



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC CASE NO. 28 OF 2019 (O.S)**

**JOSECK NJUE MBAKA.....APPLICANT**

**VERSUS**

**KUURA MURANGO.....RESPONDENT**

**AND**

**PURITY MUKAMI NJUE.....INTENDED 2<sup>ND</sup> RESPONDENT/INTERESTED PARTY**

**RULING**

1. I am called upon to render a decision on a notice of motion dated 24<sup>th</sup> November, 2020, filed by the Applicant on 25<sup>th</sup> November 2020. The Application is expressed to be brought under Order 8 rule 3, 4 & 5; Order 10, Order 40 Rule 1, 2, 3 & 4 of the Civil Procedure Rules; Section 68(1) of the Land Registration Act 2012, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Article 47 and 50 of the Constitution, 2010.

**APPLICATION**

2. The Applicant is JOSECK NJUE MBAKA, who is the Plaintiff in the suit, while the Respondent, KUURA MURANGO is the Defendant. PURITY MUKAMI NJUE is the Interested Party/Intended 2<sup>nd</sup> Respondent.

The motion came with six (6) prayers which are as follows:

- i. **THAT** this application be certified as urgent.
- ii. **THAT** the name of PURITY MUKAMI NJUE be added to the suit as a Defendant and/or intended party.
- iii. **THAT** the applicant be granted leave to amend the Notice of Motion dated 11/3/2020 and the Originating Summons dated 22/7/2019 in terms of the annexed draft amendments.
- iv. **THAT** pending the hearing and determination of this Application, the Application dated 11/3/2020 and the Originating Summons dated 11/3/2020, a temporary injunction be granted restraining the Respondent, the intended Defendant/Interested party, their agents and/or servants from interfering with land Parcel Evuvore/Evuvore/4202 and 4203 in any manner whatsoever.
- v. **THAT** pending the hearing and determination of this Application, the Application dated 11/3/2020 and the Originating Summons dated 11/3/2020 an order of inhibition be granted inhibiting the registration of any dealings with Land Parcel Evuvore/Evuvore/4202/4203.
- vi. **Such** further/other orders as befit justice and fairness; and prevent undue prejudice, mischief, vexation and an abuse of the process.

3. The application was supported by grounds, inter alia, that the applicant filed this suit seeking adverse possession of land parcel Evuvore/Evuvore/334 registered in the respondent's name. That a further application was filed seeking inhibition orders to preserve the suit parcel of land pending determination of the suit but its determination was delayed owing to the Covid pandemic. It is contended that the respondent took undue advantage of the situation and subdivided the suit parcel of land into land parcels Evuvore/Evuvore/4202 and 4203.

4. The respondent is accused of maliciously transferring the land parcel Evuvore/Evuvore/4202 to the interested party who is said to have had knowledge of the court proceedings. According to the applicant, the interested party, Purity Mukami, is a necessary party to the suit and should be added in order to determine the real question in controversy. It is also stated that the prayers for amendment, injunction, and inhibition be granted as according to the applicant, the orders will serve to preserve the subject of the suit and avoid undue mischief and abuse of process by the respondents.

5. With the application is filed a supporting affidavit dated 24.11.2020 and sworn by the applicant. The supporting affidavit reiterates the grounds in the application. Annexed to the application is a copy of green card, correspondence between the counsel on record for the parties, and applications filed before the court all meant to support of the case.

### **RESPONSE**

6. The respondent filed his response by way of replying affidavit on 27.11.2020. The response is dated 26.11.2020. The application is said to lack merit and that it ought to be dismissed. He averred that he openly and freely sold his land to the 2<sup>nd</sup> intended respondent whom he says should not be dragged into the proceedings. According to him, nothing barred him from dealing with his land, which he claims the applicant intentionally trespassed into. He argues that the court case did not preclude him from dealing with his land and tasked the applicant with citing such provision that bars a registered proprietor from exercising his proprietary rights in view of an ongoing case.

