



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT NYERI

ELC NO. 94 OF 2017

GREYSTONES DEVELOPMENT LIMITEDPLAINTIFF

-VERSUS-

PETER TRASILLA WANGARI

CAROLINE NYATHIRA MWANGI

(Sued as the administrators of the estate of the late

PETER MWANGI MAHINDU).....DEFENDANTS

RULING

1. On **29th May, 2017** Grey Stone Development Limited (hereinafter referred to as the applicant filed the instant suit seeking the reliefs listed therein against the Peter Trasilla and Caroline Nyathira Mwangi (hereinafter referred to as the respondents).

2. Simultaneously with the plaint, the applicants filed the chamber summons dated **29th May, 2017** seeking the following orders:

(i) Certification of the application as urgent and deserving to be heard *ex parte* in the first instance.

(ii) A temporary injunction to restrain the respondents whether by themselves, their administrators, servants, agents, advocates, nominees and assigns from interfering with its quiet enjoyment and possession of the properties known as Land Reference Numbers 5173/6, 5173/10, 6338/2 and 6338/4 pending the hearing and determination of the application *inter partes*.

(iii) A temporary injunction to restrain the respondents whether by themselves, their administrators, servants, agents, advocates, nominees and assigns from trespassing on, leasing or selling to any third party, constructing on, alienating or otherwise interfering or dealing with the properties known as Land Reference Numbers 5173/6, 5173/10, 6338/2 and 6338/4 pending the hearing and determination of the application *inter partes*.

(iv) An urgent date be set for *inter partes* hearing of the application.

(v) A temporary injunction to restrain the respondents whether by themselves, their

administrators, servants, agents, advocates, nominees and assigns from interfering with its quiet enjoyment and possession of the properties known as Land Reference Numbers 5173/6, 5173/10, 6338/2 and 6338/4 pending the resolution of the dispute between the parties through arbitration.

(vi) A temporary injunction to restrain the respondents whether by themselves, their administrators, servants, agents, advocates, nominees and assigns from trespassing on, leasing or selling to any third party, constructing on, alienating or otherwise interfering or dealing with the properties known as Land Reference Numbers 5173/6, 5173/10, 6338/2 and 6338/4 pending the resolution of the dispute between the parties through arbitration.

(vii) The plaintiff be at liberty to apply for such further or other orders and directions as this Honourable Court may deem fit and just to grant.

(viii) The costs of the application be provided for.

3. The application is based on the grounds on its face and supported by the affidavit of Tim Hobbs, a director of the applicant.

4. As can be gathered from the application, the applicant who has been a leasee of the respondents' claims that under the terms of the leases executed between itself and the respondents, it is entitled to automatic renewal of the leases upon expiry.

5. Explaining that it has heavily invested in the suit properties, which it uses for agricultural purposes, the applicant points out that contrary to its right to have the leases executed with the respondents renewed, the respondents have intimated their intention not to renew the leases some of which were to expire sometime in February, 2017.

6. Pointing out that under the terms of the leases executed between itself and respondents any dispute arising therefrom should be resolved by mutual agreement of parties failing which the dispute should be referred to arbitration for final arbitration, the plaintiff explains that it has engaged the respondents in a number of meetings and exchanged correspondences with the respondents in a bid to amicably settle the dispute in vain.

7. Explaining that the respondents have been adamant that the leases have expired and continued to issue it with threats of eviction, the applicant contends that it is equitable, fair and just for this court to issue the orders sought in order to protect it from possible eviction and to preserve the substratum of the impending arbitration.

8. The plaintiff is apprehensive that unless the orders sought are issued, the respondents may actualize their threat of eviction thereby causing it devastating financial loss.

