



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 38 OF 2020

JOSIAH NJONJO KIMANI.....PLAINTIFF

=VERSUS=

NAOMI WAITHIRA NJONJO.....1ST DEFENDANT

CROCKFORD EAST AFRICA LIMITED.....2ND DEFENDANT

THE CABINET SECRETARY MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....1ST INTERESTED PARTY

EQUITY BANK LIMITED.....2ND INTERESTED PARTY

SBM BANK LIMITED.....3RD INTERESTED PARTY

RULING

1. The plaintiff, **Josiah Njonjo Kimani**, is a husband to the 1st defendant, **Naomi Waithira Njonjo**. They are estranged. Through a plaint dated 10/6/2020, he initiated this suit against his wife together with the three other defendants. He named **Kenya Commercial Bank Limited, Equity Bank Limited** and **SBM Bank Limited** as interested parties in the suit.

2. His case was that he was at all material times the registered proprietor of land parcel number **Dagoretti/Uthiru/1863**, which he inherited from his late father. In 2011, he decided to subdivide the said parcel into three plots as follows: (i) 0.089 hectare plot to be held in common by himself and his son, **Tom Kimani Njonjo**; (ii) 0.027 hectare plot to be held by him and his second wife **Lucia Wambui Njonjo**; and (iii) 0.044 hectare plot to be held in common by **Naomi Waithira Njonjo** the [1st defendant] together with the couple's two daughters, **Grace Wanjiru Njonjo** and **Julia Wanjiru Njonjo**. He contended that he entrusted the 1st defendant with the sub division process. It was his case that the 1st defendant subsequently obtained three title deeds two of which fraudulently excluded his second [current] wife and the above two daughters. The subdivision titles were issued as follows: (i) **Dagoretti/Uthiru/1994 (0.089 hectare)** in the names of Josiah Njonjo Kimani [Plaintiff], Tom Kimani Njonjo, and Naomi Waithira Njonjo [1st defendant]; (ii) **Dagoretti/Uthiru/1995 (0.027 hectare)** in the names of Josiah Njonjo Kimani [the plaintiff], Tom Kimani Njonjo and Naomi Waithira Njonjo [1st defendant]; and (iii) **Dagoretti/Uthiru/1996 [0.044 hectares]** in the name of Naomi Waithira Njonjo.

3. The plaintiff contended that parcel number 1996 should have been registered in the names of the 1st defendant and the couple's two daughters while parcel number 1995 should have been registered in the name of the plaintiff's current wife, Lucia Wambui Njonjo. He added that in 2012 and 2013, without his consent, the 1st defendant obtained loans from the Agricultural Finance Corporation and from Equity Bank using parcel number 1996 as security. He added that in or about 2013, the 1st defendant deceptively and fraudulently amalgamated parcel numbers 1994 and 1995 to create parcel number **Dagoretti/Uthiru/2129** without his knowledge. He further contended that in 2013 and 2014, the 1st defendant obtained loans from **Rafiki Deposit Taking Micro Finance Limited** and from **Kenya Commercial Bank Limited** using parcel number 2129 as security. It was his case that although he was aware of the loans, he was fraudulently misled by the 1st defendant to believe that the loans were secured by parcel number 1994.

4. The plaintiff added that in or about July 2019, a letter from Kenya Commercial Bank was delivered to his home which is on parcel number 2129, demanding payment of loan arrears totaling Kshs 7,000,000. It was his case that he was surprised by the contents of the letter since the

68 apartments erected on parcel number 2129 were generating monthly rental income of Kshs 680,000 and he had authorized the 1st defendant to be collecting the rent on condition that the rent would be deposited at Kenya Commercial Bank to repay the loan taken to construct the apartments.

5. The plaintiff further contended that in or about November 2019, unknown people visited his home which is on parcel number 2129 to survey parcel number 1996 and parcel number 2129. At that point, he learnt that the 1st defendant intended to sell parcel numbers 1996 and 2129 without his knowledge nor involvement. Upon conducting searches, he established that parcel numbers 1994 and 1995 had been amalgamated into parcel number 2129 and that the 1st defendant had obtained a further loan from Kenya Commercial Bank in August 2015 through a further charge against parcel number 2129. He contended that he never gave his consent for the further charge.

