



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 53 OF 2018

RHODA MUTHOKI KIOKO WAMBUA.....1ST PLAINTIFF

SAMUEL WAITHAKA KIIGE2ND PLAINTIFF

VERSUS

MONICA NZILANI KIMUYA ALIAS

EMILY NZILANI KIMEU.....1ST DEFENDANT

MICHAEL MULI MUSYOKI.....2ND DEFENDANT

QUADCO FIFTY TWO LIMITED.....3RD DEFENDANT

MALILI RANCH LIMITED.....4TH DEFENDANT

RULING

1. In the Notice of Motion dated 15th November, 2019, the Plaintiffs have sought for injunctive orders in the following terms:

a. That pending the hearing and determination of this suit, order of injunction do issue restraining the 2nd Defendant/Respondent whether by himself, his servants and/or agents from sub-dividing, selling, transferring, parting with possession, alienating or in any manner whatsoever interfering with and/or disposing Plot No.

- i. Konza North/Konza North Block 2(Malili)/7663***
- ii. Konza North/Konza North Block 2(Malili)/7664***
- iii. Konza North/Konza North Block 2(Malili)/7665***
- iv. Konza North/Konza North Block 2(Malili)/7666***
- v. Konza North/Konza North Block 2(Malili)/7667***
- vi. Konza North/Konza North Block 2(Malili)/7668***
- vii. Konza North/Konza North Block 2(Malili)/7669***
- viii. Konza North/Konza North Block 2(Malili)/7670***
- ix. Konza North/Konza North Block 2(Malili)/7671***
- x. Konza North/Konza North Block 2(Malili)/7672***

xi. Konza North/Konza North Block 2(Malili)/7673

xii. Konza North/Konza North Block 2(Malili)/7674

xiii. Konza North/Konza North Block 2(Malili)/7675

being sub-division of Konza North/Konza North Block 2(Malili)/275 formerly known as Plot No.1622.

b. That the Honourable Court be pleased to grant the Plaintiffs leave to amend the Plaint to reflect the correct subject matter as plot numbers Konza North/Konza North Block 2(Malili) 7663-7675 being sub-divisions of Konza North/Konza North Block 2 (Malili)/275 formerly known as Plot No. 1622 and not Konza North/Konza North Block 2/1622.

c. That the costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the 2nd Plaintiff who has deponed that him, together with the 1st Plaintiff, purchased portions of land known as Agricultural plot number 1622 Malili Ranch measuring 2 acres and ½ acres respectively from the 1st Defendant; that they thought that plot number 1622 became Konza North/Konza North Block 2/1622 and that when the Defendants filed their response in this matter, they realized that the suit property had been registered as Konza North/Konza North Block 2 (Malili) 275 in the name of the 2nd Defendant.

3. It was deponed by the 2nd Plaintiff that during the subsistence of the suit, the 2nd Defendant went ahead and sub-divided the suit property into 13 plots being Konza North/Konza North Block 2 (Malili) 7663 – 7675 (*the suit properties*); that the Defendants have gone ahead and apportioned them portions of the suit property that are smaller than what they purchased; that the Defendants took advantage of the fact that they bought the suit properties with an erroneous description and that the 3rd Defendant is in the process of acquiring titles for the suit properties.

4. In response, the 2nd Defendant, who also swore the Affidavit on behalf of the 1st Defendant, deponed that on diverse dates, he purchased three portions of the property known as Malili Ranch Limited Plot No.1622 (*now Konza North/Konza North Block 2 (Malili)/275*) measuring in aggregate 0.75 of an acre from the 1st Defendant.

5. The 1st Defendant deponed that he is aware that on diverse dates, about 11 other individuals, the Plaintiffs included, purchased portions of the property now known as Konza North/Konza North Block 2 (Malili) 275 from him and that when the Plaintiffs' Application dated 21st March, 2018 came up for *inter-partes* hearing on 19th July, 2018, the 1st Defendant and himself, on one part, and the Plaintiffs' on the other part, recorded a consent on the Application.

6. It was deponed that through the consent order, the Honourable Court directed that the 1st Defendant and himself do facilitate survey and sub-division of the suit property and that the Plaintiffs did not meet the costs of survey and sub-division of their respective portions of the suit property together with the costs of transfer of their respective portions of the suit property.

7. The 2nd Defendant deponed that despite the Plaintiffs' failure and/or refusal to pay their respective portion of the survey fees, the 1st Defendant and himself went ahead with the survey of the suit property; that thirteen (13) Title Deeds were issued as a result of the survey and sub-division of the suit property and that the Plaintiffs were notified through their advocates to pay and collect their Title Deeds.

8. It was deponed that immediately upon issuance of the Title Deeds, the 1st and 2nd Defendants instructed their advocates on record to draw transfers in favour of the various beneficiaries; that their advocates drew and duly issued transfers, original Title Deeds, spousal consents and applications for consent to transfer the land in respect of all the beneficiaries save for the Plaintiffs herein who are yet to collect their documents.

9. According to the 2nd Defendant, the Application before this Honourable Court has been overtaken by events for attempting to stop a process which has already been undertaken and/or concluded; that the orders of this Honourable Court were served upon their advocates way after the Title Deeds and transfers had been released to the respective beneficiaries and that the orders sought therefore will serve no practical purpose.

10. The 2nd Defendant finally deponed that he is not privy to the details of the acreage of land the Plaintiffs purchased and that he purchased his portion of the suit property from the 1st Defendant, just like the Plaintiffs and the other beneficiaries.

11. In her submission, the Plaintiffs' advocate submitted that the Plaintiffs are innocent purchasers for value of parcel of land known as Konza North/Konza North Block 2 (Malili) 275 formerly known as plot number 1622 and that the 1st Plaintiff purchased 2 acres of the said land while the 2nd Plaintiff purchased ½ an acre of the same land.

12. Counsel submitted that the Application is seeking to enforce the Plaintiffs' right in respect to the property which they purchased; that it has not been denied that they bought the suit property; that the power of the court to allow amendments is intended to determine the true substantive merits of the case and that the Application should be allowed.

13. The 1st and 2nd Defendants' advocate submitted that pursuant to the consent orders, the 1st and 2nd Defendants caused the suit property to be surveyed and sub-divided; that subsequently, they informed all the purchasers to collect their respective Title Deeds, duly executed

transfers and all the other necessary documents for the transfer to be effected and that all the purchasers save for the Plaintiffs collected their transfer documents and hence the 2nd Defendant does not have control over the issued documents.

14. It was submitted that even if this Honourable Court were to issue the injunctive orders sought, the same would be in vain considering the fact that the 1st and 2nd Defendants have already released the Title Deeds, duly executed transfers and all necessary documents for transfers to be effected. Counsel relied on the case of **Stanley Kirui vs. Westlands Pride Limited [2013] eKLR** in which the court cited the case of **Esso Kenya Limited vs. Mark Makwata Okiyo [1992] eKLR** where the Court of Appeal dismissed an application for injunction for having been overtaken by events and held that:-

“The court cannot restrain what has already happened. If indeed the Defendant has already sold the two apartments, the balance of convenience tilts in their favour... Having now carefully considered the applicant’s Notice of Motion dated 6/2/2013 and the written submissions and the relevant law, the court finds that the applicant has failed to establish that the said application is merited.”

15. Counsel also relied on the case of **Cyka Holdings Limited vs. Nairobi City County Government & 2 others [2017] eKLR** at paragraph 12 where the Court held as follows:-

“The purpose of a temporary injunction is to prevent that which has not happened and not to prevent that which has happened. To this extent no orders of temporary injunction can be granted as prayer six (6) has been overtaken by events.”

16. It was submitted that from the onset, the Plaintiffs were aware that the Title Deed in respect of the suit property was issued in the name of the 2nd Defendant; that they were involved in the sub-division and survey of the suit property but decided not to take part in the said sub-division and that the Plaintiffs have not proved that they will suffer irreparable harm if the orders for injunction sought through the Application under consideration are not granted.

17. This suit was commenced by way of a Plaint dated 21st March, 2018. On the same day the Plaint was filed, the Plaintiffs filed an Application seeking for orders of injunction restraining the Defendants from sub- dividing, selling or parting with possession of land known as Konza North/Konza North Block 2/1622 pending the hearing of the suit.

18. The record shows that on 19th July, 2018, the Plaintiffs entered into a consent in the following terms:

- a) *The 1st and 2nd Defendants to facilitate the survey sub division of the suit property;*
- b) *The Plaintiffs to meet the costs of the sub division of their respective portions of the suit land*
- c) *The Plaintiffs to meet the costs of transfer of their respective portions in their names or their nominees’ names;*
- d) *The matter to be mentioned to confirm compliance.*

19. The above consent order was adopted as an order of the court on the same day it was recorded. In the current Application, the Plaintiffs are seeking for an injunctive order on the grounds that they were not involved in the sub-division process and that the sub-division gives them smaller portions of land. According to the Plaintiffs, they are entitled to 2 acres and ½ an acre respectively.

20. The Plaintiffs have not disputed the fact that they entered into the consent dated 19th July, 2018. Indeed, the Plaintiffs have not sought to set aside the said consent. That being the case, the Plaintiffs are bound by the consent to the extent that the Defendants were allowed by the court to sub-divide the suit property and have the portions they were claiming transferred to them.

21. Although the Plaintiffs have deponed that they were entitled to 2 acres and ½ an acre of the suit property respectively, they have not annexed on the present Application any evidence to support that allegation. Indeed, having not facilitated the registration of their properties as ordered by the court, it will be speculative for this court to hold that their rights in respect to the suit property have been, *prima facie*, violated.

22. In the circumstances, and considering that the Defendants have sub-divided the suit property pursuant to the consent order of 19th July, 2018, and the Plaintiffs having not alleged that the Defendants are in breach of any of the terms of the consent order, it is my finding that the Plaintiffs have not established a *prima facie* case with chances of success.

23. The Defendants have not opposed the Plaintiffs’ Application to have the Plaint amended. Indeed, the property that was to be sub-divided pursuant to the consent order is Konza North/Konza North Block 2 (*Malili*) 275 and not Konza North/Konza North Block 2/1622 as pleaded in the Plaint. That being so, I shall allow the Plaintiffs’ prayer for the amendment of the Plaint.

24. For the reasons that I have given, I allow the Plaintiffs’ claim in respect of the prayer for amendment of the Plaint as follows:

- a) ***The Plaintiffs are hereby granted leave to amend the Plaint in terms of the draft Amended Plaint within fourteen (14) days from the date of this Ruling.***
- b) ***Each party to bear his own costs.***

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE