



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1260 OF 2013

ESTHER MBULA MWANGANGI.....PLAINTIFF

VERSUS

NELSON MUTISYA MUUNDA.....1ST DEFENDANT

DANIEL ONGERI ONDERA.....2ND DEFENDANT

RUTH MORAA ONGERA.....3RD DEFENDANT

AND

NGURISH INVESTMENT LIMITED.....INTERESTED PARTY

RULING

The interested party filed a Notice of Motion dated **25th November 2014**, seeking for orders that this court grants a temporary injunction restraining the **2nd and 3rd Defendants**, its agents or servants from selling, transferring, disposing or in any other way alienating the suit property being plot **No Mavoko Town Block 3/29835** and **Mavoko Town Block 3/29836**, pending the hearing and determination of this suit. The application is based on the grounds stated on the face of the application and the supporting affidavit of **Michael Wainaina Ngure**, who stated that the interested party got into a sale agreement with the plaintiff for the purchase of the parcel of **ten (10) acres** within that land known as **Mavoko Town Block 3/1970**. He was however informed by the plaintiff that the 1st defendant was fraudulently disposing of the two titles namely **Mavoko Town Block 3/29835 and Mavoko Town Block 3/29836** and on carrying out a search he realised that the registered proprietors to the **Mavoko Town Block 3/29835 and Mavoko Town Block 3/29836**, were the 2nd and 3rd defendants respectively and are in the process of subdividing the suit properties so as to dispose to unsuspecting third parties.

The defendants took out a Preliminary Objection dated 15th December 2015 on the grounds that:-

1. *The application dated 25th November 2014 is a nonstarter and had been overtaken by events.*
2. *The property known as Title No Mavoko Town Block 3/1970 does not exist.*
3. *The application dated 25th November 2014, is a replica of the plaintiff's application dated 18th October 2013, and therefore res judicata*

4. *The interested party remedy (if any) lies against the plaintiff who has never been registered as the proprietor of **Title No. Mavoko Block 3/1970***
5. *The interested party has not complied with the court order made on 2nd April 2014 by the court and therefore the application herein is incompetent and should be struck out with costs.*
6. *The application dated 25th November 2014, is bad in law, fatally defective and incurable by amendment.*

This court will consider whether the preliminary objections raised by the defendants satisfy the ingredients of raising a preliminary objection. The benchmark is found in the court of appeal decision in the case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED VERSUS WEST END DISTRIBUTORS LTD (1969) EA 696. LAW J.A.** (as he then was) held that,

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleading and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court, or a plea of the limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration . . .”

SIR CHARLES NEWBOLD P. on the other hand had this to say,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”

The case of **ORARO VERSUS MBAJA 92005) I KLR 141** also decided by Ojwang J.(as then was) held that,

“A preliminary objection correctly understood, is a point of law which must not be blinded with factual details liable to be contested and in any event to be proved through the process of evidence”.

This court expects the points objected by the defendants to be a complete demurrer in the plain eye-sight. The defendants have raised 6 points of objections which I will deal with them herein below.

The court in applying these ingredients to the objections makes the following findings:- Ground 1 does not hold because the issue of whether or not the application has been overtaken by events has to be considered not in isolation but in conjunction with the facts of the applicant who was enjoined to the suit on **2nd April 2014**, and when so considered, the facts raised in the application dated 25th November 2014, will need to be ascertained by the court in whether or not to grant the orders sought therefore this ground fails the test because evidence is required to establish the interested party's relationship with the plaintiff and the defendant and how the suit property was dealt with by the parties herein. All these allegations need to be determined by adducing evidence in court.

Ground 2 does not hold because one needs to adduce evidence to prove that the title number **Mavoko Town Block 3/1970**, exists or not. I have perused the court record and seen a copy of the title to Mavoko Town **3/1970**, therefore the parties need to interrogate the origin or otherwise of the said title and in so doing evidence will be adduced by the parties herein which the court will then make a finding on whether or not the title exists or not.

Ground 3 raised *res judicata* as the application dated **25th November 2014** is a replica of the plaintiff's application dated **18th October 2013**. The court has perused the two applications and finds that even though the applications are both hinged on Order 40 seeking an injunction on **Mavoko Town Block**

3/29835 and Mavoko Town **Block 3/29836**, the application dated 25th November seeks to protect the purchaser's interest while the application dated **18th October 2014**, seeks to protect her ownership interest on allegation that the two suit properties had been fraudulently sold to third parties. The facts adduced by the applicants in these applications are different therefore this ground also fails.

Ground 4 does not hold because the interested party's remedy if any would be determined by the court and not the parties. For the court to reach a just decision on the issues of atoning the interested party it has to examine the facts and evidence tendered by the parties herein and their witnesses if any to make a finding on whether the interested party is entitled to any remedied.

Ground 5 does not hold because the application dated **25th November 2014**, cannot be rendered useless because it did not comply with the orders of this Court without giving it a chance to be heard. The cardinal principle is that a party cannot be driven from the seat of justice without being accorded a chance to be heard.

Ground 6 on whether it is bad in law, fatally defective and incurable is not explicit on the face of the application filed. The court needs to interrogate evidence in order to determine the factors or facts which go to establish existence of the suitability of the application of the court suffices.

In many instances, Courts of law have always had issues with parties who resort to raising preliminary objections improperly. Sir Charles Newbold P. in the **Mukisa Biscuits (supra)** thus said,

“That the improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

Based on the reasons of what has been stated above, the defendants' preliminary objection dated **15th December 2014** lacks merit because they do not satisfy the ingredients for raising a preliminary objection in the first instance and the same is dismissed with costs to the Plaintiff.

On the main Notice of Motion , the Court finds as follows:-

The application is based on the grounds stated on the face of the application which has been reiterated in the supporting affidavit of **Michael Wainaina Nguni**, the Director of the interested party. He stated that the interested party entered into a sale agreement with the plaintiff on 7th December 2010, for the purchase of 10 acres within the land known as **Mavoko Town Block 3/1970**. They were subsequently informed by the plaintiff that the 1st defendant had fraudulently disposed the two titles namely **Mavoko Town Block 3/29835** and **Mavoko Town Block 3/29836**, and after conducting a search he found that the 2nd and 3rd defendants were the registered proprietors respectively. He has learnt that the 2nd and 3rd defendants are now in the process of subdividing the suit properties with the intention of disposing the same to unsuspecting people with an aim of defeating the third parties claim, thereby delaying or obstructing justice. He deposes that the interested party will be greatly prejudiced by the 2nd and 3rd defendants' actions and stand to suffer irreparable loss as the interested party is a bona fide purchaser for value without notice and given the circumstances it is prudent in the interest of justice that the court issues an injunction to restrain the 2nd and 3rd defendants from disposing the suit premises pending the conclusion of the suit.

The plaintiff filed her replying affidavit wherein she confirmed that the 2nd and 3rd defendants were in the process of subdividing the suit land with the intention of selling the same to unsuspecting third parties and that it is in the best interest of all the parties concerned that the process of subdivision and possible sale of the suit premises be halted by way of a temporary injunction against the 2nd and 3rd defendants pending the hearing and determination of this suit adding that if the suit property is sold it will defeat the purpose of this suit. That it is crucial that the suit properties be maintained as they were when the suit was filed till the hearing and determination of the application and further stated that the 2nd and 3rd defendants

will not suffer any harm if the court restrains them.

The defendants did not file any replying affidavit in relation to this application.

I have carefully considered the Affidavits on record. This is an injunction application and the principles applicable are well settled in the case of **Giella –vs- Cassman Brown;**

“that the Applicant must establish a prima facie case with a probability of success, that the applicant must demonstrate that damages will not be an adequate remedy and that if the court is in doubt on the foregoing, it determines the matter on a balance of convenience”.

Prima facie case was defined by the Court of Appeal in the case of **Mrao –vs- First American Bank (K) Ltd** as a case where an applicant establishes that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter.

In the present case, has the interested party established a prima facie case with a probability of success? The interested party has stated that it purchased 10 acres of ***Mavoko Town Block 3/1970*** from the plaintiff for a consideration of ***Ksh 5,900,000/=*** and exhibited a sale agreement dated 7th December 2010. For a party to file for interlocutory application, he has to file a claim within which he hinges his claim. The interested party was joined in this suit on 2nd April 2014 and filed this application on 25th November 2014. The interested party has not filed any claim or suit herein that can be the basis of determining of whether it has a *prima facie* case or not and is hinging his rights to the suit property on the Defendants’ ownership of the same. The plaintiff is contesting ownership of the defendants’ actions on the suit properties and seems to support the interested party’s application for injunction. This court cannot therefore in these circumstances find a *prima facie* case in favour of the interested party since it has not shown any prima facie case. There is a dispute which is yet to be resolved between the Plaintiff and Defendants on ownership of the suit properties that the interested party is claiming an interest in. The court cannot therefore discern whether the interested party’s application hinged on a mandatory injunction or not. The application therefore lacks merit and is dismissed with costs. The interested party should file its pleadings within 45 days from the date of this ruling.

Dated, Signed and delivered this **23rd day March of 2015**

L. GACHERU

JUDGE

In the Presence of:-

Mr Morara holding brief Mr Mungai for the Plaintiffs/Applicant

None attendance for the Defendant/Respondent

None attendance for interested party though notified.

Hilda: Court Clerk

L. GACHERU

JUDGE