



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC N. 31 OF 2018

NGAGA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

TERESA KWAMBOKA ISANDA.....1ST DEFENDANT

JOSHUA MIREGWA.....2ND DEFENDANT

LYDIA MORAA.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 9th February 2018 brought by way of Notice of Motion by the plaintiff /applicant seeking for orders of temporary injunction restraining the defendants from interfering with the plaintiff's quiet possession and ownership of parcel NO. 9230/6 (original Number 9230/3 pending the hearing and determination of this suit. The applicant further sought for eviction of the defendants from the suit land and in the alternative entry of summary judgment.

Before the hearing of this application, the plaintiff filed a notice of preliminary objection dated 28th March 2018 seeking to strike out paragraphs 4 to 26 and annexures of the 1st defendant's replying affidavit and that the court does not have jurisdiction to deal with the matters deponed to. It also sought to declare that the defendants do not have locus standi to claim on behalf of Peter Opande (deceased).

I will therefore dispose of the preliminary objection before I deal with any other issue. Counsel submitted that the respondents filed a replying affidavit whereby they relied on a suit that was filed in Nairobi Vide Milimani High Court Commercial Case No 796 of 2009 whereby the plaintiff sued one Peter Opande (now deceased) whom he stated that was the father of the 2nd and 3rd defendants and a husband to the 1st defendant.

Counsel submitted that he had issues with the reliance on the above case as the defendants are not parties to the suit and that they have only filed a death certificate and not letters of administration. He further submitted that the Nairobi HCC No 796 of 2009 has abated due to the death of defendant one Peter Opande who had filed a counterclaim seeking for specific performance.

Counsel urged the court to strike out the replying affidavit and allow the application as prayed.

In response to the preliminary objection Counsel for the defendants submitted that the replying affidavit is properly on record as it lays a background to this case which he stated has been brought in bad faith. Counsel submitted that the defendants are wife and children of the deceased Peter Opande who are in occupation of the suit land since 2005 when Peter Opande entered into an agreement for purchase of 50 acres. He stated that it is not in dispute that the plaintiff is the registered owner of the suit land but the defendants are currently in possession.

Mr. Analo submitted that the plaintiff did not disclose to the court that there is in existence HCCC No 796 of 2009 which is still pending before the court in Nairobi Milimani Commercial Court whereby the plaintiff sought similar orders for eviction of Peter Opande and rescission of the sale agreement.

Analysis and determination

I find that the replying affidavit is proper before the court as the issues raised are public which can be ascertained by looking at the court file No 796/ 09. It is within the knowledge of the deponent and does not amount to hearsay. The deponent has also annexed copies of the plaint and the defence to help the court in the determination of the real issues.

On the issue of the court lacking jurisdiction to deal with the issues raised, I wonder whether Counsel wants to oust the jurisdiction of the court to hear the whole matter or only the issues raised in the affidavit. If that is the case then the court would happily down its tools because

there is a similar matter which is sub judice seeking for the same orders of injunction and eviction of the defendants.

On the second limb of the preliminary objection that the respondents do not have locus to claim on behalf of the late Peter Opande, I wish to state that Counsel is shooting himself on the foot as he has admitted in his submission that the defendants are wife and children of the deceased Peter Opande. It therefore follows that the plaintiff should sue them as the administrators of the late Peter Opande who gave them possession by virtue of the purchase agreement that he entered into with the plaintiff as confirmed by the annexed sale agreement. I will not say much on that issue.

I therefore find that the preliminary objection is misplaced and is dismissed with costs to the defendants.

Having sorted out the issue of preliminary objection, I now embark on the issue of the application for injunction and eviction. Counsel for the plaintiff/applicant submitted that the applicant is the registered owner of the suit land of which they annexed a copy of certificate of title. It was further Counsel's submission that the plaintiff has given notices to the defendants to vacate but they have been adamant.

Mr Njenga submitted that the defendants have relied on a suit No. Milimani commercial Case No 796 of 2009 which he stated does not relate to the current case. Counsel for the defendants submitted that the case is brought in bad faith as the plaintiff has realized that Peter Opande is deceased.

It was defendant's Counsel's submission as stated above that there is a pending suit seeking for the same orders in Nairobi High Court which has not yet been determined and that the defendants have been in occupation since 2005 when the purchase was done. He submitted that it is the respondents who will suffer injury and loss if the injunction is granted as they are in possession. The balance of convenience tilts in favour of the defendants.

The plaintiff seeks for a temporary injunction, eviction orders and summary judgment in this application. I will start by saying that the plaintiff cannot expect the court to grant eviction orders in an interlocutory application where the suit has not been heard. The prayer for eviction at an interlocutory stage therefore fails.

The next issue is whether the plaintiff's prayer for summary judgment is tenable. Looking at the case and the pleadings filed herein, this is not a clear-cut case where the court would enter summary judgment. Do you enter summary judgment for eviction, general damages and an injunction to restrain the defendants? Even if the defendants did not enter appearance after service of summons and interlocutory judgment was entered, the plaintiff is still under a duty to formally prove his case which can either be granted or dismissed. This limb of the application also collapses.

The last is as to whether the plaintiff has a prima facie case with a probability of success against the defendants. From the affidavits and the submissions of Counsel it is clear that this is a case where even though the plaintiff has annexed a copy of the title in his name, he admits in the plaint and the supporting affidavit that the defendants are in occupation. Granting an injunction in a situation where the defendant is in occupation amounts to an eviction order at an interlocutory stage. This would cause irreparable harm to the defendants who have been in occupation since 2005.

This is reinforced by the evidence in the annexed plaint filed in 2009 seeking to evict the late Peter Opande whom has been admitted by the plaintiff to be the husband and father of the defendants.

The threshold for grant of temporary injunctions are well settled and in this current case the plaintiff has not met the ingredients for such orders. There is a cloud over the case HCCC No 796 of 2009 which the plaintiff is trying to shy away from. Counsel submitted that it has abated due to the death of the defendant as the defendant had sought for specific performance. Isn't it the plaintiff who filed the suit against the defendant and has that case been marked as abated? If it has abated, what is the next cause of action? If it has not abated and the defendant is deceased, do you abandon that case and file another or you cite the administrators of the estate of the deceased if the suit survives him? There are clear laid down procedures to be followed and adhered to in such cases. I will not deliberate on that as we are dealing with an application for temporary injunction.

I find that the application lacks merit and is therefore dismissed with costs to the defendant/respondents.

Dated and delivered at Eldoret this 12th day of July, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Suter holding brief for Mr. Njenga for Plaintiff/Applicant and in the absence of Kidiavayi for Defendant/Respondent.

Mr. Koech – Court Assistant.