**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 351 OF 2015**

**JAMES KIGEN AND**

**JOHANA KIPKORIR KIGEN (Suing as the administrators**

**of the estate of the Late Zakayo Sawe Arap Ngasura).....PLAINTIFFS**

**VERSUS**

**CHINA HANAN INTERNATIONAL COOPERATION GROUP COMPANY LIMITED.....DEFENDANT**

**RULING**

## INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 11th July, 2017 by the defendant/applicant who sought for the following orders:

a) That this application be certified urgent and the same be fixed for hearing on priority basis.

b) The defendant/applicant be and is hereby allowed to access, collect and carry away the 30 tons of ballast blasted and excavated from the 1.5 acres of the land subject of the agreement with the plaintiff/respondents dated 30th October 2014 but stored elsewhere on **L.R NO. MOIBEN/MOIBEN BLOCK 2(SEGERO) 712.**

c) Costs be in the cause.

This application was filed on 11th July 2017 under certificate of urgency by the defendant/applicant who requested for a hearing date for inter parte hearing. The court scheduled the application for hearing on 25/7/17 when both counsels were ready to argue the application.

## Defendant's Counsel's Submissions.

Mr. Kapere Counsel for the defendant/applicant submitted that the defendant is seeking to be allowed access to the suit land to carry away ballast that had been excavated as per the agreement dated 30/10/14. He relied on the grounds on the face of the application and the supporting affidavit. He stated that the ballast was excavated from the 1.5 acres that the court had restricted it to undertake its activities but the same was stored in an adjacent land which the plaintiff has now denied them access.

Counsel submitted that the court had given an order restricting the applicant to undertake its activities on

1.5 acres of the suit land on 25th September 2015 and that as at the time of the court order the applicant had excavated 30 tons of ballast and stored in an adjacent plot. He further submitted that the applicant has run out of ballast and is in need of accessing the stored ballast but the plaintiff has denied access to the applicant.

Mr. Kapere urged the court to note that the projects being undertaken are government projects including four roads which have strict timelines. He stated that from perusal of the replying affidavit on record, he noticed that it is not in dispute that the ballast in question was excavated from the 1.5 acres that the court restricted the applicant to use. He also submitted that the plaintiff has not demonstrated that they will suffer any prejudice if such order is granted.

It is submitted that it is not true that the project for which the agreement was entered into is complete and it is the defendant who can tell the court the state of the projects and completion dates. Counsel stated that the replying affidavit offends order 19 rule 3 of Civil Procedure Rules whereby it states that an affidavit shall be restricted to only those facts within the deponent's knowledge. He submitted that these are government projects and when there is conflict between public interest and individual interest then the public interest prevails. He then urged the court to allow the application as prayed.

**Plaintiff/Respondent's counsel's Submissions**

Plaintiff's Counsel, Mrs. Chumba vehemently opposed the defendant's application. She relied on the replying affidavit filed in court on 11th July 2017. She submitted that the application is not based on any law in the Civil Procedure. Counsel also stated that the issues raised can only be determined in the hearing of the main suit. She further submitted that this case is premised on a lease agreement and allowing the application would be tantamount to entering summary judgement without being heard.

Mrs. Chumba further disputed that the project is a government project even though it is for the benefit of the people of Kenya. She stated that the tender was given to private individuals and there is no document annexed showing that it is a government project. She also submitted that government has its own machinery under Ministry of Public Works.

Counsel took issue with the defendant's assertion that there were other projects that were meant to be undertaken and yet in their defence they only stated Ziwa – Kitale Road. She further submitted that the lease agreement which is subject of this case expired on 30th October 2016 as it was for only 2 years and it has not yet been renewed. Counsel stated that nobody has denied the defendant access, the defendant has refused to renew the lease as they want to gain access to the plaintiff's land through a court order. She submitted that the order will prejudice the plaintiff as the lease has expired and there was no sale agreement. The only way the defendant can access the land is through renewal of the lease.

Mrs. Chumba Counsel for the plaintiff further submitted that the Ziwa - Kitale project was completed in July 2016 and it was a term of the lease agreement that the materials and stones would remain with the lessor upon completion of the project.

Mr. Kapere in a rejoinder submitted that the application is anchored under the law and that the main suit relates to issue of ownership. He urged the court to exercise its inherent jurisdiction to grant the application.

**Analysis and Determination**

This is application by the defendant/ applicant who urges the court to exercise its inherent jurisdiction to grant orders sought. The issues that arise for determination in this application are :

a) Whether the application is proper before the court.

b) Whether the orders sought will be prejudicial to the plaintiff/Respondent and should await the full hearing of the suit.

In response to the first issue as to whether the application is proper before the court, Counsel for the applicant stated that the application is brought under section 3 & 3A and order 51 rule 1 of the Civil Procedure Act and Rules. This section gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Counsel for the plaintiff/respondent had submitted that the application is not anchored on any known law. I find that the application is proper before the court as the court is clothed with inherent jurisdiction to make orders necessary for the ends of justice. The question is whether the court will exercise this jurisdiction in favour of the applicant. The ends of justice must serve both parties in a suit.

On the second issue, as to whether the orders sought will be prejudicial to the plaintiff/Respondent and should await the full hearing of the suit. The plaintiff and the defendant entered into a lease agreement dated 30/10/14 for 1.5 acres in the suit land. The lease agreement was for a period of two years which essentially expired on 30/10/16. The lease agreement had an option for renewal but there is no evidence that the same was ever renewed. Counsel for the plaintiff submitted that the lease has not been renewed and the applicant wants to access the plaintiff's land through a court order.

The court had restricted the activities of the defendant on 1.5 acres of the suit land way back on 25th September 2015 before the lease expired. The defendant claims that they had already excavated the ballast by the time the order was issued. There is no explanation given by the applicant why they did not take away the excavated material that they had stored. At this time, it was evident that the relations between the two parties had started going downhill necessitating a court order. The defendant has waited for almost two years to approach the court for the instant order. Is there something that the defendant is not disclosing to the court?

Paragraph 17 of the annexed lease agreement to the replying affidavit states that after completion of the project, any stones /materials remaining will belong to the lessor. The agreement did not indicate which road was under construction and the period thereof. The agreement further did not indicate the other projects that have been alluded to by the parties. And this is purely a lease agreement whereby the terms of the lease are clear and whatever the lessee does with the excavated material is their own concern. I will therefore not be in a position to establish whether the project or projects were completed to necessitate the handing over of the remaining stones/materials.

The plaintiff filed a suit seeking for a permanent injunction against the defendant, mesne profits together with costs of the suit. The court had directed that the Attorney General and the National Land Commission be served with the pleadings in this case. This suit involves other parties who did not participate in this application as it was against the plaintiff. The outcome of this ruling would in one way or another impact the case in respect of the parties who did not participate. The 3rd interested party who is the County government of Uasin Gishu has a counter claim that the land being public land belongs to the County government. The National Land Commission being the custodian of public land on behalf of the national and county government will also be affected by the outcome of this ruling.

Having considered the issues above, I find that the grant of the order sought for in this application will not only prejudice the plaintiff but will also put the main suit into jeopardy. I will not deal with the contention that this is a government project or not. I will also not delve into the issue whether public interest must prevail over individual interest as there are other contentious issues as to whether the suit land is public land or individual which can only be determined after a full hearing. I would not want to pre- empt any issues or outcome. The court would not want to interfere with the substratum of the case.

This matter is scheduled for hearing of the main suit on 9th October 2017 which is not far away. The parties have waited all this time and therefore there would be no harm waiting so that all the issues are dealt with once and for all not through interlocutory applications.

The upshot is that the application dated 11th July 2017 is declined with no orders as to costs. I make a further order that all the parties to be ready to proceed with the hearing of the main suit as scheduled on 9th October 2017.

It is so ordered.

Dated and delivered at Eldoret on this 18th day of September, 2017.

**M.A ODENY**

**JUDGE**

**Read in open court in the presence of:**

Mr. Omondi for Defendant/Applicant

Mrs. Chumba for Plaintiff/Respondent

CC: Koech