



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA 20 OF 2017**

**GRACE RUGURU MWANGI.....APPELLANT**

**VS**

**MARY WANGARI MAINA.....1<sup>ST</sup> RESPONDENT**

**FRANCIS MWANGI KANYURU.....2<sup>ND</sup> RESPONDENT**

**PETER MWANGI NJUGUNA.....3<sup>RD</sup> RESPONDENT**

**(An appeal from the ruling of SPMCC 73 of 2015 delivered by Hon A Mwangi (SRM) on the 29/9/17)**

**MARY WANGARI MAINA..... PLAINTIFF**

**VS**

**FRANCIS MWANGI KANYURU..... DEFENDANT**

**GRACE RUGURU MWANGI.....INTERESTED PARTY**

**PETER MWANGI NJUGUNA...INTENDED 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. I find it apt to first give the background of the case, the basis of this appeal. The gist of the case in SPMCC No 73 of 2015 in Kigumo is a simple boundary dispute. In that suit filed on the 11/5/2015 the Plaintiff sued the Defendant for boundary interference and encroachment. She averred that she was the owner of LOC2/KANGARI/5048 and 5049 while the Defendant owned LOC2 /KANGARI/3891, which parcels bordered each other. She urged the Court to order the District Surveyor to resurvey parcels 3891 and 5049.

2. In a swift defense filed on the 2/6/15 the Defendant denied the Plaintiffs claim and argued that he is not the owner of parcel 3891 but LOC1/KANGARI/443 and therefore was a stranger to the lands named in the plaint.

3. Following in hot pursuit was an application filed on the 16/6/2015 by Grace Ruguru Mwangi seeking joinder as an interested party. In it she sought that the Court sets aside all the proceedings in the suit to enable her to be heard substantially and fairly. In addition, she sought to injunct the Plaintiff from interfering transferring trespassing upon or dealing with the subject matter. The subject matter was neither disclosed in the application or in the supporting affidavit of the said Grace Ruguru Mwangi.

4. In her supporting affidavit she deponed that she is a necessary party whose presence before the Court would facilitate the effectual and complete adjudication of the suit. She accused the Respondents (Plaintiff and the Defendant) of fraud and abuse of the process of the Court as the subject land is embroiled in several suits pending in various Courts. That the decree that the Plaintiff relied upon had been set aside on the 15/9/2009 and that the Respondents have been playing musical chairs with the judicial system by filing multiplicity of suits.

5. On even date the Court granted the application in the following terms;

“That Grace Ruguru Mwangi be and is hereby enjoined as an interested party in this suit.

That pending the hearing and determination of this suit, the Court be pleased to injunct the Plaintiff from interfering transferring trespassing upon and in any other way dealing with the subject matter herein.”

6. Again, the subject matter is not disclosed in the orders of the honorable Court noting that the main suit was in respect to parcel Nos. 5048 and 5049 and 3891. The Defendant introduced parcel 443. It is not disclosed on which property these orders were executed against.
7. On the 16/7/15 the Plaintiff urged the Court by way of an application to order the District Land Registrar and the Surveyor Murang'a to set and fix the boundary between parcel 5049 owned by the Plaintiff and parcel 3891 owned by the Defendant.
8. It would appear that this application was abandoned midway before it was determined by the Court.
9. Emboldened by the joinder and after a lull of almost 2 years, the said Interested party moved the Court on the 22/8/17 seeking the joinder of Peter Mwangi Njuguna as the 2<sup>nd</sup> Defendant. In addition, sought for an injunction against the intended 2<sup>nd</sup> Defendant from interfering with **parcel 443** and any other purported subdivisions. She also sought enforcement of the orders issued on the 16/6/15 by the OCS Kigumo Police Station.
10. The grounds of the application are interalia that the Plaintiff, the Defendant and the intended 2<sup>nd</sup> Defendant visited the subject land on the 18/8/17 with the intention of subdividing the land, on the misguided notion that ELC 239 OF 2015 (now in ELC Muranga) which had been stayed by the Court in Nyeri stood dismissed. That the Plaintiff has irregularly transferred the land to the 2<sup>nd</sup> Interested Party.
11. Whilst the application of Grace Ruguru Mwangi to enjoin Peter Mwangi Njuguna is pending, the Plaintiff filed a notice of withdrawal of suit under Order 25 rule 1 of the Civil Procedure Rules on the 15/9/2017.
12. The Interested party opposed the notice of withdrawal while the Defendant supported it. The Interested party argued that the withdrawal should be disallowed because no notice was served on the parties and secondly that it seeks to defeat the claim of the interested party which claim against the Plaintiff and the intended Defendant was for a declaration that the process and dealings with title are fraudulent. That the withdrawal should not take away the interested party's claim which has become the substratum of the suit.
13. Those in support argued that the claim of the interested party though filed has not been admitted on record; there is no counterclaim by the interested party; the hearing of the suit is yet to begin hence no need for consent of the parties; the Plaintiff retains the right to withdraw the suit; the subject matter of the suit has been transferred and is no longer owned by the Plaintiff; The Interested party retains the liberty to file a fresh suit.
14. On even date(15/9/17) the said Grace Ruguru Mwangi filed her statement of claim pursuant to leave granted by the Court on the 16/6/2015, 2 years later.
15. The Court heard the matter and delivered a considered ruling on the 29/9/2017 allowing the withdrawal of the suit with costs to the other parties.
16. Aggrieved by the ruling of the Court the Interested party now APPELLANT filed the following grounds of appeal that the Hon Learned Magistrate erred in law and fact in ;
  - a. Misdirecting herself on issues and determined extraneous issues.
  - b. Finding that parties were properly served
  - c. Failing to find that the interested party's claim survived the withdrawal and that such claim should not be wished away
  - d. Failing to appreciate pertinent points of law that were raised by the interested party.
  - e. Arbitrarily favoring the Respondent with a grossly irregular ruling
  - f. Failing to find that the legal prerequisite of withdrawal were not existent.
17. Parties elected to canvass the appeal by way of written submissions which I have read and considered.
18. The Appellant submitted that the notice of withdrawal was not served upon the parties; the said withdrawal was grounded on malafides and solely meant to defeat justice; the Appellant claim against the Respondent was in form of a counterclaim and the same ought to have survived the intended withdrawal of the suit.
19. That the Appellant claim is a counterclaim and raises issues of fraud in the acquisition of the land for which the Respondent sought enforcement prayers in the withdrawn suit. That by allowing the withdrawal the Court aided an injustice by preventing the interrogation of the validity of the title. That her claim together with her right to be heard was extinguished by the 1<sup>st</sup> Respondents ill advised withdrawal. That the Appellant claim ought to have been preserved for adjudication.
20. In sum the Appellant posits that the withdrawal of the suit amounted to an abuse of the process of the Court. She relied on the case of **Beatrice Mumbi Wamahiu Vs Mobil Oil Kenya Limited (2011) EKLR** where the Court held that a counterclaim is a separate suit and in a withdrawal of suit by Plaintiff, the counterclaim was not affected. In the case of **Velvet EPZ Limited Vs Sameer EPZ Limited & Anor (2012) EKLR** the Court stated the Defendants claim was yet to be determined. Further in the case of **David Manyara Njuki Vs Afraha Educational Society & 3 Others (2002) EKLR** where the Court held that a counterclaim is a suit that stands on its own and where the

Plaintiff withdraws the suit, it does not pull down the counterclaim which continues to subsists for hearing.

21. In conclusion the Appellant urged the Court to overturn the ruling and allow the Appellant's statement of claim dated the 15/9/2017 seeking to interrogate the 1<sup>st</sup> Respondents acquisition of the title of the suit land in SRMCC NO 73 of 2015 -Kigumo.

22. The 1<sup>st</sup> Respondent submitted that the application opposing the withdrawal was an attempt by the Appellant to hold to a case that had been formally withdrawn. That the Court acted within the law in dismissing the application by the APPELLANT and the appeal lacks merits and should be dismissed with costs.

23. The 2<sup>nd</sup> Respondent failed to file written submissions.

24. The 3<sup>rd</sup> Respondent submitted that the substantive suit in the lower Court had not been set for hearing. That the 3<sup>rd</sup> Respondent had not been enjoined as a party to the suit as the application of the Appellant was pending. That the statement of claim of the Appellant had not been admitted on record- leave of the Court had not been obtained. That nothing stopped the Appellant from seeking leave to pursue whatever claim it deemed fit or file a fresh suit.

25. This Court has power to review the facts and evidence and draw its own conclusions. In the case of **Abok James Odera & Associates – Vs- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court of Appeal stated as follows regarding the duty of first appellate Court:-

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way,”

26. Order 25 rule 1 of the CPR provides that at any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

27. Where the suit has been set down for hearing the law provides two ways of effecting a withdrawal of the whole or part of the suit; absolute withdrawal which does not require the leave of the Court and qualified withdrawal which requires the consent of the parties and where the consent is not forthcoming with leave of the Court upon application.

28. The Provisions of rule 1 emphasizes the qualified right of a Plaintiff to withdraw or abandon a suit. There is no provision in the Civil Procedure rules which requires the Court to decline a withdrawal of suit or to compel a Plaintiff to proceed with his suit. Withdrawal of a suit under rule 1 is complete as soon as it is filed and the same is brought to the attention of the Court. The rationale of this position is based on a latin word *invito beneficium non datur* which means the law confers upon a man no rights or benefits which he does not desire. It would go against the wishes of the Plaintiff and would eventually lead to wastage of the Court's time.

29. This is buttressed by the decision of the Court of Appeal in **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR**. Where the Court interalia set out the three scenarios regarding Discontinuance of Suits or Withdrawal of Claims and it held:-

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality”.

30. However, if for once the Plaintiff withdraws its case then he or she would never be able to file a new suit in respect of the same cause of action against the same party or parties. Also, while withdrawing the suit, if the Court awards any cost to the Defendant, then the Plaintiff would have to bear it before taking any further action.

31. Unlike in Election and constitutional petitions, where withdrawal requires the leave of the Court, in civil cases the parties are deemed to have full control of agitating their rights and hence the unqualified right to so withdraw a suit as they desire.

32. There are however exceptions to the rule. There are instances when the Court may refuse a withdrawal of a suit; where third-party rights have accrued; withdrawal amounts to an abuse of the process of the Court or defeats the ends of justice; where the suit involves a minor, the leave of the Court must be obtained. The next of friend or a pleader on behalf of the minor must swear an affidavit confirming that the withdrawal is beneficial to the minor.

33. In this case it is not in dispute that the hearing of the matter had not begun and therefore the requirement of notice to the parties had to be met. The Appellant's argument that she was not served dissipates on account that the advocate of the Appellant proceeded to argue the application notwithstanding that he had not been served. She is therefore estopped from raising the issue of notice as it is overtaken by the

oral hearing of the matter in open Court. There is no evidence that he sought an adjournment and he was denied.

34. The impugned notice of withdrawal is reproduced here for effect as follows;

“NOTICE OF WITHDRAWAL OF SUIT

Under order 25 rule 1 of the CPR, 2010

Take notice that the Plaintiff herein has withdrawn the whole suit against the Defendant.”

35. Did the Plaintiff require the leave of the Court to effect the withdrawal? The answer may be found in the decision of the Court of appeal in **Pil Kenya Ltd Vs. Joseph Oppong [2001] eKLR** where the Court stated inter alia that the Plaintiff in that suit did not need the leave of Court to withdraw his suit nor was a Court order necessary to give effect to the withdrawal. All that was necessary was for the Plaintiff to file a Notice of withdrawal before Judgment. After Judgment, however, the leave of the Court was necessary because rights of the parties have crystallized and prejudice may be visited on a party that may be affected by the withdrawal.

36. Coming back to the instant case, the Appellant as earlier stated was enjoined in the suit on the 16/6/15 upon successful application. In addition, she was granted an order of injunction stopping the Plaintiff from entering transferring trespassing and in any way dealing with the subject matter pending the hearing and determination of the suit. As pointed out it is not clear on which property or subject matter was directed at the injunction. The 1<sup>st</sup> Respondent averred that she owned parcels 5048 and 5049 while the 2<sup>nd</sup> Respondent owned 3891 of which he refuted in his defence and stated that he is the registered owner of parcel 443.

37. It is commonly accepted by the parties that the suit land has now been transferred to the name of the 3<sup>rd</sup> Respondent. The question that begs an answer is at what point was the transfer made? It would concern the Court if it was done during the subsistence of the Court orders issued on the 16/6/15 which as I can observe on the record remain subsisting. The Appellant has annexed a copy of the green card for parcel 443 whose entries are as at 2007. There are also two titles registered in the names of the 3<sup>rd</sup> Respondent however the date of registration is ineligible and again it is only the front page that is enclosed denying the Court the opportunity to peruse the second page that would show the entries. The Plaintiff failed to place before the Court the green cards for all the parcels and how each relates to each other. It is difficult therefore for the Court in the absence of documents to pinpoint the period when the transactions took place and whether the same were in contravention of the said orders.

38. It would appear that the orders of 16/6/2015 did not call for the amendment of the Plaint to include the Appellant who had been enjoined as an interested party. The Appellant as noted on record did file a statement of claim dated the 15/9/2017 on the 15/9/17, the same day that the Plaintiff filed her withdrawal of the suit. The withdrawal is dated the 12/9/17. It is true that the statement of claim of the Appellant though on record had not been admitted with leave of the Court, noting that pleadings had long closed.

39. That said, it is important to look at the claim of the Appellant as by this time no doubt she is a party in the suit but as an interested party. In her claim she avers that the land transaction is shrouded in fraud as they were dealt with in contravention of orders in CMCC No 652 of 2004 dated 15/9/2009 which set aside earlier orders issued with respect to parcel 443 in 2004. That the transfer of the land to the 3<sup>rd</sup> Defendant was done in disobedience of the orders issued on the 16/6/15 and that the actions of the Respondents in dealing with the land are fraudulent.

40. Does an interested party have a right to superimpose her own suit on the suit of the Plaintiff? This brings me to the definition of an interested party as defined in the Constitution of Kenya 2010 as a “interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.

41. In the case of **Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 Others [2014] eKLR** defined an interested Party as follows:

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

42. It is a general proposition that in civil suits the parties are the Plaintiff and the Defendant and any party joining a civil suit should stake a position either as Plaintiff or a Defendant. In this case the Appellant sought joinder on the ground that she was a necessary party whose presence would facilitate the effectual and complete adjudication of the questions involved in the suit. That the Plaintiff was abusing the process of the Court by filing multiplicity of suits and that the decree relied upon in the acquisition of the land had been fraudulently acquired. The controversy in the Plaintiffs suit was a boundary dispute.

43. The Appellant after being enjoined in the suit filed her own statement of claim which she avers is her counterclaim which raises the issues of fraud inter alia. This is a sound ground for the Court to inquire into the allegations. However, the forum is incorrect in my view. I say so because from the Plaintiff’s suit, there appears to be no right or relief that would flow from the Appellant to the Plaintiff.

44. However looking at the context of the ruling of the Court in ELC 239 of 2015 ( now ELC 167 of 2017-Muranga), it is the first time that the Court is getting a glimpse of the interest of the Appellant in the subject lands. This suit was filed by the APPELLANT against Francis Mwangi Ruguru, Joseph Mwangi Maina Siphira Wambui Ndaire , Mary Wangare Maina and the Chief Land Registrar Muranga. Francis Mwangi Ruguru and Mary Wangare Maina are parties in this appeal. The pleadings however were not placed before the Court but as can be possibly gleaned para 1 -2 of the Ruling dated the 25/2/16 the Appellant claim is that the 2<sup>nd</sup> Respondent is her husband and that the suit

land, here referring to parcel 443 and the subdivisions therefrom is her ancestral land where she and her family have lived for over 40 years and that some of the Respondents above have fraudulently dealt with the suit property by illegally subdividing it and causing new titles to be issued.

45. In the said Ruling the Court agreed that the parties had filed multiplicity of suits which is an affront to section 6 of the Civil Procedure Act and consequently stayed the hearing of the suit pending the determination of the pending suits in other Courts.

46. Be that as it may, it is clear to the Court that the claim of the Appellant in this suit is captured in her own suit that is pending hearing and determination.

47. In my view these are issues that can and rightly so be determined in the suit of the Appellant. The Appellant claim is safely tugged away in her ELC 167 of 2017 (formerly ELC 239 of 2015) suit. In any event her claim does not form the substratum of the 1<sup>st</sup> Respondents case in CMCC No 73 of 2015 which was wholly based on a boundary dispute.

48. In other words, the Court is satisfied that the determination of this appeal will not leave the Appellant with no remedy to pursue the issues in controversy dodging the title. The proper forum is in the existing suit. I am also satisfied that no evidence was placed before me to support a claim that the withdrawal was an abuse of the process of the Court and or that rights of third parties were at stake of being prejudiced.

49. In the upshot I am satisfied that the Hon Learned Magistrate did not err in arriving at her decision to allow the withdrawal of the suit.

50. For avoidance of doubt the suit in SPMCC No 73 of 2015, Kigumo stood withdrawn as at 15/9/2017.

51. In the end the appeal is not meritorious. It is dismissed with costs to the Respondents.

52. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14<sup>TH</sup> DAY OF JANUARY 2021.**

**J.G. KEMEI**

**JUDGE**

Delivered in open Court in the presence of:

Gichobi (HB) for Njuki

Ben Mwangi (HB) for T.M. Njoroge

2<sup>nd</sup> Respondent Absent

3<sup>rd</sup> Respondent Absent

Kuiyaki: Court Assistant