



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 710 OF 2009

WILLIAMS & KENNEDY LIMITED.....PLAINTIFF

VERSUS

POSTBANK CREDIT LIMITED (IN LIQUIDATION)

Thro' DEPOSIT PROTECTION FUND BOARD –

LIQUIDATOR1ST DEFENDANT

JUMCHEM HEALTHCARE LIMITED.....2ND DEFENDANT

JUMA MUCHEMI..... 3RD DEFENDANT

AND

DAVID KIMANI GICHARU..... PROPOSED INTERESTED PARTY

RULING

1. By his Motion on Notice dated 26/11/2016, the proposed interested party (“the applicant”) sought that he be joined in these proceedings and that the proceedings be stayed pending the hearing and determination of **NRB Milimani Environment and Land Court Case No. 348 of 2019 David Kimani Gicharu v. Peter Burugu and 2 Others** (“the ELC case”). The application was brought under ***section 6 of the Civil Procedure Act and Order 1 Rule 10 of the Civil Procedure Rules***.

2. The application was supported by the affidavit of the applicant sworn on 26/11/2019. The grounds for the application were that; the applicant was the registered owner of 31 plots arising from **LR. No. 5898/5 (“the suit property”)** vide a conveyance registered by the Chief Land Registrar on 5/9/2000. That before purchasing the same from one **Ms. Grace Zena**, he conducted a search to establish that she was the lawful owner thereof.

3. That on learning that the 2nd defendant was laying claim over the suit property, he lodged the **ELC Case** challenging the legality of the 2nd defendant’s title by a plaint dated 6/11/2019. That the 2nd defendant has responded thereto alleging that it purportedly purchased the suit property from the 1st defendant in exercise of the latter’s statutory power of sale and that the present proceedings were meant to demonstrate that it holds a valid interest over the suit property.

4. For the foregoing reasons, the applicant contended that in determining the validity of the 2nd defendant’s title, the Land Court in the **ELC Case** shall have to determine the legality of the parties’ root title including that of the plaintiff in this case. That there is a likelihood that the Land Court might hold that the 2nd defendant’s title is invalid thereby rendering these proceedings a nullity. That he has an interest in these proceedings and that unless he is given a hearing, he will be prejudiced.

5. The application was opposed by the parties to the suit. The 1st defendant filed grounds of opposition to the effect that; the application was misconceived vexatious and an abuse of the court process. That it was an attempt to derail the conclusion of this matter; that the interested party had not met the criteria to be joined as an interested party and that his cause of action, if any, was time barred.

6. The 3rd defendant also opposed the application vide his grounds of opposition dated 13/12/2019. He contended that the application was an abuse of court process which was intended only to delay the conclusion of this matter. He further contended that the substratum of the

interested party's claim was based on false titles that cannot found a legitimate claim.

7. The parties filed their respective submissions which the court has carefully considered. The plaintiff submitted that, this court and the Land Court have separate and distinct jurisdictions. That the issue before this court is a commercial dispute which has nothing to do with the ownership of the suit property. That the applicant had not met the legal threshold to be impleaded as an interested party and that no case had been made for the stay of these proceedings. The cases of **Republic vs Karisa Chengo & 2 others 2017 eKLR**, **Francis Karioki Muruwaitetu and Anor vs the Republic 2015 eKLR** amongst others were cited in support of the said submissions.

8. On behalf of the 1st defendant, it was submitted that the application was an abuse of the court process as no action had been taken by the applicant since 2009 when the present case was filed. That the applicant had not met the threshold to be enjoined as an interested party, as the issues before the Land Court and this Court are different. It was further submitted that this case should not be consolidated with the ELC Case and should not be stayed as contended by the applicant. The cases of **Chairman Cooperative Tribunal and 8 others ex parte Management Committee Konza Ranching and Farming Cooperative Society Ltd [2014] eKLR**, **Nyati Security Guards and Services Ltd vs Municipal Council of Mombasa [2004] eKLR** amongst others were cited in support of those submissions.

9. On behalf of the 3rd defendant, it was submitted that the applicant was not deserving to be enjoined as an interested party and that the order for stay of proceedings was unmeritorious. The case of **Global Tours and Travel Ltd Nairobi HC Winding up No 43 of 2000** as cited in **KWS vs James Mutembei [2019] eKLR** was cited in support of those submissions.

10. On behalf of the applicant, it was submitted that the court had the discretion under ***Order 1 Rule 10(2) of the Civil Procedure Act***, to enjoin him in the suit at any stage of the proceedings. That since the applicant had an identifiable stake in the suit, he should be enjoined as a party and that he had demonstrated that his presence will enable the court effectively and completely adjudicate upon and settle all the questions involved in this matter. In the premises he should be enjoined as an interested party and the suit be stayed pending the determination of the ELC Case. The cases of **JMK vs MWN & another 2015 eKLR**, **Trusted Society of Human Rights Alliance vs Mumo Matemo & Others [2014] eKLR** and **MNM vs SNM [2019] eKLR** were relied on in support of those submissions

11. This is an application by the applicant to be joined as an interested party in this suit. His contention is that he has an interest in the subject matter of this suit. That he bought the property known as **LR. No. 5898/5** of which the suit property is part of. The purchase allegedly took place in the year 2000. That he has since challenged the ownership of the suit property by the 2nd and 3rd defendants in the **ELC Case**.

12. The law on joinder of interested parties to suits has been settled by the Supreme Court of Kenya. In the case of **Francis Karioki Muruwaitetu & another v Republic & 5 Others [2016] eKLR**, it was held:-

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: one must move the court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court...”

13. Further, in **Joshua C. Cherotich & another v Daniel K Kirui & another [2005] eKLR**, the court held that:-

“In the circumstances of this case, it would therefore be improper to enjoin the applicant to this suit, particularly at the stage which these proceedings had reached. Her presence in this suit will not aid or assist the court in the just determination of the dispute between the plaintiffs and the defendants in this suit. The proper recourse by the applicant is to have her case listed for hearing before the Chief Magistrate’s Court so that the same may be expeditiously heard and determined. There is no reason why a suit which was filed in the year 2000 by the applicant has not been heard and determined as at the date the application was filed. The ball is in the applicant’s court...”

14. From the foregoing, it is clear that an applicant must have a personal stake on the outcome of the subject matter of the suit, he must demonstrate the prejudice he will suffer if the joinder is denied and the application should not be made at a very late stage of the proceedings.

15. In the present case, the matter before court is the challenge by the plaintiff of the exercise of the statutory power of sale by the 1st defendant. The sale of the suit property by the 1st defendant to the 2nd and 3rd defendant was a purely commercial transaction between the parties.

16. The applicant stakes a claim of ownership of the suit property. That is not an issue before this Court. In determining the issue before it, this Court will not in any way inquire about the ownership of the suit property. Further, the Court will not be called upon to inquire about the veracity of the creation or otherwise, the legality of the security that gave rise to the exercise of the statutory of sale.

17. In view of the foregoing, the claim by the applicant does not lie before this Court. It lies before the Environment and Land Court where he already is. That is the Court which is endowed with the jurisdiction to determine claims about land ownership by dint of **Article 162 of the Constitution**.

18. The applicant has not demonstrated what prejudice he will suffer if joinder is denied. In my view, whether the Court determines that the exercise of the statutory power of sale was lawful or not will not affect the applicant in any way whatsoever. Any determination here, one way or the other, will only affect the parties who are already before Court and never the applicant.

19. While the Court appreciates and agrees with the applicant that the court can order the joinder of a party at any stage of the proceedings under **Order 1 Rule 10(2) of the Civil Procedure Rules**, that however, has to be in appropriate cases. That is, where such joinder will not delay a suit or materially affect the rights of the parties. That is not the case here. The case has been pending since 2009. It was at the stage of hearing when the applicant decided to throw the spanner at the works.

20. The other issue which the Court has to consider is, will the joinder of a party as an interested party add value, that is, assist the court in determining the matters in controversy between the parties? In the present case, joining the applicant will have a different outcome. The issues of ownership, illegalities of either titles will creep in. No doubt that will be an undesirable eventuality. It will but can volute the matter which is otherwise straight forward, was the exercise of the Statutory Power of sale by the 1st defendant lawful? Period.

21. The other prayer is for the stay of this suit pending the outcome of the **ELC Case**. The jurisdiction to stay a suit is one to be exercised sparingly as it affects a party's right to access justice. It should be exercised only in the clearest cases. It should be exercised in circumstances where **section 6 of the Civil Procedure Act** apply or where there is abuse of process of court. Where the likelihood of embarrassment of the court will occur, that is, two courts of similar jurisdiction arriving at different results on same facts and law.

22. In the case of **In re Estate of Gerald Mwangi Mugo (Deceased) [2019] eKLR**—this court held that:-

“Stay of proceedings is a grave one for it prevents a litigant from prosecuting his case – a right that should not be impinged upon unless for good cause. The threshold is therefore quite high for stay of proceedings interferes with right of a party to conduct his litigation....”

23. Further, in **Halsbury's Laws of England, 4th Edn. Vol. 37 pages 330 ff**, the Learned writers observe: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case...”

24. I have already found that the issues in this suit and **ELC 348 of 2019** are different. Staying this suit will achieve nothing save to vex the parties herein and clog the judicial system. The applicant's rights can be safeguarded in the ELC Case aforesaid and not in this case. He has already joined the appropriate parties in that case. He should be concerned with the prosecution of that case and leave the parties herein in peace. The prayer for stay therefore likewise fails.

25. In view of the foregoing, I have come to the inescapable conclusion that the application is without merit and is hereby dismissed with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 20th day of January, 2021.

A. MABEYA, FCIArb

JUDGE