



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO.17 OF 2002

JOYCE NGINA SIMITUPLAINTIFF

VERSUS

MICHAEL MUTISO MUTHIANI..... 1ST DEFENDANT
HON. ATTORNEY GENERAL 2ND DEFENDANT

RULING

This suit is consolidated with ELC No. 18 of 2010. On 25th January, 2010 both parties herein recorded a consent which applied to both files and which relate to a parcel of land LR No. 209/11030. This parcel of land is being claimed by both the plaintiff and defendants.

From the tenor and context of the said consent order, both parties were restrained from dealing with the subject matter to the detriment of the other. In effect, the said consent order was intended to preserve the said parcel of land until these two suits are heard and determined. However there was an order that each party was at liberty to apply generally.

There is now an application before me and under Order XXXIX Rule 4 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act for orders that the temporary injunction orders issued by consent against the plaintiff Joyce Ngina Simitu on 25th January, 2010 be discharged and or set aside.

The application is supported by several grounds set out on the face of the application and an affidavit sworn by the applicant Joyce Ngina Simitu.

The basic ground upon which the said order is sought is that, subsequent to the consent orders, the Ministry of Lands and more particularly the Principal Lands Registrar had declared that the suit property belonged to the applicant and that the title held by the 1st defendant is a forgery and or fraudulent. It is also stated that on 23rd February, 2010 the 1st defendant was charged with several counts bordering on forgery and fraud.

It is the applicant's case that, the Ministry of Lands being an authority in authentication of title documents its position in this matter ought to be relied upon by the Court.

The application is opposed and there is a replying affidavit sworn by the 1st defendant Michael Mutiso Muthiani. The allegations by the applicant are denied by the 1st defendant including the letter from the

Chief Land Registrar which is said to have been written without his consent and also the criminal charges laid against him.

Both learned counsel have filed written submissions and cited several authorities which I have read. It is not necessary for me to go over all the said authorities because of the following reasons;

The letter from the Chief Registrar of Titles can only be produced in evidence during the main trial. It cannot be produced by way of an affidavit sworn by a party in these proceedings yet the ownership of the parcel of land is contested by both the applicants and the respondent. If I were to set aside the consent order in the manner and on the basis relied upon by the applicant, I shall in effect be conferring land which is being contested before the suit is heard and determined as envisaged in the consent order. Such summary procedure is not appropriate in these proceedings.

I note that the parties were required to file their respective undertaking as to payment of damages and in my view, if that order has been complied with, that is sufficient security for either party.

Accordingly, this application is dismissed with costs to the respondent. I note that the pleadings herein are closed and the parties should take immediate steps to comply with the provisions of Order 11 of the Civil Procedure Rules, to facilitate the completion of this case.

Orders accordingly.

Dated, signed and delivered at Nairobi this 10th of day of February, 2011.

A. MBOGHOLI MSAGHA
JUDGE