**Ndaka & 4 others v Mwongela & 2 others; Nzioka & another (Proposed Respondents) (Civil Suit 04 of 2018) [2022] KEHC 14852 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14852 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKUENI**

**CIVIL SUIT 04 OF 2018**

**GMA DULU, J**

**OCTOBER 27, 2022**

**BETWEEN**

**BENJAMIN NDULA NDAKA ..... 1ST PLAINTIFF**

**JOSEPHINE WAYUA MWINZI ..... 2ND PLAINTIFF**

**PATRICK MULWA ..... 3RD PLAINTIFF**

**FIDELIS MUSEMBI ..... 4TH PLAINTIFF**

**ELIZABETH NDUNGE ..... 5TH PLAINTIFF**

**AND**

**CAROLINE NGINA MWONGELA ..... 1ST DEFENDANT**

**SETH WANZAU ..... 2ND DEFENDANT**

**MICROFINANCE BANK LIMITED ..... 3RD DEFENDANT**

**AND**

**NICHOLAS MUTUA NZIOKA ..... PROPOSED RESPONDENT**

**LAND REGISTRAR MAKUENI ..... PROPOSED RESPONDENT**

**RULING**

1. Before me is an application by way of notice of motion filed under section 1A, 1B, and 3A of the *Civil Procedure Act*, and order 1 rule 10(2) and (4), and order 40 rule 1 of the *Civil Procedure Rules* dated December 9, 2020 seeking 6 orders, some of which have been spent as follows –

    1. (Spent)

2. That the court do order that Nicholas Mutua Nzioka and Land Registrar Makueni be enjoined in these proceedings as 4th and 5th defendants respectively.

3. (Spent).

4. That an order of temporary injunction do issue restraining the proposed 5th defendant herein from dealing with the title LR No Makueni/unoa/2798 in whatever manner pending the hearing and determination of this suit.

5. That upon being granted prayer 2 above, the plaintiffs be granted leave to amend the plaint accordingly.

6. That costs be provided for.

2. The application was filed with a supporting affidavit sworn on December 9, 2020 by Patrick Mulwa, one of the applicants, in which it was deponed that the caution placed on Plot No Makueni/unoa/2798 had already been removed by the proposed 5th defendant/respondent following a court ruling delivered n November 13, 2019 in Makueni ELC Case No 36 of 2019, and that the 3rd defendant/respondent was now in the process of effecting transfer of the said property to the proposed 4th defendant, and that one of the main prayers in this suit herein is an order compelling the 1st and 3rd defendants to transfer the land parcel No Makueni/unoa/2798 to the applicants.

3. It is also deponed in the affidavit, that there is a pending issue of ownership of land in this suit that touches on the proposed 5th and 6th defendants, and that it is only fair that proceedings in Makueni ELC No 36 of 2019 be stayed, pending the outcome of this suit which seeks to determine the issue of ownership between the parties herein.

4. The application is opposed through a replying affidavit sworn by Jane Warau, as the Head of Debt Recovery Department of Rafiki Microfinance Bank Ltd, on February 15, 2021, in which it was deponed that the applicants herein had filed an injunction application dated August 30, 2017 in the Environment & Land Court against the 3rd respondent, which application was dismissed on March 1, 2018.

5. It was also deponed that the applicants thereafter filed another application dated April 11, 2018 for stay of execution, which application was also declined in a ruling delivered on June 30, 2018.

6. It was further deponed that a caution was then placed on the property, and another application was filed in the ELC suit No 36/2019 dated May 28, 2019 requiring lifting the caution by the Registrar Makueni Land Registry, and the court issued orders on November 20, 2019.

7. It is deponed thus, that the applicants herein were engaging in endless applications, and had come to this court with unclean hands.

8. The application was also opposed through a replying affidavit sworn on April 26, 2021 by Caroline Ngina Mwongela the 1st defendant, in which it was deponed that the deponent associated herself with the affidavit sworn on behalf of the 3rd respondent herein, and that the application was misconceived and incurably defective.

9. In response to the two replying affidavits, the applicants filed a supplementary affidavit sworn on July 15, 2021 by Patrick Mulwa the 3rd plaintiff is which it is deponed that the applicants stand to suffer irreparable damages, if the orders sought are not granted, since the proposed 5th respondent is at liberty to transfer the property to the proposed 4th defendants.

10. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by ON Makau & Mulei advocates for the applicants, and those filed by SI Mwaura & Company for the 3rd defendant/respondent.

11. Having considered the application, documents filed and the written submissions filed, I am of the view that this application is misconceived and for dismissal.

12. The first reasons for dismissal of the application is that there is another parallel case in another court (ELC) pending, where the orders sought herein arise from a ruling in that other court which ordered the removal of the caution on November 20, 2019.

    In my view therefore, the option of either filing as appeal from the ruling, or an application to enjoin other parties in court proceedings to obtain orders against the proposed new parties, should have been made in that ELC court and in those proceedings, not in another court and in other proceedings, even if the subject matter in the dispute is the same land, in both courts.

13. The second reason why the application herein cannot be sustained is that, the ELC court where the parallel proceedings (ELC No 36/2019) herein are pending, is the specialized court where environment and land disputes are by virtue of the *Constitution* to be determined thus this court in my view, cannot issue the orders sought herein as such action will amount to a review of the orders already issued by the ELC court which is conferred under Article 162 of the *Constitution* with the powers to issue such orders as the injunctions on land, sought herein. For avoidance of doubt, Article 162 (2) of the *Constitution* provides as follows –

    > "162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes related to-
    >
    > (b) the environment and the use and occupation and title to land"

14. The third, and last reason why this application has to fail, is that the applicants seem to be bent on endless parallel litigation in the courts in this matter by jumping from one court to another, instead of pursuing the litigation in one court to finality. Such conduct as the applicants are engaging in herein, cannot be encouraged or condoned by the courts, as it is clearly an abuse of the court process.

15. I thus find that the application herein has no merits. I dismiss the application with costs to the 1st and 3rd defendants/respondents herein.

**DELIVERED, SIGNED & DATED THIS 27TH DAY OF OCTOBER, 2022, IN OPEN COURT AT MAKUENI.**

**GEORGE DULU**

**JUDGE**