



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 39 OF 2019

U-HAUL VEHICLE LTD.....PLAINTIFF

VERSUS

KIAMBU DANDORA FARMERS CO. LTD.....1ST DEFENDANT

DANDORA HOUSING SCHEME LIMITED.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

INSPECTOR GENERAL OF POLICE.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

AND

1. BEN MAINA MWANGI

2. ELIUD KINUTHIA KAMAU

3. EPHANTUS MAINA KIRAGU

4. GEORGE MAINA GATHUKU

5. WALLACE MWANGI MACHARIA

6. SAMUEL KAMAU NGUGI

7. PETER KAMAU MBUTHIA.....PROPOSED INTERESTED PARTIES

RULING

This suit was brought by the plaintiff on 12th February, 2019 against the 1st defendant who was the only defendant in the plaint. The plaint was amended subsequently to add the other defendants to the suit. Together with the plaint, the plaintiff filed an application dated 12th February, 2019 seeking a temporary injunction restraining the 1st defendant from in any manner interfering with the plaintiff's quiet possession and enjoyment of all those parcels of land known as L.R No. 209/9466 and L.R No. 209/9467 pending the hearing and determination of the suit. On 23rd April, 2019, the plaintiff brought another application of the same date seeking an order that pending the hearing of the plaintiff's earlier application dated 12th April, 2019, the court be pleased to issue an order restraining the 1st defendant from in any manner interfering with the plaintiff's possession and enjoyment of all those parcels of land known as L.R. No. 209/9465, L.R No. 209/9466, L.R No. 209/9467 and L.R No. 209/9468 (hereinafter referred to as "the suit properties"). On 29th April, 2019, the court issued an order restraining the 1st defendant from carrying out further demolition of a perimeter wall that had been constructed by the plaintiff around the suit properties.

On 7th June, 2019, the plaintiff brought another application dated 3rd June, 2019 seeking a temporary injunction restraining the 1st and 2nd defendants from encroaching, alienating, dividing, transferring, selling, charging, developing or in whatever manner and whichever manner dealing with or interfering with the plaintiff's right of occupation, possession and/or use of the suit properties pending the hearing and determination of the suit. On 13th June, 2019, the plaintiff amended the plaint to add the 2nd to 6th defendants to the suit.

When the matter came up for hearing of the plaintiff's application dated 3rd June, 2019 inter-partes on 17th June, 2019, the court ordered that pending further orders by the court, there would be no other or further developments or construction works on the suit properties. On 18th December, 2019, the plaintiff filed yet another application dated 16th December, 2019 seeking the following orders;

- a) That the Honourable court be pleased to find and hold that the directors of the 1st and 2nd Defendants were in contempt of the court orders issued on the 17th June, 2019.
- b) That this Honourable court be pleased to hold that as consequence of their acts of contempt, the contemnors should be detained in prison for a period of 6 months or such period that the court may please.
- c) That this Honourable court be pleased to compel the contemnors to obey the said court order.
- d) That this court be pleased to issue a mandatory order directing that any and all structures erected after the issuance of the orders of this Honourable court of 17th June, 2019 be demolished forthwith.
- e) That this court be pleased to order the officers of the 5th Respondent to enforce the above orders of the Honourable court.

The application was supported by an affidavit and supplementary affidavit sworn by Francis Kibiru Njenga on 16th December, 2019 and 30th April, 2020 respectively. In his affidavit, Francis Kibiru Njenga deposed that the 1st and 2nd defendants had by themselves and/or through their agents entered the suit properties and began to excavate and erect structures thereon. He averred that the said activities were being carried out with the blessings of the 5th defendant. In his supplementary affidavit, Francis Kibiru Njenga averred that on 20th December, 2019 the court issued an order directing the OCS Buruburu Police Station to arrest and bring to court any person contravening the order in question and that the said order was not enforced. He stated that a follow up letter to the OCS Buruburu Police Station on the enforcement of the order elicited no response. He stated that due to the failure, refusal and neglect on the part of the 5th defendant to enforce the orders issued by the court, construction was still being undertaking on the suit properties in contravention of the orders issued by the court.

