



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 81 OF 2019**

**GLADYS WAITHIRA KAMAU ..... PLAINTIFF/APPLICANT**

**-VERSUS-**

**MARY NYAMBURA WAHOME & 19 OTHERS.... DEFENDANTS/RESPONDENTS**

**RULING**

By a Notice of Motion Application dated **24<sup>th</sup> July 2020**, expressed to be bought under **Sections 3,3A and 63 ( e)** of the **Civil Procedure Act**, the Plaintiff/Applicant sought the following orders;-

- 1. THAT this Honorable Court do authorize a surveyor to visit the suit properties i.e. RUIRU/KIU Block 4/1397,1371, 1372, 175, 1172, 1170, 1408, 1376, 1198, 1169, 1171, 1168, 1203, 1205, 1381, 1389, 1391, 1377, 1378, 1407, 1390 and Point out/locate the beacons on the ground and ascertain developed and non- developed portions and file a report within 14 days from the date of visit.**
- 2. THAT this Honorable Court do authorize OCS Kimbo Police Station to supervise the exercise and ensure law and order is maintained.**
- 3. Costs of this Application be provided for.**

The Application is grounded in the affidavit sworn by **GLADYS WAITHIRA KAMAU, who averred that** she is the registered owner of all the suit properties and holds a valid and indefeasible title to the said plots. She deponed that she bought the suit premises from **MWIHOKO HOUSING COMPANY LIMITED** in **1987**, and has been issued with title deeds. That when she wanted to sell some of the plots, she met resistance from some people on the ground. She further deponed that her agent noted that some pathways were closed and maize planted on some portions, hence meaning that some of the beacons have been interfered with and she would like this honorable Court to authorize a surveyor to visit the ground and locate beacons and ascertain which plots are developed and which ones are not. She contended that the Defendants are trespassers who illegally acquired her plots through the back door and for interests of justice, she urges this Court to grant the orders sought herein.

The Application is opposed by **SAMUEL NDUNGU NGUGI, swore a Replying Affidavit and averred that he has the authority to swear the affidavit on behalf of the other Defendants/Respondents except the 14<sup>th</sup> Defendant, who entered appearance through the Law Firm of MASORE NYANGAU & CO. ADVOCATES. He further averred and stated that contrary to the allegations raised by the Plaintiff/Applicant the Defendants'/Respondents on diverse dates purchased the said properties from MWIHOKO HOUSING COMPANY LIMITED, and were issued with requisite subdivision schemes approved from the Ministry of lands confirming leaseholds allotted in their respective names, marked SNN1 as subdivision schemes approvals. He contended that upon purchase, they took possession and constructed on the said properties and the applicant resurfaced in the year 2018 when the Defendants/ Respondents attempted to get their titles only to find out that their properties were registered in the name of the Plaintiff/Applicant. He further contended that the matter was taken up by the relevant authorities and in May 2019, the Ministry of Lands through a letter dated 20<sup>th</sup> May 2019, gave various recommendations. The said letter was marked as SNN 2. He further contended that they filed a suit before this Honorable Court being **ELC 130 OF 2019**, where the said suit seeks declaration of rights of ownership and cancellation of titles issued to the Plaintiff/Applicant. That in the opportune time, he shall seek to consolidate the two suits. He marked the said Complaint as SNN4. He deponed that if the said Application is allowed, it would be determinative in nature as there is a clear ownership dispute between the parties thus the action of calling the surveyor is in itself premature, prejudicial and should be denied. The 14<sup>th</sup> Defendant did not file her Replying Affidavit in response to the applicant's Application.**

Parties filed their respective Written Submissions. The 14<sup>th</sup> Defendant filed her submissions on **2<sup>nd</sup> December 2020**, through the Law Firm of **MASORE NYANGAU & CO ADVOCATES**, while the other Defendants/ Respondents filed their submissions on **24<sup>th</sup> November 2020**. The Plaintiff's submissions were filed on **6<sup>th</sup> November 2020**.

The Court has considered the Application, the Replying Affidavit, written submissions as well as the authorities relied upon. The key

question to be determined in this Application dated **24<sup>th</sup> July 2020**, is whether the Application is merited.

The Court notes that the dispute herein is over ownership of the suit property, but not a boundary dispute. The Plaintiff's/Applicant's certificate of title known as **RUIRU/KIU BLOCK 4**, and all other subsequent titles are questioned by all Defendants/Respondents. The Defendants/Respondents also contend that **ELC 130 OF 2019**, was also filed in this Court which raises similar issues.

The kind of prayers sought by the Plaintiff/Applicant cannot be determined in an Interlocutory Application. The prayers herein are final orders which can only be granted after matter is heard and determined on merit. There are contentious issues over the ownership of the suit property, being raised by the parties herein. The Court takes cognizance of **ELC 130 OF 2019** earlier filed that raises pertinent issues.

It is therefore prudent that all the issues raised therein should be canvassed during the hearing of the main suit. The Court is of the humble opinion that the Plaintiff/applicant has first to prove that she lawfully owns the suit property and that the registration of the same was procedural and then the Court can direct the surveying of the disputed parcels of Land.

For now, the Court finds that the prayer for directing the Surveyor to visit the suit properties *i.e. RUIRU/KIUBLOCK 4/1397,1371, 1372, 175, 1172, 1170, 1408, 1376, 1198, 1169, 1171, 1168, 1203, 1205, 1381, 1389, 1391, 1377, 1378, 1407, 1390* to point out/locate the beacons on the ground and ascertain developed and non-developed portions and file a report within 14 days from the date of visit **is premature** and **cannot** be issued at this stage.

The Court finds the instant Notice of Motion Application dated **24<sup>th</sup> July 2020**, is **not merited** and consequently, the same is dismissed entirely with cost being in the Cause.

Further, the Plaintiff is directed to set the matter down for hearing within the next **30 days** from the date hereof and then the matter should be decided on merit.

It is so Ordered

**DATED, SIGNED AND DELIVERED AT THIKA THIS 22ND DAY OF APRIL 2021.**

**L. GACHERU**

**JUDGE**

**22/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They 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.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Momanyi for the Plaintiff/Applicant**

**M/s Wangwa for the Defendants/Respondents**

**No appearance for the 14<sup>th</sup> Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**22/4/2021**