



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 215 OF 2018
(Formerly Nairobi ELC Suit No. 586 of 2013)

MOONGLOW ASSETS LIMITED.....PLAINTIFF

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

THE REGISTRAR OF TITLES.....2ND DEFENDANT

THE DIRECTOR OF SURVEYS.....3RD DEFENDANT

HEKIMA LAND SURVEYS LIMITED.....4TH DEFENDANT

SHAMJI KALYAN PINDORIA LIMITED.....5TH DEFENDANT

AND

RALPH EDWARD NZWIL.....PROPOSED 1ST INTERESTED PARTY/APPLICANT

WESLEY KIPROTICH LABASSOH.....PROPOSED 2ND INTERESTED PARTY/APPLICANT

RULING

1. In the Notice of Motion dated 3rd February, 2020, the Proposed Interested Parties have sought for the following orders:

- a. That the Honourable Court be pleased to certify this Application as urgent and issue such orders as may be necessary ex-parte.
- b. That this Honourable Court be pleased to enjoin the Proposed Interested Parties into the present suit to accord them an opportunity to articulate their interests in respect of this suit property.
- c. That this Honourable Court to provide directions on the issue of the costs in respect of the present Application.

2. The Application is premised on the grounds that the Proposed Interested Parties entered into a contract with the Plaintiff herein, which Agreement ceded an interest in the suit property; that the Plaintiff was to execute a transfer in favour of the Proposed Interested Parties and that the Settlement Agreement gave the Proposed Interested Parties the authority to pursue various administrative and judicial means to secure the Plaintiff's interest in the suit property against any attempts to dispossess them.

3. According to the Proposed Interested Parties, they sought the expertise of various firms of advocates to institute the present suit and to pursue it to its logical conclusion with their supervision; that in pursuit of justice for the Plaintiff, they had the liberty to pay all such fees on behalf of the company in respect of any future endeavours and ratified all the previous expenses that had been incurred with the knowledge of the Plaintiff and that the amount expended by the Proposed Interested Parties until the date of this Application is approximately Kshs. 12,600,000.00.

4. The Proposed Interested Parties have deponed that the said amount of Kshs. 12,600,000.00 and any other additional costs, is to be deemed

as a sufficient consideration for the transfer of 5.21 Ha of the suit property (*L.R No. 24573*) as and when the present suit is concluded; that the Plaintiff has however instructed another advocate who has consequently filed a Notice of Change of Advocates without any consultation with the Proposed Interested Parties and that the conduct of the Plaintiff gives the Proposed Interested Parties a reason to believe that the Plaintiff is likely to renege on the Settlement Agreement and deny the Proposed Interested Parties a forum to ventilate their interest in the suit property.

5. The Proposed Interested Parties finally deponed that being deemed as a necessary party for the wholesome determination of its interest in the suit property is likely to promote the Overriding Objective of civil procedure.

6. The Attorney General filed Grounds of Opposition in opposition to the Application on behalf of the 2nd and 3rd Defendants in which he deponed that the Applicants lack any legal interest in the suit properties; that the purported Agreement is not a Sale Agreement that despite violating the *lis pendens* doctrine, the Agreement between the Applicants and the Plaintiff is unknown in law.

7. The 5th Defendant's Director deponed that the Applicants have no legal or beneficial interests over L.R. No. 24573 (*the suit property*); that the annexed Agreement dated 6th July, 2018 does not prove any interests over the suit property by the Proposed Interested Parties (*the Applicants*) and that the contract refers to an intention to execute a transfer over a portion of the suit property in the future.

8. In the Further Affidavit, the 1st Interested Party deponed that an Interested Party need only to demonstrate an interest in the subject matter; that by virtue of the settlement agreement, they have an interest in the suit property and that the settlement agreement relates to the suit property. The Applicants' advocate filed submissions which I have considered and which I shall to in this Ruling.

9. This suit was commenced by the Plaintiff vide a Plaint dated 20th May, 2013. On 14th March, 2019, the Plaintiff amended its Plaint. In the Amended Plaint, the Plaintiff has averred that in the year 1994, the 1st, 2nd, and 3rd Defendants issued it with a title document in respect of L.R. No. 19910; that the documents in respect to the suit property were later surrendered to the 1st, 2nd and 3rd Defendants to prepare a new grant and that a new grant was issued on 4th January, 2007 with a new number being L.R. No. 24573.

10. It is the Plaintiff's case that in the year 2013, its representative found the 5th Defendant's representatives putting up a perimeter wall around the suit property. When it carried out a search, the Plaintiff has averred, it discovered that the suit property had been registered in favour of the 5th Defendant.

11. The Plaintiff has prayed for an order of eviction of the 5th Defendant and *mesne* profits from the year 2013. The Proposed Interested Parties are seeking to be enjoined in the suit on the ground that on 4th July, 2018, they entered into a contract with the Plaintiff herein (*the Settlement Agreement*).

12. It is the Proposed Interested Parties' case that in the agreement, the Plaintiff ceded an interest in the suit property and that the Plaintiff was to execute a transfer in favour of the Proposed Interested Parties. According to the Proposed Interested Parties, the Settlement Agreement gave them the authority to pursue various administrative and judicial means to secure the Plaintiff's interest in the suit property against any attempts to dispossess them.

13. The salient Clauses of the Settlement Agreement provides as follows:

“D. The Transferees (the Proposed Interested Parties) have means to finance litigation.

2. The Transferor (the Plaintiff) herewith engages the Transferees for continued facilitation of all acts legally necessary for obtaining vacant possession of the property, an engagement that the Transferees acknowledges by execution hereof.”

14. According to the Settlement Agreement, the Plaintiff agreed to transfer to the Proposed Interested Parties 5.21 Hectares ‘which transfer shall constitute total and exhaustive consideration to the Transferees for their consideration.’

15. The said Agreement was entered into between the Proposed Interested Parties and the Plaintiff after the filing of this suit. The objects of the Agreement are in respect of payment of the legal fees by the Proposed Interested Parties on condition that upon successfully prosecuting the suit, the Plaintiff is to transfer to them a portion of the suit property. The Agreement however does not state what would happen in the event the Plaintiff does not succeed in the suit.

16. Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 states that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

17. In *Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others (2014) eKLR*, the Supreme Court held as follows:

“Consequently an Interested Party is one who has an identifiable stake in the proceedings, though he or she was not a 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/her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her own cause.”

18. Commenting on the provisions similar to our Order 1 Rule 10(2), *Sarkar’s Code of Civil Procedure (11th Ed. Reprint, Reprint, 2011, Vol. 1 p887)*, provides as follows:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

19. For a party to be so enjoined in a suit, his presence must be necessary in determining the matter. Hence, the Applicants have to show that they have a stake in the proceedings and that their presence will help the court determine the issues at hand. The mere mention of the term “Interested Party” does not entitle them to be enjoined as parties to the proceedings.

20. When this suit was filed, the Proposed Interested Parties had no recognizable interest in the suit property. Indeed, from the Settlement Agreement, it is clear that the Proposed Interested Parties only came on board to finance the ongoing litigation whose outcome is unknown. The only reason why the Proposed Interested Parties are seeking to be enjoined in this suit is because the Plaintiff has appointed an advocate to represent it without consulting them.

21. The Proposed Interested Parties did not purchase the suit property. Indeed, the so called “Settlement Agreement” does not accord with the provisions of Section 38(1) of the Land Act which provides as follows:

“38. (1) No suit shall be brought upon a contract for the disposition of an interest in land unless-

a. the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

b. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

22. It is trite that for one to have an interest in land, the person must either be a legal or a beneficial owner of the land. The Proposed Interested Parties do not have a legal title to the suit land neither do they have a Sale Agreement contemplated under Sections 38(1) of the Land Act and Section 3(3) of the Law of Contract.

23. In any event, even if the purported Agreement between the Plaintiff and the Proposed Interested Parties is to be taken as a Sale Agreement, the same offends the well cherished doctrine of *lis pendens*.

24. This court has had an occasion to discuss in detail the consequences of a party selling land during the pendency of a suit. In the case of *Carol Silcock vs. Kassim Shariff Mohamed [2013] eKLR*, this court quoted with approval the decision in *Mawji vs. United States International University and Another [1976-80] KLR* which quoted *Turner L. J in Bellamy vs. Sabine [1857] I D J 566, 584*, who defined the principle of *lis pendens* as follows:

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant’s alienating before the Judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”

25. In the same case of *Bellamy vs. Sabine [1987] De J 566, (Vanwarth L J)* stated as follows:

“Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only to the litigating parties, but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end...”

26. The Proposed Interested Parties were aware of this suit when they entered into the Settlement Agreement. To the extent that the Settlement Agreement between the Plaintiff and the Applicants purported to deal with the suit property during the pendency of the suit, they cannot turn around and state that they should be involved in these proceedings just because they are likely to be affected by the outcome of the suit. Under the *lis pendens* doctrine, the Proposed Interested Parties will be bound by the decision of this court without being joined in the suit as parties.

27. More fundamentally, to the extent that the Settlement Agreement of 4th July, 2018 is not an Agreement for sale of land, the Proposed Interested Parties are neither necessary parties nor will their presence help the court determine the issues at hand.

28. For those reasons, the Application dated 3rd February, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 28TH DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE