



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E039 OF 2021 (0S)

SIMION KERERI KARORI.....APPLICANT

VERSUS

JIMMY MAINA M. WAHIIA.....1ST RESPONDENT

ASSISTANT COUNTY COMMISSIONER

KAYOLE DIVISION.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI.....3RD RESPONDENT

RULING

1. Vide an originating summons dated 16.9.2021 the Applicant filed the suit in which he seeks the following orders:

1. That the application be certified as urgent and be heard ex-parte.

2. That this court be pleased to issue temporary injunctive orders, restraining the 1st Defendant and his servants and/or agents or any other persons acting, with authority from further interfering, trespassing, taking possession or transferring the said property to the detriment of the Applicant's rights as the legal owner of the suit property.

3. That an order be made declaring the Applicant the legal owner of PLOT No. CI-292 KAYOLE.

4. That the costs of the application be in the cause.

2. In his supporting, affidavit, the Applicant avers that he purchased the suit property Plot No. C1- 292 KAYOLE in the year 1992 from one Mr. Maronga Nyasoe. He immediately took possession and he has rented out the premises to Kenya Prophetic Ministries Church who proceeded to build a church thereon.

3. In response thereof, the 3rd Respondent filed grounds of opposition dated 22.9.2021 stating that:

1. The application before court is wrongly instituted.

2. The pleadings before court are brought under the wrong provisions of the law.

3. There is misjoinder of parties as the 3rd Respondent is wrongly enjoined.

4. There is no cause of action against the 3rd Respondent and the Applicant's suit ought to be dismissed with costs.

5. The orders sought cannot be granted under originating summons

6. The application is frivolous and an abuse of court process.

4. The 1st Respondent filed a replying affidavit dated 25.10.2021 claiming that they purchased the suit land Plot CI-292 Kayole from one Ruth Sayo Kaduki on 12.3.2008. He denies that the Applicant has been in occupation of the suit premises for 28 or so years. That the Applicant encroached on the suit land 2 years after 2008 when 1st Respondent was working at Masai Mara. He contends that the Applicant is fraudulently occupying the suit premises.

5. The 1st Respondent has also filed a preliminary objection dated 25.10.2021 where he avers that the Applicant's originating summons dated 16.9.2021 is a non-starter for failing to annex the certificate of title to the land, and this is in express contravention of **Order 37 rule 7(2) of the Civil Procedure Rules**, that the said pleadings is fatally defective, and is an abuse of the court process and should be dismissed.

6. On 16.11.2021 the court gave directions for parties to file submissions in respect of the preliminary objection, whereby the 1st Respondent was to file his submissions by 6. 12.2021. None were ever filed.

7. The 3rd Respondent has filed submissions averring that no certificate of tile has been filed, that the originating summons has been filed in "ex-parte proceedings" which is an unknown procedure, that no cause of action has been disclosed and that there is no evidence of interference of ownership by 3rd Respondent.

8. In support of their arguments, 3rd Respondent has relied on the case of **Family Bank Ltd v Tossels Enterprises Limited & 2 Others (2021)eKLR**.

9. The Applicant did not file any submissions.

10. I have considered the material presented before me. The fundamental nature of a preliminary objection was given in **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA** as follows:

" A Preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose off the suit..."

11. The gist of the preliminary objection is that no certificate of title has been availed by the Applicant. However, I find that the matter is at the infancy stage. Any relevant document can be availed at the pre-trial stage of the suit when a trial bundle is normally availed. The issue of the documents which ought to be availed in support of a case is one falling in the ambit of evidence. It is not a pure point of law hence the preliminary objection cannot stand.

12. Nevertheless I am at a loss as to why the Applicants have titled their pleadings as "ex-parte", an issue also pointed out by the 3rd Respondent. Again, it is rather odd for the prayer of temporary injunction to be sought in the main pleading. usually such a prayer is brought forth separately in a notice of motion application.

13. Be that as it may, the provisions of **Article 159 2(d) of the Constitution** call upon this court to disperse substantive justice without undue regard to procedural technicalities. The fact that the Respondents are already responding to the claim is a clear indication that the proceedings cannot be *ex-parte*.

14. Further, and in order to achieve the overriding objective set out in Section 1A and 1B of the Civil Procedure Act, and noting that both Applicant and 1st Respondent are claiming to be owners of the suit land but Applicant is in possession of the same, then I proceed to give orders that status quo be maintained.

Final Orders

- 1) *The preliminary orders is dismissed with no orders as to costs.*
- 2) *Status quo to be maintained until further orders are given by the Court.*
- 3) *The Respondents are to file and serve their pleadings within 30 days.*
- 4) *The parties are to file and serve their trial bundles within 30 days thereafter.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

GIKUNDA FOR THE 3RD DEFENDANT

MWENDWA HOLDING BRIEF FOR SHADRACK WAMBUI FOR THE 1ST DEFENDANT

COURT ASSISTANT: EDEL BARASA