



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC.NO.1404 OF 2013

JOEL OKEROSI OCHAKO.....PLAINTIFF/APPLICANT

-VERSUS-

AFRICAN INDEPENDENT PENTECOSTAL

CHURCH OF AFRICA1st DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF KAJIADO.....2nd DEFENDANT/RESPONDENT

DAVID K KASIRIMO.....3rd DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff/Applicant's *Amended Notice of Motion* dated *15th May 2014*, together with a *Preliminary Objection* dated *15th September 2015*, filed by the 2nd Defendant/Respondent herein.

In the *Amended Notice of Motion* the Plaintiff/Applicant, *Joel Okerosi Ochako* has sought for various orders. The orders sought are:-

i. Spent.

ii. Spent.

iii. That a permanent injunction does issue against the Defendants, their agents, servants and/or employees and/or anyone claiming under them from entering, selling, transferring, trespassing, alienating and/or developing any further upon the Plaintiff's Plot No.2386/Residential-Noonkopir Trading Centre, Kitengela, pending the hearing and determination of the Plaintiff's suit.

iv. That the Officer Commanding Kitengela Police Station to ensure compliance of the above orders peace and tranquility.

v. That the cost of this application be provided for.

The application is premised on the grounds stated on the face of the

application and on the **Supporting Affidavit** of **Joel Okerosi Ochako**, the Plaintiff herein. These grounds are:-

- a) ***That the Plaintiff is the lawful registered owner of the suit plot whereas the 1st Defendant is not.***
- b) ***That the 1st Defendant has without any lawful cause and or authority of the Plaintiff trespassed upon the suit land and commenced thereon.***
- c) ***That unless the Defendants are restrained by this Honourable court from continuing with the illegal trespass, invasion and construction upon the suit land the Plaintiff stands to suffer irreparable loss and damage.***

In his **Supporting Affidavit**, the Plaintiff/Applicant alleged that he is the registered owner of **Plot No.2386/Residential-Noonkopir Trading Centre** situated at **Kitengela, Kajiado County**, which he **purchased** from the original owner on **31st July 2007**. It was his further averment that the said previous owner had identified the boundaries and the beacons of the said land to the Plaintiff/Applicant and thereafter the Plaintiff/Applicant took possession and ownership of the said land. He also alleged that he has continued to pay land rates to the **County Government of Kajiado** and he has also had peaceful possession of the said land. He had even dug a pit latrine at the corner of the plot. However, in **November 2013**, the 1st Defendant/Respondent invaded the said land and started constructing on it. It was his contention that the 1st Defendant/Respondent should not be allowed to occupy the said plot and he urged the Court to restrain the Defendants/Respondents from carrying the unlawful actions of trespass and construction on his suit land. The Plaintiff/Applicant has urged the Court to allow his application.

The application is **opposed** by the 1st Defendant/Respondent who responded vide the **Replying Affidavit** filed by **Peter Njaramba Maragua**, the Chairman of the 1st Defendant. He averred that the 1st Defendant/Respondent is the registered owner of **Plot NO.419 Residential – Noonkopir Trading Centre** situated at **Kitengela**, which it **purchased** on **17th June 2013**, from the beneficial owner **Paul Gitau**, who had acquired the said property from the **original allottee, Mr. Moses Sempuimaato** as is evident from annexures **PMN 1, 2 & 3**.

It was his further averment that the 1st Defendant/Respondent is an innocent purchaser for value and acquired the said parcel of land legally and had the same transferred to it after paying the requisite fee. Further, that it has been paying the **Land Rates** to the **County Government of Kajiado**. The deponent reiterated that the 1st Defendant/Respondent is the rightful owner of the suit land or **Plot No.419 Residential Noonkopir Trading Centre**. He also averred that the parcels of land referred to are different being **Plot No.2386 Residential Noonkopir Trading Centre** and **Plot no.419 Residential Noonkopir Trading Centre** and such an order of injunction cannot issue as it would be difficult to enforce the same as the plots have different numbers. He urged the Court to dismiss the Plaintiff's/Applicant's application.

The 2nd Defendant/Respondent, **County Government of Kajiado** raised a **Preliminary Objection** on the following grounds:-

- 1) ***That the suit herein as drawn and filed is hopelessly misconceived, frivolous, totally devoid of merit and incompetent for want of compliance with the mandatory provisions of the law, specifically Order 3 Rule 2(d), Order 4 Rule 5 and Order 1 Rule 3 of the Civil Procedure Rules 2010.***
- 2) ***That the Applicant has no cause of action against the 2nd Defendant/Respondent as he has not identified his right to relief as against the 2nd Defendant/Respondent in respect to the suit property and there is nothing to show that the reliefs which he seeks cannot be enforced without***

the 2nd Respondent's participation in the suit.

3) *That when the correct party to be sued is known no purpose is served by letting the wrong party (2nd Defendant/Respondent) remain on record and the Applicant cannot be allowed to vex the 2nd Defendant with litigation.*

4) *That the application as drawn and filed does not disclose any joint facts or material issues in commonality to the Respondents with respect to the alleged infringement of Applicant's property and/or the reliefs sought.*

The 2nd Defendant/Respondent prayed that the suit against the 2nd Defendant/Respondent be dismissed.

The Court directed that both the **Amended Notice of Motion** dated 15th May 2014, and the **Preliminary Objection** raised by the 2nd Defendant/Respondent be **canvassed together** by way of **Written Submissions**. The parties complied with the Court directive and filed their respective Written Submissions.

This Court has now carefully considered the instant **Notice of Motion** and the annexures thereto. The Court has also considered the **Notice of Preliminary Objection** and the **Written Submissions** and renders itself as follow;

The Court will first determine the Notice of Preliminary Objection before embarking on determination of the Amended Notice of Motion.

Before dealing with the merit of the Preliminary Objection, the Court will first determine whether what has been raised by the 2nd Defendant/Respondent is a Preliminary Objection which is capable of determining the matter to a finality. **Preliminary Objection** was **described** in the case of **Mukisa Biscuit Manufacturing Ltd...Vs...West End Distributors Ltd (1969) EA 697**,

“A Preliminary Objection is in the nature of what used to be called demurrer. It raises pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse issues”.

Further, Preliminary Objection should be capable of disposing off the

matter. See the case of **Quick Enterprises Ltd...Vs...Kenya Railways Corporation. Kisumu High Court, Civil Case No.22 of 1999**, where the Court held that:-

“when Preliminary Points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings”.

Further, as the Court embarks on determining whether the issues raised meet the criteria of what a Preliminary Objection is, the Court will also take into account that striking out a suit is a drastic remedy which should only be invoked in plain and obvious cases. See the case of **Nitin Properties Ltd...Vs...Jagjit Singh Kalsi & Another, Civil Appeal No.132 of 1989**, where the Court held that:-

“Striking out is a drastic remedy and can be invoked only in plain and obvious cases and the jurisdiction must be exercised with extreme caution.”

The Court has considered the points raised in the Preliminary Objection and they all stem from the pleadings and one would not require to ascertain any facts. Further, if the Court is to find and hold that the suit is frivolous and misconceived, then the same is capable of disposing of the whole suit. The issues

raised therefore are pure points of law and the Court finds that the objection herein meets the criteria for what a Preliminary Objection is as described in the *Mukisa Biscuits case*.

The next question is whether the said Preliminary Objection is merited. The 2nd Defendant/Respondent has alleged that the Plaintiff/Applicant has failed to comply with mandatory provisions of law specifically Order 3 Rule 2(d) which deals with the documents to accompany a suit. Order 4 Rule 5 which provides that a Plaintiff shall show the Defendant is or claim to be interested in the subject matter and Order 1 Rule 3 deals with who may be joined as Defendants.

On the issue of Order 3 Rule 2, the Court finds that this matter is still at the interlocutory stage. The pre-trial directions have not been taken. The documents allegedly left out by the Plaintiff/Applicant can still be filed before the pre-trial directions are taken.

On whether the Plaintiff/Applicant has any cause of action against the 2nd Defendant/Respondent, this Court finds that the Plaintiff/Applicant has alleged that he has been paying land rates to the 2nd Defendant/Respondent. The Court finds that it would be proper to allow the Plaintiff/applicant to advance his case in a full trial instead of driving him away from the seat of justice. The Court, in the case of *Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, held that:-

“The right to be heard is a fundamental right which cannot be easily taken away unless there are compelling reasons to warrant such a situation”.

