



REPUBLIC OF KENYA



KENYA LAW
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Shah & 42 others v Denko Properties Limited & 2 others (Land Case E006 of 2023) [2024] KEELC 4903 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE E006 OF 2023
CA OCHIENG, J
JUNE 20, 2024**

BETWEEN

SANJAY JADAVJI SHAH & 42 OTHERS PLAINTIFF

AND

DENKO PROPERTIES LIMITED 1ST DEFENDANT

DENNIS MBAABU KARANI 2ND DEFENDANT

VICTOR KOBIA MBAABU 3RD DEFENDANT

RULING

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 1st August, 2023 where they seek the following Orders:
 - a. Spent.
 - b. A temporary injunction be issued restraining the Defendants by themselves or their servants or anyone else claiming under their name and anyone authorized by them or otherwise howsoever from in any manner or otherwise whatsoever from blocking the Plaintiffs' access of the borehole water for LR No. 14790/3 until the determination of the suit.
 - c. That costs of this Application be borne by the Defendant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Sanjay Jadavji Shivji who swore it on behalf of the other Plaintiffs and himself. He confirms that the Plaintiffs' purchased their respective parcels of land being land parcel numbers Athi River/Athi River Block 19 (Denko Limited)/4, 74, 5, 6, 7, 8, 9, 10, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 38, 39, 58, 59, 62, 63, 66, 67, 70, 71, 92, 93, 94, 95, 96, 98, 99, 106, 116, 117, 118, 119, 120, 135, 138, 139, 140, 141, 144, 72 and 73, hereinafter referred to as the 'suit lands', from the Defendants and obtained their titles. He claims, it was an agreement between the Defendants and the Plaintiffs' that they would avail costs for general



developments on the property which included erecting of a perimeter fence, providing accessibility to electricity, piped water and paving internal access to roads as provided in Clause 10.5 of the Sale Agreement.

3. He contends that the Defendants have failed to provide these very crucial amenities including provision of access to piped water, from the time the property was transferred to the Plaintiffs'. Further, that a borehole was sunk by the Defendants at a common area but Plaintiffs' are prevented from using it. He reiterates that despite several demands, the Defendants has refused to allow them access the borehole. Further, from completion, the Plaintiffs have suffered loss as the properties bought have since not been and cannot still be utilized for the intended purposes as the plots were bought at a premium price to the promise of provision of amenities envisaged in Clause 10.5 of the Agreements.
4. The Defendants' opposed the instant Application by filing a Replying Affidavit sworn by the 2nd Defendant Dennis Mbaabu Karani, where he deposes that the 2nd and 3rd Defendants are wrongly sued as no Application has been made to lift the 1st Defendant's veil of incorporation. He contends that the Plaintiffs are guilty of material non-disclosure because the Plaintiffs' had entered into an agribusiness support agreement with the 1st Defendant and its sister company Greengro International Limited. He contends that the Plaintiffs have failed to disclose that they voluntarily terminated their contracts with the 1st Defendant and cannot now cry foul and make allegations against the 1st Defendant, as in this matter. Further, that the Plaintiffs evicted the 1st Defendant and its sister company Greengro International Limited and demanded that they cease as well as desist all operations on the Plaintiffs' plots.
5. He denies that there was an agreement between the parties for the provision of free water. He insists that there was an agreement between the parties' herein for provision of accessibility to piped water and not free supply of water. He avers that they used their own money and laid water pipes with which, they supplied water to the Plaintiffs' plots' during the execution of the respective agribusiness support agreement entered into between the various Plaintiffs' and the said Greengro International Limited.
6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. I have considered the Notice of Motion Application dated the 1st August, 2023 including the respective Affidavits, annexures and rivalling submissions, the only issue for determination is whether the Defendants' or their agents should be restrained from blocking the Plaintiffs' access to the borehole water on LR No. 14790/3 until the determination of the suit.
8. In line with the principles espoused in the case of *Giella Vs Cassman Brown & Company* (1973) EA 358 as well as the definition of a *prima facie* case as stated in the case of *Mrao Ltd Vs First American Bank of Kenya & 2 Others* (2003) KLR 125, I will proceed to establish whether the Plaintiffs' have established a *prima facie* case to warrant the orders of interlocutory injunction as sought.
9. The Plaintiffs' claim they purchased the suit lands, from the Defendants and obtained their titles. They contend that it was an agreement between the Defendants and themselves that they would avail costs for general developments on the property, which included erecting of a perimeter fence, providing accessibility to electricity, piped water and paving internal access to roads as provided in Clause 10.5 of the Sale Agreement. They aver that the Defendants have failed to provide these very crucial amenities including provision of access to piped water, from the time the property was transferred to them. Further, that a borehole was sunk by the Defendants at a common area but they are prevented from using it. They reiterate that despite several demands, the Defendants have still refused to allow them access the borehole. Further, from completion, the Plaintiffs' have suffered loss as the properties bought



have since not been and cannot still be utilized for the intended purposes as the plots were bought at a premium price to the promise of provision of amenities envisaged in Clause 10.5 of the Agreements.

10. Looking at the documents presented and on perusal of Clause 10.5 which I note provides that:

“The Vendor shall avail at its cost the following services to the general development known as Green Hub Estate Phase 2 (LR NO. 14790/3)

- i. Perimeter Fence
- ii. Accessibility to Electricity
- iii. Accessibility to Piped Water (Borehole Source)
- iv. Paving of internal access roads.”

11. From the aforementioned Clause which is in the respective agreements, it is clear the Defendants’ were supposed to provide accessibility to piped water. The Defendants’ have opposed the instant Application insisting that it is the Plaintiffs’ who denied them, access to their properties. Further, that there was an agreement for provision of accessibility to piped water but not free supply of water. The Defendants except for confirming they laid down pipes have however not indicated whether they provided the Plaintiffs, with accessibility to the borehole or not.

12. Based on these facts, I find that the Plaintiffs have indeed established a prima facie case to warrant the orders of interlocutory injunction as sought.

13. As to whether the Plaintiffs’ will suffer irreparable harm which cannot be compensated by way of damages. The Plaintiffs’ claim, they have not been able to properly utilize their respective parcels of land because of lack of access to water, which the Defendants were supposed to provide. In Nguruman Ltd. Vs. Jan Bonde Nielsen & 2 Others (2014) eKLR, it was held that:

“...the applicant must establish that he ‘might otherwise’ suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

14. Since the Plaintiffs’ paid for the suit lands and acquired their titles, I find that the Defendants should also have adhered to the terms of the contract (Sale Agreement). I note failure to adhere to the said terms have culminated in the Plaintiffs’ inability to use the suit lands. In the circumstances, I find that the Plaintiffs’ alleged injuries are not speculative as they have demonstrated that the Defendants’ have failed to provide them with accessibility to the borehole as had been agreed upon in the said Sale Agreements.

15. On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the same tilts in favour of the Plaintiffs’ and on the need to restrain the Defendants from denying them access to the borehole.



16. In the circumstances, I find that the Plaintiffs' Notice of Motion Application dated the 1st August, 2023 is merited and will allow it.
17. I will proceed to make the following orders:
 - a. An order of temporary injunction be and is hereby issued restraining the Defendants by themselves or their servants or anyone else claiming under their name and anyone authorized by them or otherwise howsoever from in any manner or otherwise whatsoever blocking the Plaintiffs' access to the borehole water for LR No. 14790/3 until the determination of the suit.
 - b. Costs of the Application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JUNE, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Parties absent

Court Assistant – Simon/Ashley

