



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 375 of 2010

MICHEAL WAWERU NGENE.....PLAINTIFF/RESPONDENT

VERSUS

DOROTHY IKAMBA MUTURI.....DEFENDANT/APPLICANT

RULING

1. The applicant filed a Notice of Motion dated 10/2/2012 under section 3A and 63 (c) of the Civil Procedure act Cap. 21 laws of Kenya, Order 2 Rule 15((1) (d), Order 40 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules 2010, Laws of Kenya and all other enabling provisions of the law, seeking the following orders.
 - a. Spent
 - b) That the order for the arrest and detention of the defendant/applicant in prison for a term not exceeding 6 months issued on 6th October 2011 be stayed pending hearing of this application inter-partes.
 - c) That the order for the arrest and detention of the defendant/applicant in prison for a term not exceeding 6 months issued on 6th October 2011 against the defendant/applicant be set aside.
 - d) That the order of injunction issued 8th December 2010 against the defendant/applicant be stayed pending the hearing of this application inter-parties.
 - e) That the order of injunction issued 8th December 2010 against the defendant/applicant be set aside.
 - f) That the plaint dated 2nd August 2010 be struck out and suit dismissed with costs for being an abuse of the process of the court.
 - g) That costs of this application be provided for.

The application is based on the following grounds.

- i. The defendant/applicant is not the owner of the suit property and has no interest whatsoever in the suit property Kasarani Re-settlement project phase one plot no. 244.
- ii. Kasarani Re-settlement Company limited has confirmed in writing that the registered owner of the suit property Kasarani Re-settlement Project phase one plot No. 244 is Nancy Wambeti Muturi.

- iii. The order of injunction issued 8th December 2010 against the defendant/applicant and the order for the arrest and detention in prison of the defendant/applicant for a term not exceeding six 6 months for contempt of court is irregular and amounts to gross injustice of monumental proportion to the defendant/applicant
- iv. The order of injunction issued 8th December 2010 was obtained by deliberately misleading the Honourable court that the defendant/applicant is the owner of the suit property and owns the building constructed thereon.
- v. The defendant was not served with plaint, certificate of urgency dated 2nd August 2010, chamber summons dated 2nd August 2010 for injunction, supporting affidavit sworn on 30th July 2010 and hearing notice for inter parties hearing.
- vi. The defendant was also not served with order of injunction issued 8th December 2010 penal notice, certificate of urgency dated 7th July 2011, Notice of motion dated 7th July 2011, supporting affidavit sworn on 7th July 2011 for leave to institute contempt proceedings and hearing notice for the said application.
- vii. The power of Attorney purportedly donated to the plaintiff by Peter Kiminidri Mambarara Jointly to John Njenga Chege and the plaintiff Michael Waweru Ngene is not a power of Attorney but a mere letter dated 18th August 2009 purportedly written by the said Peter Kimindiri Mambarara appointing the said John Njenga Chege and the plaintiff as caretakers of Kasarani/Mwiki Santon Area No. 244 Jua Kali.
- viii. In the absence of a Power of Attorney duly registered under the provisions of Registration of Documents Act Cap. 285 Laws of Kenya the plaintiff has no locus standi to file suit on behalf of the alleged owner.
- ix. Section 4 of the Registration Documents Act Cap. 285 Laws of Kenya provides that all documents conferring or purporting to confer declare limit or extinguish any right, title or interest, whether vested or contingent to, or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed .. provided that, if any such document relates to land registrable under any such Act and also land not so registrable, such document shall also be registered under this Act.
- x. Section 9 Registration of documents Act Cap 285 Laws of Kenya provides that every document the registration whereof is compulsory shall be registered within two months after its execution and if executed outside Kenya shall be registered within two months after its arrival in Kenya.
- xi. Section 18 Registration of Documents Act Cap 285 Laws of Kenya provides that a document the registration of which is compulsory under this act shall not, unless duly registered, be received as evidence in any transaction affecting the property to which the document relates, except with the consent of the court and upon such terms and conditions as the court may impose.
- xii. The purported power of Attorney used in filing the plaint herein is defective and incompetent by virtue of the provisions of the stamp duty act Cap 480 which makes it mandatory to pay stamp duty in respect of a power of Attorney and prohibit its use in Court if stamp duty is not paid for.
- xiii. The purported power of Attorney is a nullity ab initio and invalid for failure to comply with section 4, 9 and 18 of Registration of Document Act Cap. 285 and the stamp duty act Cap 480 and as a consequence thereof the plaint filed herein is incompetent.
- xiv. The description of the suit plot in paragraph 3 of the plaint as Kasarani Jua Kali Phase plot No. 244 situate at Nairobi Kasarani Area is materially different from the description in the letter purporting to be power of Attorney which describes the same as Kasarani/Mwiki santon area No. 244 Jua kali.

xv. No document of title of the suit land, certificate of ownership from Kasarani Re Settlement Company limited or any document of whatever nature has been annexed to the supporting affidavit of the plaintiff Michael Waweru Ngene Plaintiff/Respondent in support of the claim of ownership of the suit land.

xvi. The plaint filed herein is incompetent ab initio for having been commenced by the plaintiff Michael Waweru Ngene who has not been authorized by John Njenga Chege the joint caretaker mentioned in the letter purporting to be power of attorney to commence the proceedings herein and for commencing suit without powers of Attorney.

xvii. The plaint herein discloses no reasonable cause of action against the defendant/applicant and is abuse of the process of the court.

xviii. The application is extremely urgent in that there is an order for the arrest and detention in prison of the defendant/applicant for a term not exceeding six 6 months and defendant/applicant is in danger of being arrested and taken to jail.

xix. The affidavits of service sworn by Cosmas Kithome on 8th December 2010 and 20th December 2010 and Jackson Agire sworn on 12th August 2010 are false in that neither has the defendant/applicant ever visited the offices of Betty Rashid & Co. Advocates or spoken to the Betty Rashid over the phone or meet Jackson Agire at the Chief's Camp in Kasarani on 3rd August 2010 or any other day.

xx. The defendant/applicant was never served through an alleged son by the name ERIC as defendant /applicant has only one child Sarah Muturi, a daughter who is married and lives with her husband in Nairobi. He stand to suffer irreparable harm by being arrested over suit property which he does not own and has never owned.

xxi. The defendant/applicant has a valid defence to the claim and the orders given are irregular, invalid, highly prejudicial defendant/applicant and will infringe on defendant/applicant's constitutional rights as defendant/applicant has no interest whatsoever in the suit property.

xxii. The defendant/applicant will suffer irreparable harm by being arrested over suit property which she does not own and has never owned.

xxiii. The defendant/applicant has a valid defence.

2. The applicant filed an affidavits in support dated 10/2/2012 and 24/5/2012 the respondent filed a replying affidavit dated 24/4/2012. I have read and considered the contents of the said affidavits. The plaintiff filed a plaint dated 2nd August 2011. Simultaneously he also filed a chamber summons seeking injunctive orders against the defendant and was granted an injunctive order by Justice Muchelule on the 8th of December 2010 against the defendant restraining the defendant by herself, her agents and servants or any other person from threatening, trespassing, evicting, erecting, obstructing or in any other way whatsoever interfering with the plaintiffs quiet enjoyment and possession of property known as Kasarani Jua Kali Phase 1 Plot No. 244 situate at Nairobi Kasarani area.

3. According to the plaintiff the said orders were served on the defendant on the 20th of December 2010 at the site and she refused to obey the Court order and continued to interfere with the property. On the 6th of October 2011 the plaintiff appeared before Justice Koome and argued the application dated 7th of July 2011. The orders sought in the said application was for the arrest and detention of the defendant in prison for a term not exceeding 6 months for contempt of Court. The plaintiff was heard and the Justice Koome granted prayer 2 of the application which was for the arrest of the defendant. The defendant upon learning of the said order has filed the present Notice of Motion. The issues before me are;-

i. Should the order for arrest and detention of the defendant be set aside?

ii. Should the order of the injunction issued on the 8th of December 2010 against the defendant be stayed pending the interpartes hearing of the application/be set aside?

iii. Should the plaint dated 2nd of August 2010 be struck off and the suit be dismissed with costs for being an abuse of the Court process?

4. The plaintiff avers that the defendant was served with the application and the Court orders of 8th of December 2010. The applicant in her affidavits deny that she was served as sworn in the affidavit of service sworn by Cosmas Kithome on 8th December 2010 and 20th December 2010 and Jackson Agire Sworn on 12th August 2010. She also avers that she has never visited the offices of the plaintiff's counsel nor spoken to her, nor has she been served through an alleged son by the name ERIC as she has only one child Sarah Muturi, a daughter who is married and lives with her husband in Nairobi. In the replying affidavit of the defendant dated 24th of April 2012 he makes no statement to challenge the applicant's averments that she was served. I have looked at the said affidavits and I note the following: In the affidavit of service dated 10th August 2010 of Jackson Agire he states that he telephoned the defendant on her cell phone No. 0736987756 and they agreed to meet near the Chief's camp at 11 am, that they met and the plaintiff introduced the defendant to him and that the defendant accepted the documents and said she was taking them to her lawyer. In the affidavit of service of Cosmas Kithome, he states that on the 6/10/2010 at the offices of Betty Rashid Advocate, the advocate called the defendant on her telephone number 0736987756 and asked her to go to the said office that he served the defendant with a hearing notice after he introduced herself to her. In the supporting affidavit of the plaintiff dated 7th of July 2011 the plaintiff avers that the defendant was served with the Court order and penal notice on the 20th of December 2010. The plaintiff does not disclose who served the defendant with the orders issued on the 8th December 2010. There was no affidavit from the process servers to challenge what the plaintiff has deponed and I therefore believe what the plaintiff' has averred that what is deponed that the affidavits are not true. I therefore set aside the orders of arrest and detention as prayed for in prayer c and the order of injunction that was granted exparte on the 8th of December 2010 as prayed in prayer (e). There is therefore no need to stay the order of 8th of December 2010 as prayed in prayer (d). I also note that the defendant avers that the plot does not belong to her but one Nancy Wambeti Muturi and she has demonstrated this by attaching a letter from Kasarani Settlement Project dated 31st January 2012 ("D12").

5. The next issue is whether the plaint dated 2nd of August 2010 should be struck off and the suit dismissed with costs for being an abuse of the Court process. When the plaintiff filed his plaint dated 2nd August 2010. He also filed a verifying affidavits and annexures, copy of receipt from Kasarani Jua Kali and copies of sale agreement between Teresia Wangui Ndichu and Peter K. Mabarara. In the said plaint the plaintiff avers at paragraph 3 and 4 that;

Paragraph 3....“Peter Kimindiri Mambarara is the owner of property with leasehold interest in a plot at Santon Kasarani, Kasarani Jua Kali Phase 1 Plot No. 244 situate at Nairobi Kasarani Area”.

Paragraph 4....The plaintiff also avers that on the 18th August 2009, the said peter Kimindiri Mambarara executed a Power of Attorney in favour of the plaintiff and appointed the plaintiff as the done to be his attorney and generally in relation to Peter Kimindiri Mambarara's interest in the above mentioned title to do anything and everything the said Peter Kimindiri Mambarara could do, and for him and in his name executed all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out powers hereby given details whereof are well within defendant's knowledge.

The said power of Attorney is not one of the documents that were attached to the plaint when it was filed on the 2nd of August 2010. The plaintiff attached a letter dated 8th of August 2009 which refers to a power of attorney. The letter is from Peter Kimindiri Mambarara to Mr. John Njenga Chege and Michael Waweru Ngene. This letter is exhibited as “D14” in the applicant's affidavit. The plaintiff's counsel when

filing their written submissions filed a power of Attorney executed by Peter Kimindiri Mambarara on the 18th of August. This was not done procedurally as Counsel ought to have filed a further affidavit to introduce it nor was this Power of Attorney attached to the plaint when it was filed. I have however perused the said copy of the power of Attorney attached and it has no evidence that it was registered and no evidence of stamp duty as required by section 18 of the Registration of Documents Act which states that:

“A document the registration of which is compulsory under this Act shall not, unless duly registered, be received as evidence in any transaction affecting the property to which the document relates, conditions as the court may impose”.

The provisions of Section 18 a mandatory. The plaintiff did not seek the Court’s consent as provided under the said section. A power of Attorney is one such document that must be registered as provided under section 4 of the said Act Cap 285 and the Stamp Duty Act Cap 480 section 19. Counsel for the defendant has clearly dealt with the issue of the plaint being defective in page 2 of his submissions. I agree with him that the purported power of attorney is a nullity ab initio and invalid for failure to comply with sections 4,9 and 18 of the Registration of Documents Act Cap 285 and the Stamp Duty Act Cap. 480 and as a consequence thereof the plaint filed herein is incompetent. I therefore strike out the plaint dated 2nd August 2010 with costs to the defendant/applicant.

Orders accordingly.

Dated, signed and delivered this 25th day of October 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the plaintiff
..... For the Defendant
..... Court Clerk