



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 31 OF 2009

FRANK MWANGI MATHEWS.....PLAINTIFF/APPLICANT

VERSUS

ELIZABETH HANNA WAITHERA.....1ST DEFENDANT/RESPONDENT

SOIL MERCHANTS (K) LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. The Applicants herein filed an application dated the 15th June, 2010 seeking to join the following persons in the suit as defendants.

- i. Stephen Mwangi Nderitu
- ii. Pauline Wambu Kiruma
- iii. Stephen Muchiri Karoku
- iv. Emily Njinguini Irugu
- v. Lilies Nyawira Mwangi
- vi. Margaret Nyambura
- vii. Valentain Nyambura Tipis
- viii. Joyce Njoki Njau
- ix. Humhey Omondi Ogutu
- x. John Ouma Onala
- xi. Godwin Omondi Ojwang
- xii. George Gichuru Ndiritu
- xiii. George Ouru Osumo
- xiv. Catherine Wanjugu Mwangi, Alice Njoki Kingori and Rose Kaari Njeru as Trustees of Dada Wa Africa
- xv. Winfred Mboya Osumo
- xvi. Pauline Gathigia Ndiragu
- xvii. Irene Murugi Kabuya
- xviii. Evans Lusigi Mugeru

2. The application is premised on grounds that the applicant filed the suit on the 10th February, 2009 in respect of parcels **Numbers Ngong/Ngong / 15506** and **Ngong /Ngong /15507** (hereinafter, “the suit premises”) subsequent to filing of the suit premises was sub-divided and new titles created; being **Ngong/Ngong/44531–44554** whereafter they were registered in the names of persons sought to be enjoined. It is therefore necessary to enjoin the parties in order to enable the

court to effectively adjudicate upon and settle all questions involved. The new registered owners are now developing their respective parcels exposing the applicant to substantial loss.

3. In support of the application, the Applicant deposed an affidavit stating that he purchased the suit premises in 1993 from **Lolomaitaa Ene Sidi Moiko**. He paid the greater part of the purchase price but the 1st Respondent fraudulently secured a transfer of the land to herself and later transferred it to the 2nd respondent. On discovering the fraud he registered a caution against the titles and obtained a restraining order in **Kajiado SRMCC No. 117 of 2005**. He later withdrew the suit on the 11th February, 2009 and filed the instant suit.
4. The 1st Respondent has subdivided the suit premises and transferred it. The new registered owners of the created titles are as follows;-

1. Ngong/Ngong/44531-Stephen Mwangi Nderitu
2. Ngong/Ngong/44532-Stephen Mwangi Nderitu
3. Ngong/Ngong/44533-Stephen Mwangi Nderitu
4. Ngong/Ngong/44534- Pauline Wambui Kiruma
5. Ngong/Ngong/44535-Stephen Muchiri Kaniku

-Ngong/Ngong/44535- Kamoku and Emily

-Ngong/Ngong/44535-Njiguini Irugu

6. Ngong/ Ngong/44536-Lilies Nyawira Mwangi
7. Ngong/Ngong/44537-Margaret Nyambura and Valentin Wilson Kanani
8. Ngong/Ngong/44538- Joyce Njoki Njau
9. Ngong/Ngong/44539-Humphrey Omondi Ogutu
- 10.Ngong/Ngong/44540- John Ouma Onala
- 11.Ngong/Ngong/44541- Godwin Omondi Ojwang
- 12.Ngong/Ngong/44542- George Gichuru Ndiritu
- 13.Ngong/Ngong/44543- George Gichuru Ndiritu
- 14.Ngong/ Ngong/44543- James Ouru Osumo
- 15.Ngong/Ngong/44544 and 44546