7. He states that the applicant purchased the adjacent parcel no. Evuvore/Evuvore/335 in the year 2011 but constructed on his land, Evuvore/Evuvore/334 sometime in the year 2015/2016. He claims to have had numerous disputes with the applicant based on the said occupancy of the land. He is against the orders for inhibition and prohibition being granted for reason that the applicant's claim of adverse possession has not succeeded. He claims that his son resides on the land and terms barring him and his family from entering the land as suicidal. It is his contention that the applicant should relocate his property to his land.

8. The 2<sup>nd</sup> intended respondent filed her replying affidavit on 27.11.2020 and dated 26.11.2020. She says she is an innocent purchaser for value and claims to have conducted due diligence prior to purchasing the land by carrying out a search at the land's office which confirmed that the land had no encumbrance. She too has protested against being dragged to the dispute. It is her averment that lack of registration of the encumbrance in the land register is high degree ignorance on the applicant's part. The applicant's suit was said to have been rendered nugatory and the court has been cautioned from allowing him to revive it through backdoor. It is argued that the applicant's claim on temporary injunction cannot be granted as his claim on adverse possession cannot stand as he has not enjoyed quiet uninterrupted possession by virtue of the numerous disputes he has had from when he trespassed on the land.

### **SUBMISSIONS**

9. The application was canvassed by way of written submissions. The applicant filed his submissions on 9.4.2021. He gave a background of the suit and identified three issues for determination. The first was whether Purity Mukami should be added to the suit as a co-defendant to which he answered in the affirmative by virtue of the intended defendant being the purchaser of a property which is the subject of the suit. It was submitted that she is a person of great interest whose presence is necessary to enable the court determine all questions in controversy in respect to the resultant subdivision from the suit parcel Evuvore/Evuvore/334.

10. The second was whether leave to amend the notice of motion and the Originating Summons should be granted. It was submitted that it was necessary to amend the pleadings in order to identify the real subject of the suit in contention and the real parties who stand to unfairly gain or lose after determination of the suit. The last issue was whether a temporary injunction and inhibition should be granted. It was reiterated that the respondent had interfered with the original suit parcel of land by subdividing it and causing closure of the original title and it was argued that the intent was to frustrate and defeat the course of justice. The court was urged to preserve the sanctity of the suit and the subject matter by way of temporary injunction and inhibition as prayed in the application.

11. The respondent filed his submissions on 25.5.2021. He reiterated the contents of his replying affidavit and submitted that bringing on board the intended 2<sup>nd</sup> respondent would be an abuse of the court process as she was neither a plaintiff nor defendant. Further, he said that it would infringe her rights as an interested party as she could not file any pleadings. The court was urged to dismiss the application with costs.

12. The intended 2<sup>nd</sup> respondent on the other hand filed her submissions on 12.10.2021 wherein she gave a history of the suit. It is her case that the applicant owns land parcel Evuvore/Evuvore/335 but has trespassed on land parcel Evuvore/Evuvore/334, a matter which she claims has been subject of deliberations by different bodies. The intended 2<sup>nd</sup> respondent admits to having purchased a portion of the suit parcel of land but states to have done it after exercising due diligence. It is her opinion that she is not a necessary party to the suit as all parties to this suit have their land which is demarcated and none should be allowed to cause the other unnecessary trouble.

13. It is argued that the land is privately owned and the respondent had every right to deal with it as he wanted. The intended 2<sup>nd</sup> respondent alleges that the applicant has caused malicious damage to the suit parcel of land. She has attached an assessment report in support of this. It is further argued that for a prayer of temporary injunction to be granted the applicant must demonstrate he has a case that has merit and stands a chance of succeeding. Ultimately it was submitted that the respondent gave out his land willingly and the court was urged to direct the applicant to stick to his parcel of land.

### **ANALYSIS AND DETERMINATION**

14. I have considered the application, the responses made, and the rival submissions. I have also looked at the court record. From the facts of the case, four issues arise for determination before this court viz:

- i. Whether Purity Mukami Njue should be added to the suit as a co-defendant?

ii. Whether leave to amend the notice of motion and Originating summons should be allowed?

iii. Whether orders of temporary injunction should be granted?

iv. Whether an order of inhibition should be granted to preserve the status of the suit pending hearing and determination of the suit?

