this application and suit this Honourable Court be pleased to stay set aside, vary and or review and vacate its ex-parte orders given on the 22nd March 2019 and issued on 25th March 2019.

4. By an order of temporary injunction this Honourable Court be pleased to bar, stop and restrain the Plaintiffs/Applicants their servants, agents, relatives or employees or whomsoever acting for them or through them or on their behalf from entering , trespassing , building , constructing , occupying , taking possession or committing any acts and or in any manner whatsoever dealing with the 3rd Defendant/Applicant parcel of land LR No. 13330/527 until the hearing and determination of this application and suit.

5. That the fences and or structures erected/developed on the 3rd Defendant/Applicant parcel of LR No.1330/527 on and after 22nd march 2019 by the Plaintiffs/Respondents when the orders were issued be hereby ordered to be immediately demolished and removed at the Plaintiffs/Respondents costs.

6. *that in the interests of justice and in alternative and without prejudice to the prayers sought above, a preservative order be issued immediately preserving the suit property LR No.1330/527 in its present condition, status and position without any parties in this suit accessing ,occupying, taking possession, entering, developing or constructing any structures (permanent or temporary) or working or dealing with the suit property until the application and suit herein is heard and determined or as directed by this Honourable Court.*

7. *That the OCS Kasarani Police Station or the District Commissioner, Kasarani do supervise compliance of the Court orders issued hereby.*

8. *That cost of this application be provided for.*

3. The suit property is LR No.1330/527 (suit property) which is currently registered in the name of the 3rd Defendant. The 3rd Defendant had purchased the suit property from the 2nd Defendant. The transfer into the 3rd Defendants name was registered on 6th August 2015. The 2nd Defendant had had her transfer from the 1st Defendant registered on 30th July 2012.

First application

4. The 2nd and 3rd Plaintiffs/Applicants are the administrators of the estate of Pierina Nyokabi Kinyanjui (Deceased) who died on 11th October 2012. The deceased was a shareholder of Thome Farmers No.5 Ltd by virtue of which she was entitled to one plot. The deceased was allocated plot No.274 which later became the suit property.

5. In 1992, the 1st Defendant filed a suit against members of Thome Farmers No.5 Ltd seeking to evict them from LR No.13330 which was an amalgamation of two parcels. The suit was Nairobi HCCC NO.6206 of 1992. This suit was comprised through a consent whereby all the occupants were to pay additional sums of Kshs.200,000/= each to enable them have titles processed by the lawyers of the 1st Defendant.

6. The deceased complied with the consent by paying Kshs.200,000/= to the firm of M/s Kimani Kahiro & Associates who were the Advocates for the 1st Defendant . When the 1st Defendant fell out with the firm of Kimani Kahiro & Associates, they appointed the firm of Chege Wainaina to carry out the transaction relating to their properties. The deceased went to the firm of Chege Wainaina & Co. Advocates where she was asked to pay a sum of Kshs.2,000,000/= to cater for stamp duty and other charges. The deceased paid the kshs.2,000,000/= but she unfortunately passed on before title could be processed. The deceased was in the meantime utilizing the suit property as the storage for her goods .

7. In March 2019, the 2nd and 3rd Plaintiff/Applicants were informed that there was someone who had invaded the suit property and that he was in the process of excavating the ground in order to put up a building. It is at this time they moved to court and obtained ex-parte orders stopping the construction. The Applicants were shocked to learn that the 1st Defendant/Respondent had sold the suit property to the 2nd Defendant/Respondent who had in turn transferred it to the 3rd Defendant/Respondent.

1st Respondent's response.

8. The 1st Respondent opposed the applicants' application based on a replying affidavit sworn by Peter Mungai on 27th September 2019. The deponent says that he is a general manager of the 1st Respondent. He stated that prior to the transfer of the suit property to the 2nd Respondent the suit property was in the name of the 1st Respondent which transferred it to the 2nd Respondent who in turn transferred it to the 3rd Respondent. The 1st Respondent contends that the suit property has never vested in Thome Farmers No.5 Ltd for the deceased to claim any interest over the same and that Thome Farmers No.5 Ltd was neither a shareholder of the 1st Defendant/Respondent nor its director.

9. The 1st Respondent further contends that the consent which was recorded in Nairobi HCCC No. 6206 of 1992 had timelines within which those affected had to pay the kshs.200,000/= and that the deceased was not one of the beneficiaries of the consent and even if she was one of the beneficiaries , she did not pay the Kshs.200,000/= within the time given and that the Kshs.2,000,000/= which she allegedly paid to M/s Chege Wainaina & Co.Advocates was paid after the suit property had been sold to the 2nd Respondent.

3rd Respondent's response

10. The 3rd Respondent opposed the Applicants application based on an affidavit sworn by Prince Kinyua Gathuita on 16th May 2019. The deponent who states that he is a director of the 3rd Respondent denies the Applicants' contention and states that there is nothing on record to show that Thome Farmers No.5 Ltd had any connection with the 1st Respondent who were the registered owners of the suit property which they sold to the 2nd Respondent who in turn sold it to the 3rd Respondent.

11. The 3rd Respondent contends that it has been in possession of the suit property since the year 2015 when the property was transferred to it by the 2nd Respondent. The 3rd Respondent states that when it took possession of the suit property, the same was vacant; that it is the one which applied for change of user which it obtained and that it dug a borehole and connected electricity to the suit property after which it started excavating the property with a view to putting up a multistorey building for which approvals had been obtained.

12. The 3rd Respondent contends that the Applicants only came in and chased the persons who were carrying out excavation after being assisted by hooligans. The 3rd Respondent contends that it has title to the suit property and that the Applicants used the ex-parte court order

to evict it from the suit property.

Analysis

13. I have considered the Applicants application as well as the opposition thereto by the 1st and 3rd Respondents. I have also considered the submissions filed by the Applicant and the 3rd Respondent. The only issue for determination in this application is whether the Applicants have established a prima facie case to warrant issuance of injunctive orders.

14. There is no contention that the area where the suit property is located is generally called Thome farmers No.5. The larger portion known as LR 1330 was owned by the 1st Respondent which was in the process of selling the same to Thome Farmers No.5 Ltd but the sale did not go through. As at the time the negotiations broke down, Thome Farmers No.5 Ltd had already settled its members. When the 1st Respondent filed Nairobi HCCC 6206 of 1992, a consent was recorded which allowed those in occupation to make additional payment of Kshs.200,000/= to 1st Respondent.

15. The materials placed before me show that the deceased made payment of Kshs.200,000 to the firm of M/s Kimani Kahiro & Associates . When the 1st Respondent changed their lawyers to M/s Chege Wainaina & Co Advocates , the deceased paid another sum of Kshs.2,000,000 which she was told was for stamp duty and processing of title. There are correspondence from the firm of Chege Wainaina & Co. Advocates which confirm that they were acting for 1st Respondent. There is no denial that the deceased paid the Kshs.200,000/= and the Kshs.2,000,000/=.

Conclusion:

16. It is clear that the 1st Respondent entered into sale agreement with the 2nd Respondent without taking into the consideration the deceased who had taken possession of the suit property in 1988 and who had complied with the consent of 1992 by paying Kshs.200,000/= . The 3rd Respondent may have title but the Applicants are entitled to grant of an injunction so that the property may be preserved as the case is determined. At this stage, the Court is not expected to determine who is the rightful owner or not. This is a matter which is left for the main hearing. I therefore find that the Applicants have demonstrated a prima facie case. I allow the application dated 22nd March 2019 in terms of prayers (d) and (f) .

It is so ordered.

Second Application.

17. In this application, the 3rd Defendant/Applicant contends that following the grant of injunctive orders to the Plaintiffs/Respondents on 22nd March 2019, the Respondents used the orders to evict the Applicant from the suit property. The Applicant argues that after it was evicted, the Respondents have been putting up illegal structures which have not been approved; that the construction of the structures is done during the day and at night and that the sole purpose is to defeat the Applicant's claim to the suit property. The Applicant argues that it has been in occupation of the suit property since 2015 and that the injunction orders granted to the Respondents were granted based on material non-disclosure.

18. The Applicant argues that upon purchase of the suit property from the 2nd Defendant, it took possession in 2015, applied for change of user which was allowed and thereafter applied for construction of a multi storey building which was also approved. The Applicant then applied for drilling of a borehole which was allowed and it connected electricity to the suit property. The Applicant argues that while it was undertaking all these, there was no protest from anyone until 23rd March 2019 when its workers were disrupted as they embarked on the construction of a foundation for the complex which it had set to build on the suit property.

19. The Applicant further argues that it put up a semi-permanent structure where it kept building materials and fenced the suit property with barbed wire and that no one came to protest the construction and fencing.

Response by Respondents.

20. The Respondents have denied the allegations by the Applicant that they have never been in possession of the suit property. The Respondents deny the allegation by the Applicant that it sunk a borehole on the suit property. They contend that the only structure on the suit property is a store which their mother had put up for storage for their business items. The Respondents deny being aware of any approvals granted to the Applicant and that if there was any visit to the suit property for purposes of those approvals, then such visits were clandestinely held. The Respondents only concede that there is electricity connected to the suit property and that they do not understand on what basis it was installed.

21. The Respondents argue that when they became aware of the visits to the property by unknown persons, they reported the matter to the police who treated whoever was visiting the suit property as a trespasser. The Respondents argue that they had put up a structure which they have leased to a third party and that the Applicant is trying to mislead the court to believe that it has been in occupation of the suit property.

Further affidavit by Applicant.

22. In a further Affidavit sworn by Prince Kinyua Gathuita , on 21st June 2019, the Applicant contends that it was the one in occupation until it was dislodged following the ex-parte orders granted by this court. The Applicant argues that there was no building in the suit property prior to 25th March 2019 and any buildings and fence on the suit property were put up after the institution of this suit. The Applicant argues that

the borehole was sunk in 2016.

23. The Applicant argues that the tenancy agreement which has been exhibited by the Respondents in the affidavit in opposition to this applications is a forgery which should be investigated by the DCI.

Analysis

24. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions filed by the parties herein. The only issues for determination are firstly, whether the injunction orders granted herein ought to be discharged and secondly whether the injunctive orders sought ought to be granted.

25. On the first issue, there are no materials placed before me to show that the ex-parte injunctive orders which were granted on 22nd march 2019 were obtained based on non-disclosure of material facts. The Respondents had demonstrated that their mother had a share with Thome Farmers No. 5 Ltd which share entitled her to Plot No.274 which plot later became the suit property. When the 1st Respondent filed Nairobi HCCC No.6206 of 1992, a consent was entered in which the deceased and others were expected to pay Kshs.200,000/= to have their titles processed. The deceased paid this amount and a further Kshs.2,000,000/= for processing a title. The deceased took possession of the plot in 1988 and there was no way a person other than the deceased would have again been given title. The injunctive orders which were given were therefore given based on factual facts which cannot be said to have been misleading.

26. On the second issue, the Applicant is seeking both temporary injunctive orders and mandatory injunctive orders. On the part of temporary injunction the same cannot be granted as the Respondents have already been granted injunction to protect the suit property. Besides this there is no basis upon which the Applicant can be granted a temporary injunction.

27. The Applicant is also seeking mandatory injunction ordering demolition of structures which were allegedly put up by the Respondent after the institution of this suit. The principles for grant of mandatory injunction are now settled. A mandatory injunction can only be granted where there are clear and uncontested facts. In this case, it is the Applicant's word against the Respondents' word which cannot be the basis of grant of any mandatory injunction.

Conclusion

The Court cannot order that all the parties keep off the suit property as sought by the Applicant. The Respondents moved the court and they demonstrated that they have a prima facie case. Based on the analysis herein above. I find that the Applicant's application dated 1st April 2019 lacks merit. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated,Signed and delivered at Nairobi on this 14th day of November 2019.

E.O.OBAGA

JUDGE

In the Presence of:-

M/s Wangui for Mr Ndegwa for 3rd Defendant,

Mr Osewe for Mr Nyakundi for 2nd Defendant,

M/s Mutie for M/s Nakato for 1st Defendant and

Mr Maina for Mr Okatch for Plaintiff/Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE