



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC SUIT MISC. APPL. NO 338 OF 2012

EMMA MUTHONI WAMBAA

Suing as the personal representative and

Administrator of the Estate of the late

LAWRENCE R. WAMBAA (DECEASED)APPLICANT

VERSUS

JAMES MACHARIA GITUARAH.....RESPONDENT

AS CONSOLIDATED WITH

ELC SUIT NO. 378 OF 2012

EMMA WAMBAA

(Suing as the personal representative and

Administrator of the Estate of the late

LAWRENCE R. WAMBAA (DECEASED).....1ST PLAINTIFF

EDWIN WAMBAA REGERU.....2ND PLAINTIFF

VERSUS

JAMES MACHARIA GITUARAH.....1ST DEFENDANT

RULING

The Applicant filed an Originating Notice of Motion in ELC Misc. Appl. No. 338 of 2012 dated 12th May 2011 pursuant to the provisions of Order 1 Rule 10, Order 8 Rule 3 and Order 41 Rule 1 of the Civil Procedure Rules, as well as sections 1A, 3A and 18 (1)(B) and (2) of the Civil Procedure Act. The Applicant sought the following orders:

1. That this Honourable Court be pleased to withdraw Chief Magistrate's Court Civil Suit No. 13591

- of 2004, Emma Muthoni Wambaa –vrs- James Macharia Giruarah (Milimani) and transfer it to this court for hearing and determination.
2. That Edwin Wambaa Regeru be joined in the said Chief Magistrate’s Court Civil Suit No. 13591 of 2004, as the 2nd Plaintiff.
 3. That this Honourable Court be pleased to grant leave to the plaintiffs to amend their amended plaint dated 14th November, 2008 in the terms and manner of the draft amended plaint annexed hereto.
 4. That the draft amended plaint annexed hereto be deemed as duly filed and served on the defendant upon paying the requisite fees.
 5. That Mr. H. W. Gichohi be appointed a receiver and manager of the suit property, L.R. No. 278, Ongata Rongai Residential – Kware Scheme, with power to take immediate possession and collect rent until suit is heard and determined.
 6. That this Honourable Court be pleased to fix the amount to be paid as remuneration for the service of the receiver.

Prayer 1 was granted by the Court on 8th December 2012, and the parties recorded a consent in court on 30th January 2013 allowing the grant of prayers 2, 3 and 4. The parties also agreed that prayers 5 and 6 of would be disposed of by way of written submissions. The Chief Magistrate’s Court Civil Suit No. 13591 of 2004 was duly transferred to the High Court and given a new case number namely ELC 378 of 2012. It was later consolidated with the Originating Notice of Motion under consideration.

The grounds for and facts giving rise to the application and prayers sought are stated in the said application and in the supporting and further affidavits sworn by the Applicant on 12th May 2011 and 17th October 2011 respectively . In summary, the Applicant and Edwin Wambaa Regeru are the personal legal representative of Lawrence Regeru Wambaa (deceased) who died intestate on 4th February, 2007, having been so appointed on 28th July, 2008 in High Court Succession Cause No. 2051 of 2007. Further, that at the time of his death, the said Lawrence Regeru Wambaa (deceased) was the owner of the parcel of land at Ongata Rongai known as Plot No. 278, Residential at Ongata/Rongai Trading Centre, the said land having been transferred to him by the original allottees. The applicant attached a copy of the said transfer.

The Applicant claims that the said plot No. 278, Residential – Ongata/Rongai Trading Centre was undeveloped until March 2004, when the Respondent started constructing a building thereon. Further, that the deceased Lawrence Regeru Wambaa thereupon filed Civil Case No. 13591 of 2004 at the Chief Magistrate’s Court at Nairobi,, and obtained an injunction to restrain the Respondent from putting up a building on the said plot. The Deceased was later substituted by the Applicant in the said suit.

However, that the Respondent disobeyed the orders of the said the Chief Magistrate’s Court, and constructed on the plot, and that due to the developments put up on thereon the plot it is now valued at over Kshs.11 million. The Applicant annexed a valuation report showing that there is a 2-storey building with 8 flats on the said plot. It is the Applicant’s contention that the Respondent has let the said 8 flats to tenants and collects rents which he converts to his use, and that if a receiver is not appointed during the pendency of the suit, the estate of the late Lawrence Regeru Wambaa will continue to suffer substantially. The Applicant justified her choice of Mr. H. W. Gichohi, as receiver, and stated that he is an experienced accountant, who had handled many receiverships and liquidations, and attached his curriculum vitae.

The Respondent opposed the application in a Replying Affidavit he swore on 6th June 2011 and an undated Further Affidavit filed in court on 17th June 2011. The Respondent stated that he is the registered owner of plot No. 1142/Residential located at Ongata Rongai and that the flats referred to by the Applicant are constructed on the said plot and not on plot No. 278/Residential Ongota Rongai. Further, that these houses have always been there even during the hearing of CMCC No. 13591 of 2004 and are his property which he cannot be deprived of.

The Respondent also stated that the Applicant cannot be allowed to lay claim on plot No. 1142 – Kwale-Ongata Rongai when she in possession of plot No. 278 – Kwale-Ongata Rongai. The Respondent annexed copies of electricity bills as proof of the Applicant’s such possession of Plot No. 278 – Residential Ongata

Rongai and photographs of a primary school alleged to have been built by the Applicant on the said plot.

The Respondent contended that the Applicant cannot apply for a receiver to run the property when she has not contributed towards the construction of the same, and that the rental income he is receiving is being used to service loans which he obtained to construct the flats. Further, that the alleged plot No. 278 Ongata Rongai residential is not listed in the confirmation of grant of the Applicant, and that she therefore lacks capacity to file this application since the Deceased's estate has been distributed and she is not a beneficiary of the said plot, neither was it vested on any one of the beneficiaries.

The Applicant in response to the Respondents allegations stated that realized that only a survey would resolve the dispute regarding ownership and locations of the alleged two plots, and her Advocates arranged for a survey to be undertaken by surveyors of the County Council of Kajiado. Further that the said surveyors furnished her with a report on 30th September, 2011 made up of a letter, a map and photographs, which she annexed. Further, that the report, showed that plot No. 1142 Ongata Residential does not exist and that the Respondent has put up the building with eight flats on plot No. 278 Ongata Rongai Residential.

The Plaintiff and 1st Defendant filed written submissions upon which they relied during the hearing of the Plaintiff's Notice of Motion on 27th May 2013. The Applicant's Counsel argued in submissions dated 26th February 2013 that this court has the power to place the disputed property in the hands of a receiver and manager during the pendency of this suit pursuant to the provisions of Order 41 of the Civil Procedure Rules. It was further argued that it is clear from the facts of the application and suit between the parties that this is a case of double allocation of the same property by Kajiado County Council, and that this Court has ruled in **Gitwany Investments Ltd. Vs Tajmal Ltd & Others (2006) 2 EACA 76** that the Defendant's remedy is against the County Council of Kajiado.

The Applicant's counsel further argued relying on the decision of this Court in **James P. Maina Kariuki vs Moses Maina Ngugi & Kahawa Sukari, HCCC 157 of 2007** that the late Lawrence Regeru Wambaa was the first allottee of the disputed land as a result of the transfer of the land to him dated 16th November 1987, and that the Defendant had constructive notice of such allotment at the time he was given his letter of allotment in 1997. Further, that any buildings that the Respondent put on the land after the injunction granted in to Lawrence Regeru Wambaa in November 2004 belonged to the Applicant.

It was also argued by the counsel that a party cannot base his claim on his wrong doing, and will not be allowed to benefit from the disobedience of a court order. Counsel relied on the decisions in **Nabro Properties vs Sky Structures (2002) 2KLR 299** and **Kenya Tourist Development Corporation vs Kenya National Capital Corporation Nairobi HCCC No.6776 of 1992** in this regard.

Lastly, it was submitted for the Applicant that it was in the interests of justice that a receiver/manager be appointed herein, since the dispute revolves around the matter of ownership of property and the Respondent who currently has possession has against the orders of the court proceeded to develop the property and receive revenue from rent of the same and should not be allowed to do so. The Applicant's counsel relied on various authorities in this respect, including the decisions in **Triple Eight Investments (K) Limited vs City Finance Bank Limited & Another, 2008 e KLR** and in **Fred Karl Kisewetter vs Peter Koeneck Malindi J.R.17 of 2011**. The counsel in addition relied on a passage from **Kerr and Hunter on Receivers and Administrators, 18th Edition** by Muir Hunter Q.C..

The Respondent's counsel filed two sets of written submissions. In the submissions dated 18th July 2011 the counsel argued that the issue of an official receiver did not arise in this suit because the property is not jointly owned by the Applicant and the Respondent, and neither was it jointly developed. In the submissions dated 20th March 2013 it was argued that the court needed to first establish that the plot No 278 Ongata Rongai Kware belongs to the Applicant, which can only be established by way of viva voce evidence at full trial. Further, that the appointment of a receiver would determine where plot 278 Ongata Rongai is located, and that no allegation has been made of irreparable mischief will be done to the property in question unless the court provides protection.

I have read and carefully considered the pleadings and submissions made by the parties. The main issue to be decided is whether a receiver can be appointed to take possession and receive rent from the flats constructed by the Defendant on the disputed property. The Applicant has argued that this court has the power to appoint a receiver in the circumstances of this case, and relied on the provisions of Order 41 Rule 1 of the Civil Procedure Rules which provide as follows:

“1. (1) Where it appears to the court to be just and convenient, the court may by order—

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.