The application was opposed by the 1st defendant through a replying affidavit sworn by its director Joseph Mwangi Karanja on 12th March, 2020. The 1st defendant's said director averred that the suit properties were within a larger parcel of land known as L.R 116379/3 that was owned by the 1st defendant. He denied that the 1st defendant was carrying out any construction on the suit properties as alleged by the plaintiff. He averred that the 1st defendant had abided by the orders of the court and that the allegations made against the 1st defendant were malicious and were only intended to disparage the reputation of the 1st defendant before the eyes of the court. The 1st defendant averred that since the area where the suit properties were situated was prone to land invasion by squatters, there was a possibility that those who were carrying out construction on the said properties were squatters. He urged the court to dismiss the application.

In a ruling delivered on 26th November, 2020 on the plaintiff's said application, the court stated as follows in part:

“Apart from the orders seeking the punishment of the directors of the 1st and 2nd defendants for the activities taking place on the suit properties in defiance of the orders made by the court on 17th June, 2019, the plaintiff had also sought an order for the demolition of the structures that have been put up on the suit properties in contempt of the said order. I am satisfied from the evidence placed before the court that even after the court stopped any other or further construction on the suit properties, the construction works continued. I am also convinced that those who were carrying out construction on the suit properties were aware of these proceedings and of the fact that the activities they were engaged in were stopped by the court. The activities on the suit properties were in the circumstances being carried out in contempt of court. It is regrettable that even the Police could not bring the contemptuous acts to an end by arresting those found on the suit properties after the court ordered such arrest to be carried out to unmask those behind the construction. I believe that the Police will still have an opportunity to come clean on the matter.

As submitted by the plaintiff and the Attorney General, the court cannot be helpless on the face of deliberate defiance of its orders. I am convinced that demolition of the structures put up on the suit properties after the orders made herein on 17th June, 2019 will send a strong message to the contemnors and those who have been protecting them that you defy a court order at your own peril. I am satisfied that in the circumstances of this case, an order for the demolition of the structures put up on the suit properties in defiance of the orders made on 17th June, 2019 is necessary to redeem in the words of the Attorney General “the already ridiculed image of the court.”

In the end the court made the following orders:

- “1. All the structures and buildings constructed on or put up on L.R. No. 209/9465, L.R No. 209/9466, L.R No. 209/9467 and L.R No. 209/9468 after 17th June, 2019 shall be demolished by the owners thereof forthwith.**
- 2. The plaintiff shall pin a copy of this order in a conspicuous place on each of the said structures and shall also publish the order once in the Daily Nation and the Standard newspapers on a week day.**

3. In the event that the owners of the said structures fail to demolish the same within 21 days from the date of the publication of the order in the two (2) newspapers as aforesaid, the plaintiff shall be at liberty to carry out the demolition of the same at its own cost which costs shall be recoverable at the conclusion of the suit subject to proof from whichever party the court will find to have been responsible or contributed to the construction of the said structures.

4. In the event that the demolition of the said structures becomes necessary pursuant to order 3 above, the 5th respondent through the Officer Commanding Dandora Police Station shall provide the plaintiff with the necessary security to enable it carry out the demolition.

5. The costs of the application shall be in the cause.”

During the entire period when the court gave the various orders referred to above which were all disobeyed, no one came up to own the constructions that were being undertaken on the suit properties. While admitting that there were people carrying out construction on the suit properties, the 1st defendant denied any knowledge of them and suggested that they may have been squatters. The court had no doubt that with its orders of 26th November, 2020, those who were carrying out construction on the suit properties would ultimately come up to defend their structures. That is where we are now.

What is now before the court is a Chamber Summons application dated 23rd December, 2020 by the proposed 1st to 7th interested parties (hereinafter referred to only as “the applicants”) seeking the following orders:

1. That the applicants be joined in this suit as 1st to 7th interested parties.
2. That the plaintiff and the defendants be ordered to serve the applicants with all the pleadings that they have filed in this suit to enable the applicants to respond to the same.
3. That the orders made on 1st December, 2020 be stayed, vacated and/or set aside pending the hearing and determination of the suit.

The applicants’ application that was supported by the affidavit of the 1st and 6th interested parties/applicants was brought on the grounds that;

1. The orders of 1st December, 2020 were issued ex parte and the same touched on the rights and assets of the applicants.
2. The applicants were not made parties to the suit and as such they were condemned unheard.
3. The applicants would suffer irreparable loss and damage if the orders made on 1st December, 2020 are not stayed.
4. The applicants were innocent purchasers for value and it is necessary that they be heard in the interest of justice.

In his supporting affidavit, the 1st applicant, Ben Maina Mwangi averred that he purchased a piece of land from the 1st defendant several years ago and constructed a house thereon on which he was residing and also conducting business. He stated that he was issued with an allotment letter by the 1st defendant. He stated that he came to learn that the court had issued orders against him in this suit although he was not a party to the suit. He stated that he was not heard before the said orders were made. He contended that he was condemned unheard.

In his affidavit in support of the application, the 6th applicant who swore the said affidavit on his own behalf and on behalf of the 2nd, 3rd, 4th, 5th and 7th applicants stated that they bought parcels of land from the 1st defendant several years ago. He stated that upon payment of the full purchase price, they were issued with certificates of allotment in respect of the said parcels of land. He stated that they thereafter took possession and commenced construction on the said parcels of land which were at various stages. He stated that on 15th December, 2020, they were shocked to see some unruly people throwing some papers at them and asking them to vacate the said parcels of land within 21 days. He stated that they later realized that the said papers were indeed a court order issued in this suit which allowed for the demolition of their premises on the said parcels of land. He stated that they were not parties to this suit and were not named in the said court order.

The 6th applicant stated that it was necessary for them to be joined in this suit so that they can be heard in the matter. He stated further that it was also necessary for the said order issued on 1st December, 2020 to be stayed so as to forestall the intended demolition of their properties.

The application was opposed by the plaintiff through grounds of opposition and a replying affidavit sworn by its advocate Kevin Wakwaya both dated 29th January, 2021. In its grounds of opposition, the plaintiff contended that the application was frivolous and amounted to an abuse of the process of the court since the same was brought in bad faith. The plaintiff contended that the applicants had not shown any separate and distinct interests in the suit properties from that claimed by the 1st defendant to warrant their joinder to the suit. The plaintiff averred that the applicants would not suffer any prejudice if they were not joined in the suit since they were shareholders of the 1st defendant who represented their interest in the suit. The plaintiff averred that as members of the 1st defendant, the applicants were all along aware of the existence of this suit and the various orders that had been made in the same but chose to ignore the same. The plaintiff averred that the applicants had not produced prima facie evidence of ownership of the parcels of land which they claimed to own. The plaintiff averred further that there was no relationship between the applicants’ share certificates and the properties in dispute in the suit. The plaintiff averred that the applicants had not demonstrated that their presence before the court was necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The plaintiff averred further that if the applicants had interest in the suit properties, they should have sought to be joined in the suit as defendants or plaintiffs rather than as interested parties.

The plaintiff averred that the existence of this suit was published in a daily newspaper and as such the applicants could not feign ignorance of the same. In his replying affidavit, Kevin Wakwaya reiterated the contents of the plaintiff's grounds of opposition and contended that the applicants had not met the threshold required for joinder of parties to a suit.

The applicants' application was heard by way of written submissions. The applicants filed their submissions dated 11th February, 2021 while the plaintiff filed its submissions dated 16th July, 2021. I have considered the applicants' application together with the affidavit and grounds of opposition filed in support thereof. I have also considered the submissions by the advocates for both parties and the various authorities cited in support thereof. The following is my view on the matter.

Order 1 Rule 10(2) of the Civil Procedure Rules 2010 provides as follows:

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.

In Francis Karioko Muruatetu & Another v Republic & 5 Others [2016] eKLR (Muruatetu case) that that was cited by the Plaintiff, the court stated as follows on joinder of an interested party to a suit:

“Enjoinment is not as of right but is at the discretion of the court, hence sufficient grounds must be laid before the court, on the basis of the following elements.

i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.

ii) The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”

From the material before the court, the dispute between the plaintiff and the 1st defendant over the suit properties did not start with the filing of this suit. The dispute started in 2016 when the 1st defendant is alleged to have invaded the suit properties and brought down a section of the perimeter wall that had been put up around the said properties. The Plaintiff filed a suit against the 1st defendant in the Chief Magistrates Court in 2016, namely, Milimani Commercial Court CMCC No. 534 of 2016 to restrain the said act of interference. As at that time, there was no issue of any construction being undertaken on the suit properties. The lower court suit was withdrawn on 20th December, 2018 and this suit subsequently filed on 12th February, 2019. Even as at the time when this suit was filed, there was no allegation or claim by the plaintiff that the 1st defendant or any other party had commenced construction on the suit properties.

From the material on record which includes photographs and police reports, construction on the suit properties commenced in April, 2019. As I have stated earlier, on 29th April, 2019, the court issued an order restraining the 1st defendant from interfering with the suit properties. This was followed by an order made on 17th June, 2019 stopping any other or further construction or development on the suit properties. Construction on the suit properties continued despite these orders. On 20th December, 2019, the court ordered the OCS Buruburu Police Station to enter the suit properties, arrest and bring before the court any person who was continuing with construction of the suit properties despite the said court orders. The OCS Buruburu Police Station did not act on the said order and the construction continued until 26th November, 2020 when the court ordered that all structures put up on the suit properties in defiance of the court orders aforesaid be demolished. It is this final order that prompted the applicants to come up claiming that they are the owners of the structures on the suit property.

As I stated in my ruling of 26th November, 2020, I am not convinced that the applicants who have admitted that they are shareholders of the 1st defendant were not aware of the existence of this suit and the various orders made in the suit by the court. Now that the applicants have come up and claimed that the structures which the plaintiff claims to have been constructed in defiance of the orders of this court belong to them, I am of the view that they should be allowed to join the suit and tell the court under what circumstances the said structures were put up and why the various court orders were disobeyed. These applicants who were carrying out construction on the suit properties are now standing at the door of the court; why should they be turned away from entering when even the police were unable to bring them to court after an order was made for that purpose? In the circumstances, the court is inclined to exercise its discretion in allowing the application for joinder.

As concerns, the limb of the application seeking the setting aside of the orders made on 26th November, 2020 and issued on 1st December, 2020, I am of the view that it would be a mockery of the judicial process to grant the order taking into account what I have stated earlier. First, the application for the setting aside of the said orders should not have been brought together with the joinder application. The applicants should have waited until they are joined as parties to the suit before seeking to set aside the said orders if good reason existed for seeking such order. Setting aside of a court order is not a matter to be treated lightly and casually as the applicants have done herein. The court needs to know among other things; when the applicants entered the suit properties, when they commenced and finished constructing the structures thereon, whether the structures were approved and by who, and why the 1st defendant did not know that they were on site despite them being the 1st defendant's shareholders. As of now, there is no basis in my view for the setting aside of the said orders. The power to set

aside an ex parte order is discretionary. It is settled that the court's discretionary powers must always be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in Patriotic Guards Ltd. v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, (2018) eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

The principles to be considered by the court in setting aside an order made in the absence of a party were set out in the case of Shah v Mbogo [1967] E.A 116 as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

Applying the said principles to this case, I am not inclined to exercise my discretion in favour of applicants. The applicants in my view were aware of the existence of this suit and of the various orders that had been made by the court. I am of the view that they chose not to participate in this suit earlier in order to continue with construction on the suit properties. They were only prompted to action by the orders which they seek to set aside. Having chosen to obstruct the cause of justice, the applicants cannot benefit from this court's discretion.

In the final analysis and for the foregoing reasons, I hereby make the following orders on the applicants' application dated 23rd December, 2020;

1. The applicants are joined in this suit as 1st to 7th interested parties respectively.
2. The applicants are at liberty to apply for and take copies of the pleadings in the court file that they may need.
3. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 4th day of October 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Awandu h/b for Mr. Were for the Applicants

Mr. Wakwaya for the Plaintiff

Mr. Oruko h/b for Mr. Murunga for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

Mr. Kamau for the 4th, 5th and 6th Defendants

Ms. C.Nyokabi-Court Assistant