



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 114 OF 2018

ELIEZER NJUGUNA MUNGAI.....PLAINTIFF/RESPONDENT

VERSUS

JOHN MUYA MUNGAI.....1ST DEFENDANT/APPLICANT

LAND REGISTRAR KIAMBU.....2ND DEFENDANT/APPLICANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT/APPLICANT

DAVID KAMAU MUNGAI.....PROPOSED 4TH DEFENDANT/APPLICANT

RULING

There are two Applications herein for determination. The 1st Application is the **Chamber Summons** dated **28th August 2020** brought by the intended 4th Defendant, premised to be bought under **Order 1 Rules 3, 10(2), 14, 15 & 25** of the **Civil Procedure Rules, Sections 1A, 1B, 3A & 63** of the **Civil Procedure Act**, and **Article 159** of the Constitution seeking for orders that;

- 1. David Kamau Mungai be enjoined in the suit as the 4th Defendant herein.**
- 2. Costs be provided for.**

The Application is supported by the Affidavit of **David Kamau Mungai**, who averred that he is the intended 4th Defendant. That he is a biological brother to the Plaintiff and the 1st Defendant. He contended that the original title to LR.No. Dagoretti/Thogoto/T.18, measuring 100 feet by 100 feet is in the hands of the 1st Defendant and that the 1st Defendant is the sole owner of half a share of LR.No. Dagoretti/Thogoto/T.18.

It was his further contention that he has a beneficial interest in half share of LR.No. Dagoretti/Thogoto/T.18, on account of it having been bequeathed to the Plaintiff and himself by their late father one Amos Mungai Kariuki. That the Plaintiff has failed to disclose his interests in half share of LR.No. Dagoretti/Thogoto/T.18, therefore, making him a necessary party to these proceedings.

The Application is opposed and the Plaintiff/Respondent filed his Replying Affidavit dated **16th September 2020**, by **Eliezer Njuguna Mungai**, who contended that the subject matter was filed in the year 2018 and the same was heard and is awaiting a Judgement date. That the 1st Defendant though represented by Counsel, he did not file a Defence and as the matter stands, evidence has been adduced and is awaiting Judgement date. Further, that the subject plot is owned by two persons, excluding the Applicant herein.

The Plaintiff/Respondent also filed Grounds of Objection dated **16th September 2020** and stated as follows:-

- 1. The Application is frivolous, incompetent, vexatious and an abuse of the due process of the law and court, the same remains misconceived.**
- 2. The Application as drawn and laid before court is a misnomer alien to law and procedure and does not lie in law, the prayer sought herein is untenable and not maintainable in law.**
- 3. The Application is a belated attempt to stall the matter and the same remains obnoxious and incompetent.**

The 1st, 2nd and 3rd Defendants/Respondents did not respond to 4th Defendant/Applicant's Application.

Parties were directed to file written submissions. The Proposed 4th Defendant/Applicant's filed his submissions dated **12th February 2021**, through the **Law Firm of Maina & Onsare Partners Advocates**. While the Plaintiff/Respondent filed his submissions dated **17th June 2021**, through the **Law Firm of Kirubi Mwangi Ben & Co. Advocates**.

The main issue for determination is whether the proposed 4th Defendant/Applicant is deserving of the orders sought.

The Court has considered the instant Notice of Motion Application, Grounds of Objection and Replying Affidavit. The Court too has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and makes the following rendition:-

It is evident that the Plaintiff filed this claim against the 1st, 2nd and 3rd Defendants/Respondents on **11th April 2018**, and sought for several prayers among them;- *that the Honorable Court be pleased to issue permanent orders to compel the 1st Defendant to surrender the title of all that piece of land known as **LR.No. Dagoretti/Thogoto/T.18**, to the 2nd Defendant.*

The Court will start with the issue of joinder of **David Kamau Mungai** to the proceedings as a 4th Defendant herein. **Order 1 Rule 10(2)** 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.”

It is evident from the above provisions of law that the court is empowered to enjoin all the parties that are necessary for effective and complete adjudication of a matter before it. As observed earlier, the dispute herein is over claim for ownership and intended subdivision of land parcel **LR.No. Dagoretti/Thogoto/T.18**.

It is also evident that the 1st Defendant holds the title to the suit property as claimed by the Plaintiff and the intended 4th Defendant. **Further, he alleges that he has a beneficial interest in half share of LR.No. Dagoretti/Thogoto/T.18, on account of it having been bequeathed to the Plaintiff and himself by their late father one Amos Mungai Kariuki.**

It is this Court's considered view that, if it were to find for the Plaintiff, then the said **David Kamau Mungai** would be affected by the Court Orders. That would happen without having heard the evidence of **David Kamau Mungai** and thus against the rule of **Natural Justice**.

The Court finds that **David Kamau Mungai** the Intended 4th Defendant is a necessary party herein for effective and complete adjudication of the dispute and therefore he should be enjoined to the suit as a 4th Defendant. Having found that **David Kamau Mungai** is a necessary party and there is need to enjoin him herein, then the natural event that follows is that the **Plaint** has to be amended. **Order 8 Rule 3(5)** provides as follows:-

“An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

Further it is trite that amendment should be freely allowed at any stage of proceedings so long as the said amendments are not prejudicial to other parties. See the case of **Central Kenya Ltd....Vs...Trust Bank & 4 Others, CA 222 of 1998**, where the Court held that:-

“All amendments should be freely allowed at any stage of the proceedings provided that the amendments or joinder as the case may be will not result in prejudice or injustice to the other party, which cannot properly be compensated for in costs.”

Taking into account the relevant provisions of law, and being guided by **Section 3A** of the **Civil Procedure Act**, the Court finds that the necessary Order herein is to allow the Applicant be enjoined in this suit to defend his position as no prejudice will be occasioned to the Plaintiff.

The Second Application is the Notice of Motion Application dated **24th September 2020**, brought by the 1st Defendant/Applicant premised to be bought under **Articles 40 and 50** of the **Constitution**, **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act**, **Section 94 (2)** of the **Land Registration Act**, **Order 7** and **51 Rule 1** of the **Civil Procedure Rules** for orders that;

- 1. This Honorable Court be pleased to set aside the proceedings taken on 20th March 2019.**
- 2. Leave be granted to the 1st Defendant to file his defence and accompanying pleadings out of time.**
- 3. This Honorable Court be pleased to refer this matter to the Land Registrar, Kiambu in compliance with Sec 94 (2) of the Land Registration Act.**

4. *Costs be provided for.*

The Application is supported by the Affidavit of **John Muya Mungai**. He averred that the matter was scheduled for pretrial conference before the Hon. Deputy Registrar on 4th December 2018, and the Hon Deputy Registrar, in the absence of the Defendants confirmed the matter ready for hearing on the part of the Plaintiff and set down the matter for Formal Proof on 20th March 2019, wherein the Plaintiff called one witness and closed his case.

It was his contention that on 26th June 2020, the Court noted in its directions that there had been no proper service of the hearing of 20th March 2019, upon the 2nd and 3rd Defendants. It was his further contention that the Counsel previously representing his interests in the matter never kept him informed on the progress. That he has filed his Application dated 28th August 2020, seeking to enjoin his brother as the 4th Defendant to support his Defence.

The 2nd and 3rd Defendants did not oppose the 1st Defendant/ Applicant's Application. On 10th November 2020, the Court gave the Plaintiff/Respondent the last chance to file his Replying Affidavit. The Plaintiff/Respondent did not file his Replying Affidavit and his Submissions. The 1st Defendant/Applicant filed his submissions dated 1st March 2021 through the Law Firm of Maina & Onsare Partners Advocates.

The Court has now carefully considered the instant *Notice of Motion* and the annexure thereto, the pleadings in general and the written submissions, together with the cited authorities. The Court has also considered the relevant provisions of law and the issue for determination is whether the Application is merited.

In deciding whether or not to grant the orders sought and exercise its discretion, the Court is also guided by the Principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed.

The Court notes that the 1st Defendant/Applicant was duly served with a Mention Notice on 10th October 2018, as evidenced by an Affidavit of Service sworn by John Macharia Muraguri, while the 2nd and 3rd Defendants upon service filed their joint statement of Defence dated 4th June 2018.

Further, on 15th January 2019, the 1st Defendant/Applicant was served with a hearing notice dated 10th January 2019, as evidenced by an Affidavit of Service sworn by Timothy Kalamu Simiyu. On the 23rd August 2019, the 1st Defendant/Applicant appointed the Law Firm of James T. Makori, who filed a Notice of Appointment and Grounds of Opposition dated 6th September 2019, and subsequently, on 26th August 2020, he appointed the Law Firm of Maina & Onsare Advocates who filed a Notice of Change of Advocates and who later requested for file perusal via letter dated 13th August 2020. The 1st Defendant/Applicant did not file his Statement of Defence within the stipulated time.

It is the Court's considered view that the Affidavit of Services sworn by Timothy Kalamu Simiyu, has satisfactorily detailed the process of service of the 1st Defendant/Applicant and the same having been served personally, then service was validly effected.

It is apparent that the Defendants were absent and so were their advocates on the Formal Proof hearing on the 20th March 2019. Though the 1st Defendant/Applicant has sought for setting aside of *ex parte* proceedings, the principles to be considered are similar to the ones for setting aside *ex parte Judgment*.

The Formal Proof hearing was heard on 20th March 2019, and the 1st Defendant/Applicant filed this application on 24th September 2020. There was unexplained delay in bringing the instant Application for setting aside. The Plaintiff filed the suit in the year 2018. It is evident that the 1st Defendant/Applicant herein had not even complied with Order 11.

However, the Court is alive to the fact that by the period when the 1st Defendant/Applicant advocates requested for file perusal, it is when the Covid 19 Pandemic was very alive in the Country and the Court had halted face to face services countrywide. Therefore, it would have been a challenge getting the said proceedings and filing relevant pleadings. For the interest of justice and as provided by Section 3A of the Civil Procedure Act, the Court finds that the necessary Order herein is to allow the 1st Defendant/Applicant defend his case.

Further, Court must then determine whether or not the draft Defence raises any triable issue. Order 12 Rule 7 of the Civil Procedure Rules provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside *ex parte orders* are discretionary and the Court must use its discretion to come to a conclusion, while also ensuring that Justice has been done. The Court in Patel...Vs....E.A Cargo Handling Services Ltd (1974) EA 75, held that:-

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

In his draft Defence, the 1st Defendant/Applicant alleges that the property has never been for Plaintiff to sell without the express consent of the 1st Defendant. Further, that the Plaintiff has already sold off a portion to one Martin Waweru Wangui, which sale is subject to a Court case. This Court is of the considered view that there remains an issue in dispute and therefore the draft Defence raises triable issue. This is because another party namely David Kamau Mungai, has been brought into the picture.

On the 3rd prayer, the same cannot be determined at this juncture. Whether the issue in controversy is a boundary dispute or subdivision, parties will have to call evidence to establish so.

For the above reasons, the Court finds and holds that it is prudent to allow the Chamber Summons Application dated **28th August 2020**, brought by the intended 4th Defendant only in terms of **prayer No.1** and with costs being in the cause.

Consequently, the Court finds the **second Notice of Motion** application dated **24th September 2020**, brought by the 1st Defendant/Applicant is found merited in terms of prayer No. **1 and 2** only with **throw away costs of Kshs.15,000** to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of July 2021.

L. GACHERU

JUDGE

15/7/2021

Court Assistant – Lucy

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 **15th March 2020**, this **Judgment** 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

No appearance for the Plaintiff/Respondent

M/s Ngui for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Applicant

No appearance for the 3rd Defendant/Applicant

No appearance for the proposed 4th Defendant/Applicant

L. GACHERU

JUDGE

15/7/2021