



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 81 OF 2018

MELISSA MUHONJA MMATA.....PLAINTIFF

VERSUS

LAWRENCE MMATA CHORE

MARY AWINO KWEYU.....DEFENDANTS

ATTORNEY GENERAL

DCIO KAKAMEGA.....INTERESTED PARTIES

RULING

The first application is dated 15th February 2019 and is brought under sections 3, 3A of the Civil Procedure Act, order 1 rule 10, order 40 rules 2 & 2 of the Civil procedure Rules seeking the following orders;

1. That this application be certified urgent and be heard exparte on priority basis and in the 1st instance.
2. That the Attorney General and DCIO Kakamega Central Police Station be and are hereby made parties or interested parties to this suit.
3. That the 2nd interested party/respondent herein, her servants, her assignees, agents and whosoever acts through her and/or any police officer be restrained by grant of a temporary order of injunction from re-arresting, charging, incarcerating in custody, apprehension in court and or interfering in any manner whatsoever with peaceful stay of the applicant on that whole parcel of land known as Butso/so/Shikoti/17938 till the hearing and determination of this application.
4. That the 2nd defendant/respondent, her servants, assignees, agents and/or whosoever acts through her be and are hereby restrained by grant of a temporary order of injunction from alienating part of L.R. NO. Butso/so/Shikoti/17938, trespassing onto it, taking possession and/or collecting rent from tenants staying on the apartment on the said Land till hearing and determination of this suit.
5. That the 2nd interested party/respondent be and is hereby ordered to release to the applicant his original Land title deed for L.R. NO. Butso/so/Shikoti/17938, copy of pin certificate No. A001199406Z and a copy of discharge of charge she confiscated from the applicant at Kakamega Police Station on the 24th December, 2018.
6. That the 2nd interested party/respondent be ordered to refund Ksh. 100,000/= only to the 1st defendant/applicant same purported to have been cash bail paid to her on 22nd December, 2018.
7. That costs be provided for.

It is grounded on the annexed affidavit of Lawrence Mmata Chore, the applicant and the following grounds that, the 1st and the 2nd defendant entered into a sale of land agreement dated 30/8/2018 with intend to sale a portion measuring 0.17 Ha without developments. That a dispute arose on the finalization of the same due to intervention of 3rd parties. That the 1st defendant was arrested on 21st/12/2018 on allegations made by the 2nd defendant herein over the suit land. That the 2nd defendant caused the arrest of the 1st defendant who was detained at Kakamega Police Station cells and he is out on police bond of Ksh. 50,000/= only whereas he paid Ksh. 100,000/= only to one (Peter) a junior officer to the 2nd interested party/respondent upon her instructions. That during the period he was in custody, the intended 2nd interested party and his officers coerced the 1st defendant and the plaintiff to execute an agreement transferring 0.2 ha from the suit land to the 2nd defendant besides being forced to sign transfer forms and again forced to sign another agreement dated 24th December, 2018. That

the intended 2nd interested party equally confiscated the original title deed of the suit land, PIN certificate and discharge of charge from the applicant. That the 1st defendant was equally ordered to hand over the list of tenants to the 2nd defendant and surrender the houses to the said 2nd defendant. That this was under duress as the 1st defendant was threatened. That the 1st defendant is afraid of being arrested anytime as a result of the sale of land agreement made on 30/8/2018 and is under persistent intimidation. That no consent from the Land Control Board has been obtained as per the Land Control Act. That the applicant has a statutory defense against the claim by the 1st defendant and hence legally protected from prosecution. That the applicant proposes to pay the consideration amount of Ksh. 30,000,000/= in eight instalments from 28th February, 2019. The intended 2nd interested party is acting with impunity and ultravires her powers.

The second application is dated 4th March 2019 and is brought under section 1A, 1B, and 3A of the Civil procedure Act, order 11 rule 3 h and order 51 rule 1 of the Civil procedure Rules seeking the following orders;

1. That the suit herein namely Kakamega ELC case No. 81 of 2018 and ELC case No. 4 of 2019 be consolidated for purposes of being heard and determined together.
2. That Mary Awino Kweyu be deemed as the plaintiff in the consolidated suits and Lawrence Mmata Chore be deemed as the 1st defendant in the consolidated suits and Melissa Muhonja Mmata be deemed the 2nd defendant in the consolidated suits.
3. That the file relating to ELC case No. 4 of 2019 be the lead file for purpose of filing any further pleadings and recording of court proceedings.
4. That the sum of Kshs. 2.5 Million be deposited by the 1st defendant to Onganda & Associates bank Account No. 078000044176 at Family bank Limited on 10th January 2019 or thereabouts in favour of the second defendant therein, as well as subsequent deposits to be made by the 1st Defendant in 8 installments for a period of 4 months from 28th February 2019 so as to raise an aggregate sum of Kshs. 30,000,000/- be transferred forthwith to a joint interest earning account to be opened by and in the names of the 1st and 2nd defendants' advocates on record and be held in such account in trust for both the defendants pending determination of the suits or further orders of the court.
5. That the cost of this application be in the cause.

The applicant submits that it is clear from the pleadings that Kakamega ELC No. 4 of 2019 was filed after ELC No. 81/2018 had been filed. That both cases are in respect of the same parcel of land. That ELC No. 4 of 2019 offends the provisions of section 6 of the Civil Procedure Act hence bad in law. That issues raised in civil suit No. 4/2019 can be adequately raised in case No. 81/2018. That the present application is mischievous as it intends to circumvent the provisions of section 6 of the CPA. That this suit is thus bad in law and should not be consolidated with the present suit. That the applicant is not clear or what he wants from the plaintiff and the 1st defendant.

Such duplication of proceeding will lead to duplication of legal costs and wastage of court's time. Where the rendering of specific performance claimed for at paragraph 19 above becomes impossible, the plaintiff's alternative claim is that the 1st defendant to pay the plaintiff the aggregate sum of Ksh. 39,000,000/= (being a refund of the purchase price together with the contractually agreed damages for breach of agreement) together with interest thereon from the date of institution of this suit and, in that regard, the prayer incorporated in this plaint as item "e" and phrased as other alternative (and/or further) relief as this honourable court may deem fit and just to grant is to be deemed as denoting or expressly referring to (and/or including) the plaintiff's alternative claim hereinabove pleaded. The 1st defendant has sworn and filed in this suit an affidavit dated 15/2/2019 in which he acknowledges part of her alternative claim for refund of the purchase price and further confirms having deposited a sum of Ksh. 2.5 Million with his advocates on record in her favour. The 1st defendant has even supplied a copy an electronic money transfer deposit slip as proof of such deposit. A copy of the said 1st defendant's affidavit and a copy of the said electronic money transfer deposit slip are annexed hereto as exhibit "MK-2" AND "MK-3" respectively. Since the 1st defendant has admitted part of her alternative claim and prayer (namely, the refund of the purchase price in the event of a failure of specific performance), and since he has already started making deposits in anticipation of a final judgment against him in in that regard, she believes it is for the good of all the parties and also necessary for the ends of justice that the money deposited by the 1st defendant be transferred forthwith to a joint interest earning bank account to be opened in the joint names of their advocates on record and be held in such account pending further orders of this honourable court.

This court has considered both applications and the submissions therein. On the first application as regards joining interested parties, the question we need to ask is who is an interested party. Black's Law Dictionary 9th Edition, page 1232 defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

In the case of *Trusted Society Of Human Rights v Mumo Matemo & 5 others* [2014]eKLR, the Supreme Court held that:

"an interested party is one who has a stake in the proceedings though he or she was not 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 or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause".

In the case of *Joseph Njau Kingori vs. Robert Maina Chege & 3 others* [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit:

"When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending

party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”

I have perused the annexures in support and opposition to the application Annexed is a copy of the notice of motion filed in Kakamega High Court Petition 61 of 2018 which is marked as exhibit “MAK-1”. The plaintiff submitted that, looking at the 1st defendant’s Notice of Motion application dated 15/2/2019 together with the accompanying supporting affidavit the said application is substantially similar to the earlier one dated 24/12/2018 which he filed in the High Court under Petition Number 61 of 2018. The only material difference is that he has substituted the Director of Public Prosecution as a party with the Attorney General. I concur with these submissions, it would occur to me that the applicant has already filed a petition as regards the interested parties. I also find that he has not fulfilled the principals of enjoining the Attorney general and DCIO Kakamega as interested parties in this matter and that prayer must fail.

On the prayer for injunction, the principals governing the grant of interlocutory orders are clear. As stated in the case of *Giella vs. Cassman Brown* (1973) EA 358.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

Lawrence Mmata Chore, the applicant submitted that, the 1st and the 2nd defendant entered into a sale of land agreement dated 30/8/2018 with intend to sale a portion measuring 0.17 Ha without developments. That a dispute arose on the finalization of the same due to intervention of 3rd parties. He claims that he was coerced to sign transfer documents. The respondent, Mary Kweyu maintains that she has paid full purchase price and involved the police in order to get her property. I find that the facts in this case can only be determined once the same go to full trail. In the interest of justice I order that an inhibition order to issues against the suit property pending the hearing and determination of this matter. Costs of this application to be in the cause.

On the second application dated 4th March 2019 as to the consolidation of suits, the first suit is against Lawrence Mmata Chore (the 1st defendant herein) and Melisa Muhonja Mmata (the plaintiff herein) in the Environment and Land Court at Kakamega being Kakamega ELC Case No. 4 of 2019 as confirmed by a copy of the plaint which is annexed hereto and marked as exhibit “MK-1”. Both Lawrence Mmata Chore and Melisa Muhonja Mmata have since entered appearance in the Kakamega ELC Case No. 4 of 2019, with Lawrence Mmata Chore being represented by the law-firm of Ong’anda & Associates while Melisa Muhonja Mmata choosing to act in person. As I can see from the contents of the suit document annexed hereto as exhibit “MK-1” and the plaint filed in this suit, both suits relate to a land sale agreement dated 30.8/2018 for the sale of land parcel number Butso/17938 by the 1st defendant to the plaintiff Mary Kweyu at a consideration of Ksh. 30,000,000/= . In the plaint filed in Kakamega ELC Case No. 4 of 2019 she has, on the one hand, invited this honourable court to essentially find that the aforesaid land sale agreement is valid and to accordingly grant an order for specific performance of the agreement by way of transfer of the suit land to her. The plaintiff Melisa Muhonja in this suit has, on the other hand, invited this honourable court to essentially find that the aforesaid land sale agreement is invalid and to accordingly frustrate specific performance by preventing the intended transfer of the suit land.

The principles for consolidation of suits are set out in the case of *Nyati Security Guards & Services Ltd V Municipal Council of Mombasa* (2000) eKLR where the court held as follows:

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where:

- a) Some common question of law or fact arises in both or all of them;*
- b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;*
- c) For some other reason, it is desirable to make an order for consolidating them;”*

I find that these matters relate to the same parties concerning the same subject matter and certify the principals laid down in the above authority.

On the issue of the rental income of the suit premises the applicant Mary Kweyu submitted that, both the 1st defendant and Kenya Women Microfinance Bank Ltd (hereinafter called “the lending bank”) that the lending bank had sought to sell the aforesaid land parcel number

Butsotso/Shikoti/17938 in order to recover the loan that the 1st defendant had borrowed but failed to repay in accordance with the relevant loan agreement. It had even been noted on the title deed for land parcel number Butsotso/Shikoti/17938 that a legal charge had been registered against the said land parcel on 23/4/2015 to secure a sum of Ksh.20, 000,000/= that the 1st defendant had borrowed from the lending bank. Annexed is a copy of the title deed for land parcel number Butsotso/Shikoti/17938 which is marked as exhibit "MAK-2". Both the official of the lending bank and 1st defendant further confirmed to her that the lending bank had given the 1st defendant the option of getting a buyer to who the land could be sold by private treaty for purposes of repaying the outstanding loan so that he can at least fetch a fair price. The lending bank had also given the 1st defendant an ultimatum that, if he does not quickly source for a buyer to conclude a sale by private treaty with, the lending bank would immediately proceed to have the said land sold by public auction which would most likely fetch a price that is less than Ksh. 20,000,000/=. The 1st defendant, with the permission of the lending bank, voluntarily entered into a land sale agreement for the sale of the whole of land parcel number Butsotso/Shikoti/17938 with all the developments thereon to her by private treaty at a purchase price of Ksh. 30,000,000/= which she has fully paid, with a substantial portion of the purchase price being paid directly to the lending bank so as to fully clear the outstanding loan that the 1st defendant owed the lending bank. Annexed hereto a copy of the relevant Land Sale "Agreement which is marked as exhibit "MAK-3". She ought to be receiving rental income of about Ksh. 250,000/= per month from the 12 apartments erected on the said land parcel number Butsotso/Shikoti/17938 because it is clearly stated in clause 4 of the said land sale agreement that she was free to take immediate possession after paying the purchase price. That she reported the 1st defendant to the police because, despite having paid him the full purchase price of Ksh. 30,000,000/=: he had openly told her that he will neither give him the whole parcel number Butsotso/Shikoti/17938 nor refund her any money nor permit her receive rental income from the 12 apartments. He had further openly dared her to take him wherever she wished while claiming that he had adequate resources to engage her in endless legal battles. That the 1st defendant who, after having secured his release from the police cell by paying the Ksh. 50,000/= as bail on 24/12/2018, coerced her to agree to take a reduced land acreage of parcel number Butsotso/Shikoti/17938 (i.e. a portion thereof measuring 0.2 Hectares with all developments thereon) or else be prepared to lose both the land and the purchase price. The 1st defendant accordingly coerced and intimidated her into signing the document he has marked as exhibit "LMC-2" which she signed out of fear and desperation. After having signed the said document, it dawned on her that the 1st defendant's antics were in fact far from over because a couple of days later he openly disowned the very document and told her that the most she would be getting will be the undeveloped 0.17 hectare portion of the said land parcel number Butsotso/Shikoti/17938.

Lawrence Mmata Chore, the applicant admits, the 1st and the 2nd defendant entered into a sale of land agreement dated 30/8/2018 with intend to sale a portion measuring 0.17 Ha without developments. That a dispute arose on the finalization of the same due to intervention of 3rd parties. That the applicant Lawrence Mmata Chore proposes to pay the consideration amount of Ksh. 30,000,000/= in eight instalments from 28th February, 2019. I find that there is need to secure the rental income of the said property pending the determination of this matter. I find that the second application has merit and I grant the following orders;

1. That the suit herein namely Kakamega ELC case No. 81 of 2018 and ELC case No. 4 of 2019 be consolidated for purposes of being heard and determined together.
2. That the file relating to ELC case No. 4 of 2019 be the lead file for purpose of filing any further pleadings and recording of court proceedings.
3. That the sum of Kshs. 2.5 Million be deposited by the 1st defendant to Onganda & Associates bank account No. 078000044176 at Family bank Limited on 10th January 2019 be transferred forthwith to a joint interest earning account to be opened by and in the names of the 1st and 2nd defendants' advocates on record as well as subsequent monthly rental income from the suit property and be held in such account pending determination of the suits or further orders of the court.
4. Cost of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 4TH JULY 2019.

N.A. MATHEKA

JUDGE