9. In support of the averments in the application and the affidavit sworn in support of the application, the deponent of the supporting affidavit has annexed the following documents to the supporting affidavit:

(a) Copy of a lease dated 1st February, 2007, marked **TH-1**;

(b) Copy of a lease dated 12th April, 2011 marked **TH-2**;

(c) Copy of a certificate of confirmation of grant issued to the respondents marked **TH-3**;

(d) Copies of statements of account demonstrating payment of rent marked **TH-4**;

(e) Copy of correspondence attaching rent payment schedule until the year 2037, marked **TH-5**;

(f) Copy of valuation report by Knight Frank detailing the infrastructural improvements on the suit

properties, marked **TH-6**;

(g) Copy of the plaintiff's advocates letter dated 16th November, 2016 marked **TH-7**;

(h) Copy of the defendant's advocate's letter dated 1 December, 2016 marked **TH-8**;

(i) Copies of correspondences relating to negotiations marked **TH-9**;

(j) Copies of returned cheques and letter dated 8th February, 2017 marked **TH-10** and **TH-11** respectively;

(k) Copies of newspaper reports on the land unrest marked **TH-12**.

10. In reply and opposition to the application, the respondents filed the grounds of opposition and the replying affidavit filed on 20th June, 2017 on which it is contended that the application is a non starter, misconceived and bad in law; that the orders sought are untenable and incapable of being issued and that the application is ingeniously crafty, devoid of merit and ought to be disallowed. Further that this court lacks jurisdiction to grant the orders sought.

11. Terming the application premature, the respondents have in addition to denying the applicant's contention that they have threatened to evict it from the suit property deposed that the applicant has not exhausted the remedies provided by law and in particular **Section 152(f)** of the Land Act.

12. According to the respondents, the applicant has not made a case for being granted the orders sought because:

(i) The subject matter of arbitration is not under threat;

(ii) There is no urgency demonstrated on why the prayers sought ought to be issued;

(iii) The effect of the prayers sought is to freeze and disinherit the beneficiaries of the estate of Peter Mwangi Mahindu, who are entitled to their rightful share of the estate;

(iv) They own the suit properties and therefore orders of trespass cannot be sought and issued against legitimate owners of the suit properties;

(v) Granting of the orders sought by the applicant would amount to this honourable court re-writing the contract for the parties;

(vi) Granting of injunctive orders sought by the applicant would be causing undue hardship on the respondents and prejudicial to the other beneficiaries of the deceased's estate who have interest over the suit properties and will be condemned unheard.

13. The respondents have further deposed that the applicant is in material breach of the lease granted to it by the landlord.

14. The exhibits marked **TH** (newspaper cuttings and internet blog print outs) are said to be intended at portraying the respondents who are legitimate owners of the suit properties as invaders and calculated at diverting the attention of the court from the material breaches by the applicant.

15. It further contended that the applicant does not have automatic right to renew the leases at its own sole discretion.

16. In a rejoinder, the applicant through the supplementary affidavit of Tim Hobbs sworn on 17th July, 2017 has deposed that the respondents have totally miscomprehended the nature and purport of its application. In that regard, it is reiterated that the applicant's fears of eviction are legitimate and well

founded.

17. It is pointed that the respondents have not denied having issued the letter dated 1st December, 2016 (exhibit **TH-8**) in which they demanded that the applicant and its sub-tenants vacates the suit property by 31st January, 2017 and contended that the respondents having issued a letter requiring the applicant to vacate the suit properties by 31st January, 2017 only the court can stop them from commencing the legal process to have it evicted.

18. It is further pointed out that the respondents have admitted that there is a dispute between them which is whether it has automatic right to renewal of the Leases.

19. Arguing that the respondents have not denied the allegation that they want the applicant out of the suit property as soon as possible and that there exists an arbitration clause in the lease agreements; the applicant maintains that the respondents have intimated their intention of having the parties agree on a single arbitrator to hear and determine the dispute between them.

20. Terming the respondent's contention that it intends to disinherit the respondents and rewrite the contract between them untrue, the applicant maintains that it has heavily invested in the suit properties for the ultimate benefit of the respondents.

21. With regard to the allegation that the applicant is in material breach of the lease agreements hereto it is submitted that this court is not the proper forum for determining that issue.

22. Concerning the information contained in the newspaper cut outs hereto, it is submitted that the information is not insignificant as the violence witnessed around the area where the suit property is situated was widely reported and it caught the attention of the whole nation.

