



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO. 633 OF 2017

ERIC MUGO & 12 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

BROOK VILLAS ESTATE LIMITED.....1ST DEFENDANT/RESPONDENT

CHARLES KANIARU MUTHOGA.....2ND DEFENDANT/RESPONDENT

DENNIS MURANGIRI KIRINYA.....3RD DEFENDANT/RESPONDENT

IRAD TECHNOLOGIES.....4TH DEFENDANT/RESPONDENT

INFOUR PROPERTIES LIMITED.....5TH DEFENDANT/RESPONDENT

AND

DUNCAN MACHARIA GATU.....1ST INTERESTED PARTY

URITHI HOUSING CO-OPERATING SOCIETY LTD.....1ST INTERESTED PARTY

RULING

There are two issues herein for determination. The first is *Notice of Motion* application dated *3rd July 2017*, brought by the Plaintiffs/Applicants who have sought for orders that:-

- 1. That the Honourable Court be pleased to issue an interim order of injunction restraining the Defendants and/or the Interested parties, their agents, servants and/or employees from selling, dealing, interfering, alienating or otherwise disposing of all that piece of land being Juja/Komo Block 1/3451 and Juja/Komo Block 1/3452 pending hearing and determination of this application..***
- 2. That the costs of this application be provided for.***

The application is premised on the following grounds:-

- 1. That the intended Interested Parties are bonafide purchasers for value without notice of the property forming the subject matter of this suit.***
- 2. That there is an ongoing sale transaction between the 1st and 2nd Interested Parties, and the Plaintiffs/Applicants are apprehensive that they will be deprived of the land if the suit property is sold in the continuance of the suit.***
- 3. That the suit will be rendered nugatory if the suit property is not safeguarded by way of an injunction at this preliminary stage.***
- 4. That this Honourable Court has the powers to make such orders as prayed in this application.***

It is also supported by the annexed *Affidavit* of *Eric Rugo Mugo*, who averred that he has been authorized by the other 12 Plaintiffs to swear

the instant affidavit. He also stated that they entered into various sale agreements with the 1st Defendant who was in turn purchasing 12 acres portion of land from land known as **Juja/Komo Block 1/25** as per the **Sale Agreement** dated **14th May 2015**. However the said sale agreement was rescinded and the 1st Defendant herein filed an **ELC No.25 of 2016** at **Milimani Environment and Land Court**.

Further that the Plaintiffs/Applicants did pay their respective purchase price to the Defendants herein for purchase of fully serviced plots from the 1st Defendant after the 1st Defendant had fully purchased a portion of land from the 1st Interested party's land known as **Juja/Komo 1/25**. He further averred that after the deal between the 1st Defendant and 1st Interested Party collapsed, the suit property **Juja/Komo Block 1/25** was subdivided into two portions being **Juja/Komo Block 1/3451** and **Juja/Komo Block 1/3452**, which the 1st Interested party is intending to sell to the 2nd Interested party to the dismay of the Plaintiffs/Applicants herein and thus this suit and application.

The 2nd issue is the **Notice of Preliminary Objection** dated **24th July 2017**, filed by the 1st Interested Party who averred that:-

i. There exists a pending case over the same subject matter as far as concerns the Plaintiffs, 1st Defendant and the Interested Parties being ELC No.25 of 2016 Nairobi.

ii. The suit does not disclose any cause of action against the 1st and 2nd Interested Parties.

iii. The suit is frivolous, vexatious and an abuse of the process of court.

Further the 1st Interested Party filed a **Replying Affidavit** and averred that the Plaintiffs are strangers to him as they are not privy to the contract between the 1st Defendant and the 1st Interested Party. He further averred that having had the title deed to his suit property and having not entered into any contract for sale of the said land with the Plaintiffs, the Plaintiffs/Applicants cannot purport to be innocent purchasers without notice. Further that the Plaintiffs were aware that the 1st Interested Party had rescinded the sale agreement with the 1st Defendant but they still went ahead and entered into sale agreement with the 1st Defendant for land that did not belong to it. It was his contention that he has since entered into a sale agreement with the 2nd Interested Party in exercise of his constitutional right to property.

He also contended that the Plaintiffs/Applicants are aware of **ELC No.25 of 2016**, at **Milimani Environment and Land Court** wherein the Plaintiffs were enjoined as Interested Parties but they went ahead and filed this suit which is an abuse of the court process. It was his further contention that as the registered owner of the suit property, he had inalienable rights to deal with the property in any manner that he deemed proper including selling the same to 2nd Interested party and Applicants have no *locus standi* to question the said sale of his property to the 2nd Interested Party herein or any other party that he may wish to deal with. He urged the Court to dismiss the instant application.

The Defendants/Respondents did not file any response to the instant application but they had alluded through their Advocate that they were not opposed to the Plaintiff's application. It was also brought to the attention of the court that there are *status quo* orders in place in **ELC No.25 of 2016**, which involves the same parties and suit property and this Court did issue *status quo* order in terms of or in line with *status quo* order in place in **ELC No.25 of 2016**.

The Court directed that both the **Notice of Motion** application and the **Notice of Preliminary Objection**, be canvassed together by way of written submissions and the parties herein complied with the said directions.

The Court has now carefully read and considered the written submissions and the cited authorities. The Court has also considered the pleadings in general and the annexures thereto, together with the

relevant provisions of law and it makes the following findings:-

Though the Court indicated that the **Notice of Motion** application and the **Notice of Preliminary Objection** will be determined together, the Court will first deal with the **Notice of Preliminary Objection** before embarking on the determination of the **Notice of Motion**. It is evident that **Preliminary Objection** is capable of bringing a matter to conclusion preliminarily. The Court has considered the issues raised in the **Preliminary Objection** by the 1st Interested Party and it has to determine first whether what has been raised herein fits into the description of what a **Preliminary Objection** is.

Preliminary Objection was described in the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further in the case of **Oraro...Vs...Mbaja (2005) 1 KLR/41**, the Court held that-

“A Preliminary Objection consists of a point of law which has been pleaded or which arise by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

It is also evident that **Preliminary Objection** stems from the pleadings and it is capable of determining the matter preliminarily. See the case

of Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

The 1st Interested Party has alleged that the suit herein is **subjudice** and goes against the spirit of **Section 6** of the **Civil Procedure Act** which states:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed:.

It was alleged that there is another **ELC No.25 of 2016** in **Milimani Environment and Land Court** involving the same parties and same parcels of land. The Plaintiffs did admit in their **Plaint** existence of such matter **ELC No.25 of 2016**.

The 1st Interested Party has also alleged that the suit herein disclosed no cause of action and is frivolous and vexatious and so should be struck out. The issue of cause of action and suit being **frivolous** stems from the pleadings. Therefore the Court finds the **Notice of Preliminary Objection** herein is indeed a **Preliminary Objection** as described in the **Mukisa Biscuits Case (supra)**.

Having found that the **Preliminary Objection** herein meets the ingredients of what constitutes a **Preliminary Objection**, is the said **Preliminary Objection** merited?

The Court has considered the pleadings attached to the **Preliminary Objection** and has confirmed that indeed there is in existence **ELC No.25 of 2016** at **Milimani Environment and Land Court** involving all the parties herein. The Plaintiffs herein were enjoined in the said suit as Interested Parties. The subject matter in **ELC No.25 of 2016** is the same subject herein being **Juja/Komo Block 1/3451** and **Juja/Komo Block 1/3452**. Whatever relief the Plaintiffs are seeking herein could have been sought in **ELC No.25 of 2016**. The filing of this suit is indeed contrary to the spirit of **Section 6** of the **Civil Procedure Act**. If the court would be minded to proceed with the suit herein, there is a danger that at the end of the two matters, there would be two conflicting decisions which would indeed be a calamity to the judiciary and a source of embarrassment.

The Plaintiffs herein were not acting in good faith when they filed this suit in this Court knowing very well that there exist another suit in another court with existing orders of *status quo* and which involved same parties and same subject matter. The Applicants should have sought their instant prayers in **ELC No.25 of 2016**.

The Court has even seen that the Applicants have attempted to file an application for consolidation of the two suits herein. **ELC No.25 of 2016**, was an earlier suit and if the Applicants needed any consolidation, they should have done so in the earlier suit but not this recent suit which was filed while the Plaintiffs were very much aware of existence of **ELC No.25 of 2016**, wherein they are parties thereto and the subject matter is the same. The Court finds that there was and there is no need for the Plaintiffs herein to file multiplicity of suits over the same subject matter. The Plaintiffs should await the hearing of **ELC No.25 of 2016** and ventilate their contentions therein.

Having found that indeed this suit was filed in contravention of Section 6 of the Civil Procedure Act, the Court finds that as provided by the said provision of law, the best remedy herein is to **stay** this suit until **ELC NO.25 of 2016** has been heard and determined.

Consequently, the Court finds that the Preliminary Objection herein as field by the 1st Interested Party is merited. However, the Court will not strike out this suit but will order it stayed as provided by Section 6 of the Civil Procedure Act until **ELC No.25 of 2016 at Milimani Court** is heard and determined, but 1st Interested Party is entitled to costs.

Having ordered that this suit should be stayed, the Court finds no reason to determine the **Notice of Motion** application dated **3rd July 2017** as the Applicants herein can seek the said orders in **ELC No.25 of 2016**. Further, the Plaintiffs/Applicants paid the purported purchase price to the 1st Defendant while knowing that its purchase of the property from 1st Interested Party was not yet complete.

This Court finds no reason to sustain the **status quo order** it had issued earlier. The said orders of status quo are hereby vacated.

This suit is hereby stayed but with costs to the 1st Interested Party.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of April 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Applicants

No appearance for 1st - 4th Defendants/Respondents

M/S Chege for 1st Interested Party

No appearance for 2nd Interested Party

Lucy - Court clerk.

Court – Ruling read in open court in the presence of m/s CHEGE FOR 1ST Interested Party and absence of all other parties and their advocates.

L. GACHERU

JUDGE

27/4/2018