6. It was the plaintiff's case that subsequent to that, he prompted the Deputy County Commissioner of Kabete Sub-County to write a letter dated 19/11/2019 to the Land Registrar, requesting the Land Registrar to place restrictions on parcel numbers 1996 and 2129, a request which the Land Registrar acted upon. He added that in January 2020, he was served with a notice of motion dated 13/12/2019, filed by the 1st defendant, seeking removal of the restriction on parcel number 1996. He instructed *M/s Chepkuto Advocates* to represent him in the proceedings. Subsequently, on 3/2/2020, he established that the 1st defendant had sold parcel number 1996 to the 2nd defendant and a new title deed had been issued to the 2nd defendant on 22/1/2020. The plaintiff faulted the Deputy Commissioner for writing to the Land Registrar to remove the restriction.

7. The plaintiff contended that since 2011, the 1st defendant had engaged in actions of fraud and deceit against him and had unlawfully infringed on his right to property guaranteed under Article 40 of the Constitution. He itemized various particulars of fraud.

8. It was his case that save for the signature appended to the documents authorizing subdivision of parcel number 1983 into three portions, he had not signed any other document authorizing the amalgamation of any property, consenting to the charge relating to parcel number 1996 or consenting to the further charge relating to parcel number 2129. He added that since the 1st defendant had no legitimate title over parcel number 1996, she could not pass a proper title to the 2nd defendant.

9. Consequently, the plaintiff sought the following verbatim reliefs against the defendants.

a) A Permanent injunction to be issued restraining the 1st defendant and Kenya Commercial Bank either by themselves of their personal representatives, agents and/or employees or otherwise from advertising for sale, or in any other way offering for sale, leasing, subletting, charging, interfering and/or otherwise dealing in any other manner howsoever with the property known as Dagoretti/Uthiru/2129 without the written consent of the plaintiff lawfully obtained.

b) A mandatory injunction be issued to the 1st defendant to compel her to deposit the rent collected from the apartments constructed on Dagoretti/ Uthiru/ 2129 in the proper bank account at the Kenya Commercial Bank which holds a charge of Dagoretti/ Uthiru/ 2129 until the loan secured by the first charge is repaid.

c) A declaration that the further charge registered against Dagoretti/ Uthiru/ 2129 in favour of the Kenya Commercial Bank in unlawful as it was registered without the consent of the plaintiff and his wife Lucia Wambui Njonjo.

d) A declaration that the registration of the 1st defendant as the sole owner of Dagoretti/ Uthiru/ 1996 was irregular, unlawful, fraudulent, null and void ab initio and therefore that the 1st defendant had no legitimate title over Dagoretti/ Uthiru/ 1996.

e) A declaration for the transfer and registration of Dagoretti/ Uthiru/ 1996 to the 2nd defendant and the subsequent charge to SBM Bank Limited was irregular, unlawful and fraudulent since the 1st defendant did not have a legitimate title over Dagoretti/ Uthiru/ 1996.

f) An order for the cancellation of the registration of the 2nd defendant from the title of Dagoretti/ Uthiru/ 1996 and the said title to revert to either the plaintiff or to the 1st defendant together with Grace Wanjiru Njonjo and Julia Wanjiru Njonjo in common.

g) A declaration that the DCC Kabete Sub – County's removal of the restriction it had place on Dagoretti/ Uthiru/ 1996 without informing the plaintiff was unlawful and contrary to the principles of natural justice and the requirements of the Land Registration Act, 2012.

h) The costs of this suit be borne by the plaintiff and in the event costs are awarded to the interested parties the same be borne by the 1st defendant in light of the fact that this suit has been brought about the 1st defendants actions.

i) General damages and any other reliefs this court may deem just and expedient to grant.

