



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 98 OF 2013

MARGARET WAKURU NYUTHO.....PLAINTIFF

VERSUS

JOSEPH KIARIE NJOROGE..... 1ST DEFENDANT

DR. DOMINIC KIBIGO KARANJA..... 2ND DEFENDANT

MAURINE KAWIRA KIBIGO..... 3RD DEFENDANT

THE CHIEF LAND REGISTRAR..... 4TH DEFENDANT

RULING

This suit was filed by way of Plaint dated 21st January 2013 seeking *inter alia* that the court do declare that the registration of the 2nd and 3rd Defendants as the registered proprietors of property known as NAIROBI/BLOCK 110/531 in Thome (hereinafter referred to as the “suit property”) is irregular, null and void and that the court do declare that the Plaintiff is the bona fide and rightful owner of the suit property jointly with the 1st Defendant.

At the same time of filing suit, the Plaintiff filed Notice of Motion dated 21st January 2013 under certificate of urgency (hereinafter referred to as the “Injunction Application”) seeking *inter alia* for an interim injunction restraining the Defendants from disposing off or continuing with construction on the suit property pending the hearing and determination of the Application. The Injunction Application was supported by the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff. The 2nd and 3rd Defendants filed their Grounds of Opposition dated 4th February 2013 as well as a Replying Affidavit sworn on 18th April 2013 in response to the Injunction Application. The Plaintiff filed a Further Affidavit sworn on 24th April 2014. In response, the 1st Defendant filed his Replying Affidavit sworn on 21st June 2013. The Plaintiff filed her written submissions dated 3rd June 2013 to the Injunction Application. On his part, the 1st Defendant filed his written submissions dated 25th June 2013.

The Plaintiff thereafter filed a further application being Notice of Motion dated 31st May 2013 (hereinafter referred to as the “Consolidation Application”). The Consolidation Application is the subject of this ruling.

In the Consolidation Application, the Plaintiff is seeking for orders to consolidate this suit with **HCCC No. 492 of 2011**. The grounds in support of this are to be found on the face of the Consolidation Application. The said application is further supported by the Supporting Affidavit of the Plaintiff sworn on 31st May 2013 in which she avers that sometimes in 2005, she lodged a criminal complaint against her husband the 1st Defendant regarding the sale of the suit property whereby her signature was forged to facilitate a fraudulent transfer of the suit property to the 2nd and 3rd Defendants. She further averred that her complaint resulted in the arrest and prosecution of the 1st Defendant in **Criminal Case No. 1318 of 2005**. She further averred that in the criminal case she instructed the law firm of Kabiru & Co. Advocates to watch brief for her. She further stated that unbeknown to her, the said Advocates proceeded and filed a civil case for her being **HCCC No. 492 of 2011** between herself and the 1st, 2nd and 3rd Defendants. She stated further that the issues in dispute in two suits are substantially similar. She confessed that she thought that the documents presented to her by the said advocates to sign related to the criminal case and not this other suit. She further averred that she only came to learn of this other suit when the same was cited by the 2nd and 3rd Defendants in their grounds of opposition. He further stated that it would save the courts time to hear both suits together and that no prejudice would be suffered by the Defendants. In response thereto, the 2nd and 3rd Defendants filed their Grounds of Opposition/Notice of Preliminary Objection stating as follows:

1. That the Consolidation Application is frivolous, vexatious and an abuse of the court process because the Plaintiff filed this suit well aware of the existence of that other suit.
2. That the Consolidation Application is aimed at avoiding paying costs for that other suit if withdrawn as opposed to consolidated.
3. That there are no similar issues for determination in the two suits.
4. That the Plaintiff was not being candid with the court on her reason for filing this suit while knowing of the existence of that other suit.

In her Replying Affidavit sworn on 15th July 2013, the Plaintiff contended that the Preliminary Objection did not raise any pure point of law and that the 5 points in it relate to points of fact not law. She further contended that though similar, the two suits should not be dismissed. She further indicated that upon learning of the existence of that other suit, she immediately filed the Consolidation Application to save on costs. She further intimated that this suit is based on fraud and fraudulent transfer of property to which she still has the original title and should be determined on merit and not technicalities. I have read the 2nd and 3rd Defendants' written submissions.

Overall, it is common ground that in addition to this present suit, there is another suit namely HCCC No. 492 of 2011 between the Plaintiff and the 1st, 2nd and 3rd Defendants. It is also common ground that the issues for determination in that suit are similar to the issues pending for determination in this suit. **Section 6 of the Civil Procedure Act** provides as follows:

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.

I have considered the explanation submitted by the Plaintiff as to why she filed this suit when all along there was in existence the other suit being HCCC No. 492 of 2011 between herself and the 1st, 2nd and 3rd Defendants. I am satisfied with her explanation as to how this other suit came into existence. Now that there are two pending suits dealing with the same subject matter and revolving around the same issues, the Plaintiff has filed the Consolidation Application. In **David Ojwang' Okebe & 11 Others v South Nyanza Sugar Company Limited & 2 Others CA Kisumu Civil Appeal (Appl) No. 139 of 2008 (2009) eKLR**, the Court of Appeal discussed the main object of consolidation, that is,

“to save costs and time by avoiding a multiplicity of proceedings covering largely the same

ground. Thus where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or serious of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so.”

To my mind, I find that it is in order to allow the Consolidation Application and I hereby so hold. Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 30TH

DAY OF MAY 2014

MARY M. GITUMBI

JUDGE