-Catherine Wanjugu Mwangi-

-Alice Njoki Kingori and

- Rose Kaari Njeru as trustees of Dada Africa

16. Ngong/Ngong/44545- Soil Merchants
- 17.Ngong/Ngong/44547- Winfred Mboya Osumo
- 18.Ngong/Ngong/44548 and 44550

-Pauline Githaiga Ndiragu

- 19.Ngong/Ngong/44549,44551 and 44550

-Irenie Murugu Kabuya

- 20.Ngong/Ngong/44554- Evans Lusigi Mugeru

5. The said new registered owners have started developing their suit premises and unless they are enjoined as parties to the suit he cannot obtain restraining orders against them.
6. The 1st Respondent filed grounds of objection whereby she stated that the application is an abuse of the court process; it lacks merit and is intended to delay the trial; the applicant is guilty of non-disclosure of facts and the application is intended to mislead and divert the court's attention from

- real issues that the applicant has a pending application dated 8th May, 2009 touching on the same issues.
7. The 2nd Respondent's director, **Samuel Njenja** deposed a replying affidavit whereby he stated that the application was misconceived as the 2nd Respondent bought the suit premises from the 1st Respondent who held the land for 13 years before it was transferred to him. A search carried out at the Lands Office revealed that the 1st Respondent was the registered owner with no restrictions.
 8. There having been no caution as alleged by the applicant the suit premises was subdivided and new titles issued to new owners; prior to this suit being instituted. The Court order was not registerable upon the suit premises as they had been closed upon subdivision.
 9. The application dated 8th May, 2009 was filed soon after the existence of the suit premises came to the knowledge of the applicant. It was for that reason that he sought leave to amend the plaint, an application that remains pending.
 10. Following the closure and the subdivision of the original land, new parcels of land created became distinct and have nothing to do with the original; therefore, new parties cannot be enjoined.
 11. The applicant cannot allege fraud because he has no documentary evidence of proof of purchase. He has no proprietary rights over the suit premises. If aggrieved the applicant should seek repleve of specific performance from **Lolomeitaa Ene Sidi Moiko**
 12. The suit contravenes the provisions of **Section 39** of registered **Lands Act** as the 2nd respondent bought the suit premises from the 1st Respondent and was not bound to enquire how she acquired it. That in the year 1996 the 1st Respondent was the proprietor of the suit and **Section 143 (2)** of the **Registered Lands Act** provides necessary protection.
 13. The application was canvassed by way of written submissions which I have taken into consideration.
 14. The application is brought pursuant to the provisions of **Order 1 rule 10(2)** of the **Civil Procedure Rules** which provides that:-

'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''.

15. The Applicant claims ownership of the suit premises having purchased it from one **Lolomeitaa Ene Sidi Moiko** in 1993. When he discovered the alleged fraud having occurred in the year 2009, he lodged a caution of the Land Registry, Nairobi on **Title No. L.R. Ngong/Ngong /15506** and **L.R. Ngong/15507** which are the subject matter herein. The 1st Respondent who is alleged to have committed fraud transferred the suit premises to the 2nd respondent who in turn subdivided the premises and sold to other parties. These new owners are developing the parcels of land hence the applicant being apprehensive that he will suffer irreparable loss. To be able to obtain orders against them, they must be enjoined as parties to the suit.
16. The 1st and 2nd respondent acknowledged the fact that the 1st respondent purchased the suit premises from **Lolomeitaa Ene Sidi Moiko** and got registered in 1996. There is an indication that the 1st respondent purchased the property in her capacity as the wife of the applicant
17. Accordingly to **Order 1 rule 10(2)** of the **Civil Procedure Rules**, the court has a discretion to order an addition of the defendant in order to have questions arising in the suit determined effectually and entirely. The respondents herein seem to have ceased being proprietors of the suit premises proceedings against them without including other persons in possession of the same may be futile. It is therefore a valid argument by the applicant that the only option is to enjoin the registered owners of the subdivided portions as defendants. Since the discretion bestowed upon the court can be exercised at any stage of the proceedings, the fact that an application dated 8th May, 2009 is still pending before court cannot be a bar to the order sought being granted. What

- matters would be what justice demands.
- 18.It will be in the interests of justice to have the prayers sought granted. I therefore allow the application. The persons listed in prayer (ii) of the application shall be joined as defendants in this suit. Consequently, the plaint shall be amended as provided by the law in order for the amended copies of summons and of the plaint to be served upon the new defendants.
- 19.Each party shall bear their own costs.
- 20.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH

day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE