



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 606 OF 2015

(FORMERLY NAKURU HCCC NO. 231 OF 2012)

FLORENCE CHELANGAT LANGAT.....PLAINTIFF

VERSUS

TIMOI FARMS AND ESTATE LIMITED.....1ST DEFENDANT

ISAYA KIPTONUI KIMEYWO.....2ND DEFENDANT

RULING

This suit has been pending in court for the last 7 years. No serious attempt has been made by the parties to have the case heard and conclusively determined. For the entire period of 7 years, what the parties have engaged in are interlocutory applications one after the other. What is before me is such application by the plaintiff. When this suit was transferred from the Environment and Land Court at Nakuru to this court, there was a pending application by the plaintiff dated 18th August, 2014 in which the plaintiff had sought among others the following orders;

1. That the defendants account for all previous sale of tea from the estate from July, 2014 to date.
2. That the defendants place all proceeds from the sale of tea into a joint account in the names of the advocates for the parties until the hearing and determination of the suit.
3. That an interim independent tea manager be appointed to run the tea estate, the subject of this suit pending the hearing and determination of the suit.
4. That during the period that the independent manager will manage the estate, the defendants be ordered to vacate the suit properties.
5. That the proceeds of the tea sales realised by the independent tea manager be deposited in a joint account to be opened in the names of the advocates for the parties until the suit is heard and determined.

When the matter came up for mention on 21st November, 2017, the parties agreed to abandon the said application so as to expedite the hearing and determination of the suit. The court fixed the main suit for hearing on 25th September, 2018. On 25th September, 2018, the hearing of the suit did not take off because the plaintiff sought leave to amend her plaint which leave was granted. On 5th November, 2018, the suit was once again listed for full hearing on 12th November, 2019. The hearing date was taken by the plaintiff's advocate. On 27th November, 2018; a few weeks after listing the suit for hearing, the plaintiff filed yet another application brought by way of Notice of Motion dated 16th November, 2018 seeking the following orders;

1. That pending the hearing and determination of this suit, the proceeds from the sale of tea from the suit properties be deposited in court.
2. That a reputable tea estate manager be appointed by the court to manage and remit the proceeds from the sale of tea to court.

This is the application which is the subject of this ruling. The application is supported by an affidavit sworn by the plaintiff, Florence Chelangat Langat on 16th November, 2018. The same is opposed by the defendants through a replying affidavit sworn by the 2nd defendant, Isaya Kiptonui Kimeywo filed in court on 10th June, 2019. The application was heard on 27th June, 2019 in the absence of the defendant.

The Plaintiff's Case.

The plaintiff contended that the suit herein was listed for hearing on 12th November, 2019 which was the earliest date available when the date was taken. The plaintiff contended that she used her savings to purchase the suit properties in 2012 and had hoped that she would live off the proceeds from the sale of tea. The plaintiff contended that she had suffered and would continue to suffer with no source of income as she awaited the determination of this suit that had been pending since 2012. The plaintiff contended that she was not receiving any income from the sale of tea on the suit properties which was being collected by the defendants. The plaintiff contended that the defendants were reaping from where they did not sow. The plaintiff averred that the orders sought if granted would give her a good chance of recovering the proceeds from the sale of tea on the suit properties since 2012 and would also prevent any wastage on the suit properties. The plaintiff averred that she would suffer irreparable harm and severe prejudice if the orders sought were not granted.

The Defendants' Case.

The defendants contended that the 1st defendant purchased the suit properties in 2008 with tea plantation and had planted more tea thereon. The defendants contended that the 1st defendant constructed houses on the suit properties and had all along been in exclusive possession and occupation of the same. The defendants contended that they filed a suit against Kipngeno Arap Ngeny from whom the plaintiff purchased the suit properties namely, Nakuru HCCC No. 32 of 2010 and obtained an order of injunction restraining him from selling the said properties. The defendants contended that the plaintiff obtained titles for the suit properties fraudulently while the said injunctive orders against Kipngeno Arap Ngeny were in subsistence hence she had no legal claim over the proceeds from the sale of tea on the suit properties. The defendants contended that the plaintiff had never occupied the suit properties and that she could not be allowed to use the titles obtained fraudulently to obtain the orders sought herein. The defendants contended that Emukule J. had made a finding that it was the defendants who were in possession of the suit properties and had ordered that they continue in possession until this suit was determined. The defendants contended that the said orders by Emukule J. could not be altered through the present application. The defendants urged the court to dismiss the plaintiff's application as lacking in merit.

Determination:

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application. Finally, I have considered the submissions that were made before me by the plaintiff's advocate on 27th June, 2019. Without considering the merit of the plaintiff's application, I am of the view that the same is an abuse of the process of the court for two reasons. First, as I have mentioned earlier in the ruling, there is a pending application dated 18th August, 2014 which had been brought by the plaintiff seeking orders similar to the ones sought in the present application. That application was abandoned by the plaintiff so that the hearing of the main suit could be expedited. The parties were thereafter given a hearing date for the main suit. That application was not withdrawn and if the plaintiff wished to pursue it even after fixing this suit for hearing, she could do so instead of filing a fresh application. Secondly, I am of the view that it was improper for the plaintiff to bring the present application after the suit had been fixed for hearing. The suit as acknowledged by the plaintiff has been pending since 2012. The present application was not going to conclusively determine the suit and if anything, could only prolong it. An interlocutory application that has a potential of frustrating a hearing of a suit or delaying the same is an abuse of the court process.

On the merit of the application; again, I see no luck for the plaintiff. The plaintiff had obtained an ex parte order in this suit on 29th June, 2012 restraining the defendants from entering or interfering with the plaintiff's entry, occupation and possession of the suit properties. Armed with the said order, the plaintiff moved into the suit properties and evicted the defendants therefrom. The defendants filed an application dated 4th July, 2012 seeking the discharge and setting aside of the said ex parte order. The defendants also sought an order that the plaintiff and her agents do vacate the suit properties and remain out of the same until this suit and Nakuru HCCC No. 32 of 2010 were heard and determined. In a ruling delivered on 19th July, 2012, Emukule J. found that the plaintiff had obtained the said ex parte order through concealment of material facts. The court also found that the defendants were the ones who were in possession of the suit properties and that the plaintiff had fraudulently misinterpreted and misapplied the ex parte order aforesaid which she used to evict the defendants from the suit properties. On the basis of those findings, the court discharged the said ex parte order of injunction that had been made in favour of the plaintiff on 29th June, 2012 and ordered the plaintiff to vacate and handover the suit properties to the defendants pending the hearing of this suit and Nakuru HCCC No. 32 of 2010. An application by the plaintiff to stay the said orders by Emukule J. was dismissed on 31st July, 2012.

I am in agreement with the defendants that the orders sought by the plaintiff if granted would be contrary to the orders made by Emukule J. on 19th July, 2012. Emukule J. had ordered that the defendants do remain in possession of the suit properties pending the hearing of this suit and Nakuru HCCC No. 32 of 2010. In my view, if an estate manager is appointed to manage the suit properties, it would result in the eviction of the defendants from the same. Again, while making an order that the plaintiff vacates and hands over possession of the suit properties to the defendants pending the hearing of the suit herein, the court must have been satisfied that the defendants had an arguable defence to the plaintiff's claim with good prospects of success. The plaintiff has not presented before me any new material that would warrant the granting of the orders sought.

In the final analysis, I find no merit in the plaintiff's application dated 16th November, 2018.

The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 12th day of November 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Kimani for the Plaintiff

Mr. Kamara for the Defendants

C. Nyokabi-Court Assistant