(2) Nothing in this rule shall authorise the court to remove from the possession or custody of any person property whom any party to the suit has not a present right so to remove.”

The discretion given to the court by the said provisions is wide and the court can order the appointment of a receiver in any circumstances where it is just and convenient. The only limitation that is put on the exercise of the court’s power is in sub-rule 2 which requires that the person seeking the appointment of a receiver must have a present right to the property.

A present right to the property in my understanding means an established right to the property, and not a right to be determined in the future. If there is no established right over the property, then the court may appoint a receiver to preserve property from some danger that threatens it and where required to ensure its proper management pending litigation to decide the rights of the parties. I am guided in this respect by the statement given in paragraph 1-9 at page 8 of **Kerr and Hunter on Receivers and Administrators, 18th Edition** by Muir Hunter Q.C. as follows:

“...If the court is satisfied, upon the materials it has before it, that the applicants has established a good *prima facie* title and;

- 1. That the property the subject-matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of the receiver is asked for, or**
- 2. That there is at least some reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed**

the appointment of a receiver is almost a matter of course. If there is no danger to the property, and no fact is in evidence to show the necessity and expediency of appointing a receiver, a receiver will not be appointed.”

The need for courts to exercise caution in the appointment of receivers with regard to cases of disputed title is echoed in **Halsbury’s Laws of England, 4th Edition, Volume 39** at paragraph 828 as follows:

“..Now however, an interlocutory application for a receiver by a person asserting a purely legal title will be entertained, and a receiver may be appointed if the court thinks that the plaintiff will probably succeed at the hearing and that, in all the circumstances of the case,

the appointment is just and convenient. In an action for recovery of land, the jurisdiction is exercised with great caution, and if the defendant is in occupation a receiver will only be appointed in special circumstances, as otherwise the substantive issue may in effect be determined by evidence only admissible on interlocutory application, and a defendant in such an action may be deprived of the privilege of replying on his occupation without disclosing the title.”

The questions to be answered by this Court therefore is whether the Applicant has an established right to the suit property, and if not, whether the said property is in need of preservation. The Applicant in this respect has argued that such right exists as a result of the prior allotment of the suit property to the late Lawrence Regeru Wambaa and also as a result of the injunction granted to the deceased in Chief Magistrate’s Court Civil Suit No. 13591 of 2004. She also brought evidence of a survey that shows that the two plots namely Plots No. 278 and 1142 Ongata Rongai Residential are one and the same. The Respondent on the other hand argues that this is an issue yet to be determined at full trial and no risk of irreparable damage to the property has been shown.

I find that I have to agree with the Respondent’s arguments. The reasons for doing so are firstly, that the issue of the Applicant’s right to the suit property has not been determined with finality and is the subject of ELC 378 of 2012 which is pending hearing and determination by this court. It is noteworthy in this regard that the decisions relied on by the Applicant as supporting her rights to the suit property namely **Gitwany Investments Ltd. Vs Tajmal Ltd & Others (2006) 2 EACA 76** and **James P. Maina Kariuki vs Moses Maina Ngugi & Kahawa Sukari, HCCC 157 of 2007** are final decisions made after full trial and not at an interlocutory stage.

Secondly, no evidence was provided by the Applicant of any wastage and dissipation of, or damage to the suit property or of the flats she alleges are built thereon. On the contrary the evaluation report she produced in evidence shows an increase in the value of the suit property. Lastly, the Applicant will in any event suffer no prejudice in the event that she establishes her rights to the suit property and rent from the flats built thereon if any, as she has prayed for mesne profits in the further Amended Complaint filed in ELC Suit 378 of 2012 dated 30th January 2013.

The decisions cited by the Applicant in which receivers were appointed pursuant to the provisions of Order 41 of the Civil Procedure Rules are also distinguished for the same reasons. In **Triple Eight Investments (K) Limited vs City Finance Bank Limited & Another, 2008 e KLR** the Plaintiff already had title to the property in dispute which he had bought at a public auction. Likewise in **Fred Karl Kisewetter vs Peter Koeneck Malindi J.R.17 of 2011** the applicant therein already had established rights in a business partnership that was being dissolved, with the court finding that he was a joint purchaser of, and investor in the property in question. In addition the property in issue was found to be at risk of being dissipated.

Finally, I do appreciate and sympathise with the arguments made by the Applicants that the construction of the flats on the suit property by the Respondent may have been in disobedience of court orders, and that he may be benefitting from a wrong he has committed. However, the proper remedy in such circumstances is to cite the Respondent for contempt of court, and if such contempt is established, the court will then grant the appropriate orders.

Prayers 5 and 6 of the Plaintiff’s Originating Notice of Motion dated 12th May 2011 are therefore denied for the foregoing reasons, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____June____, 2013.

P. NYAMWEYA

JUDGE