



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MAKUENI
ELC CASE NO. 36 OF 2019

RAFIKI MICROFINANCE BANK LIMITED.....1ST PLAINTIFF

NICHOLAS MUTUA NZIOKA.....2ND PLAINTIFF

VERSUS

DANIEL KAKUI KIOKO.....1ST DEFENDANT

WINFRED WAMBUA.....2ND DEFENDANT

JACKSON WAMBUA.....3RD DEFENDANT

LAND REGISTRAR MAKUENI.....4TH DEFENDANT

CAROLINE NGINA MWONGELA.....PROPOSED 5TH DEFENDANT

SETH WANZAU.....PROPOSED 6TH DEFENDANT

AND

BENJAMIN NDULA NDAKA.....1ST PROPOSED INTERESTED PARTY/APPLICANT

JOSEPH WAYUA MWINZI.....2ND PROPOSED INTERESTED PARTY/APPLICANT

PATRICK MULWA.....3RD PROPOSED INTERESTED PARTY/APPLICANT

FIDELIS MUSEMBI.....4TH PROPOSED INTERESTED PARTY/APPLICANT

ELIZABETH NDUNGE.....5TH PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. The Proposed Interested Parties/Applicants filed the Notice of motion dated 2nd December, 2020 under certificate of urgency of even date. It is brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** in addition to **Order 1 Rule 10(2), (4)** and **Order 40 Rule 1** of the **Civil Procedure Rules, 2010**.

2. The Applicants seek the following Orders:

i) [SPENT]

ii) **THAT the Applicants herein be enjoined in these proceedings as interested parties.**

iii) **THAT the court do order that Caroline Ngina Mwangela and Seth Wanzau be enjoined in these proceedings as the 5th and 6th Defendants respectively.**

iv) **THAT there be an order of stay of proceedings in this matter pending the hearing and determination of Makueni HCCC No. 4 of 2018 (formerly Makueni ELC No. 331 of 2017).**

v) [SPENT]

vi) **THAT an order of temporary injunction do issue restraining the 4th Defendant herein from dealing with the title to LR. No. Makueni/Unoa/2798 in whichever manner pending the hearing and determination of this suit.**

vii) **THAT upon grant of prayers 2 and 3 above, the Plaintiff be ordered to amend the plaint accordingly.**

viii) **THAT costs be provided for.**

3. The application is supported by the affidavit of Benjamin Ndula Ndaka sworn on the same day on his behalf and that of his co-applicants. It is premised on the grounds that the proposed 5th and 6th Defendants are the 1st and 2nd Defendants respectively in Makueni HCCC No. 4 of 2018 where the Applicant herein is one of the Plaintiffs. In addition, the 1st Plaintiff herein is the 3rd Defendant in the said suit. That the main prayer in Makueni HCCC No. 4 of 2018 is for an order compelling the proposed 5th and 6th Defendants to transfer among others the suit property herein, Title No. Makueni/Unoa/2798 to the proposed interested parties. That the ownership of the suit property is thus in dispute and subject to the aforesaid High Court case.

4. It was added that the 2nd Plaintiff herein purchased the suit property during the pendency of the High Court case and that he seeks orders for transfer of the suit property to him within this suit. That the entire dispute revolves around all the parties in this application and that both suits are so closely related that there may be a danger of contradicting decisions should both cases proceed concurrently.

5. It was deposed further that on account of the foregoing, it is in the interest of fairness that these proceedings be stayed so as to enable the questions which have been raised in the High Court case to be determined. That it was also in the interest of justice that the proposed interested parties and the proposed defendants be joined in these proceedings in order to effectively adjudicate on the dispute. That the injunctive reliefs sought against the 4th Defendant are for purposes of safeguarding the suit property from being transferred to the 2nd Plaintiff while at the same time preserving the Applicants' right to be heard without their claim to the title being alienated any further.

