



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CONSTITUTIONAL APPLICATION NO. 1377 OF 2016

ROBERT KINUTHIA MUNGAI.....APPLICANT

VERSES

FIKAH ACRES LIMITED.....RESPONDENT

KENYA PLANTERS CO-OPERATIVE UNION LTD....INTERESTED PARTY

RULING

The suit herein was brought in a rather unusual manner. The suit which is a constitutional application was brought by way of Originating Notice of Motion contrary to the provisions of the Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides that such applications be brought by way of a petition. In his Originating Notice of Motion dated 7th November, 2016, the applicant sought among others, the following:

- a. An order that the subordinate courts have no jurisdiction to entertain disputes relating to land as the same is exclusively reserved for the Environment and Land Court.
- b. An order that the subordinate court at Thika lacks jurisdiction to entertain the case that was filed by the respondent against the applicant in the Chief Magistrates Court at Thika, namely, CMCC No. 41 of 2015, FIKAH ACRES LIMITED VS. ROBERT KINUTHIA MUNGAI.
- c. An order that the court does call for the record of the proceedings in THIKA CMCC No. 41 of 2015, FIKAH ACRES LIMITED VS. ROBERT KINUTHIA MUNGAI and make an order or give any direction it considers appropriate for the fair administration of justice.
- d. An order of temporary injunction restraining the respondent from trespassing on, entering, wasting, damaging, alienating, selling, disposing of or in any other manner dealing with all those parcels of land known L.R No. 1363/10-16, 1363/22-28 and 1363/33 (hereinafter referred to as “the suit properties”) pending the hearing and determination of the dispute between the applicant and the interested party over the suit properties which is the subject of Nairobi HCCC No. 542 of 1991 and Nairobi HCCC No. 779 of 2009.
- e. An order that all pending litigation between the applicant, the respondent and the interested party be referred to the Environment and Land Court for hearing and determination.

Together with the Originating Notice of Motion, the applicant filed an application by way of Notice of

Motion dated 7th November, 2016 seeking the following orders:

- a. That the respondent be restrained from trespassing on, entering, wasting, damaging, alienating, selling, disposing of or in any other manner dealing with all those parcels of land known as L.R No. 1363/10-16, 1363/22-28 and 1363/33 (“the suit properties”) pending the hearing and determination of the dispute between the applicant and the interested party over the suit properties which is the subject of Nairobi HCCC No. 542 of 1991 and Nairobi HCCC No. 779 of 2009.
- b. That the court orders dated 19th January, 2015 and 2nd February, 2015 issued in THIKA CMCC No. 41 of 2015 be stayed pending the hearing and determination of the application.
- c. That the court does call for the record of the proceedings in THIKA CMCC No. 41 of 2015 and make any order or give any direction it considers appropriate for the fair administration of justice.

This is the application which is before me for determination.

The applicant’s case:

The applicant’s case as set out in the Originating Notice of Motion and the Notice of Motion before the court is as follows. The applicant has contended that he was at all material times the registered proprietor of a parcel of land known as L.R No. 1363/2 (hereinafter referred to as “the original plot”). The applicant subdivided the original plot into several portions which gave rise to among others the suit properties herein. The applicant had mortgaged the original plot to the interested party to secure a loan that was advanced to the applicant by the interested party. A dispute arose between the applicant and the interested party over the said mortgage and the applicant filed a suit against the interested party, namely, Nairobi HCCC No. 542 of 1991. In that suit, the court restrained the interested party through an order made on 28th February, 1991 from selling, disposing of, alienating or in any other manner interfering with the original plot.

In the year 2009, the interested party filed a suit against the receivers it had appointed over the original plot in Nairobi HCCC No. 779 of 2009. In that suit, the applicant was added as a defendant on 24th June, 2011. The applicant filed its statement of defence and counter-claim against the interested party on 4th April, 2012. The applicant has contended that whereas the interested party terminated its case against the said receivers and withdrew its claim against the applicant in Nairobi HCCC No. 779 of 2009, the applicant’s counter-claim against the interested party in that suit is still pending hearing and determination. The applicant has contended that despite the existence of the injunction order that was issued in Nairobi HCCC No. 542 of 1991 on 28th February, 1991 and further orders that were issued in Nairobi HCCC No. 779 of 2009, the interested party caused the parcels of land which arose from the subdivision of the original plot to be transferred to its name on 7th August, 2014. The interested party subsequently transferred the suit properties to the respondent on 19th August, 2014.

The applicant has contended that on 19th January, 2015, the respondent filed a suit against the applicant at the Chief Magistrate’s Court at Thika in THIKA CMCC No. 41 of 2015 and obtained ex parte interim orders of injunction restraining the applicant from trespassing on, entering or interfering with the suit properties. The said orders were extended on 2nd February, 2015 up to 3rd March, 2015. The applicant has contended that the Chief Magistrate’s Court at Thika had no jurisdiction to determine the dispute between the applicant and the respondent over the suit properties. The applicant has contended that the value of the suit properties is in excess of Kshs. 80,000,000/- and as such beyond the pecuniary jurisdiction of the Chief Magistrate’s court. The applicant has contended further that the subject matter of the dispute between the applicant and the respondent being land, the Chief Magistrate had no jurisdiction to determine the dispute such jurisdiction having been conferred exclusively upon the Environment and Land Court by the Constitution of Kenya, 2010. The applicant has contended that since the dispute between the applicant and the interested party over the suit properties is still pending determination before the court, the respondent which derived its titles over the suit properties from the interested party cannot claim to have a good title over the said properties. The applicant has contended that the respondent filed THIKA CMCC No. 41 of 2015 and obtained the said ex parte orders with the intention of defeating justice.

The respondent's and the interested party's cases:

The applicant's application was opposed by the respondent and the interested party. The interested party filed a Notice of Preliminary Objection dated 18th January, 2017. In its preliminary objection, the interested party has contended that the application is *res judicata*. The interested party has contended that the issues raised in the application had been raised and determined by Odunga J. in a ruling that was delivered on 1st February, 2016 in Nairobi HCCC No. 779 of 2009. On its part, the respondent opposed the application through a replying affidavit sworn by Stephen Gitau Kinene, the respondent's general manager. The respondent has contended that it is the registered owner of the suit properties having purchased the same from the interested party for valuable consideration. The respondent has contended that the applicant has concealed material facts to the court. The respondent contended that the applicant has not disclosed to the court the fact that he defaulted in the repayment of the loan that was advanced to him by the interested party as a result of which it entered into a settlement agreement with the interested party on 23rd November, 1998. The respondent has contended that under the said agreement, the applicant who had subdivided the original plot into thirty (30) portions agreed that some of the portions of the original plot be discharged and released to the applicant and the others be transferred to the interested party in settlement of the applicant's indebtedness to the interested party. The respondent has contended that the suit properties were amongst the parcels of land that were assigned by the applicant to the interested party in settlement of the debt he owed to the interested party. The applicant has contended that the suit properties were available to the interested party for disposal to the respondent by way of sale without any reference to the applicant. The respondent has contended that following an agreement for sale between it and the interested party, it paid to the interested party the purchase price in full after which the interested party executed conveyance of the suit properties in its favour which were registered on 21st August, 2014.

The respondent has contended that the applicant concealed to the court the fact that he had brought a similar application for injunction in Nairobi HCCC No. 779 of 2009 which was dismissed by Odunga J. on 2nd February, 2014 for among others, non-disclosure of material facts. The respondent has contended that the issues raised herein by the applicant were considered and determined by Odunga J. in the said ruling. The respondent has contended that the application herein is *res judicata*. The respondent has contended that the applicant's application is an abuse of the process of the court and should be struck out. The respondent has contended that THIKA CMCC No. 41 of 2015 on which these proceedings are grounded has been wholly withdrawn. The respondent has contended that the substratum of the constitutional application on which the present application is based has been lost with the withdrawal of the said case and as such the continuation of the proceedings herein is untenable.

The analysis and determination:

The application was argued by way of written submissions. I have considered the application together with the affidavit in support thereof. I have also considered the respondent's replying affidavit and the interested party's Notice of Preliminary Objection in opposition to the application. Finally, I have considered the written submissions by the parties' respective advocates and the authorities that were cited in support thereof.

From the material on record, I am of the view that prayers 4 and 5 of the applicant's application have been overtaken by events. There is uncontroverted evidence before the court showing that THIKA CMCC No. 41 of 2015 has been wholly withdrawn. It is not necessary in the circumstances to stay the suit or to call for the record of the same in exercise of this court's supervisory jurisdiction. What is left for determination by this court is the applicant's prayer for a temporary injunction pending the hearing of Nairobi HCCC No. 542 of 1991 and Nairobi HCCC No. 779 of 2009.

The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury

which would not be adequately compensated by an award of damages. It was held further in that case that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and went further to state as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

As I have stated at the beginning of this ruling, this is a rather strange case. The suit was instituted as a constitutional application by way of an Originating Notice of Motion. I have not appreciated the rationale behind the applicant’s choice of a constitutional application as a way of seeking the reliefs set out in the Originating Notice of Motion. I have not discerned any constitutional issue in the dispute before me which relates to land ownership. The main issue raised in the Originating Notice of Motion concerns the jurisdiction of the Chief Magistrate’s Court to entertain THIKA CMCC No. 41 of 2015. As I have stated earlier, that suit has been withdrawn and as such nothing turns on the reliefs sought in respect thereof. In any event, I don’t think that a constitutional application was the most appropriate procedure to challenge the jurisdiction of the Chief Magistrates Court. I am of the view that the issue of jurisdiction should have been raised in the first instance before the Chief Magistrate. It was after the Chief Magistrate’s Court had determined the issue that a party who was dissatisfied could move to this court on appeal or through judicial review. In the event that the Chief Magistrate’s Court had declined to determine the issue of its jurisdiction which I am not satisfied was the case herein, this court could still be moved to issue an order of mandamus compelling it to do so.

I wish also to state that I am unable to see any relationship between the Originating Notice of Motion and the application for injunction before me. As indicated in prayer 4 of the Originating Notice of Motion and prayer 3 of the Notice of Motion, the temporary injunction is sought pending the hearing and determination of Nairobi HCCC No. 542 of 1991 and Nairobi HCCC No. 779 of 2009. The temporary injunction is not sought pending the hearing and determination of the Originating Notice of Motion. For the court to determine whether or not to grant the injunction sought, the court has to consider the merit of the applicant’s claims in Nairobi HCCC No. 542 of 1991 and Nairobi HCCC No. 779 of 2009. This court is not seized these cases. I am of the view that it is not open for the applicant to institute a new suit seeking a temporary injunction pending the hearing and determination of an existing suit. The present application is contrary to the established rules of procedure and substantive law on temporary injunctions.

The applicant has contended that it had sought and obtained a temporary injunction in Nairobi HCCC No. 542 of 1991. The applicant has not explained why it has become necessary to seek another injunction pending the hearing and determination of that case.

I have also noted that the applicant had sought a temporary injunction against the respondent and the interested party in Nairobi HCCC No. 779 of 2009 in respect of the suit properties. The application was heard by Odunga J. who struck out the same on 1st February, 2016 as an abuse of the court process. The court found that the applicant had concealed material facts to the court and as such was not deserving of equitable relief. The court also found that the applicant had benefited from the agreement dated 23rd November, 1998 which he sought to challenge in Nairobi HCCC No. 779 of 2009 and as such it would have been inequitable to grant an injunction to the applicant.

The applicant did not learn any lesson from the said decision of Odunga J. In the present application, the applicant had once again concealed to the court the fact that he had made an injunction application in Nairobi HCCC No. 779 of 2009 against the respondent and the interested party which was struck out with costs. I am in agreement with the respondent and the interested party that the grounds upon which the applicant had sought injunction in Nairobi HCCC No. 779 of 2009 are the same ones that have been put forward in support of the present application. It is my finding that the present application is *res judicata* and that the applicant is guilty of concealment of material facts which should disentitle him to the orders sought.

The upshot of the foregoing is that the application dated 7th November, 2016 has no merit. The application is dismissed with costs to the respondent and the interested party.

Dated and Delivered at Nairobi this 5th day of April 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Chege for the Applicant

Mr. Ondabu holding brief for Njenga for the Respondent

Mr. Ondabu holding brief for Kairu for the Interested Party

Catherine Court Assistant