23. Maintaining that there is a clear dispute between itself and the respondents which the parties have agreed can be resolved by way of arbitration, the applicant contends that in the absence of an order from this court restraining the respondents from evicting it from the suit property, the respondents may commence an eviction process and ultimately evict it from the suit properties thus rendering the impending arbitral process an academic exercise.

24. For the foregoing reasons, the applicant urges the court to grant it the orders sought.

25. The parties to this dispute filed submissions and authorities which I have read and considered.

26. While highlighting the submissions filed on behalf of the applicant, counsel for the applicant informed the court that the applicant seeks the court's facilitation in the arbitration process. He submitted that the test for such facilitation includes:

(i) Existence of arbitration agreement/clause;

(ii) Bona fide dispute between parties;

(iii) Threat to the substratum of the dispute to be referred to arbitration;

(iv) Appropriate measure to be given in the circumstances of the case.

27. He relied on the case of **Safaricom v. Oceanview Beach Hotel Ltd & 2 others (2010) e KLR.**

28. In applying the said test to the circumstances of this case, he pointed out that an arbitral agreement exists between parties to the dispute hereto and that there is a threat which if not addressed, the substratum will be wasted.

29. Explaining that eviction has not taken place because of the on going negotiations, he pointed out that

an objection has been taken by the respondents concerning the jurisdiction of this court to determine the dispute preferred before it.

30. Based on the provisions of **Section 13** of Environment and Land Court Act, 2011 (E & LCA, 2011), he submitted that this court has jurisdiction to determine the issue. In that regard he made further reference to the cases of:-

1. **Levius Koyio Matseshe & Another v. Martin Makoosio & Another** (2017) e KLR;
2. **Lagoon Development Ltd v. Beijing Industrial Designing & Researching Institute** (2014) e KLR;
3. **Presbeta Investment Limited & Another v. National Bank of Kenya & 2 Others** (2016) e KLR;
4. **Dupoto Group Limited v. Kenya Airports Authority & Another** (2013) e KLR;

31. Pointing to the court that an arbitrator had been agreed upon, he urged the court to grant the orders sought.

32. On his part, counsel for the respondents submitted that under **Section 7** of the Arbitration Act, on which the plaintiff's application is premised, it is the High Court as opposed to the Environment and Land Court (E & LC) that has jurisdiction to hear the dispute herein. In that regard he made reference to the case of **Republic v. Karisa Chenga & 2 others, Sc of K Petition No. 5 of 2015** (2017) e KLR and submitted that the Supreme Court made it clear that E & LC and Employment and Labour Relations Court (E & LRC) cannot perform the functions of the High Court and vice versa. He also relied on the following authorities in support of his case;

1. **Ernest Kevin Luchidio v. Attorney General & 2 others** (2015) e KLR;
2. **Capital Fish Kenya Limited v. Monnatz Limited & 2 others** (2010) e KLR;
3. **Safaricom Limited (as by plaintiff);**
4. **Inforcard Holdings Ltd v. Attorney General & 2 Others** (2014) e KLR;
5. **Seven Twenty Investment Ltd v. Sandhoe Investment Kenya Ltd** (2013) e KLR;
6. **Upward Scake Investment Co. Ltd & 7 Others v, Mwangi Kang'ara Advocate** (2015) e KLR;
7. **Andrew Omtata Okoiti & 5 Others v. Attorney General & 2 Others** (2010) e KLR.

33. According to counsel for the respondent, even though the High court and the E & LC have the same status, status is not the same thing as jurisdiction.

34. Arguing that an arbitration clause is separate from the contract on which it is premised, counsel for the responded submitted that it matters not what the dispute is about.

35. Maintaining that the application is misconceived, counsel for the respondents reiterated the contention that the dispute herein does not concern Environment, use and occupation of land.

36. Concerning the tests espoused by counsel for the applicant, he submitted that the applicant's counsel left out test 3 and 4 espoused in the authority he referred to and introduced a test which is none-existent.

37. He acknowledged that parties have agreed on an arbitrator and urged the court to allow parties to go

before the arbitrator in equal footing.

38. With regard to the applicant's apprehension that unless the orders sought are granted the respondents may evict it from the suit property, he submitted that apprehension of eviction cannot be a ground for grant of an injunction.

39. He also submitted that media reports and print outs relied on by the applicant are not admissible.

40. In closing, he urged the court, in case it determines that it has jurisdiction to hear and determine the dispute, to find that the applicant has not met the threshold for being granted the orders sought.

41. In a rejoinder, counsel for the applicant submitted that the Arbitration Act came into force in 1998 before the E & LC was established and maintained that the reliefs sought relate to use and occupation of land in respect of which this court has jurisdiction to hear and determine.

42. Concerning reference to the **Karisa Chengo** case, he submitted that the case is inapplicable to the circumstances of this case because the subject matter of that case was whether the E & LC had jurisdiction to hear and determine a criminal case.

43. He maintained that there is real threat of eviction and urged the court to preserve the subject matter of the intended arbitral proceedings.

Analysis and determination

44. From the pleadings and submissions made in respect thereof, I find the issues for the court's determination in my view to be:

(a) Whether this court has jurisdiction to hear and determine the dispute herein?

(b) Subject to the outcome of (1) above whether the applicant has made up a case for being granted the orders sought or any of them?

(c) What order(s) should the court make?

45. With regard to the first issue, I begin by pointing out that the dispute herein is basically an issue concerning use and occupation of land. That being the case, by dint of the provisions of **Article 162 (2) (b)** as read with **Article 262(7)** of the Constitution of Kenya, 2010 (COK, 2010); **Sections 13** and **150** respectively of the E & LCA, 2011 and the Land Act, 2012, I find and hold that this court has jurisdiction to hear and determine the dispute herein.

46. Concerning reference to the High Court in **Section 7** of the Arbitration Act, **Article 262 (7)** COK, 2010, obligates this court to construe all law in force immediately before the coming into force of the new constitution with alterations, adaptations, qualification and exceptions necessary to bring it into conformity with the Constitution.

47. As the Arbitration Act was enacted way before the promulgation of the COK, 2010 and the enactment of the E & LCA, 2011 and the Land Act, 2012, in the changed circumstances of our land laws, I am of the view that reference to the High Court in the Arbitration Act, in matters concerning land and Environment, like in the instant case, should be construed as reference to the E & LC.

48. In view of the foregoing, I reiterate my finding that this court has jurisdiction to entertain the dispute herein as it relates to rights over land. In that regard see the above cited provisions of the law which provide as follows:

“Article 162(2) Courts shall establish courts with the status of the High Court to hear and determine disputes-

(a).....

(b) the environment and the use and occupation of, and title to, land.

Article 262(7) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this constitution.”

49. Also see the provisions of **Section 13** of the E & LCA, 2011 which details the Jurisdiction of the Environment and Land Court; and **Section 150** of the Land Act, 2012 which vests the E &LC with jurisdiction to hear and determine disputes, actions and proceedings concerning land.

50. On whether the applicant has made up a case for being granted the orders sought, from the affidavit evidence on record and in particular the correspondences exchanged between the advocates for the parties to this dispute annexed to the supplementary affidavit of Tim Hobbs filed on 19th July 2017, I gather that the parties are in agreement as to the existence of a dispute over the subject matter of this application. Those correspondences show that the parties are in agreement as to the need to appoint an arbitrator to arbitrate the dispute between them.

51. That being the case, I hold the view that it is in the interest of justice to preserve the subject matter of this application pending the hearing and determination of the impending arbitral proceeding.

52. For avoidance of doubt, the orders issued herein will not affect the rights of the parties under the existing lease agreements.

53. The upshot of the foregoing is that the application herein is allowed in terms of prayers (v), (vi) and (vii) of this ruling.

54. Costs of the application to shall abide the outcome of the arbitral proceedings.

55. Orders accordingly.

Dated, signed and delivered at Nyeri this 20th day of December, 2017.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff/applicant

Mr. Muthee h/b for Mr. Mugira for the defendant/respondent

Court assistant - Esther