



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO. 422 OF 2015

GOLDEN ACRE LIMITED..... PLAINTIFF

=VERSUS=

NDIMA TEA FACTORY

COMPANY LTD & 2 OTHERS DEFENDANTS

RULING

1. The plaintiff/applicant filed a Notice of Motion dated 18th May 2015, in which it sought the following orders:-

1. Spent

2. Spent

3. Pending the hearing and determination of this suit this Honourable Court be pleased to issue an order of injunction to restrain the 1st and 2nd Respondents either by themselves, their servants, agents, employees or otherwise howsoever from proceeding with the Disposal of land that was advertised in the Daily Nation Newspaper Edition of April 8, 2015 at page 31 or dealing in whatever other mode disposing ,alienating, selling or offering for sale or inviting any offer for the sale of the properties known as Land Reference no. 7405/13, Land Reference No.7405/15 and Land Reference No.7405/18.

4. The costs of the application be borne by the Respondents.

2. The first respondent is a tea factory which is managed by the second respondent. The third respondent is a wholly owned subsidiary of the second respondent. The first respondent is the registered owner of LR Nos.7405/13 (IR No.4751) measuring 34.4 hectares , LR No. 4705/15 (IR No.45717)measuring 34.4 hectares and LR No.7405/18 (IR No.47516/1) measuring 11.99 hectares (suit properties). Collectively, the suit properties are 200 acres.

3. The suit properties had initially been acquired by the first respondent for purposes of planting eucalyptus trees for wood fuel but since the trees were not doing well, the first respondent instructed the second respondent to advertise the suit properties for sale through competitive bidding. The second respondent advertised sale of the suit properties in the Daily Nation of 19th September 2014 where it called upon members of the public to tender for the sale of the suit properties.

4. It was an express term of the tender documents that the second respondent reserved the right to accept or decline any or all applications without the obligation to assign any reason for the decision. It was a further term that the tender would remain valid for 90 days after opening and that the tender security of Kshs.500,000/= would be forfeited if a tenderer withdrew its bid during the tender validity period. On 7th October 2014 the Management Tender Committee opened II bids which were received. The applicant became the highest bidder at Kshs.74,000,000/=.

5. The applicant contends that being the highest bidder, it waited for communication from the second respondent to avail completion documents so that the suit properties could be transferred to it. While the applicant was following up on the completion documents, it was informed that the suit properties had been re-tendered and that the same were to be sold to someone else. The applicant further contends that on further inquiries it was informed that the suit properties had been advertised in the Daily Nation Newspaper of 8th April 2015 and that the tender opening had been conducted on 28th April 2015.

6. The first and second respondent had not offered any explanation to the applicant why this had to happen; that the applicant later learnt that

the respondents were alleging that it had withdrawn from the bid through letter dated 7th October 2014. The applicant denies that it was the author of that letter and that this was a fraudulent scheme by the first and second respondents to undermine its interest in the purchase.

7. The applicant further learnt that there was another person called Mary Muthoni Njogu who was also laying claim to the suit properties and had filed Nairobi HCCC No.186 of 2015 against the three respondents and Kenya Tea Development Agency. It is on this basis that the applicant applied for injunction to stop transfer of the suit properties to a third party other than it.

8. The applicant's application was opposed through a replying affidavit sworn by John Kennedy Omanga the Company Secretary of the three respondents. The deponent of the affidavit stated that when the bids were opened and read to the representatives of the bidders, a letter dated 7th October 2014 was received from the applicant withdrawing from the bid. In a strange twist of events, the next five highest bidders withdrew their offers for one reason or the other. The net effect of the mass withdrawal was that Mary Muthoni Njogu who had bid for Kshs.47,000,000/= was poised to clinch the tender. Owing to this strange happenings, the respondents were forced to carry out due diligence. They called for search of directors of the companies which had withdrawn and it turned out that Mary Muthoni Njogu was a shareholder or director in most of those companies. It also turned out that three of the companies which include the applicant shared the same postal address.

9. It became apparent that there was a bid to manipulate the tender process by withdrawal so as to give an upper hand to Mary Muthoni Njogu. The said Mary Muthoni Njogu filed HCCC No.189 of 2015 in which she annexed confidential internal communication of the Management Tender Committee which led credence to the fact that the tendering process had been manipulated and was tainted with corrupt schemes meant to benefit Mary Muthoni Njogu. The respondents reached a decision to nullify the tender. The respondents contend that the applicant's application is an abuse of the process of the court which is made with unclean hands and does not meet the threshold for grant of injunction.

10. I have considered the applicant's application as well as the opposition thereto by the respondents. I have also considered the submissions by the respondents. The applicant was given time to file submissions but they never filed any. This being an application for injunction I have to decide whether the applicant has met the threshold for grant of the same. The first consideration for grant of an injunction is whether the applicant has demonstrated a prima facie case with probability of success. In the present case, the applicant had taken part in the bidding process and it emerged the highest bidder at Kshs.74,000,000/.

11. The tenders were opened and they were announced. The applicant was informed that it was the highest bidder. On the same day it tendered a letter withdrawing from the bid. There was no reason given for withdrawal. The highest second bidder was Milestone Estates and Construction Limited at Kshs.66,000,000/= which also withdrew its bid on the ground that it had visited the suit properties and found them unsuitable for the project which it had in mind. The third highest bidder was Prime Portfolio Limited at Kshs.58,000,000/= which also withdrew its bid on 7th October 2014 for reasons it did not wish to disclose.

12. The fourth highest bidder was Wawai Enterprises Limited at Kshs.51,000,000/= which withdrew its bid on 8th October 2014 on the ground that hours before opening of the tender, they had won yet another tender and its directors had advised that they channel the money to the other tender. The fifth highest bidder was Fast Truck Supplies Limited at Kshs.50,000,000/- which withdrew its bid on 7th October 2014 on the ground that it had ran into financial hardship and would therefore not comply with terms of the tender.

13. The withdrawal of the five tenderers who were ahead of Mary Muthoni Njogu who bid for Kshs.47,000,000/= meant that Mary Muthoni Njogu was poised to be declared the highest bidder. Mary Muthoni was a director in Milestone Estate and Construction Limited. She was also a director in Fast Truck Supplies Limited.

14. The applicant company shared a postal address with another Company called Graceland Gardens Limited which also took part in the bid but which also withdrew its bid on 8th October 2014. Mary Muthoni Njogu under Fast Truck Supplies Limited shared a postal address with the applicant. The applicant pretended not to know Mary Muthoni Njogu but it is clear that they had something in common otherwise they would not share a postal address if they did not know each other. The applicant also pretended not to know who authored the letter of withdrawal which was signed by a person not a director of the company.

15. What happened in this matter was a clear plot to allow Mary Muthoni Njogu to win the tender. The applicant's hands are tainted and no court of law can allow a person to benefit from his own wrong doing. A person seeking to gain from equity must approach the court with clean hands. Even without considering whether a prima facie case has been demonstrated, the mere fact that the applicant has approached the court with unclean hands is enough to disentitle the applicant to an equitable relief of injunction. The applicant's application is an abuse of the process of the court. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 16th day of April 2018.

E.O .OBAGA

JUDGE

In the absence of parties who were notified of the date and time of delivery of Ruling.

Court Assistant: Hilda

E.O .OBAGA

JUDGE