6. The application is opposed vide the grounds of opposition filed by the Plaintiffs on 17th December, 2020. It was averred that the application is misconceived and it had been brought in bad faith. That the object of this suit was to lift and or remove the caution placed over the suit property by the 1st, 2nd and 3rd Defendants and hence they Applicants lacked locus. That the said caution over the suit property had subsequently been removed. That Makueni HCCC No. 4 of 2018 is a purely commercial dispute which explains why this Court transferred it the High Court in the first place. It was averred that in a Ruling delivered by this Court on 1st March, 2018, an application for orders of injunction filed by the proposed interested parties was dismissed and thus the current prayer herein is in bad faith. Lastly, the Plaintiffs/Respondents averred that the application is untenable and ought to be dismissed with costs.

7. The Applicants filed submissions in support of the application on 2nd June, 2021. They argue that they have an identifiable stake in these proceedings being purchasers of the suit property which was sold to them by either the proposed 5th and 6th Defendants and or subsequent vendors who purchased the suit property from the proposed 5th and 6th Defendants. That being the Plaintiffs in Makueni HCCC No. 4 of 2018, they have sought orders for the transfer of the title to the suit property from the 1st Plaintiff and the proposed 5th and 6th Defendants to them. That their presence in these proceedings will enable this Court to fully settle all the issues in controversy between the parties.

8. On stay of these proceedings, the Applicants argue that the continuation of these proceedings simultaneously with the High Court case will likely lead to contradicting decisions. That the question of ownership of the suit property is pending before the High Court. On the grant of injunctive relief against the 4th Defendant, it was submitted that the Applicants had satisfied the requirements laid down in the case of **Giella v Cassman Brown [1973] EA 358**. That the 1st Plaintiff had entered the suit property with the intention of selling it to the 2nd Plaintiff and unless restrained, the Applicants will suffer irreparable harm. More to that, it was submitted that in order to facilitate determination of the real questions in controversy between the parties, the Plaintiffs ought to be freely allowed to amend their pleadings. The following authorities were relied on: -

i) **Crescent Distribution Services Limited v Egnite Technologies Limited & another [2013] eKLR;**

ii) **Benja Properties Limited v Savings and Loans Kenya Limited [2005] eKLR;** and

iii) **AMM v JMN [2019] eKLR**

9. The Plaintiff/Respondents filed submissions in reply on 28th June, 2021. It was submitted that the Applicants and the proposed defendants who are being sought to be joined in this suit had no interest in these proceedings. That in the instant suit, the Plaintiffs had sought orders to remove a caution placed over the title to the property by the 1st, 2nd and 3rd Defendants and not the Applicants and the purpose of the suit had been served. That as opposed to having just a close connection with the suit property, the Applicants claim a purchasers' interest which they wish to agitate in these proceedings and that excludes them from the purview of being interested parties. It was further submitted that the prayer for injunction pending hearing and determination of this suit is misconceived and an abuse of the process of this court as such relief had been dismissed previously. Lastly it was submitted that the instant application was an attempt to vex this Court and to prevent the 2nd Plaintiff, as an innocent purchaser for value, his rights over the suit property. The following authorities were relied on: -

i) **AMM v JMN [2019] eKLR;**

ii) **Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR;**

iii) **Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR;**

iv) **Kanorero River Farm Limited & another v National Bank of Kenya [2005] eKLR;** and

v) **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**

10. I have perused the pleadings herein and in my view the issues for determination are as follows: -

i) whether the Applicants have satisfactorily demonstrated that they have an identifiable stake in these proceedings and that they will suffer prejudice if their interests are not articulated herein;

ii) whether sufficient cause has been demonstrated by the Applicants to merit stay of these

proceedings; and

iii) whether the Applicants have a prima facie case for the grant of injunctive reliefs.

11. In disposing of the first issue, I have perused the Complaint filed in court on 28th May, 2019 in respect of the proceedings herein. Unquestionably, one of the claims is for the removal of the caution registered on Title No. Makueni/Unoa/2798. The second claim is for the execution of transfer instruments in favour of the 2nd Plaintiff by the 4th Defendant. So far, the 4th Defendant has removed the caution on the Title to the suit property. What remains for disposal in this suit is the issue of transfer of ownership of the suit property to the 2nd Plaintiff.

12. I have also perused the Complaint annexed to the application and marked as Exhibit "BNN1". In that suit, the claim is for a declaration that the creation and registration of some charge instruments in favour of the 1st Plaintiff by the proposed 5th Defendant was illegal. Subsequent to that declaration, the proposed Interested parties herein sought a permanent injunction against the 1st Plaintiff from repossessing and advertising the suit property for sale. Lastly, the proposed interested parties sought that the proposed 5th and 6th Defendants be compelled to transfer the suit property to them in accordance with their respective purchases. The said suit was formerly Makueni ELC Case No. 331/17 before being transferred to the High Court and is currently Makueni HCCC No. 4 of 2018.

13. In the context of this case, I note that there are two aspects to the High Court dispute. One is in respect of the statutory power of sale arising from the charge instruments whereas the other is in respect of the contractual agreements between the proposed interested parties and the proposed 5th and 6th Defendants. Should the prayers advanced by the Applicants against the 1st Plaintiff herein in that suit succeed, then it shall make way for their claim of ownership to be heard. Should the same prayers fall through, then they would still have their day in court for proper compensation from the alleged vendors of the suit property subject to the Limitation of Actions Act.

14. The application herein seems to be targeted at the inclusion of the proposed interested parties so that they can agitate their claims to the suit property against the proposed 5th and 6th Defendants who are the alleged registered owners. While the Plaintiffs' claim and the Applicants' claims remotely trace back to their interactions with the proposed 5th Defendant, I do not hold the view that they share a common origin. The claims are separately distinct and cannot be consolidated. In this suit, this Court bears a limited consideration to the question of the Plaintiffs' entitlement to the suit property based on an exercise of statutory power of sale over a parcel of land that is not registered in the Applicants' names.

15. There does not seem to me to be an identifiable stake over which the Applicants can ventilate their interests or grievances within these proceedings. Conversely, the Applicants wish to agitate some property rights over the suit property as evidenced by their prayers 3 and 6 of the application. To this end they do not fall within the meaning of interested parties with reference to the decision of Justice Munyao Sila in **Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR** which appears in both parties' submissions. The Court aptly held as follows: -

"12...For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit...". This is the same position I took in the case of Joseph Leboo v Director, Kenya Forest Service & Others (Eldoret ELC No 273 of 2013).

13. It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it."

16. On the second issue for determination, I hold the view that an order of stay of proceedings is a serious judicial action which seriously interferes with the conduct of any litigation. It is a discretionary power which must be exercised judiciously and only in exceptional circumstances. An excerpt from **Halsbury's Laws of England, 4th Edition Vol. 37 page 330 and 332**, is quite relevant. It states that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The application for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

17. The Environment and Land Court and the High Court share parallel jurisdictions. Flowing from my finding on the previous issue, the Applicants have no locus to ventilate their claims within the cause of action herein. At any rate, I am not convinced that there is an overlap of the substantive issues for determination in this suit alongside the High Court case. The High Court case is commercial in nature in the sense that Plaintiffs in that case have sought to annul the charge instrument created over the suit property while in this suit the Plaintiffs seek to be registered as proprietors of the suit property. The cause of action here is not frivolous and the Applicants have not demonstrated otherwise.

18. Lastly, the Applicants needed to demonstrate a prima facie case to merit the grant of the injunctive reliefs sought. As correctly pointed out by the Respondents, this Court delivered a Ruling on 30th August, 2017 dismissing a similar application by the Applicants. That Ruling has never been reviewed or set aside on appeal. Needless to say, the said prayer is caught by the doctrine of *res judicata* and cannot therefore succeed. The Court of Appeal in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** judiciously held as follows: -

“...there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

19. Inevitably, the application herein lacks merit and I hereby dismiss it with costs to the Respondents.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 22ND DAY OF MARCH, 2022.

MBOGO C.G.

JUDGE

22/3/2022

COURT ASSISTANT: T.CHUMA