



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 48 OF 2011

OCHIENG OKELLO.....
.....PLAINTIFF

VERSUS

JUDY AKINYI ODUOR AGUKA.....
.....1ST DEFENDANT

LAWRENCE ODUOR AGUKA.....
.....2ND DEFENDANT

AND

DAVID KARANJA KARAU.....
1ST INTERESTED PARTY

GEORGE NJUGUNA.....
.....2ND INTERESTED PARTY

DR. JOHN KABUTHA MUGO.....
.....3RD INTERESTED PARTY

SARAH JEROP RUTO.....
4TH INTERESTED PARTY

MUTHOGA NGERA.....
5TH INTERESTED PARTY

ROBERT WILLIAMS.....
6TH INTERESTED PARTY

PAULINE NJERI WILLIAMS.....
.....7TH INTERESTED PARTY

JOHN AUBREY CHARLES HERBERT.....

8TH INTERESTED PARTY

JOHN MURIMI NJOKI.....

.....9TH INTERESTED PARTY

JOCELYN WANJIKU MURAYA.....

10TH INTERESTED PARTY

WALLACE NGUGI MBUGUA.....

11TH INTERESTED PARTY

MARY MUGURE NGUGI

12TH INTERESTED PARTY

DR. GATHAIYA JUMBI

13TH INTERESTED PARTY

RULING

The Plaintiff filed an application by way of Notice of Motion on 8th February 2011 as amended on 26th May 2011, seeking interim injunctive orders against the Defendants, their servants, agents and/or transferees from disposing of or alienating in any manner whatsoever whether by grant, sale of encumbrance the property originally known as L.R. No. 6725/21 (hereinafter referred to as the suit property), or any subdivisions thereof, and to further injunct the said Defendants their servants, agents and/or transferees from constructing on the aforesaid property and/or damaging or wasting it including destroying or interfering with the boundary marks thereon pending the hearing and determination of this suit.

The grounds for the application are that the Plaintiff has a registrable interest in the suit property, and the Defendants have in unclear circumstances akin to fraud obtained the registration of the suit property in their names. The Plaintiff is apprehensive that unless injunctive orders are issued, the property may be sold to other parties thereby denying the Plaintiff the right to challenge the irregular transfer of the suit property to the Defendants, and taking into consideration that the suit property is alleged to have been sold to other third parties it needs to be preserved in terms of the orders sought so as to preserve the substratum of the suit herein.

The above-stated grounds are elaborated upon in the Plaintiff's Supporting Affidavit sworn on 8th February 2011, his Further Affidavit sworn on 12th July 2011 and his Supplementary Affidavit sworn on 24th November 2011. In summary the Plaintiff depones that he bought the suit property together with his former wife Arnethia Okelo in 1968, and the property has been held in his and Arnethia Okelo names as joint tenants since its acquisition. Further, that neither the Plaintiff nor Arnethia Okelo have transferred the property to a third party, nor have they executed any documents transferring their proprietary interest in the said property to third parties.

The Plaintiff also states that his former wife left the country for the United States of America in 1983, and that in the year 2003 as part of a divorce settlement the suit property was vested in him after his former wife relinquished her interest in the said property. The Plaintiff annexed as evidence a copy of the Indenture and Conveyance of the property executed between one Margaret Ann Chapman as the vendor, and the Plaintiff and the said Arnethia Okelo as the purchasers on 29th March 1968, and an affidavit sworn by the said Arnethia Okelo confirming the above-stated facts.

The Plaintiff further states that it was his wished to sell the suit property, and upon taking an interested purchaser to view the suit property in October 2010, he found the said property in the process of being sub-divided. Further, that after intensive investigation, he was able to determine that the Defendants were

registered as the owners of the property. The Plaintiff also stated that he had received rates demand notes on the property, and had been duly paying rates on the property. The Plaintiff averred that he has never sold his interest in the subject property to any third party not least the Defendant, and the Defendants therefore did not have a good title capable of being transferred to the Interested Parties herein. The Plaintiff also averred that the original conveyance referred to by the Defendants and the Interested Parties dated 8th July 1992 in which the suit property is alleged to have been transferred by the Plaintiff and Arnethia Okelo to the Defendants was not executed by Plaintiff; the signature therein attributed to him is a forgery; and that he has never met the advocate who allegedly drew and witnessed the execution of the said document.

The Plaintiff deponed that when he discovered that his property had been interfered with, he reported the matter to the Criminal Investigations Department (C.I.D) , and that as part of the investigations the his specimen signatures and those of his former wife were taken by the CID for purposes of comparing them with those executed in the indenture dated 8th July 1992. Further, that he thereafter commissioned a private document examiner through the firm of S. K. Opiyo to study the said signatures and determine their veracity. The Plaintiff has attached as evidence the said Document examiner's report, the letter of instructions and other supporting documents.

The Defendants' response is contained in Grounds of Opposition dated 15th July 2011, a Replying Affidavit sworn on 16th August 2011 and a Further Affidavit sworn on 7th February 2011 by the 2nd Defendant. The 2nd Defendant depones that on the 6th day of July 1992 the Plaintiff and his wife Arnethia Okelo as joint owners sold the suit property to him at a purchase price of Kshs. 5,000,000/=, and he has annexed a copy of the Agreement for Sale. Further, that subsequent to the said sale the Plaintiff and his wife Arnethia Okelo conveyed the said parcel to him through an indenture dated 8th July 1992 and registered with the Ministry of Lands on 10th July 1992, which indenture is also annexed as evidence. The 2nd Defendants averred that he had since the said date held the said parcel of land as sole proprietor, and enjoyed its use peacefully without any disturbance from anyone including the Plaintiff.

The Defendants disputed the Document examiner's report produced by the Plaintiff as evidence, and stated that in the absence of any documentary evidence from the alleged document examiner of his qualifications and training in dealing with documents and handwriting, the said examiner ought to be cross-examined in regard to the said report. Further, that the report relied upon would have been more credible if the same had emanated from a gazetted government document examiner agreed upon by both the Plaintiff and the Defendants.

The Interested Parties responded by filing Replying Affidavits sworn by or on behalf of the Interested Parties on various dates. The Interested Parties explained in detail in the said Replying Affidavits the various processes entered into between themselves and the Defendants' Advocates for the sale and transfer of portions of land excised from the suit property, and also attached supporting documents as evidence, including the said sale agreements, payment documents, and the registered indentures/deeds of conveyances. The Interested Parties in their Replying Affidavits deponed that as a result of the said processes, they are now the registered proprietors of sub-divisions of the suit property. The said sub-divisions registered in the Interested Parties names are L.R Numbers 6725/199, 6725/200, 6725/201, 6725/202, 6725/203, 6725/204, 6725/205, 6725/206, 6725/207, and 6725/208. The Interested Parties also aver that they exercised due diligence before committing themselves into the said sale transactions, and are *bona fide* purchasers for value without notice of any alleged fraud committed by the 1st and 2nd Defendants prior to the sale.

The Interested Parties further deponed that the Plaintiff's interest in the property was extinguished upon cancellation of L.R. No. 6725/21, and the subsequent registration of the resultant sub-divisions currently owned by the respective Interested Parties who have acquired proprietary rights. The Interested Parties also stated that damages can adequately compensate the Plaintiff for his claims.

The parties herein filed written submissions, and at the hearing of the application on 8th February 2012 requested that a ruling be given on the basis of the pleadings and submissions filed. The Plaintiff's

Advocate filed Written Submissions dated 17th June 2011 and Reply Submissions dated 18th August 2011. The Plaintiff contends that there are serious issues to be tried as required by the decisions in **Giella vs Cassman Brown & Co. Ltd (1975) E.A. 358** and **American Cyanamid vs Ethicon (1975) 1 All E.R. 504** for injunctive relief to issue. Further, that the Plaintiff has shown he still holds the original title to the property, and the same was vested in him in a divorce settlement in 2003 after the purported transfer to the Defendants in 1992. The Plaintiff submits that issues have been raised as to the veracity of the agreement of sale allegedly entered into between the Plaintiff and Defendants, and the subsequent transfers to third parties, which is the reason why the *status quo* ought to be preserved pending the hearing of the suit. The Plaintiff also submits that he will suffer irreparable harm if the property is further alienated, and relies on the Court of Appeal decision in **Shariff Abdi Hassan vs Nadhif Juma Adan 2006 eKLR** that a wrongdoer cannot keep what he has taken because he can pay for it.

The Defendants' Advocate filed written submission dated 16th August 2011, in which they argue that the Plaintiff has failed to establish a *prima facie* case as the property with respect to which the preservative orders are sought is no longer in existence, having been subdivided into ten separate parcels which have since acquired different registration numbers, and the application is therefore overtaken by events and *status quo* orders cannot hold. Further, that the allegations of fraud have not been established by the Plaintiffs, and there is no evidence of criminal proceedings instituted against the Defendants. The Defendants' Advocate further submits that the Plaintiff can be adequately compensated in damages, and the balance of convenience is in the Defendants favour as they were the registered proprietors of the suit property until 2008 when the property was sub-divided.

The 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 10th and 13th Interested Parties' Advocate filed submissions dated 7th September 2011 in which they reiterated the Defendants submissions that the Plaintiff has not established a *prima facie* case, and that the suit property has a value which can be ascertained and the Plaintiff can be awarded damages in the event he succeeds in the main suit. Further, that the balance of convenience tilts in favour of the Interested Parties who have invested in the sub-divisions emanating from the suit property. The said Interested Parties also submit that the Plaintiff is guilty of laches having been aware of persons interested in the property from 2002.

The 11th and 12th Interested Parties in their Written Submissions made the same contentions and relied on the Court of Appeal decision in **YFO Masakhalia & Anor vs Nairobi City Council & 3 others, Civil Appeal (Nairobi) No. 95 of 2001** where the Court of Appeal dismissed an appeal on the ground that the subject matter was no longer in existence. The said Interested Parties also relied on the decision in **Edwin Wambaa & Anor vs Joseph Kariuki & 6 Others , High Court Civil Suit (Mombasa) No. 274 of 2009** where this Court declined to issue an injunction because the Defendants therein were already in possession of the suit land which had been sold to them, and were in the process of developing it.

The 2nd and 5th Interested Parties in their Written Submissions dated 2nd September 2011 and 8th August 2011 respectively, in addition argued that the Plaintiff's Amended Notice of Motion is defective in that the Interested Parties have not been made parties to the suit, and the process of enjoining them was unprocedural as there is no provision for the same under Order 1 of the Civil Procedure Rules. The 2nd and 5th Interested Parties also relied on the decision of this Court (Maraga J. as he then was) in **Mehta & 2 others vs The Commissioner of Land & 2 Others (2004) eKLR** that the Plaintiff cannot expect relief against third parties without giving them an opportunity to defend themselves.

The 2nd Interested Party also submitted relying on various authorities that the Amended Notice of Motion contravenes the provisions of Order 8 Rule 7 of the Civil Procedure Rules, which requires that the date of the order allowing the amendment or rule under which it is amended should be endorsed on an amended pleading. The 5th Interested Party also submitted that the Plaintiff has not joined the Commissioner of Land, and yet is seeking to have the title to the suit property impeached.

I have read and carefully considered the pleadings, evidence, written submissions and authorities cited by the respective parties to this application. I will first deal with the preliminary issues raised by the 2nd and 5th Interested Parties as to the whether the Amended Notice of Motion is defective for not complying with

Order 8 Rule 7 of the Civil Procedure Rules, and for the reason that the joinder of the Interested Parties is unprocedural.

It is true that this Court in the decisions cited by the 2nd Interested Party of **Stockman Rozen Kenya Ltd vs Da Gama Rose Group of Companies Ltd 2002 (1) KLR 572** and **Wilfred Dickson Katibi vs Barclays Bank of Kenya and 2 others HCCC No 259 of 2005**, did hold that failure to endorse on amended pleadings the number of the rule in pursuance of which the amendment was made was fatal. In my view the two decisions are distinguished by the important factor that they were decided before the enactment of Article 159 (2) (d) of the Constitution, which provides that Courts in exercising judicial authority should be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

Order 8 Rule 7 of the Civil Procedure Rules in my opinion should be read in its entirety, and the procedure therein is meant to ensure that no undue prejudice is occasioned to the other party or parties in a suit as a result of the amendment, and the effect of their compliance or non-compliance must be gauged with this end result in mind. In light of the provisions of Article 159(2) (d) of the Constitution, I do not find that the failure to endorse on an amended pleading the rule or order of the court pursuant to which it is amended will cause any substantial prejudice or injustice to the Defendants and/or Interested Parties herein, and is a technicality whose non-compliance is not fatal.

On the second preliminary issue about joinder of the Interested Parties, the Plaintiff in his Reply Submissions contended that they did file an application under certificate of urgency dated 26th May 2011, and one of the prayers sought in the said application was joinder of the parties listed in the application as parties to the suit. Upon perusal of the Court record, that prayer was granted by Honourable Justice Mbogholi Msagha on 26th May 2012. The Plaintiff then amended the pleadings to include the said parties in the application herein as Interested Parties. The Plaintiff filed on 9th February 2011 has so far not been amended by the Plaintiff, and the door for applications for amendments of pleadings in this suit is still open. This finding also applies to the submissions made on the joinder of the Commissioner of Land. There is also no prayer in the said Plaintiff to support the submissions made that there are reliefs being sought as against the Interested Parties.

I also note that the said application by the Plaintiff dated 26th May 2011 was brought under the provisions *inter alia* of Order 1 Rules 3, 5, 7 and 10(2) of the Civil Procedure Rules. While Rules 3, 5 and 7 deal with joinder of Defendants, under Rule 10(2) a party can be joined as a Plaintiff, Defendant or in the capacity of a party if their presence is necessary in order for the Court to completely and effectually adjudicate upon and settle all questions in the suit. It is therefore not the case that a party can only be joined as a Plaintiff or Defendant to a suit, and Order 1 Rule 10(2) allows for the joinder of Interested Parties. I therefore find that the Interested Parties are properly joined as parties to the suit filed herein.

The substantive issue left to be determined is whether a *prima facie* case has been demonstrated by the Plaintiff as stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, to entitle him to the injunctions sought. I will begin by addressing the argument put forward by the Defendants and Interested Parties that no orders of injunction or *status quo* can be issued by this Court, as the substratum to be preserved namely the suit property is no longer in existence. The decision of the Court of Appeal in **YFO Masakhalia & Anor vs Nairobi City Council & 3 others, Civil Appeal (Nairobi) No. 95 of 2001** was cited in support of this argument by the 11th and 12th Interested Parties. The said decision is distinguished firstly on the basis that it was an appeal from orders in an application to review a vesting order, and did not involve the grant of an injunction, and secondly and more importantly, final judgment had already been entered by the High Court as to ownership of the suit properties in question. In the present application the issues of the ownership of the suit property, and the validity of the sub-divisions thereof is yet to be determined by this Court. Pending such determination, it is my finding that this Court has powers under Order 40 Rule 1 of the Civil Procedure Act to preserve any property in dispute however known or registered.

The Plaintiff has produced evidence of ownership the suit property by annexing a copy of the original title

to the suit property. The Defendants and Interested Parties have also produced copies of titles with regard to the suit property and sub-divisions thereof in the form of registered indentures and deeds of conveyance. The validity of these titles, and whether there was any fraudulent dealing with the suit property is a matter that can only be decided after a full hearing of the suit filed herein. This will also include the detailed examination of the document examiners report produced in evidence by the Plaintiff, which is not possible at this stage, and can only be done at full trial. For these reasons I am unable at this stage to find a *prima facie* case in favour of the Plaintiff on the basis of his ownership of the suit property or alleged fraud in the transfers to the Defendants and Interested Parties.. The issue of adequacy of damages therefore does not also arise, and I must decide the Plaintiff's' application on the basis of balance of convenience. I find that the balance of convenience does slightly tilt in favour of the Interested Parties to the extent that they are the ones in possession of the suit property, and some of them also claim to have made substantial investments thereon. I therefore order that the *status quo* be maintained as follows:

1. The Plaintiff, Defendants, and the 1st to 13th Interested Parties herein either by themselves or through their servants, agents and/or employees are restrained from selling, disposing of, transferring or alienating in any manner whatsoever whether by grant, sale of encumbrance the property originally known as L.R. No. 6725/21, and/or any of the subdivisions thereof namely L.R Numbers 6725/199, 6725/200, 6725/201, 6725/202, 6725/203, 6725/204, 6725/205, 6725/206, 6725/207, and 6725/208 pending the hearing and determination of the suit filed herein or until further orders.

2. The Plaintiff, Defendants, and the 1st to 13th Interested Parties herein either by themselves or through their servants, agents and/or employees are restrained from undertaking any further construction the property originally known as L.R. No. 6725/21, and/or any of the subdivisions thereof namely L.R Numbers 6725/199, 6725/200, 6725/201, 6725/202, 6725/203, 6725/204, 6725/205, 6725/206, 6725/207, and 6725/208 and/or damaging or wasting the said property, including destroying or interfering with the boundary marks thereon pending the hearing and determination of the suit filed herein or until further orders.

3. The Plaintiff by himself or through his servants, agents and/or employees is restrained from interfering with the 1st to 13th Interested Parties' occupation, possession and quiet enjoyment of the land parcels identified as L.R Numbers 6725/199, 6725/200, 6725/201, 6725/202, 6725/203, 6725/204, 6725/205, 6725/206, 6725/207, and 6725/208 as currently registered in the respective Interested Parties, pending the hearing and determination of the suit filed herein or until further orders.

4. The costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____30th____ day of ____April____, 2012.

P. NYAMWEYA

JUDGE