



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 293 OF 2018

EILEEN MERCY WANGARI KARUGI.....PLAINTIFF

VERSUS

CRISPUS MAINA GAITHO.....DEFENDANT

AND

ROSE WAMBUI MAINA.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

(Application to vary, discharge or set aside an order of injunction and to have the applicant enjoined as interested party; plaintiff having sued the defendant claiming that they jointly purchased several properties and that the properties are therefore held in her trust; plaintiff seeking an order of injunction against the defendant which order was granted; among the properties listed being one registered in the name of the applicant who was not party to the proceedings leading to the order of injunction; it was improper for the plaintiff to seek an order of injunction without enjoining the owner of the property; the applicant as owner was never heard before the order was issued; order of injunction against the property owned by the applicant discharged; applicant also enjoined as interested party as she is wife of the defendant and may have a stake in the disputed properties)

1. The application before is that dated 16 September 2020 filed by Rose Wambui Maina, who seeks to be enjoined into these proceedings as interested party and further seeks to have discharged or varied the orders of injunction issued on 4 June 2020. The application is opposed by the plaintiff.

2. The history of the matter is that through a plaint filed on 11 December 2020, the plaintiff averred that she was in a relationship with the defendant and that they have been cohabiting since the year 2003 though never formally married. She pleaded that during the pendency of their relationship, the two acquired various properties and that she contributed to their purchase. The suit properties were described as follows :-

- (i) Plot No. 2618 Taveta Phase II Settlement Scheme
- (ii) Plot No. Subdivision No. 237617 (Original Number 3840/4 Section III MN Creek Age Lodge CR No. 33354/3.
- (iii) Plot No. 15031/89 CR No. 13016/43
- (iv) Plot No. 15031/157 CR No. 50353 Galaxy Voi.
- (v) Plot No. Voi Subdivision No. 89, 90, 157 and 158 Voi.
- (vi) Plot No. 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort.
- (vii) Other properties in Umoja, Ruai, Sultan Palace and St. Kelvin High School Voi and others to be mentioned with the leave of the court.

3. She pleaded that she and the defendant cemented their relationship by registering a private company known as Galaxy Crislyn Kenya Limited where they each held a 50% stake. She pleaded that it was their agreement, that whilst the properties would be bought in the name of the defendant, she would contribute towards the purchase price and carry out improvements, and that her half share would be held in trust for her benefit, and further, that she would reside on the Plot No. 9122/23 (sic) Jumba Ruins Road, Mtwapa Galaxy Resort (the correct number

of the Plot being Plot No. 9122/93 and not 9122/23). She averred that on 2 July 2018, the defendant walked out of the relationship with all the original documents for the mentioned properties. She wrote to the defendant a letter dated 20 November 2018 to have the properties severed but the defendant neglected to reply to the letter and instead he evicted her from the Plot No. 9122/93 Jumba Ruins Road, Mtwapa Galaxy Resort (hereinafter Plot No. 9122/93). In the plaint, she sought orders to have her reinstated on the plot No. 9122/93 and for a declaration that the suit properties are held in her trust. She wants further orders for the properties to be settled on a 50:50 basis.

4. Together with the plaint, the plaintiff filed an application seeking orders that pending the hearing of the suit, she be reinstated into the Plot No. 9122/93, and for the preservation of the other suit properties.

5. The defendant contested the application for injunction. Inter alia, he stated that he purchased the properties LR Nos. 15031/89,90,157 and 158, in the years 1997-1999 and he completed payment in the year 1998 before he met the plaintiff in the year 2003. He developed a hotel on these parcels of land which he sold on 13 May 2009 and relocated to Mtwapa, Mombasa, but the deal did not go through and he repossessed the hotel in the year 2015. He then leased it to some third parties. While in Mombasa, he claims to have singly bought the Plot No. 9122/93. He averred that he was issued with a title deed which he later transferred to his legally married wife in the year 2018 who then took possession. The said legally married wife is no other than Rose Wambui Maina, the applicant herein. He asserted that the company that operates the hotel therein is Galaxy Hotel Mtwapa which is fully owned by him. He stated that the plaintiff wished to purchase this hotel but she could not get financing and instead she purchased from him the house in Plot No. 1956/457 Voi, which the defendant transferred to her, but which his wife (the applicant) lived in. Because she (plaintiff) was working in Mombasa, he offered to have her live in one of the apartments at Galaxy Hotel Mtwapa while the applicant continued staying in the house in Voi. He admitted having registered a company together but stated that it did not take off and no account for it was ever opened. He stated that the plaintiff subsequently evicted the applicant from the house in Voi.

6. The application for injunction was heard by Omolo (J), my predecessor in the station before she was transferred to Busia. She delivered the ruling electronically on 9 June 2020. In the ruling, she held that the plaintiff is entitled to an order of injunction in respect of the properties Plot No. 2618 Taveta Phase II Settlement Scheme and the Plot No. 9122/93 (Galaxy Resort Mtwapa). She issued an order restraining the defendant from evicting her from the said resort until the case is concluded.

7. It will be recalled that in this application, the applicant wishes to have the said orders varied, discharged, or set aside. The applicant has grounded her application on the claim that she is the lawful owner of the Plot No. 9122/93 which is the subject of these proceedings. She has further stated that she is wife to the defendant and has a stake in all the other properties mentioned by the plaintiff in this suit. She avers that owing to the order issued, she has literally been forced to close down business. To her supporting affidavit, she has annexed a copy of the title and search to the Plot No. 9122/93. She averred that she occupies some of the rooms in the property together with her family, whereas the plaintiff occupies part of the property. She deposed that on 8 September 2020, the plaintiff attacked them and proceeded to break locks and weld off the metal doors of their rooms. There are other complaints but I do not find it necessary to spell them out.

8. The plaintiff filed a replying affidavit to oppose the motion. She has deposed inter alia that the Plot No. 9122/93 was purchased jointly by herself and the defendant in the year 2008 upon which the property was registered in the name of the defendant. She has contended that the transfer of the property on 17 September 2018 to the applicant was mischievous, so as to deny her access to it. She contended that the first time the applicant stepped into the hotel was in December 2018 after this case had been initiated and interim injunctive orders issued. She averred that the applicant was aware of this case but chose not to be part of it. She complained that the applicant and her children are in contempt of the injunctive orders issued by court and should not be granted audience until they purge the contempt. She claimed that it is she who has been attacked by the applicant.

9. The defendant filed a replying affidavit supporting the applicant's endeavours.

10. I invited counsel to file written submissions which was done. I have taken note of the submissions of Ms. Arika, learned counsel for the applicant, and Ms. Waihenya, learned counsel for the plaintiff. Mr. Muthami, learned counsel for the defendant, submitted in support of the application.

11. The application is inter alia brought pursuant to the provisions of Order 40 Rule 7 which provides as follows :-

7. Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

12. There is therefore jurisdiction to discharge, vary, or set aside an order of injunction. The principal argument presented by the applicant is that an injunction was issued over property that she owns, without her being made a party to the suit, and without any opportunity being given to her to be heard. I think the applicant has a point. The Plot No. 9122/93 is certainly registered in her name and she became registered as proprietor prior to this suit being filed. My view is that it was improper for the plaintiff to seek an injunction against the defendant when the defendant was not the owner of this property. The plaintiff ought to have sued the applicant if she wanted to have any rights determined over this property. It was pointless seeking an order of injunction against a person who is not the proprietor of the property. Now that the proprietor has come out in the open, and it clear that she was not heard before the injunction was issued, the only fair thing to do is to vary the order of injunction issued on 9 June 2020, so as to discharge the orders of injunction over the Plot No. 9122/93. For the avoidance of doubt, the order of injunction is hereby varied so that it does not apply to the Plot No. 9122/93. It should be deemed that no order has been made in respect of this property in favour of the plaintiff. The result is that the plaintiff will need to prove her case over this property without the benefit of an order of injunction.

13. I am aware that the plaintiff has complained that there is disobedience of the order of injunction. That complaint is misplaced. The applicant cannot be held to be in disobedience of an order that was never directed at her. The order of injunction was never against the applicant but was against the defendant. The defendant is not the proprietor of the Plot No. 9122/93. The plaintiff cannot transfer that order to apply to the applicant. If she wanted the applicant bound by that order, she ought to have made the applicant a party in the first instance. In fact, I do not see how the plaintiff can succeed in her case without amending her pleadings to include the applicant, if at all she wishes to

have any orders made in respect of the Plot No. 9122/93. But that will be her decision to make.

14. In so far as joinder of the applicant is concerned, the applicant has stated that she is wife to the defendant and has an interest in all the properties mentioned. It is just that she be enjoined as an interested party in this case. She is so enjoined and she is at liberty to file any pleadings to safeguard her interest.

15. The only issue left is costs which I award to the applicant as against the plaintiff, for it was wrong for the plaintiff to seek an order of injunction for the Plot NO. 9122/93 without enjoining the owner thereof.

16. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA