



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 58 OF 2008

GERALD KIGOJI RUKARIA & 15 OTHERSPLAINTIFFS

VERSUS

MATUMAINI VENTURES LIMITED1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED2ND DEFENDANT

GACHIRI KARIUKI3RD DEFENDANT

AND

JACK LIU.....1ST AFFECTED PARTY

BMW PRECAST HOUSING DEV. LTD.....2ND AFFECTED PARTY

RULING

1. In the Application dated 14th December, 2016, the “Affected Parties” are seeking for the following orders:

a. This Honourable Court be pleased to set aside, vary, vacate, stay, discharge, review and or rescind the orders issued in this matter on the 31st day of August, 2016.

b. And or in the alternative and for as long the said orders subsists, this Honourable Court be pleased to order the Plaintiffs to deposit the security in court in case in the sum of Kenya Shillings Two Billion (Kshs. 2,000,000,000.00) being value of the proposed development on the said property including projected return on investment projected by the Affected Parties.

c. This Honourable Court be pleased to grant or issue any other and or further orders suitable and just to forestall any further actions by the Plaintiffs whose affect may adversely and or grossly affect the Affected Parties’ quiet possession and development of the suit land.

d. Costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Affected Party who has deponed that he is the 2nd Affected Party’s Director; that on 15th January, 2015, the 2nd Affected Party entered into an agreement for the purchase of land known as L.R. No. 15324 at a total cost of Kshs. 122,000,000 and that the land had been acquired by Edward Jason Wanjehi who had acquired it from the 2nd Defendant.

3. It is the 1st Affected Party's deposition that he is an innocent purchaser for value; that he was not aware of the dispute between the Plaintiffs and the Defendants and that the 2nd Affected Party acquired the suit land for the purpose of putting up 1000 houses which project is at an advanced stage.
4. The Applicants have deponed that as at the time the Plaintiffs obtained the orders, they did not disclose to the court that there was an ongoing project on the land; that the Plaintiffs' earlier Applications for injunctive orders were declined by the court and that the Plaintiffs have not even enjoined the Affected Parties in the suit.
5. In reply, the 1st Defendant deponed that as at the date of the Sale Agreement of 15th January, 2015, the suit land was already the subject matter of this suit; that there is no evidence that the 2nd Defendant passed to Edward Jason a clean title and that in its Amended Defence, the 2nd Defendant alleged that it had passed title to the 1st Defendant and therefore had no title to pass to a third party.
6. It is the Plaintiffs' case that as at the time of the alleged sale, there was a caveat which had been ordered to remain in place by an order of the court dated 18th February, 2011 and that the said order was served on the 2nd Defendant.
7. According to the Plaintiffs, the Application of 12th August, 2016 was based on an apprehension that the land was being disposed; that the Plaintiffs will demonstrate that the beneficiaries of the alleged sale are Samuel Kimani and John Mburu advocate and that the agreement alludes to the fact that the Vendor is not engaged or threatened by any litigation which is not true.
8. The 1st Plaintiff deponed that the advocate on record for the Affected Parties was also acting for the Vendor in the Sale Agreement of 11th January, 2015; that the 2nd Affected Party was aware of this suit and that one Edward Jason is phantom raised by the 3rd Defendant to cloud the issues herein.
9. On 27th April, 2017, the Affected Parties herein filed a Notice of Preliminary Objection in which they averred that the Application of 12th August, 2016 is *res judicata*.
10. A partner in the 3rd Defendant's firm deponed that the Plaintiffs have numerously brought similar Applications in this court; that the court declined to issue orders of injunction; that Mr. Jack Liu is not a party in these proceedings and that the Application should be dismissed.
11. In his submissions, the Affected Parties' advocate submitted that the orders of this court were issued without affording the Applicants an opportunity to be heard and that the injustice visited on the Applicants should be removed.
12. In his submissions, the 3rd Defendant's advocate submitted that the Affected Parties should have been joined in the suit first before the orders were granted and that allowing the order to subsist and having been reached without involving the affected parties is tantamount to fanning a prevailing injustice.
13. This is one of those matters which, despite the numerous orders of the court, the parties have not set down for hearing. Instead, they have kept on filing one Application after the other, with the result that the suit property has now been sold to a third party (*the Affected Parties*).
14. The record shows that together with the Plaintiff, the Plaintiffs filed an Application dated 14th May, 2008 seeking for injunctive orders as against the 2nd Defendant in respect to the suit property.
15. In his Ruling of 12th May, 2009, Lenaola J (*as he was then*) dismissed the Plaintiffs' Application. In his Ruling, the Judge held that the Plaintiffs' remedy lies in a refund of their money and in damages.
16. The Plaintiffs then filed a Notice of Appeal on 14th May, 2009. The Appeal has never been

prosecuted to date. After amending their Complaint, the Plaintiffs filed another Application dated 4th September, 2012 seeking for injunctive orders restraining the Defendants from transferring the suit land to a third party pending the hearing of the suit.

17. On 6th February, 2014, Thurania J dismissed the said Application and observed as follows:

“Indeed, the suit has been the subject of many Applications. Taking into account the Ruling by Hon. Lenaola J, made on 12th May, 2009 which Ruling stands to date, the Plaintiffs ought to move to fix the case for the hearing of the main suit...”

18. When the Plaintiffs filed in this court the Application dated 12th August, 2016 seeking for injunctive orders, they were aware that the suit land had been sold to the Affected Parties.

19. I say so because on the face of the Application, the Plaintiffs averred as follows:

“The Applicants have learnt that the 1st and 2nd Respondents have despite their Defences on record denying ownership of the land purportedly alienated to one Jack Liu the suit land...”

20. However, the Plaintiffs did not seek to enjoin the Affected Parties herein before seeking the orders of injunction.

21. Considering that the Plaintiffs’ two Applications for injunctive orders had been dismissed by the court, and in view of the fact that there was no order of the court restraining the Defendants from selling the property, the Plaintiffs should have sought the leave of the court to bring the new parties on board before seeking for any adverse order as against them. That is what the rules of natural justice, and the right to a fair hearing is all about.

22. In the circumstances, I am in agreement with the submissions of the Applicants that the orders of 31st August, 2016 should not have been issued before hearing the Affected Parties.

23. For those reasons, I allow the Affected Parties’ Application dated 14th December, 2016 in the following terms:

a. The orders of this court issued on 31st August, 2016 be and are hereby set aside.

b. The Plaintiffs shall pay the costs of this Application.

c. The Plaintiffs to fix this matter for hearing on a priority basis.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF JULY, 2017.

O.A. ANGOTE

JUDGE