10. Together with the plaint, the plaintiff filed a notice of motion dated 10/6/2020 seeking; (i) an interlocutory injunctive order restraining the 1st defendant and the 1st interested party against selling, leasing, subletting, charging or dealing with parcel number 2129; (ii) an interlocutory injunctive order compelling the 1st^t defendant to deposit the rent collected from the apartments constructed on parcel number 2129 in the proper mortgage account held with the 1st interested party; and (iii) an interlocutory injunctive order restraining the 2nd defendant and the 3rd interested party against selling, leasing, charging or dealing with parcel number 1996. The application was supported by the plaintiff's affidavit sworn on 10/6/2020 in which he reiterated his case as outlined above. The said application is one of the three items falling for determination in this ruling.

11. The second item falling for determination is the chamber summons dated 14/8/2020 through which the 2nd interested party seeks to be removed from these proceedings on the ground that there is no cause of action against it. The application was supported by an affidavit

sworn on 14/8/2020 by Kariuki Kerigo, He deposed that the 2nd party did not have any interest in the suit properties, adding that no relief was sought against them in the amended plaint.

12. The third item falling for determination is the 1st interested parties' preliminary objection dated 30/10/2020, through which the 1st interested party objected to the jurisdiction of this court on the ground that disputes relating to charges and mortgages are a preserve of the civil and commercial courts and not the Environment and Land Court. Since the preliminary objection raises a question of jurisdiction, I will dispose it first.

13. The preliminary objection dated 30/10/2020 was canvassed through written submissions dated 6/4/2021, filed by the firm of *Njoroge Kugwa & Co. Advocates*. Counsel cited Article 162 of the Constitution and the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & others (2017)eKLR*. Counsel contended that the claim against the 1st interested party and the issues raised as between the plaintiff and the 1st interested party fell outside the jurisdiction of this court and urged the court to strike out the suit.

14. The plaintiff responded to the preliminary objection through written submissions dated 24/5/2021, filed by the firm of *Kiragu Wachira & Company Advocates*. Counsel cited Article 162 of the Constitution and Section 13 of the Environment and Land Court Act and submitted that this suit challenges: the registration of the 1st defendant as proprietor of parcel number **Dagoretti/Uthiru/1996**; various charges; amalgamation of Dagoretti/Uthiru/1994 and 1995 to create parcel number 2129; sale of parcel number 1996 to the 2nd defendant; and removal of restrictions against parcel number 1996. Counsel urged the court to reject the preliminary objection.

15. I have considered the notice of preliminary together with the written submissions thereon. I have also considered the gist of the plaintiff's claim. The single question to be answered in the preliminary objection is whether this court is the proper court to adjudicate the dispute in this suit.

16. The broad jurisdiction of this court is spelt out in Article 162(2) (b) of the Constitution. **Section 13** of the Environment and Land Court Act further sets out an elaboration of the disputes that fall within the parameters set by the Constitution.

17. An examination of the plaint reveals that through this suit, the plaintiff challenges the amalgamation of parcel numbers 1994 and 1995 to create parcel number 2129. Secondly, the plaintiff challenges the registration of the 1st defendant as the sole proprietor of parcel number 1996 and the subsequent transfer of the land to the 2nd defendant. Thirdly, the plaintiff challenges the further charge created against the amalgamated title and the charge created against parcel number 1996. Lastly, the plaintiff challenges the vacation of the restriction that had been registered against parcel number 1996. Given the above circumstances, it does emerge that the dominant issues in this suit relate to amalgamation of the two titles and registration of the 1st defendant as proprietor of parcel number 1996. This court is, in the circumstances, the proper court to deal with the dispute.

18. The result is that the preliminary objection dated 30/10/2020 is rejected. I now turn to the chamber summons dated 14/8/2020 brought by the 2nd interested party.

19. The 2nd interested party's case is that it has no subsisting charge against any of the title. It has no interest in any of the suit properties. It lent money against one of the titles and the loan was subsequently repaid in full whereafter it discharged the suit property. No proper reason has been tendered by the plaintiff to justify the retention of the 2nd interested party as a party to this suit. The court is, in the circumstances, in agreement with the 2nd interested party that there is no proper basis for retaining the 2nd interested party as a party to this suit. Should there be need for evidence from the 2nd interested party, that evidence can be properly procured without retaining the 2nd interested party a party to this suit.

20. The result is that the 2nd interested party's chamber summons dated 14/8/2020 is allowed in terms of prayer 1 but with no order as to costs. I now turn to the plaintiff's application dated 10/6/2020.

21. The plaintiff's application dated 10/6/2020 is a plea for interlocutory injunctive reliefs pending the hearing and determination of this suit. The principles upon which jurisdiction to grant interlocutory injunctive relief is exercised is well settled. First, the applicant is expected to demonstrate a prima facie case with a probability of success. Second, the applicant is expected to demonstrate that if the injunctive relief is declined, he would stand to suffer injury that may not be indemnified through an award of damages. Third, should there be doubt on either or both of the above two requirements, the court should determine the application based on the balance of convenience. Lastly, at this interlocutory stage of the proceedings, the court does not make conclusive or definitive findings on the key issues in the dispute.

22. At the centre of all the allegations which the plaintiff has made in this suit and in the application under consideration is the 1st defendant. The 1st defendant is a wife to the plaintiff pursuant to a monogamous marriage contracted on 5/5/1989. There is no evidence that the said monogamous marriage has been dissolved. In the plaintiff's own words, he entrusted the 1st defendant with the subdivision of the original parcel of land. The plaintiff has not disputed the fact that he signed the relevant mutation papers. Secondly, although the plaintiff has made allegations of fraud, there is no evidence to suggest that he has made reports to the Criminal Investigation Directorate to investigate those allegations so that appropriate charges can be preferred against the 1st defendant. The 1st defendant's position is that the plaintiff has been privy to all the dealings relating to the suit properties. Indeed, the plaintiff confirms that he signed documents relating to the first charge relating to parcel number 2129 although he is challenging the amalgamation which gave rise to the title. Further, the couple's son, Tom Kimani Njonjo, has been a party to the transactions but the plaintiff has, for unknown reasons, left him out of this suit.

23. It is not lost to this court that the interlocutory injunctive reliefs which the plaintiff seeks are targeting third parties who were not privy to their family dispute. Those third parties have given money on the strength of the titles which the plaintiff is challenging. The plaintiff has not made the third parties defendants in this suit.

24. Given the above circumstances, I do not think the plaintiff has demonstrated a prima facie case with a probability of success as against the 1st and 3rd interested parties whom he strangely elected not to join as substantive parties to this suit. The balance of convenience, in my

view, favours a situation where the rights of the innocent lenders are not curtailed. It is up to the couple to sort out their family issues and ensure that the loans secured by the titles are regularly serviced and eventually repaid in full pending the hearing and determination of this suit. The result is that the court finds that the applicant in the application dated 10/6/2020 has failed to satisfy the criteria for grant of interlocutory injunctive reliefs.

25. In the end, the plaintiff's application dated 10/6/2020; the 1st interested party's preliminary objection dated 30/10/2020; and the 2nd interested party's chamber summons dated 14/8/2020 are disposed as follows:

(a) The plaintiff's application dated 10/6/2020 is dismissed for lack of merit. Costs shall be in the cause.

(b) The 1st interested party's preliminary objection dated 30/10/2020 is rejected for lack of merit. Costs shall be in the cause.

(c) The 2nd interested party's chamber summons dated 14/5/2020 is allowed in terms of prayer 1, but with no order as to costs.

DATED AND SIGNED AT THIKA ON THIS 28TH DAY OF MARCH 2022

B M EBOSO

JUDGE

DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MARCH 2022

J G KEMEI

JUDGE

In the presence of: -

Plaintiff: Ms Mulongo

Defendants: Chege, Wanja

Interested Parties: Ms Waigwa, Gichuki

Court Assistant: Phyllis Mwangi