This Court after careful consideration of the Preliminary Objection raised

by the 2nd Defendant/Respondent finds that failure to comply with the stated provisions of the Civil Procedure Rules is not fatal to the suit as that is capable of being cured by amendments or filing of further documents. For the above reasons, the Court finds the ***Notice of Preliminary Objection*** dated ***15th September 2015***, by the 2nd Defendant/Respondent is ***not merited***. The same is dismissed ***entirely with costs in the cause***.

The Court now turns to the ***Amended Notice of Motion*** where the Applicant has sought for a permanent injunction against the Defendants. The Court will be guided by the principles set out in the case of *Giella ..Vs...Cassman Brown Co.Ltd 1973 EA 358*, and these principles are:-

- a) ***The Applicant must establish that he has a prima facie case with probability of success.***
- b) ***That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) ***When the Court is in doubt, to decide the case on a balance of convenience.***

First, the Court will determine whether the Plaintiff/Applicant has a *prima-facie* case with probability of success. The Plaintiff/Applicant has alleged that the 1st Defendant has encroached on its suit property ***Plot No.2386/Residential-Noonkopir Trading Centre***, which he purchased from ***David Kimiti Kasirimo*** on ***31st July 2007*** as evident from the ***Sale Agreement*** annexure ***JO01***.

However, the 1st Defendant/Respondent has alleged that it is occupying its parcel of land being ***LR.No.419/Residential Noonkopir Trading Centre***, which it purchased from ***Daniel Gitau Karanja*** as is evident from the ***Sale Agreement PNM1***.

From the documents produced by the Plaintiff/Applicant and the 1st Defendant/Respondent, they own two different and distinct parcels of land at ***Noonkopir Trading Centre***. The Plaintiff/Applicant is the one who has alleged and therefore he had a duty to prove that indeed the Defendants/Respondents have

encroached on **Plot No.LR.2386 Residential- Noonkopir Trading Centre** and not **LR.No.419/Residential Noonkopir Trading Centre** as alleged by the 1st Defendant/Respondent. The Court therefore finds that without admission from the 1st Defendant/Respondent that it is occupying **Plot No.2386** as alleged by the Plaintiff/Applicant, the Plaintiff has not established that he has a prima-facie case with probability of success.

Though the Plaintiff/Applicant alleged that he purchased the suit plot in the **year 2007**, he has not been in occupation of the suit plot. He has not put any development on it apart from the alleged pit-latrine. The suit plot can be valued and quantified. Therefore the Plaintiff/Applicant cannot allege that the loss he might incur is not capable of being compensated by any award of damages. See the case of **Wairimu Mureithi..Vs..City Council of Nairobi, Civil**

Appeal No.5 of 1979(1981) KLR 322, the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

Having found that the Plaintiff/Applicant has failed to establish the 1st and 2nd limbs in **Giella’s case**, the Court finds no reason to deal with the 3rd limb of balance of convenience.

This Court finds that the issues raised by the Plaintiff/Applicant herein can only be adequately dealt with in a full trial wherein he will have an opportunity to avail his witnesses especially the surveyor who would shed light on whether the plot the Plaintiff/Applicant is referring to is **LR.No.2386/Residential-Noonkopir Trading Centre** or **LR.No.419/Residential Noonkopir Trading Centre** as claimed by the 1st Defendant/Respondent.

The upshot of the foregoing is that the Plaintiff/Applicant’s **Amended Notice of Motion** dated **15th May 2014**, is **not merited**. The said application is **dismissed entirely with costs in the cause**.

Further, the Court directs the parties to prepare the suit for hearing and comply with Order 11 within the next 60 days from the date of this Ruling. The suit property herein **falls** within the **jurisdiction of Kajiado, Environment and Land Court**. The file herein to be **transferred** forthwith to **Kajiado,**

Environment and Land Court for final hearing and determination of this suit.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this **31st** day of **August, 2017**.

L. GACHERU

JUDGE

31/8/2017

In the presence of

No appearance for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

Mr. Mwalimu holding brief for Mr. Mutomi for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017