



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC CASE NO 103 OF 2021

JEREMIAH CREEK LIMITED.....PLAINTIFF

VERSUS

TABITHA NDUNG’U.....DEFENDANT

AND

ANDREW THIAINE IMWATI.....INTERESTED PARTY

RULING.

BACKGROUND

1. This suit was commenced by way of plaint dated 22nd February 2017 and is in respect of land parcel Kwale/Diani Complex/1069 hereinafter referred to as the suit land. It is the Plaintiff’s case that it has at all times been the registered owner of the suit land. The Defendant is sued in her own capacity and as the widow personal representative of the estate of Charles Kamau. That the suit land was invaded by the Defendant’s husband (deceased) who had been permitted to supervise construction on the land. It is contended that the defendant took advantage of her husband’s invasion and moved into the suit land and that attempts to have her vacate the same through notices to vacate have borne no fruit. It is the Plaintiff’s case that both the defendant and her late husband were intent on defrauding the plaintiff and one Maureen Millet off the suit land as she was elderly and also a foreigner. The Plaintiff thus prays inter alia for an order of eviction against the Defendant.

2. In response, the Defendant filed a defence and later applied for joinder of the interested party as the initial registered owner from whom the suit property was allegedly bought. The orders were granted. The Defendant denies the Plaintiff’s claims as stated in its pleadings and states that the transfer of the suit land to the Plaintiff was procured fraudulently through collusion with the Land Registrar Kwale. That the suit land belongs to a company by the name Escafeld Holdings Limited where her late husband Charles Kamau was the sole director. It is further alleged that the land was bought from the interested party herein Andrew Thianie Imwati and that the Interested Party had no capacity to sell the suit land to another party. The Defendant filed a counterclaim seeking for a declaration that the transfer of the suit land to the Plaintiff was fraudulent and further that the suit ought to be dismissed with costs of the counterclaim.

3. The suit was fixed for hearing on 19th October 2020 when it was adjourned at the instance of the Plaintiff who was away in the United Kingdom, on 8th March 2021 at the instance of Counsel for the Defendant who was unwell and the matter was stood over generally. On 4th November 2021 the matter was again adjourned to 17th January 2022 at the instance of Counsel for the Defendant who insisted on physical hearing in the presence of the Plaintiff who was still outside jurisdiction. This court was then ready to proceed by way of both virtual and physical hearing (hybrid). On 14th January 2022 the Defendant filed a Notice of Motion application the subject of this ruling, under certificate of urgency seeking for orders;

1) Spent

2) That there be a stay of further proceedings in this matter pending the hearing and determination of this application or further orders of this honourable court

3) That this honourable court be pleased to grant leave to the Defendant to enjoin the County/District Land Registrar Kwale as the Necessary Party in this matter.

4) That this honourable court be pleased to grant leave to the Defendant, consequent to the order sought in paragraph 3 above, to re-amend the Defendants amended statement of defence and counterclaim herein in the manner as set out in the draft re amended Defendant’s statement of defence and counterclaim hereto annexed.

5) That the Defendants re amended Defendant's statement of defence and counterclaim be deemed to have been duly filed upon payment of the requisite filing fees

6) That costs of this application be provided for.

4. When this application came before court on 14th January 2022 I directed that Parties appear before this court on 17th January 2022 the date of the hearing for further orders with a rider that they should explore disposal of the same by consent before then. There was no consensus and this court proceeded to hear the application and allowed parties to highlight on their submissions which had been filed prior in compliance to the orders of the court. I also allowed parties to highlight on their submissions.

The Applicants Submissions

5. Briefly Mr Tindika Counsel for the Defendant relying on the Civil Procedure Act and Civil Procedure Rules 2010 as well as the holding by the Court of Appeal in **Central Kenya Ltd Versus Trust Bank & 5 Others [2000] eKLR** urged that the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. According to Counsel no prejudice would be occasioned to the Plaintiff in the event the orders sought in the application were granted. Further that the overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties and mere delay was not a ground for declining to grant leave. With regard to joinder counsel relied on the case of **Peter Irungu Wainaina Versus Chege Njihia & Others [2018] eKLR** and submitted that the Land Registrar was central in the registration and issuance of the title to the Plaintiff, that in the event that the court would make a finding that the transfer was fraudulent then the Defendant was bound to seek orders to expunge the fraudulent entry. It was further submitted that two specific prayers had been made in respect of the Land Registrar, that he was the holder of the office being sought to be enjoined and the maker of the documents to be produced. It was contended that if the Land Registrar failed to produce the same then the court can make orders against him. That the other prayer was for the registrar to cancel and delete the title deed issued to the Plaintiff and the court could not make such orders against a witness as the same were specifically against the registration. Therefore, implementation could not be effected against someone who was not a party.

6. Mr Khakula Counsel for the Plaintiff relied on his submissions filed on 26/1/2022 and grounds of opposition filed on 18/1/2022. Reference was made to section 1A of the Civil Procedure Act on expeditious hearing of matters and resolution of the same within a reasonable time. That the application was being made 5 years after filing of the suit and hence the same was not made in good faith. It was submitted that the counterclaim filed was to have the land registrar produce certain documents. That the court had power to order cancellation of documents, that the land registrar would produce the same before court and the court would have the chance to consider them. Further that the application was defective as it did not state whether the registrar will be an interested party or a defendant and the same would only confuse the court. In addition, it was emphasised that it was not easy to identify the role of the Registrar whether they would be a defendant or an interested Party or under third party proceedings. Mr. Tindika in response contended that the Registrar would be joined as a necessary party as envisaged under Order 1 Rule 10(2). According to Mr. Kakhula there was no need to join in the Registrar as a party since he could be summoned as a witness and produce documents on how land transactions are supposed to be undertaken. Counsel urged that the court would be able to make a necessary finding even without the joinder sought. The cases of **Ruai Central 54 Association Versus Paddy Ngángá & Another [2020] eKLR** and **Pizza Harvest Ltd Versus Felix Midigo [2013] eKLR** were cited to support the Plaintiffs objections.

ANALYSIS AND DETERMINATION

7. From the above, the main issue that emerge for determination is whether or not the Land Registrar Kwale should be enjoined as a necessary party to the suit.

8. **Order 1 Rule 10 (2) of the Civil Procedure Rules** provides for a party to be enjoined in a suit as a necessary party as follows:

“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.”

I have seen the guiding principles reproduced in the case of **Peter Irungu Wainaina Versus Chege Njihia & Others [2018] eKLR** while quoting Havelock J in the case of **Technomatic Limited T/A Promopack Company Vs. Kenta Wine Agencies Limited & Another (2014)eKLR** for joining a party thus;- He must be a necessary party, he must be a proper party, in the case of a defendant there must be a relief flowing from that defendant to the Plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit. See also the case of **Werrot & Co. Ltd & 3 Others Vs. Andrew Douglas Gregory & 2 Others [1998] eKLR**

9. The Plaintiff has urged during oral submissions that the Land Registrar is a public officer, the current one may not be the one who effected the transfer. It is the bearer of the office to bring the documents and for the court to consider the same. He distinguished the authorities urging that in **Central Kenya Ltd Versus Trust Bank & 5 Others [2000] eKLR** there was no way the court would have made an effective decree unless the parties participated in the proceedings and give their side of the story. That in the instant case the court should be able to issue an effective decree because the key issue is transfer of the property to the defendant and the process thereof. The case of **Peter Irungu Wainaina Versus Chege Njihia & Others (supra)** was said to be persuasive. I respectfully disagree with Counsel. In my view it is the principles that are applicable in guiding the court in the instant case and not the facts for every case is considered on its merits and circumstances.

10. Guided by the above principles I have noted that the applicant herein seeks to enjoin the Land Registrar Kwale and to subsequently seek orders against the said Registrar. From the pleadings filed before court it is clear that allegations of fraud have been raised. The key consideration should be whether the participation of the registrar as a party to the proceedings is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit. The answer to this is in the affirmative. It is noteworthy that even though the Land Registrar has been adversely mentioned in the Defendant's pleadings, they are not a party to the suit abnatio. The Defendant alleges that the title in possession of the Plaintiff was obtained by questionable means and the same can only be expounded upon by the holder of the office dealing with such transfer of the suit land. From the pleadings including defence and counterclaim it is alleged the Land Registrar executed the requisite documents facilitating transfer of the land and which included obtaining consent of the land control board and transfer. Allegation of collusion between the Plaintiff and the Land Registrar to defraud the Defendant off the suit land are raised. A prayer is further made compelling that the intended Necessary Party to produce before court all the original documents in the transfer of the suit property and other documents detailing the manner in which the title deed was issued. The office of the Land Registrar cannot hide under the guise that the registrar is a holder of an office as Counsel for the plaintiff would want this court to believe. They must be held to account for actions that have been called into question. As public servants they should be guided by the national values and principles of governance stipulated under article 10 of the Constitution of Kenya 2010 in the discharge of their duties. I have no doubt in my mind that the Land Registrar is a necessary party in these proceedings and his participation will enable this court to look at the issues in totality and come up with a more informed determination and for the ends of justice to be met. Further that the amendments are necessary for the just determination of the controversy between the parties.

11. During highlighting of the submissions, Counsel for the Plaintiff raised concerns that the Plaintiff has never been able to occupy the suit property for over 10 years and no amount of costs can be able to compensate for this loss. In my view this is overridden by the need for substantive justice. It is also urged that the application was defective as it did not state whether the registrar will be an interested party or a defendant and the same would only confuse the court. In addition, it was emphasised that it was not easy to identify the role of the Registrar whether they would be a defendant or an interested party or under third party proceedings. In this regard I think Counsel for the Plaintiff has a point but this should not be a basis for rejecting the application. Further this court will give effect to the principle of substantial justice without undue regard to technicalities as envisaged under Article 159 of the Constitution. While the Civil Procedure Rules only recognise a defendant and a plaintiff in a suit commenced by way of Plaint, there are emerging trends which have now been accepted by the courts, that is joinder as an interested party. Naming a party as necessary party has not been a common description in our citations. Having considered the nature of the role of the Land Registrar as I understand it from the application, the Registrar will not only produce documents as they ordinarily do but will have to shed some light on how the transactions were undertaken for accountability considering the adverse allegations. In this regard it is my view that the Registrar can be named as a defendant in this matter for clarity and to guide on the nature of documents they should file.

12. The upshot of the foregoing is that I find the Defendants application has merit and allow the Notice of Motion dated 14th of January 2022 in terms of the following orders that; -

- 1) Leave be and is hereby granted to enjoin the County/District Land Registrar Kwale as 2nd Defendant in these proceedings.
- 2) The Defendant to file and serve its amended defence and counterclaim within 14 days from the date hereof in default of which the leave granted shall lapse.
- 3) The Plaintiff shall be at liberty to respond to 2) above within 14 days of service.
- 4) The Defendant shall serve upon the Land Registrar Kwale (proposed 2nd Defendant) the pleadings within 14 days whereupon the Land Registrar Kwale shall respond accordingly within 21 days of service.
- 5) The rest of the parties to the suit shall respond to 4) above as they deem necessary within 7 days of service.
- 6) The Plaintiff shall file and serve a reply to the amended defence to counterclaim within 14 days from the date of service of the amended pleadings.
- 7) Costs of the application shall be to the plaintiff.
- 8) Matter to be set down for further directions on priority basis.

DELIVERED AND DATED AT KWALE THIS 17TH DAY OF MARCH 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Tindika..... for the Defendant/ Applicant

Mr. Sikhu H/B for Khakula for the Plaintiff/ Respondent

Mr. Denis Mwakina..... Court Assistant.