



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**LAND AND ENVIRONMENTAL DIVISION**

**ELC CIVIL SUIT NO. 631 OF 2011**

**MAURICE NDAMBUKI KITIVO ..... PLAINTIFF**

**VERSUS**

**THOMAS KINYUA MBEU .....1<sup>ST</sup> DEFENDANT**

**JOSPHAT KAMAU NJOGU .....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS .....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, NAIROBI .....4<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiffs in the suit herein filed an application under Certificate of Urgency by way of Notice of Motion dated 11<sup>th</sup> November 2011 seeking the following substantive orders:

1. That an order for a temporary injunction be issued restraining the 1<sup>st</sup> Defendant/Respondent whether by himself, agents and/or servants from trespassing onto, selling, disposing and/or transferring or in any manner whatsoever interfering with the Property Title No. NAIROBI/BLOCK 122/497 (hereinafter referred to as the suit property) pending the hearing and determination of the suit.
2. That the suit herein be consolidated with HCC NO. 573 of 2011 filed at Nairobi involving the Plaintiff and the 1<sup>st</sup> Defendant herein.
3. Costs of the Application be borne by the Defendants/Respondents.

The grounds for the application were that the Plaintiff is the owner of the suit property, having bought it and his names entered in the register of City Chicken & Eggs Dealers Cooperative Society which had subdivided the land parcel known as Land Reference No. NAIROBI/BLOCK/122 and sold the subdivisions to its members. The Plaintiff subsequently paid the requisite fees and charges, took possession of the suit property and has been awaiting the Certificate of Lease to be issued by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiff has however since learnt that the suit property was registered in the names of the 2<sup>nd</sup> Defendant and subsequently transferred to the 1<sup>st</sup> Defendant who has trespassed on the suit property, besides depositing some building materials therein with a view of commencing development. The Plaintiff claims that the registration of the suit property in the names of the 2<sup>nd</sup> Defendant and the subsequent transfer to the 1<sup>st</sup> Defendant was illegal, unlawful and fraudulent.

The 1<sup>st</sup> Defendant filed Grounds of Opposition dated 22<sup>nd</sup> November 2011 on the grounds that the Plaintiff's application offends the provisions of Order 4 Rule 1(1) (f) of the Civil Procedure Rules and is an abuse of the process of the court as there is an already and existing suit namely High Court ELC Suit No. 573 of 2011 involving some of the parties herein, the same subject matter, and where there are interim orders of which the Plaintiff was aware before filing the suit herein.

The Plaintiff in High Court ELC Suit No. 573 of 2011 is dated 21<sup>st</sup> October 2011 and was filed on the same date. The Plaintiff in the said suit also filed an application by way of Notice of Motion of the same date seeking temporary injunction restraining the Defendant who is also the Plaintiff in the suit filed herein, from dealing with the suit property. Interim orders were granted by Ougo J. on 21<sup>st</sup> October 2011 which have been extended to-date pending *inter partes* hearing of the application. The Plaintiff in the present suit is dated 11<sup>th</sup> November 2011 and was filed on the same date. Interim orders were granted at the *ex parte* hearing of the present application on 14<sup>th</sup> November 2011 by Koome J (as she then was), restraining the 1<sup>st</sup> Defendant from dealing with the suit property, which interim orders have been extended since then.

At an *inter partes* hearing of the present application on 25<sup>th</sup> November 2011, the court directed that the hearing of the preliminary issue raised by the 2<sup>nd</sup> Defendant that a similar suit namely High Court ELC Suit No. 573 of 2011 is pending, be heard on 19<sup>th</sup> December 2011. As this Court was not sitting on 19<sup>th</sup> December 2011, the hearing of the preliminary issue was set for, and proceeded on 26<sup>th</sup> January 2012. Mr Kabaiko, the Counsel for the Defendants reiterated his grounds of opposition at the said hearing, and submitted that the Plaintiff herein in abuse of the court process, obtained orders barring the 1<sup>st</sup> Defendant from interfering with the suit property, when there were similar orders obtained against the Plaintiff granted in High Court ELC Suit No. 573 of 2011. He also submitted that section 6 of the Civil Procedure Act (Cap 21) is clear that a suit filed when there is a pending suit between the same parties cannot proceed. The Defendant's Counsel relied on the decisions in Eddah Wairimu Njuguna & Another v Kenya Commercial Bank Ltd & Others,

H.C.C.C No 1852 of 2001 and Julius Macharia Mwangi v Bank of Baroda & Another H.C.C.C No 1188 of 2002 where similar preliminary objections were upheld by this Court.

The Plaintiff's Counsel, Mr. Wanaina, opposed the preliminary objection, and while admitting that there are two suits relating to the suit property, submitted that the two suits are not the same. Counsel argued that the cause of action in the suit filed herein emanates from fraud and illegality and the prayers sought are therefore different. Further, that the parties in the two suits are not the same, as the Plaintiff in the suit herein as sued additional Defendants. Counsel also submitted that the Plaintiff was cognisant of the previous suit and had disclosed its existence in the Plaintiff, and also sought a prayer in the present application that the two suits be consolidated. Finally, Counsel distinguished the two authorities relied on by the Defendant's Counsel, stating that the parties in the pending suits in the cited authorities were the same, and the suits dealt with the same issues.

After consideration of the pleadings filed in this case and submissions by the parties, I find that the two main issues for consideration is whether section 6 of the Civil Procedure Act is applicable, and whether there has been an abuse of the process of court. Section 6 of the Civil Procedure Act has two main aspects in its application. The first is that the matter in issue should directly and substantially be the same in the two suits. The matter in issue does not refer to specific issues but to the entire subject in controversy. My finding on this aspect is that the subject of controversy in the suit filed herein and in High Court ELC Suit No. 573 of 2011 is the same, namely, ownership of the suit property.

The Plaintiff in High Court ELC Suit No. 573 of 2011 who is the 1<sup>st</sup> Defendant in the suit filed herein is seeking prayers for a declaration that he is the owner of the suit property, and a permanent injunction restraining the Plaintiff herein from interfering with his ownership and possession of the said property. The Plaintiff in the suit filed herein who is also sued as Defendant in High Court ELC Suit No. 573 of 2011 is also seeking various prayers in relation to the suit property including a permanent injunction restraining the 1<sup>st</sup> Defendant from dealing with the suit property, a declaration that the Plaintiff is owner thereof, and that the registration and that the transfer of the suit property in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is void, rectification of the Register by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, cancellation of the certificate of lease to the 1<sup>st</sup> Defendant and issuance of a new certificate of lease to the Plaintiff with respect to the suit property.

The second aspect to be met in section 6 of the Civil Procedure Act is that the parties must be the same in the two suits. On this aspect I do find from an examination of the pleadings in the two suits that the Plaintiff in this suit is the Defendant in High Court ELC Suit No. 573 of 2011, while the 1<sup>st</sup> Defendant herein is the Plaintiff in the said suit. I also find that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are additional parties in the suit herein, who are not party to High Court ELC Suit No. 573 of 2011. For this reason section 6 of the Civil Procedure Act is inapplicable to the two suits since the said additional parties would be prejudiced by a stay of this suit, as will be the Plaintiff to the extent of his claim against the said additional parties. The suit filed herein will therefore not be stayed.

This finding notwithstanding, I find that similar issues of law and fact arise in both suits. For reasons of expediency and in the interests of their expeditious disposal pursuant to sections 1A and 1B of the Civil Procedure Act, both suits will be best heard together. I have in this regard also been persuaded by the decision of the Court of Appeal in Kishor Kumar Dhanji Varsani v Punny Barbir Kaur Nakuru Civil Application 132 of 2010, where the Court of Appeal held as follows in relation to stay and consolidation proceedings pending in the High Court:

“...a grant of stay order would not result in the expeditious disposal of the matter in view of the multiplicity of suits filed in the superior court. In the circumstances, we are of the view that the interests of justice would be served better by declining a stay so that the superior court is left with an opportunity to reach finality as regards all the suits filed. Indeed one of the requirements of the overriding objective is that the Court has to be broadminded in its endeavour to do justice. In this regard we cannot in the circumstances ignore the existence of a multiplicity of the suits and the pending application to consolidate them, a procedure which is clearly appropriate to the attainment of a final determination.”

The Court of Appeal made this statement in light of the overriding objective contained in sections 3A and 3B of the Appellate Jurisdiction Act. This court has adopted this argument in relation to sections 1A and 1B of the Civil Procedure Act which has similar overriding objectives. For these reasons I order that High Court ELC Suit No.631 of 2011 and High Court ELC Suit No. 573 of 2011 be and are hereby consolidated for hearing and disposal together.

On the second issue of whether there has been an abuse of the process of court in the proceedings herein, I do find this to be the case in light of the conflicting orders granted with respect to the suit property in the two cases, at a time when the Plaintiff herein was aware of the earlier orders first granted by this court on 21<sup>st</sup> October 2011. In order to resolve this conflict, I have examined the pleadings and evidence in the two applications giving rise to the conflicting orders, namely the application dated 21<sup>st</sup> October 2011 in High Court ELC Suit No. 573 of 2011 and the application dated 11<sup>th</sup> November 2011 in High Court ELC Suit No.631 of 2011, with a view of determining what the *status quo* orders should be given with regard to the two suits.

I find from the said pleadings that Thomas Kinyua Mbeu, the 1<sup>st</sup> Defendant herein, has produced documents of ownership of the suit property as evidence, namely a certificate of lease over the suit property issued on 8<sup>th</sup> July 2011. No such document of ownership has been produced by Maurice Ndambuki Kitivo, the Plaintiff herein, or of ownership by the vendor who sold the suit property to him, namely City Chicken and Eggs Dealers Co-operative Society Limited. For this reason and pursuant to the powers conferred on this court under section 3A and 63(e) of the Civil Procedure Act, I hereby order that the *status quo* be maintained as follows in the two suits now consolidated, namely High Court ELC Suit No.631 of 2011 and High Court ELC Suit No. 573 of 2011:

1. That Maurice Ndambuki Kitivo, who is the Plaintiff herein and Defendant in High Court ELC Suit No. 573 of 2011 by himself, his agents, servants or employees is restrained from interfering with the ownership and possession of Nairobi/BLOCK 122/497 by Thomas Kinyua Mbeu, who is the 1<sup>st</sup> Defendant herein and Plaintiff in High Court ELC Suit No. 573 of 2011, pending the hearing and determination of the two consolidated suits, namely High Court ELC Suit No.631 of 2011 and High Court ELC Suit No. 573 of 2011 or until further orders.
2. That no further construction to be undertaken or to be continued on Nairobi/BLOCK 122/497 by the said Maurice Ndambuki Kitivo and Thomas Kinyua Mbeu either by themselves, their agents, servants or employees pending the hearing and determination of the two consolidated suits, namely High Court ELC Suit No.631 of 2011 and High Court ELC Suit No. 573 of 2011 or until further orders.

The above orders dispose of the application dated 21<sup>st</sup> October 2011 in High Court ELC Suit No. 573 of 2011, and the application herein dated 11<sup>th</sup> November 2011 in High Court ELC Suit No.631 of 2011. The costs of the application dated 21<sup>st</sup> October 2011 in High Court ELC Suit No. 573 of 2011 shall be in the cause, while the costs of the application dated 11<sup>th</sup> November 2011 in High Court ELC Suit No.631 of 2011 shall be borne by the Plaintiff in that suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_22<sup>nd</sup>\_\_\_ day of \_\_\_March\_\_\_, 2012.

P. NYAMWEYA

JUDGE

