



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. E087 OF 2021

LANDMERK INTERNATIONAL PROPERTIES LIMITED.....PLAINTIFF

=VERSUS=

ANNE WANGARI MUNENE.....DEFENDANT

MAISHA STEELS (EAST) AFRICA LTD.....INTENDED INTERESTED PARTY

RULING

1. The Plaintiff initiated this suit through a plaint dated 13/8/2021. Its case was that it entered into a sale agreement dated 14/7/2018 with the defendant, pursuant to which it agreed to sell to the defendant **Land Parcel Number Ruiru Township/260** at a purchase price of **Kshs 33,000,000**. The defendant made a partial payment of Kshs 16,500,000 but failed to pay the balance. Consequently, it rescinded the sale contract. It added that upon rescinding the contract, the defendant hurriedly transferred the suit property into her name using some of the completion documents which it had entrusted to her.

2. Consequently, it sought the following reliefs against the defendant:

- a) Cancellation of the registered transfer and the subsequent title deed issued to the defendant;*
- b) A permanent injunction restraining the defendant whether by herself or her agents from further transferring ownership, selling, charging, interfering or dealing with the property;*
- c) Damages for breach of contract;*
- d) Costs of this suit; and*
- e) Interest on (c) and (d) above at court rates.*

3. Together with the plaint, the plaintiff brought a notice of motion dated 13/8/2021, seeking various interlocutory reliefs, among them, preservatory orders. On 21/9/2021, the court gave disposal directions relating to the plaintiff's application dated 13/8/2021 and directed that the application be heard interpartes on 19/10/2021.

4. On or about 7/10/2021, **M/s Maisha Steel (East Africa) Ltd** (the intended interested party) brought a notice of motion dated 6/10/2021, seeking to be joined in this suit. Further, they sought an order restraining the defendant against evicting or harassing them. The said application dated 6/10/2021 is the subject of this ruling.

5. The application was supported by an affidavit sworn on 6/10/2021 by Mr **Manish Patel**. He deposed that the intended interested party took possession of the suit property on 1/7/2021 and subsequently entered into a formal tenancy agreement with the plaintiff on 10/9/2021. He added that on 4/10/2021, the defendant, in the company of police officers from Ruiru DCI's Office visited the suit property and attempted to stop them from carrying on business on the suit property. He further contended that the defendant was harassing them with a view to causing them to abandon the suit premises. He deposed that the actions of the defendant were subjecting them to irreparable damage and loss. He urged the court to grant the orders sought in the application.

6. The defendant opposed the application through a replying affidavit sworn on 1/11/2021. She deposed that the intended interested party could not have taken possession of the suit property on 1/7/2021 because she was given possession of the suit property by the plaintiff on 26/5/2021 pursuant to an addendum agreement dated 26/5/2021 between her and the plaintiff. She added that the agreement dated 10/9/2021 was fabricated and, in any event, provided for a commencement date in the month of October 2021 which contradicted the deposition of the intended interested party. She added that the purported lease contravened the status quo order issued by the court on 21/9/2021. She deposed that the lease agreement was inadmissible because it was not stamped as required under the Stamp Duty Act. She urged the court to

reject the application.

7. The plaintiff responded to the application through a supplementary affidavit sworn on 4/10/2021 by Patrick Nderitu. He deposed that he was not privy to the addendum agreement exhibited by the defendant and pursuant to which the defendant purported to have been given vacant possession of the suit property.

8. The application was canvassed through written submissions dated 3/12/2021, filed by the firm of *Mariara & Company Advocates*. Counsel submitted that the following two issues fell for determination in the application: (i) Whether the applicant met the threshold set out under the law for joinder as an interested party; and (ii) Whether the intended interested party had demonstrated substantive interest to permit joinder in the proceedings.

9. On the first identified issue, counsel cited the supreme Court decision in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others [2016]eKLR; Petition No 15 of 2016* and submitted that where one has a right that is threatened or affected by any proceedings, then that person has a right to be joined in the proceedings as an interested party. Counsel argued that the applicant stood to be adversely affected by the proceedings because he had a lease agreement relating to the suit property. Counsel added that pursuant to the lease agreement, the applicant was in occupation of the suit property. Counsel added that the applicant was a necessary party for the effectual and complete adjudication and settlement of all the questions involved in the dispute.

10. On whether the applicant had demonstrated substantive interest in the suit property, counsel submitted that both the plaintiff and the defendant had acknowledged that the applicant was in occupation of the suit property. Counsel argued that, as a tenant, the applicant had a stake in the suit property.

11. The defendant filed written submissions dated 26/11/202 through the firm of *Mugane & Company Advocates*. Counsel identified the following as the four issues falling for determination in the application: (i) Whether there exists a valid lease between the plaintiff and the applicant; (ii) Whether the lease adduced as evidence by the applicant is admissible; (iii) Whether the applicant is trespassing on the suit property; and (iv) Whether the applicant should be joined to this suit.

12. On whether there exists a valid lease between the plaintiff and the applicant, counsel submitted that by the time the plaintiff and the applicant purported to execute a lease in favour of the applicant, this suit subsisted and the plaintiff was aware that she (the defendant) was the registered proprietor of the suit property. Counsel added that **Section 24** of the Land Registration Act vested in the defendant all rights in the suit property. Further counsel for the defendant argued that the lease relied upon by the applicant was invalid because it was allegedly signed by only one of the directors of the plaintiff's company and it was not attested. Counsel argued that the purported lease was a ploy by the plaintiff and the applicant to dispossess the defendant the suit property.

13. On the admissibility of the lease, counsel submitted that the lease which the applicant was relying on was an instrument chargeable with stamp duty and because it was not stamped, Section 19 of the Stamp duty Act barred the court from receiving it as evidence.

14. Counsel for the defendant further submitted that the applicant was a trespasser because the plaintiff lacked the capacity to contract with third parties in relation to the suit property. Counsel added that the applicant had failed to demonstrate that it had an identifiable interest in the suit property or that it was a necessary party for the effectual and complete adjudication of the dispute in the suit. Counsel urged the court to dismiss the application.

15. I have considered the application, the response to the application, and the parties' respective submissions on the application. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in the application. Three key issues fall for determination. The first issue is whether the lease agreement relied upon by the applicant is inadmissible as evidence by dint of **Section 19** of the Stamp Duty Act. The second issue is whether the application meets the criteria for joinder. The third issue is whether the application satisfies the criteria for grant of restraining orders. I will make brief sequential pronouncements on the three issues in the above order.

16. A lease agreement is an instrument chargeable with stamp duty under the Stamp Duty Act. **Section 19** bars the court against receiving a chargeable instrument on which Stamp duty has not been paid. This issue was raised by the defendant both in her replying affidavit and in the written submissions. The intended interested party and the plaintiff appear to have ignored it. It is also noted from a cursory perusal of the sale agreement and the addendum agreement that the two instruments, though similarly chargeable, appear not to have been stamped. I will for now restrict my focus on the lease agreement because that is what has been challenged. It is, however, expected that both the plaintiff and the defendant will similarly ensure that they have presented the two instruments to the Collector of Stamp Duty for assessment and payment of stamp duty if they ultimately intend to produce them as evidence.

17. The fate of the lease agreement is that it is inadmissible and will remain inadmissible until stamp duty is assessed by the Collector of Stamp Duty and duly paid. That is my finding on the first issue. I now turn to the second issue.

18. The second issue is whether the application meets the criteria for joinder. The principles that guide our courts when exercising jurisdiction to grant orders of joinder are well settled. A party seeking an order of joinder is required to demonstrate an identifiable interest or stake in the proceedings. The Supreme Court of Kenya emphasized this principle in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others [2016]eKLR; Petition No 15 of 2016* by outlining the following criteria:

i. The personal interest or stake that the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.

19. Secondly, the court is vested with powers to *suo motto* join, as a party, any person who it considers to be a necessary party for the effectual and complete settlement of the questions in the dispute before it. **Order 1 rule 10(2)** of the Civil Procedure Rules contains the following framework in this regard:

“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”.

20. In the present application, the applicant presented a lease agreement which has been adjudged inadmissible at this stage. It cannot, in the circumstances, be said that the applicant has demonstrated an identifiable interest or stake in these proceedings. Both parties to this suit, however, appear to indicate that the applicant is in occupation of the suit premises. Indeed, the defendant has termed the applicant a trespasser and has deposed that she has in the past sought police assistance to eject the applicant from the suit premises. The above circumstances, in my view, render the applicant a necessary party for the effectual and complete adjudication and settlement of the key questions in this dispute. I will, in the circumstances, admit the applicant as an interested party notwithstanding that the lease agreement it purported to rely on was found inadmissible. That is my finding on the first question.

21. Last is the question as to whether the applicant has satisfied the criteria for grant of an injunctive order. My answer to this question is in the negative. I say so for two reasons. First, the applicant has not pleaded any claim in this suit. The applicant is basically asking the court to give it an injunctive order in the absence of any claim against either of the two parties. That is not permissible under our Civil Procedure Rules. Secondly, the lease agreement which the applicant waved to the court has been found to be inadmissible. The applicant cannot, in the circumstances, be said to have satisfied the criteria for grant of an interlocutory injunctive relief. The result is that the court has no basis upon which to issue an injunction in favour of the applicant.

22. In the end, the intended interested party’s notice of motion dated 6/10/2021 is disposed in the following terms:

a) Maisha Steel (East) Africa Ltd is admitted as an interested party in this suit.

b) The said interested party’s plea for a restraining order is declined for lack of merit.

c) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF MARCH 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Olwe for the Plaintiff

Ms Mukobi for the Defendant

Mr Mariaria Intended Interested Party

Court Assistant: Lucy Muthoni