



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C CASE NO. 278 OF 2017**

**SAFARICOM LIMITED.....PLAINTIFF/APPLICANT**

**-VS-**

- 1. JOSENGA COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**
- 2. SABINA GITHINA.....2<sup>ND</sup> RESPONDENT**
- 3. PUNDA MILIA CO-OPERATIVE SOCIETY LIMITED....3<sup>RD</sup> RESPONDENT**
- 4. THE LAND REGISTRAR, MURANGÁ.....4<sup>TH</sup> RESPONDENT**
- 5. ROBERT KIMANI NDUNGU.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Plaint dated 4/2/2015 filed in the Environment and Land at Nyeri, the Plaintiff prays for the following orders against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants:-

- a) Temporary injunction do issue restraining the Defendants, their servants, agents, members, employees or any other persons acting at their behest from threatening the Plaintiff, its servants, employees and/or agents or in any way interfering with or impeding the Plaintiff's access to its Base Transmitter Station and right of way over land known as land Title Number MAKUYU/MAKUYU/BLOCK 1/5993.
- b) Costs of the suit herein.
- c) Any other or further relief that the court may deem appropriate to grant.

2. On application and order of the Court dated the 27/7/2016, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were enjoined in the suit. The Plaintiff has not amended its Plaint to seek any relief against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

3. On 14/11/2016, the 2<sup>nd</sup> Defendant filed her Statement of Defence, Counter-Claim and Cross- Claim. In the Counter-Claim and Cross-Claim, the 2<sup>nd</sup> Defendant alleges that the Plaintiff and the 1<sup>st</sup> Defendant illegally and fraudulently acquired title to land Title Number MAKUYU/MAKUYU/BLOCK 1/5993 which is right within her land Title Number MAKUYU/MAKUYU/BLOCK 1/5992 and sought the following orders:-

Against the Plaintiff;

- a) A declaration that land Title Number MAKUYU/MAKUYU/BLOCK 1/5993 was illegally created from parcel No. Title Number MAKUYU/MAKUYU/BLOCK 1/5992 and as such the lease between the Plaintiff and the 1<sup>st</sup> Defendant is null and void.
- b) Mesne profits amounting to the equivalent of what is payable under the current lease agreement from the year 2004 to-date.
- c) Costs of the Counter-Claim.
- d) Any other further relief that the court may deem fit to grant.

Against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants:-

- a) A declaration that land Title Number MAKUYU/MAKUYU/BLOCK 1/5993 was illegally created from parcel land Title Number MAKUYU/MAKUYU/BLOCK 1/5992 and as such the lease between the Plaintiff and the 1<sup>st</sup> Defendant is null and void.
- b) The 4<sup>th</sup> Defendant is ordered to rectify the map to reflect cancellation of land Title Number MAKUYU/MAKUYU/BLOCK 1/5993.
- c) The 1<sup>st</sup> Defendant is ordered to pay the 2<sup>nd</sup> Defendant the amounts illegally acquired from the Plaintiff by dint of the illegal creation of land Title Number MAKUYU/MAKUYU/BLOCK 1/5993 and subsequent lease agreement.
- d) Costs of the Cross-Claim.
- e) Any other relief that the court may deem fit to grant.

4. On 16/12/2016 the 1<sup>st</sup> Defendant filed its Defence to the 1<sup>st</sup> Defendant's Cross-Claim. The 1<sup>st</sup> Defendant denies the 2<sup>nd</sup> Defendant's Claim and in particular that Title Number MAKUYU/MAKUYU/BLOCK 1/5993 is fictitious and hived off from land Title Number MAKUYU/MAKUYU/BLOCK 1/5992.

5. The Plaintiff, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have not filed any defence to the 2<sup>nd</sup> Defendant's Counter-Claim and Cross-Claim.

6. Upon hearing of the Plaintiff's application dated 8/3/2016 the court on 15/4/2016 by consent of the Advocates for the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants made the following orders:-

- a) THAT the 2<sup>nd</sup> Defendant will grant the Plaintiff access to the suit property until the hearing and determination of the suit.
- b) THAT the Plaintiff shall give a 24 hour notice to the 2<sup>nd</sup> Defendant for routine maintenance and an hour notice for emergencies.
- c) THAT the Defendants to comply with Order 7 of the Civil Procedure Rules within 14 days.

7. It is common ground that this consent order binds the Plaintiff, 1<sup>st</sup> & 3<sup>rd</sup> Defendants. Nevertheless, the Plaintiff has alleged that the 2<sup>nd</sup> Defendant has disobeyed the court order and by a Notice of Motion dated 15/3/2017 and filed in court on even date has sought the following orders:-

- a) THAT the 2<sup>nd</sup> Defendant does grant the Plaintiff unrestricted access to the suit property for

purposes of removing the Plaintiff's installations and equipment from its Base Transmitter Station and restoring the land to its condition before the Plaintiff's occupation.

b) THAT the OCPD and/or OCS in charge of Makuyu Police Station to ensure compliance of the access order and where necessary, the Plaintiff to be provided with armed police security for purposes of accessing and removal of its Base Transmission situate on the suit property.

c) The costs of the application are borne by the 2<sup>nd</sup> Defendant.

8. The application is supported by the Affidavit of Daniel Mwenja Ndaba. It is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the grounds set out in the Affidavits of Wanjiru Ngugi and Sabina Githina (2<sup>nd</sup> Defendant filed on 27<sup>th</sup> April and 10<sup>th</sup> April 2017 respectively). The Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants have filed Written Submissions on 19<sup>th</sup>, 25<sup>th</sup> and 29<sup>th</sup> May 2017 respectively. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have not filed any response to the Plaintiff's application.

9. This Ruling relates to the Plaintiff's application described above. In the documents filed by the parties, the following matters are stated:-

a) By a letter dated 27/6/01 addressed to the 3<sup>rd</sup> Defendant the Plaintiff offered to lease part of Title Number Makuyu/Makuyu/Block 1/5308 for the purpose of installing a Base Station for a period of Nine years and Eleven Months.

b) By an agreement dated 22/01/03 the 3<sup>rd</sup> Defendant leased portion of land being part of the land comprised in Title Number Makuyu/Makuyu/Block 1/5308 to the Plaintiff for a period of Nine years and Eleven Months commencing 13/7/01 for the purpose of constructing, installing, maintaining, repairing or altering a telecommunications base station site.

c) By an Agreement for Sale dated 28/1/2004 the 3<sup>rd</sup> Defendant sold three acres described as Farm House excluding Safaricom Booster being a portion of all that piece of land comprised in Title Number Makuyu/Makuyu/Block 1/5308 to the 2<sup>nd</sup> Defendant's late husband CHARLES GITHINA MWANGI.

d) By a letter dated 25/6/2004 the 3<sup>rd</sup> Defendant informed the Plaintiff that Lease of all that piece of land comprised in the land Title Number Makuyu/Makuyu/Block 1/5308 had been subdivided into four portions and that the portion let to the Plaintiff is now Title Number Makuyu/Makuyu/Block 1/5993.

e) By an agreement dated 30/8/2004 the 3<sup>rd</sup> Defendant gave a Supplementary Lease all that piece of land comprised in the land Title Number Makuyu/Makuyu/Block 1/5993 to the Plaintiff. It is stated in the Supplementary Lease that the land described in the preceding sentence is part of the land comprised in the land Title Number Makuyu/Makuyu/Block 1/5308 in respect of which the 3<sup>rd</sup> Defendant had on 22/1/ 2003 given the Plaintiff a lease. It is instructive to note the following statements in the Recitals of the Agreement:-

a) The Agreement is supplemental to that relating to the land Title Number Makuyu/Makuyu/Block 1/5308 (the Old Title).

b) The Landlord wishes to sub-divide the Old Title. As a result, the original Old Title document of the Landlord has to be surrendered on instructions from the Commissioner of Lands.

c) The Landlord (3<sup>rd</sup> Defendant) has requested Safaricom (Plaintiff) to grant a surrender of the lease granted on 22/1/03 by executing a Deed of Surrender to be registered simultaneously with the surrender of the Old Title.

d) A new Title being Title Number Makuyu/Makuyu/Block 1/5993 (the New Title) will be issued to the Landlord (3<sup>rd</sup> Defendant).

10. On 23/9/ 2004 a Title Deed for all that piece of land measuring 0.957 Hectares registered as Title Number Makuyu/Makuyu/Block 1/5992 was issued to the 2<sup>nd</sup> Defendant. It is stated that this sale excluded the Plaintiff's booster. It is alleged to be the larger land being all that parcel of land registered as Title Number MAKUYU/MAKUYU/BLOCK 1/5993 registered in the name of the 1<sup>st</sup> Defendant and leased to the Plaintiff lies.

11. By an Agreement for Sale dated 8/5/13 the 3<sup>rd</sup> Defendant sold all that piece of land comprised in Title Number MAKUYU/MAKUYU/BLOCK 1/5993 to the 1<sup>st</sup> Defendant.

12. On 13/6/2013 the 4<sup>th</sup> Defendant issued a Certificate of Official Search which he indicates that on 23/9/2004 the 3<sup>rd</sup> Defendant was registered as the proprietor of all that piece of land comprised in Title Number Makuyu/Makuyu/Block 1/5993 on which he on 28/9/04 registered a lease to the Plaintiff for six years commencing 13/7/04. This is alleged to be the smaller land leased by the 1<sup>st</sup> Defendant to the Plaintiff and lying inside all that larger parcel of land registered as Title Number MAKUYU/MAKUYU/BLOCK 1/5992 belonging to the 2<sup>nd</sup> Defendant.

13. On 26/7/13 a Title Deed for all that piece of land measuring 0.0256 Hectares registered as Title Number Makuyu/Makuyu/Block 1/5993 was issued to the 1<sup>st</sup> Defendant. This is alleged to be the smaller land leased by the 1<sup>st</sup> Defendant to the Plaintiff and lying inside all that larger parcel of land registered as Title Number MAKUYU/MAKUYU/BLOCK 1/5992 belonging to the 2<sup>nd</sup> Defendant.

14. By an agreement dated 24/10/2013 the 1<sup>st</sup> Defendant leased all that piece of land comprised in Title Number MAKUYU/MAKUYU/BLOCK 1/5993 to the Plaintiff for a period of 15 years commencing 30/06/2013 for the purpose of erecting a Base Transceiver Station.

15. By a Witness Statement filed in court on 14/11/2016 the 2<sup>nd</sup> Defendant states that Mr. E. N. Ngángá is a Director of the 1<sup>st</sup> Defendant and was part of the legal team of the 3<sup>rd</sup> Defendant when the land Title Number MAKUYU/MAKUYU/BLOCK 1/5992 was being sold to the 2<sup>nd</sup> Defendant's late husband by the 3<sup>rd</sup> Defendant and he was opposed to the sale.

16. By a letter dated 21/2/17 terminated the lease between it and the 1<sup>st</sup> Respondent with effect from 21/5/17.

17. Having set out the above chronology I have to examine the effect of the consent order of 15/4/16 stated above. The consent order in respect of the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants have the effect of reserving until the hearing and determination of the suit:-

a) The Plaintiff's right on notice to the 2<sup>nd</sup> Defendant to access the piece of land Title Number MAKUYU/MAKUYU/BLOCK 1/5993 for routine maintenance and emergencies.

b) The Plaintiff's and the 1<sup>st</sup> Defendant's right to continue their Landlord and Tenant relationship on the terms expressed in the Agreement dated 24/10/13 relating to all that piece of land registered Title Number MAKUYU/MAKUYU/BLOCK 1/5993.

c) The 2<sup>nd</sup> Defendant's right (subject to proof) to compensation for any loss or damage suffered by reason of the alleged wrongful actions of the Plaintiff and/or the 1<sup>st</sup> Defendant in respect of all that piece of land registered Title Number MAKUYU/MAKUYU/BLOCK 1/5993.

18. Nevertheless, the Plaintiff has terminated its lease with the 1<sup>st</sup> Defendant with effect from 21/5/17 and

sought to remove its Base Transmission Station from all that piece of land registered Title Number MAKUYU/MAKUYU/BLOCK 1/5993 leased to it by the 1<sup>st</sup> Defendant. The effect of this action is to fundamentally change the substratum of its case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. In the application under consideration, the bone of contention is the purpose (removal of Base Transmission Station) for which the Plaintiff seeks access to the land registered Title Number Makuyu/Makuyu/Block 1/5993 leased to it by the 1<sup>st</sup> Defendant which the 2<sup>nd</sup> Defendant contents is contrary to the consent order.

19. The 2<sup>nd</sup> Defendant contents that it has and will continue to allow access to the Plaintiff as ordered by the court and that it is not open for the Plaintiff to change the terms of the consent order. It is clear that the orders sought by the Plaintiff are a fundamental departure from the consent order.

20. There are unexplained issues touching on the Plaintiff's claim and the 2<sup>nd</sup> Defendant's Counter-Claim. The major cause is the circumstances leading to registration of the land registered as Title Number MAKUYU/MAKUYU/BLOCK 1/5993, leasing of the land to the Plaintiff and the action taken by the Plaintiff when it noticed the land is within the larger Title Number MAKUYU/MAKUYU/BLOCK 1/5992.

21. Upon termination of the lease with the 1<sup>st</sup> Defendant and demand for removal of its Base Transmission Station from the land Title Number MAKUYU/MAKUYU/BLOCK 1/5993, the Plaintiff's case has changed from right of access to the land for maintenance and emergency service. It probably now relates to wrongful detention and/or access for maintenance and emergency service. This would be a variance of the consent order.

22. The grounds for variation of a consent order are set out by the law. These are the same as those which would necessitate setting aside a contract which are; Mistake, Misrepresentation, Frustration etc. The Plaintiff has not established any of these. It is noteworthy that the Plaintiff, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have not filed a defence on the 2<sup>nd</sup> Defendant's claim.

23. In these circumstances, the Plaintiff's application is dismissed with costs payable by the Plaintiff.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2017**

**J.G. KEMEI**

**JUDGE**