15. On the first issue, it is not disputed that the respondent subdivided the suit parcel of land Evuvore/Evuvore/334 into Evuvore/Evuvore/4202 and Evuvore/Evuvore/4203 during the pendency of the suit. He further sold land parcel Evuvore/Evuvore/4202 to the intended 2<sup>nd</sup> respondent. The applicant has called upon the court to allow the intended 2<sup>nd</sup> respondent to be a party in the suit in order to determine the real questions in controversy. The intended 2<sup>nd</sup> respondent has admitted to having purchased land parcel Evuvore/Evuvore/4202 but according to her she is not a necessary party to the suit and the court should therefore not allow the prayer for joinder.

16. The law on joinder of parties is stipulated under Order 1 Rule 10 (2) of the Civil Procedure Rules. I note that the applicant has not invoked this provision but has sought the prayer for joinder. The court in its role to uphold the overriding objective shall nonetheless invoke the provisions of Order 1 rule 10 of the Civil Procedure Rules which provides as follows:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

17. From the provisions of the law, it is clear that either party can seek for joinder of a person whose presence before the court would be necessary to enable the court determine the matter effectively and settle all questions in the suit. The intended 2<sup>nd</sup> respondent who is sought to be a party in the suit has acquired a property that the applicant has a claim over. In my view, she is a proper party to be enjoined in the suit as it would be in her interest to defend a property of which she is registered as owner, and of which the applicant contends to be an adverse possessor. Any orders made on the property, adverse or otherwise may directly affect her interest in the land. Her presence in the suit is indeed necessary and joining her as a party in the suit will not only ensure that she is not condemned unheard but also that her interest as well will be protected by virtue of her participating in the suit.

18. Apart from joinder of the intended 2<sup>nd</sup> respondent, the applicant has also sought for orders to amend his pleadings in the Originating summons and notice of motion that is subject to the suit. It is trite law that amendment of pleadings should be allowed at any stage of the case before judgment provided the amendment does not occasion injustice to the opposing party. The law on amendment of pleadings is Order 8 rule 3 which grants courts powers to allow for amendment. In the case of *Harrison C. Kariuki v Blueshield Insurance Company Ltd* [2006] eKLR the court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd* [2000] EALR 365 and held that:

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”

19. This was the same position upheld in the case of *Freight Forwarders Kenya Limited v Aya Investments Uganda Limited* [2014] eKLR where the court stated “Our Courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side. The court went ahead to cite with approval the case of *EAST BAKERY –Vs- CASTELINO (1958) E.A. 461* which stated that

Order 8 Rule 3 grants the Court that discretion to permit amendment. The power to amend pleadings is provided in the Rules for the following purpose-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just. Order 8 Rule 5(1) of the Civil Procedure Rules.”

20. I share in the reasoning of the above cited cases. The purpose of seeking an amendment is to enable a court determine the real questions in controversy without causing injustice to the other party. I have carefully looked at the proposed amendments that are sought to be made in the pleadings. The first is the inclusion of the intended 2<sup>nd</sup> respondent as a party to the suit who has purchased a property which is a resultant subdivision from the suit parcel of land. As discussed above, the intended 2<sup>nd</sup> respondent is a necessary party to the suit and her inclusion will not be prejudicial to any party to the suit including herself. It will instead enable the court to include the real parties likely to be affected by the outcome of the suit. Further, joinder of the intended 2<sup>nd</sup> respondent will avoid a multiplicity of suits as the property she has purchased is the subject matter in the suit. If any orders are made without her inclusion she would probably file a separate suit seeking to have her interest protected and this is what this court is seeking to prevent.

21. The second proposed amendment is the substitution of land parcel Evuvore/Evuvore/344 with the land parcels Evuvore/Evuvore/4202 and Evuvore/Evuvore/4203 which are resultant subdivisions of the suit parcel of land. The applicant’s case is that the respondent has subdivided the suit parcel of land Evuvore/Evuvore/334 and the land now has new title numbers. The applicant argues that the subdivisions to the suit parcel of land has caused the closure of the original title deed to the land, which essentially has rendered the suit parcel of land to be non-existent.

22. This claim has not been denied by the respondent, who has admitted to having subdivided the land but argues that he had every right as the registered owner to deal with his land as he pleases. The applicant in his submissions has argued that the subdivision was intended to defeat justice and the intention was to have the original suit rendered nugatory and inconsequential as it is obvious that a court could not pronounce itself upon a non-existing subject. I agree with the applicant on this, as no order can be made by the court on a non-existent subject parcel of land. If any order is made, it is of no effect and cannot be implemented. There is therefore need to allow amendment for substitution of the original parcel number with the resultant subdivisions. This is for reason that the suit parcel remains the same regardless of the subdivisions done and such amendment will enable the court to effectively determine the dispute before it. No prejudice will be occasioned to either party. The prayer for amendment is therefore allowed.

23. I now turn to the prayer seeking injunctive order. It is clear to me that when this suit was filed against the respondent, he filed a replying affidavit and a counter-claim. Later on, he also filed an application for injunction against the applicant. It would therefore be true to say that the respondent wanted a restraining order against the applicant. The application under consideration now however was filed by the applicant. I expected the applicant to demonstrate sufficiently that he has met the threshold set out in *Gielu Vs Cassman Brown & Co. Ltd* [1973] EA 358. The threshold entails establishing a prima facie case with a probability of success, demonstrating a likelihood to suffer irreparable loss that damages can not adequately compensate, and, if need be, showing that the balance of convenience tilts in your favour. This was not demonstrated.

24. It is important to point out also that if the applicant really felt he should get an order of injunction, he should have given an undertaking to pay damages to the respondent if it ultimately turns out that it was undeserved. In *GATI Vs BARCLAYS BANK (K) LTD* [2001] KLR 525 the court held, inter alia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction can not issue.

25. Considering all this, I am not persuaded that the applicant has demonstrated that he is deserving of a temporary injunctive order. I therefore decline to grant a restraining order. My considered view is that damages are an adequate remedy in this matter.

26. The applicant also asked for an order of inhibition. Section 68(1) of the Land Registration Act provides as follows:

“The court may make an order (herein after referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge”

27. In *DORCAS MUTHONI & 2 OTHERS Vs MICHAEL IRERI NGARI* [2016] EKLK (ELC No. 324 of 2015, EMBU) the court observed as follows:

“An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the owner of the property under dispute from registering any transaction over the said property until further orders or until the suit in which the property is a subject is disposed off”. And in *JAPHET KAIMENYI M’NDATHO Vs M’NDATHO M’MBWIRIA* [2012] eKLR the conditions necessary for a grant of an order of inhibition were stated by Makau J as follows:

- a. That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant, unless preservative orders of inhibition are issued.
- b. That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.
- c. That the applicant has an arguable case.

28. From the pleadings, and even by admission of the respondent himself, the land in dispute in this suit was subdivided and a portion sold to a third party while the case was still pending. The actions of the respondent do not demonstrate good faith. It seems clear that he was trying to steal a march against the applicant. In my view, it is well shown that a real risk exists of dealing with the disputed land by the respondent in a manner that may defeat the interest of justice. It is not possible to say at this stage that the applicant has a case that is likely to succeed but it is clear to me that his case is certainly arguable.

29. My considered position is that the applicant has shown well that an order of inhibition is necessary in this case. I therefore grant an order of inhibition as prayed.

30. Lastly, I wish to point out that costs are not asked for. I therefore make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18<sup>TH</sup> DAY OF JANUARY, 2022**

In the presence of Njiru Eddie for applicant; The intended 2<sup>nd</sup> defendant present in person and in the absence of Mugambi Njeru for respondent.

CA: Leadys

**A.K. KANIARU**

**JUDGE**

18.01.2022