



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.245 OF 2017

(FORMERLY CIVIL SUIT NO.3086 OF 1994 – NAIROBI)

ERASTUS G. NDUHIU T/A EMAC

ENTERPRISES LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

MUGUMOINI FARMERS CO. LTD.....DEFENDANT/APPLICANT

AND

INSHWIL BUILDERS ENGINEERING LTD.....INTERESTED PARTY

RULING

The Defendant herein *Mugumoini Farmers Co. Ltd*, the Applicant brought this *Notice of Motion* application dated **2nd February 2017**, and sought for various orders. The application is premised under Order 9 Rule 9(a), Order 12 Rule 7, Order 40 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of law. The orders sought are:-

1) Spent.

2) That this Honourable Court be pleased to order reinstatement of this suit which was dismissed on 23rd June 2016.

3) That this Honourable Court be pleased to grant leave to the firm of M/S Wanyonyi & Muhia Advocates to come on record for the Defendant herein in place of M/S Chacha Mwita & Co. Advocates.

4) That this Honourable Court be pleased to order that a temporary injunction do issue against Inshwil Builders Engineering Ltd by themselves and or their agents, successors, assigns, representatives and employees from any way transferring, charging, interfering, selling, sub-dividing, disposing off or intermeddling or in any way dealing with all that piece and or parcel of land known as Kakuzi/Kirimiri Block 7/37 and its sub-divisions, Kakuzi/ Kirimiri Block 7/249 (sub-divided to Kakuzi/Kirimiri Block 7/381, Kakuzi/Kirimiri Block 7/382 & Kakuzi/Kirimiri Block 7/383), Kakuzi/Kirimiri Block 7/250 or any other sub-divisions thereof including but not limited to Kakuzi/ Kirimiri Block 7/33 until hearing and determination of this application.

5) That this Honourable Court be pleased to order that any title in respect of Kakuzi/Kirimiri Block 7/37 and or any sub-divisions thereto be revoked forthwith and the Registrar, Thika Land Registry reinstates the title in favour of the Defendant.

6) That this Honourable Court do direct Francis Ngone Gathiga to repay the Defendant Kshs.5 Million, which he unlawfully and illegally embezzled from the Defendant pursuant to the unlawful sale of the suit property.

7) That costs of this application be provided for.

The application is supported by the grounds stated on the face of the application and on the *Supporting Affidavits* of *Simon Igeche Thiga* and *Joseph Kamande Ngone*.

Among the grounds in support of the application are:-

1. That the Defendant has never had a Director or Secretary by the name Benjamin Kamande Kinara.
2. That the sale agreement was void ab initio as the parties had no capacity to enter into the contract as there was at the material time an existing prohibitory order issued by this Honourable Court on 9th April 1998 in respect of the suit property.
3. That orders given by this Honourable Court on 20th November 2003 should therefore be vacated as they emanated from misrepresentation by the then directors of the Defendant and further from a void affidavit.
4. That further orders given by this Honourable Court on 7th December 2009 were obtained by misrepresentation and based on a false affidavit and therefore should be set aside.
5. That no professional valuation of the suit property was ever done prior to its sale resulting to its sale at Kshs.5,000,000/= being far below the market value.
6. That the sale price was far below the market price and the sale was illegal ab initio.
7. That the shareholders are poor peasant farmers who acquired the suit property in the 1960s and they stand to suffer irreparably if the court does not intervene urgently and grant the orders sought.

In his supporting Affidavit, **Simon Igecha Thiga**, averred that he was elected one of the Directors of the Defendant on 17th March 2003. He further averred that neither **Julius Mbugua Gatuha** nor **Benjamin Kamande Kinara** were Directors of the Defendant nor did they have any authority to sign any legal instruments on behalf of the Defendant. He also stated that he resigned as a Director in **October 2006**, and shortly thereafter moved to United States of America permanently.

On his part, **Joseph Kamande Ngone** averred that he is one of the Directors of the Defendant having been elected on 14th April 2016. He also averred that at all material times, the Defendant was the owner of all that piece of land known as **Kakuzi/Kirimiri Block 7/37**, measuring about **229 Acres**. He also stated that in the **year 2016**, it came to the knowledge of the current directors that the suit property had been transferred to the **Interested Party** herein, **Inshwil Builders Engineering Ltd**, without the knowledge and/or consent of the shareholders. That the said transfer was done with collusion of one of the Directors herein **Francis Ngone Gathiga**. It was his contention that the transfer herein emanated from the **Sale Agreement** dated 11th July 2003, and from the said agreement, none of the alleged signatories had capacity or authority to sign on behalf of the Defendant as they had been **removed from the office** on 17th May 2003. Further that the Defendant had never had a Director or Secretary by the name of **Benjamin Kamande Kinara**. He further averred that the agreement was void ab initio as it was not witnessed or stamped by any Advocate. He also averred that the sale agreement was void ab initio as the parties had no capacity to enter into the Contract as there was at the material time an existing Prohibitory Order issued by the court on 9th April 1998, in respect of the suit property. He urged the Court to allow the instant application.

The application is opposed by the Interested Party, **Inshwil Builders Engineering Co. Ltd**, who filed a **Notice of Preliminary Objection** dated 27th February 2017 and stated that:-

- 1) That there is no pending suit upon which the application dated 2nd February 2017 can be premised upon as required under **Order 40 of the Civil Procedure Rules**.
- 2) That in this matter the main suit was finalized on 24th May 1995, when the application dated 6th December 1994 to struck out the defence was allowed, and Decree issued on 24th May 1995 by Justice Hayanga.
- 3) That accordingly the Order made on 23rd June 2016 purporting to dismiss the suit under **Order 17 Rule 2(1)** and **Order 42 Rule 35(2)** has no legal effect as it was made erroneously as there was no suit pending before court on 23rd June 2016, which was capable of being dismissed as the main suit had long been determined 24th May 1995, when the Decree was issued by the court in favour of the Plaintiff and the Plaintiff Bill of Costs dated 10th March 1997 taxed in the sum of **Kshs.111,980/=** and Certificate of Taxation signed by **C.K.Njai**, Deputy Registrar dated 17th July 1997.
- 4) That temporary injunction orders under **Order 40 of the Civil Procedure Rules** cannot issue where there is no pending suit.
- 5) That the application dated 2nd February 2017, is not supported by cogent facts and evidence and the application does not meet the test required for court to issue injunction orders.
- 6) That the application has no merit, is frivolous and vexatious, is incompetent and bad in law and is clearly filed in court in bad faith and as an afterthought.
- 7) That the Defendant has not approached this court with clean hand and has not made a full disclosure of all material facts as this suit had already been determined.

The Interested Party urged the Court to allow the instant **Notice of Preliminary Objection** and dismiss the Defendant's **Notice of Motion** application.

The Plaintiff filed his *Grounds of Opposition* on 22nd February 2017 and opposed the instant application and stated:-

1. *That the application is bad in law in that it is frivolous, vexatious, scandalous, incompetent and an abuse of the process of the court.*
2. *That the two affidavits of Joseph Kamande Ngone and Simon Igecha Thiga are bad in law as they are full of speculations and ought to be struck out.*
3. *That this matter was finalized long time ago and litigation must come to an end.*
4. *That this application calculated and intended to deny the Plaintiff enjoyment of the fruits of his judgement and ought to be dismissed with costs.*

However, the Plaintiff later withdrew the said Grounds of Opposition and its submissions and filed an affidavit sworn by *Simon Kamere Advocate*. He averred that after the Judgement was entered against the Defendant, he applied for and was issued by the Court in *HCCC No.3086 of 1994* with a Prohibitory Order against the Defendant prohibiting them from in any manner transacting with land parcel *No.Kakuzi/Kirimiri Block 7/37*. He further averred that neither him nor the Plaintiff has ever applied for lifting of the said orders. He further averred that he was dismayed to discover that the said orders were lifted on 17th December 2009, on an application by the Defendant's advocate. He also deposed that the Plaintiff has not been fully paid as alleged by the Defendant and Interested Party on 20th November 2003, when they sought to be permitted to sale and purchase the suit property. He contended that the orders herein were granted through *deceit* and *fraudulent collusion* between the Interested Party and some officials of the Defendant. He therefore urged the Court to reinstate the orders granted by the court without involving the Plaintiff.

The Court directed that both the *Notice of Motion* dated 2nd February 2017 and the *Preliminary Objection* be canvassed together by way of *written submissions*. In compliance thereof, the parties did file their respective written submissions which this Court has carefully read and considered. The Court has also considered the court records and the proceedings in general. The Court has further considered the various relevant provisions of law and makes the following findings:-

It is clear that the initial claim herein was a *pure civil claim* wherein the Plaintiff was praying for payment of *Kshs.3,060,522/=* by the Defendant being an *outstanding amount* in respect of goods sold and delivered to the Defendant. Therefore the main claim is not a claim over title to land, use or occupation to land.

It is also evident that the Defendant's Defence was struck out and Judgement was entered in favour of the Plaintiff. Further, a *Decree* was drawn on 24th May 1995, and thereafter execution of the Decree followed. It is evident that during the execution of the said Decree, the Plaintiff sought to satisfy the said Decree by seeking to be allowed to sell the Defendant suit property being *Kakuzi/Kirimiri Block 7/37*. Further, the Plaintiff applied for a Prohibitory Order against the said property awaiting the execution of the Decree. However, several other applications were made wherein the Defendant applied for *Vacation of the Prohibitory Orders* and the suit property was sold to the Interested Party. The Defendant has alleged *fraud* and *misrepresentation* in the vacation of the Prohibitory Orders and later the sale and transfer of the suit property to the Interested Party. It should be noted that the main claim herein is over payment of a *Civil debt*. The suit property was introduced during the execution stage. Therefore the main claim is a settled matter and what is remaining is execution of the Decree in issue.

Since the Court directed that the *Notice of Preliminary Objection* and the instant *Notice of Motion* be canvassed together, this Court will now endeavour to determine the two.

However, the Court will deal with the *Notice of Preliminary Objection* first before embarking on the instant *Notice of Motion*. The Interested Party has raised various grounds in support of its *Notice of Preliminary Objection*. The main one is that there is no pending suit upon which the application dated 2nd February 2017, was premised as the main suit was finalized on 24th May 1995.

The Court will first determine whether what the Interested Party has

raised is a Preliminary Objection as was described in the case of *Mukisa Biscuits Manufacturing Ltd..vs..West End distributors Ltd, Civil appeal no.9 of 1969*, to mean:

“A Preliminary Objection consists of a point of law which has been pleaded or which arise from a clear implication out of Pleadings and which if argued as a preliminary point may dispose of the suit...It cannot be raised if any facts have to be ascertained or if what is sought is an exercise of judicial discretion”.

Further, a *Preliminary Objection* was described in the case of *Oraro...Vs...Mbaja (2005) 1 KLR/41* to mean:-

“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”.

Further in the above stated case the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by the normal rules of evidence”.

In the case of Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu, HCCC No.22 of 1999, 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.”

Therefore, is the **Notice of Preliminary Objection** raised by the Interested Party, a **Preliminary Objection** as described in the Mukisa Biscuits case?

It is evident that a **Preliminary Objection** consists of pure point of law which has been pleaded or arise by clear implications out of the pleadings. The Interested Party has alleged that the main suit herein was concluded on **24th May 1995**, when the Defence was struck out and a **Decree** issued on 24th May 1995. The main suit herein was a pure civil dispute involving claim for payment of a civil debt. It did not involve title to land, use or occupation of the same. Therefore if the main suit is finalized and what is in issue is the execution of the same, the issue of whether an injunction can issue in concluded matter is a point of law which is capable of disposing off the instant application preliminarily. Therefore the Court finds that what has been raised by the Interested Party meets the credential of what amounts to a **Preliminary Objection** as was described in the Mukisa Biscuits case (supra).

Having found that what the Interested Party has raised amount to a **Preliminary Objection** which is capable of disposing the instant application, the Court will now determine whether the said **Preliminary Objection** is merited.

The Interested Party has alleged that there is no pending suit and Order 40 of the Civil Procedure Rules is not applicable. As the Court observed earlier, the main suit herein was a pure civil dispute claiming a civil debt. The matter was concluded and execution proceedings followed. It is only during the execution period that the suit property was introduced. The Defendant/Applicant have alleged that the suit property was transferred to the Interested Party **fraudulently**. Fraud is a serious allegation which cannot be proved through affidavit evidence. It has to be proved by calling of witnesses and cross-examining the said witnesses in a full trial. **Order 40** applies where temporary measures are taken through an award of temporary injunction. It states as follows:-

Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or is wrongfully sold in execution of a decree;

or;

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The matter herein is a concluded matter. If temporary injunction is granted, will the Court re-open the matter by calling witnesses to confirm if there was **fraud** or **misrepresentation** as alluded by the Defendant/Applicant? If the Defendant felt aggrieved by the actions of some of the alleged Directors of the Defendant, it ought to have filed a new **cause of action**, but not to file an application of this nature which has capability of re-opening the suit. However, the claim by the Defendant is totally different from the main suit.

Further, the Court cannot make an order of revocation of a title deed by relying on affidavit evidence. For such an order to be granted, evidence has to be called to support the claims made by the Defendant/Applicant. The Court concurs with the Interested Party that Order 40 cannot be invoked in this matter which is already concluded and there is no pending suit.

Having found that the Defendant/Applicant raises serious issues of **fraud** and **misrepresentation** and which raise a new cause of action which is very different from the main suit herein which is already concluded, the Court finds that the Interested Party's **Preliminary Objection is merited** and upholds the same. The Court further finds that the said **Preliminary Objection is capable of disposing of** the instant **Notice of Motion**. For the above reasons, the Court upholds the Interested Party's **Preliminary Objection** and finds that the Defendant's/Applicant's **Notice of Motion** application dated **2nd February 2017** is **not merited** as it is **frivolous, vexatious, incompetent** and **bad in law**. For the above reasons, the said **application is dismissed entirely with costs to the Interested Party herein**.

Having found that the **Notice of Motion** dated **2nd February 2017** is **bad in law** and having dismissed the same, the Court finds no reasons to determine the merits of that application. If Defendants are aggrieved they should **file a new cause of action** as litigation must come to an end. **Notice of Motion** dated **2nd February 2017** is **dismissed entirely with costs to the Interested Party**.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mrs. Beaco holding brief for Mr. Kamere for Plaintiff/Respondent

Mrs. Beaco for Defendant/Applicant

M/S Kinyua holding brief for Mr. Ndurumo for Interested Party/

Respondent

Esther - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

9/4/2018