



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 24 OF 2020

GODFREY MUGAMBI KIMATHI.....1ST PLAINTIFF

RUTH NDURU STANLEY.....2ND PLAINTIFF

JANE KANARIO STANLEY.....3RD PLAINTIFF

JOSELYNE KINANU MWIRICHIA.....4TH PLAINTIFF

VERSUS

STANLEY KIMATHI MWIRICHIA.....DEFENDANT

RULING

1. Before me is a notice of motion dated 16/07/2020 brought pursuant to Order 40 rule 1 (a) & (b) of the Civil Procedure Rules, Section 1A, 1B, 3, 3A & 63 of the Civil Procedure Act (Cap 21), Article 10(2) & Article 159 of the Constitution of Kenya where the following orders have been sought.

1) Spent

2) That this Honorable court be pleased to grant an interlocutory order of Injunction against the respondent his servants/agents/workers/representatives or any person restraining them from evicting/harassing/selling/transferring/entering into or in any other way, dealing in the subject suit property ABOTHUGUCHI/MARIENE/2452 pending the hearing and determination of this application inter parties.

3) That this Honorable court be pleased to grant an interlocutory order of Injunction against the respondent his servants/agents/workers/representatives or any person restraining them from evicting/harassing/selling/transferring/entering into/ in any other way, dealing in the subject suit property ABOTHUGUCHI/MARIENE/2452 pending the hearing and determination of the suit.

4) Spent

5) That this Honorable Court be pleased to order that all proceeds of rent arising from the commercial building tenants in Meru Town Block II/807 be deposited in a joint interest earning account between either the respective parties and/or their advocates or the same be deposited in court pending the hearing and determination of this suit

6) That this Honorable Court do issue any other order in the interest of justice.

7) That the cost of this application be provided for.

2. The application is based on the grounds on the face of it and on the supporting affidavit dated 16/07/2020 of Godfrey Mugambi Kimathi who avers that the defendant is his biological father and the registered owner of parcel No. ABOTHUGUCHI/MARIENE/981 together with parcel Meru town BlockII/807. That the defendant approached him when he faced difficulties in paying a loan in which the two parcels of land were held as security at Sidian Bank and Housing Finance Co-operation respectively.

3. After consultation with family members the 1st plaintiff paid off the loan and upon completion, his father asked him to organize for subdivision of parcel ABOTHUGUCHI/MARIENE/981 which resulted in two parcels ABOTHUGUCHI/MARIENE/2451 and 2452. The defendant proceeded to give him ABOTHUGUCHI/MARIENE/2452 and he has since taken occupation, possession, has extensively developed the suit land and settled with his young family. The other resultant parcel of land was to be given to his other siblings.

4. That even after sub division, the titles remained in defendant's name and he has been making threats to remove/evict the 1st plaintiff from ABOTHUGUCHI/MARIENE/2452 and further threatened to dispose off the suit land which would be to his detriment because if evicted he will be rendered homeless.

5. The 1st plaintiff also states that parcel Meru Town Block II/807 originally belonged to his grandfather who gave it to the defendant to hold in trust for the family with the effect that he would share proceeds with the family which he does not do and the defendant has refused/failed or neglected to acknowledge that he holds the same in trust for the family, and he has plans to dispose of the same. He avers that it is in the best interest of justice to preserve the properties and prevent the same from wastage and thus the prayers sought should be granted.

6. The application is opposed vide a replying affidavit dated 01/09/2020 sworn by Kimathi Stanley Mwirichia, the defendant who avers that this application violates the principle of res sub judice as there exists 2 separate suits being **Meru ELC Case No. 151 of 2017 and Meru CMCC No. 5 of 2019** wherein the subject matter in issue in this suit is directly and substantially in issue in the 2 suits, which suits are yet to be determined. He has invited the court to look at the file ELC 151 of 2017. He avers that orders of inhibition have already been issued in Meru ELC 151 of 2017 in respect to ABOTHUGUCHI/MARIENE/980, 981 and 982.

7. He also stated that the 2nd plaintiff is his mother, while the 3rd and 4th plaintiffs are his sisters, where in Meru ELC 151 of 2017, the 3rd and 4th plaintiffs have sued him and the 2nd plaintiff together with his brothers who are not part of this suit. He avers that the suit properties herein are not held in trust as they were gifted to him inter vivos by his father which is the reason he was never a beneficiary in his father's estate but his sisters and mother were bequeathed properties in the estate of his late father and as such the plaintiffs have no claim whatsoever on the suit properties. Thus defendant prays for the dismissal of the application as well as the staying of these proceedings pending the hearing and determination of the 2 other suits.

8. The plaintiffs have also filed a further affidavit and submissions, but the same will not be considered by this court as they were filed contrary to the orders given on 12/10/2020- see proceedings of 27.1.2021.

Analysis and determination

9. I have carefully perused the application, the affidavits and the supporting documents attached and I do frame the issues for determinations as follows;

a) Whether the application before this court is res sub judice the proceedings in Meru ELC Case No. 151 of 2017 and Meru CMCC No. 5 of 2019

b) Whether the orders sought in the application dated 16.7.2020 are merited

10. Once an issue of jurisdiction is raised, the court has to determine the same before taking any further step as jurisdiction is everything.

11. The res sub judice rule is codified in **Section 6 of the Civil Procedure Act** as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

12. In support of his arguments, the defendant filed copies of the plaint in Meru ELC Case No. 151 of 2017 and Meru CMCC No. 5 of 2019. On the face of it, *Meru CMCC No. 5 of 2019, Kimathi Stanley Mwirichia Vs HFC Limited*, the issue in dispute relates to a chargee and chargor relationship concerning the property identified as Meru municipality Block 11/807. In the ELC Case No. 151 of 2017 before this court, the issue in dispute was whether the defendants in that suit held the parcels of land Nos. 980-982 in trust for the plaintiffs. The plaintiffs are alleging fraud in the manner the three parcels were transferred to the defendants. In the current ELC no 24 of 2020, the plaintiffs are praying for a declaration that parcel 2452 belongs to 1st plaintiff and that parcel 807 be declared to be family property.

13. It is not in dispute that the defendant herein is the registered owner of the suit parcels. It is also not disputed that the 2 other cases are in existence and are pending before other courts (no 151 of 2017 is before this court). It appears not to be in dispute that parcel ABOTHUGUCHI/MARIENE/2452 is a subdivision of ABOTHUGUCHI/MARIENE/981.

14. I discern that the 1st plaintiff herein is not a party in Meru ELC Case No. 151 of 2017. However, the rest of the parties are present in both suits. Jane Kanario and her sister Joselyne Kinanu (the 3rd and 4th plaintiffs in this suit) are the ones who filed the suit no. 151 of 2017 against their mother Ruth Nduru Stanley (now 2nd plaintiff), their brother Stanley Kimathi Mwirichia (now the defendant) amongst other defendants. In that suit ELC 151 of 2017, the two sisters are claiming a share of the land parcels no. 980, 981 and 982. In a ruling delivered on 18.7.2018, the court noted that the current defendant had joined ranks with his sisters Jane and Joselyne, but perhaps that was because the ruling mainly concerned the utilization of parcel 980 and not 981. This time round, the two sisters have filed this suit along with their mother and the son of the defendant. The 1st plaintiff wants a portion of what was 981. The plaintiffs also desire that parcel 807 be declared as family property.

15. **In Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR**, which quoted the supreme court in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)**, the court pronounced itself on the subject of *sub judice and* aptly stated: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of Section 6 is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other: that both suits are pending before courts of competent jurisdiction and lastly: that the suits are between the same parties or their representatives.”

16. In **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** which was quoted in **ASL Credit Limited v Abdi Basid Sheikh Ali & another [2019] eKLR** the court held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

17. For the case before the magistrate’s court, I will not comment on the matter until a substantive application is brought before me for determination. That way, this court would be in a position to call for the file for perusal.

18. For the current suit vis a vis ELC 151 of 2017, I have no difficulties in determining the issue of sub-judice. I find that parcel 2452, being a subdivision of parcel 981, is now being claimed by a son of defendant and he contends that he is the one who paid the loan to salvage parcel 981. The claim of the 1st plaintiff is completely different from the claims lodged in ELC 151 OF 2017. Further, this 1st plaintiff is not a party in the suit ELC 151 of 2017.

19. As for parcel 807, the same is not part of the pleadings in case no.151 of 2017.

20. What resonates from the foregoing analysis is that the doctrine of res sub-judice is not wholly applicable in this matter. Nevertheless, the parties herein are family members who trace their claims to what was once owned by the husband of Ruth Nduru. At the heart of the dispute will be issues of trust, fraud and transfer through gift intervivos. Any orders given in this suit will in one way or the other have a bearing on the other suit 151 of 2017.

21. In the circumstances, I decline to grant any orders of injunction at this stage. Instead the orders of inhibition shall remain in force until the suit is determined. Further, I direct that this suit be handled alongside file ELC no.151 of 2017. Thus the application partially succeeds in terms of prayer no. 4 only. The costs of this application shall abide the outcome of the main suit. This matter is to be mentioned on 19.4.2021.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 27.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE