



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC NO. 357 OF 2014

(Formerly NYERI HCC No. 16 of 2010)(O.S)

LUCY NJERI GICHANGA, GEORGE NJENGA

(Suing as the legal representatives of the estate of the late

GODFREY GATAUWA) 1ST PLAINTIFF

JAMES E. GICHANGI

(Suing as the legal representative of the estate of the late

ELIUD MWAURA) 2ND PLAINTIFF

-VERSUS-

JOHN KAMITI NELSON MAREGWA1ST DEFENDANT

MOSES KARINGITHI MAREGWA .. INTENDED 2ND DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion application dated 26th January, 2018 expressed to be brought under **Section 1A, 1B and 3A of the Civil Procedure Act, Order 1 rules 3, 6 and 10(2) and (4), Order 40 rules 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules, 2010 (the Rules)**, the Plaintiffs sought the following orders:-

(a) Spent.

(b) Spent.

(c) Leave be granted to the Plaintiffs to amend the originating summons dated 9th February, 2010 to enjoin Moses Karingithi Maregwa as the 2nd Defendant in this suit.

(d) Spent.

(e) Pending the hearing and determination of this suit, a temporary injunction do issue restraining the 1st Defendant and the intended 2nd Defendant, their servants or agents or any other person or persons, from trespassing, evicting or interfering in any manner whatsoever with the quiet, peaceful and exclusive possession of the Plaintiffs' said land.

(f) Spent.

(g) Pending the hearing and determination of this suit, a temporary injunction do issue restraining the intended 2nd Defendant, his servants or agents or any other person or persons, from transferring, charging, subdividing or dealing in any manner whatsoever the Plaintiffs' said land.

(h) Spent.

(i) Pending the hearing and determination of this suit, an order be issued inhibiting the land Registrar from registering any dealings pertaining to the said Land other than the registration of the said Land in the names of Plaintiffs as prayed or until otherwise ordered by this Honourable court.

(j) Subject to payment of court filing fees, the annexed amended originating summons be deemed as duly filed.

(k) Costs of this application be provided for.

2. The application was based on the numerous grounds on the face of it and the supporting affidavit of James E. Gachangi the 1st Plaintiff, sworn on the 26th day of January, 2018. The Plaintiffs in this suit have filed it in their capacities as the legal administrators of the estates of the late Godfrey Gatauwa and the late Eliud Mwaura Gachangi, who allegedly were the joint purchasers of the suit land from the Defendant. The Plaintiffs alleged that on 18th January, 2018 upon conducting a search on the suit land, they discovered that it had been transferred to a third party by the name of Moses Karingithi Maregwa. This is the person they sought to join in the suit as the 2nd Defendant. They also sought further orders against this intended 2nd Defendant as enumerated in their application.

B. THE PLAINTIFFS' CASE

3. The Plaintiffs filed the suit in their capacities as the personal representatives of the deceased purchasers of the suit land. The Plaintiffs asserted that they had leased the suit land to a lessee by the name of Stephen Muriuki who had a caretaker on the land. Neither Mr. Stephen Muriuki nor his caretaker were joined as parties to the suit.

4. The Plaintiffs stated that they learnt about an intended eviction from the suit land from the caretaker who stays on land when the Defendant accompanied by the Chief of Kariti Location visited the land and issued threats of eviction to the caretaker. This prompted the Plaintiffs to conduct a search on the suit land. The search on the land disclosed that it had been transferred to a third party. The Plaintiffs consequently sought to join this new registered proprietor as a 2nd Defendant in the suit. They also sought the various other orders as stated in their application.

C. THE DEFENDANT'S RESPONSE

5. In his response to the Plaintiffs' application, the Defendant filed a replying affidavit sworn on the 26th March, 2018. In the said affidavit, the Defendant termed the Plaintiffs' application as bad in law as it sought multiple adverse orders against one Moses Karingithi Maregwa yet he was not a party to the suit. The Defendant confirmed to have transferred the suit land to Moses Karingithi way back in 2017 and that claimed that he had been in possession since then. Finally, the Defendant accused the Plaintiffs of indolence since the suit has been in court for the last nine (9) years and the Plaintiffs had failed to prosecute it.

D. DIRECTIONS ON SUBMISSIONS

6. When the matter came up before the court on the 23rd September 2020, the court directed that the application be heard by way of written submissions. The parties were granted 7 days each to file their submissions. The record shows that the Plaintiffs filed their submissions on 13th October, 2020 whereas the Defendant filed his on 27th October, 2020.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Plaintiffs' application together with the supporting affidavit. The court is of the opinion that the following three (3) issues arise for determination:

(a) Whether the application for leave to amend the originating summons dated 9th February, 2010 and join a 2nd Defendant in the suit should be allowed.

(b) Whether the injunctive orders sought against the intended 2nd Defendant should issue.

(c) Whether the Plaintiffs are entitled to orders of inhibition.

F. THE PLAINTIFFS' SUBMISSIONS

8. In regard to the application to amend the originating summons, the Plaintiffs submitted that for the purpose of determining the real question in controversy between the parties it was necessary that the amendment be allowed and the intended 2nd Defendant be joined as a party to the suit. They relied on the provisions of **Order 8 rules 3, 4 and 5 of the Rules**. The Plaintiffs further cited the case of **Joseph S. Wafula v Elena Chepkurgat Talam (sued as the legal administrator of the estate of the late Kiptalam Arap Togo) [2019] eKLR** in support of their prayer for leave.

9. In the said case, the court held that the overriding consideration in an application of such nature ought to be whether the amendments sought were necessary for the determination of the suit. The court restated the principles set out by the Court of Appeal in **Central Kenya Limited v Trust Bank Limited (2000) 2 E.A 365** as follows:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided that there be no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

10. The Plaintiff too cited the case of **Evanson Mbutia Gitahi v Priscilla Wanjiku Mwathi [2019 eKLR]** re-affirming those principles. The policy of the law is that amendments should be allowed if no injustice is occasioned to the other party(s) however negligent, late or careless the Applicant may have been in the first omission.

11. The Plaintiffs’ plea was that their proposed amendment was not only necessary but that their application to amend was brought without undue delay upon discovering the change in ownership of the suit property.

12. The Plaintiffs further submitted that it was absolutely necessary to join the intended 2nd Defendant into the suit, since the orders ultimately sought in the suit may adversely affect his interest in the land. They cited the provisions of **Order 1 rule 10(2) of the Rules** that allow the court either upon or without the application of either party and at any stage to order that the name of any person who ought to have been joined or whose presence before the court may be necessary be joined in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

13. The Plaintiffs cited the decision of the High Court in **Peter Ngonde Gitau v Thomas Mugeni Oseko [2017] eKLR** whereby the court set out the test for determining whether or not to allow a party to be joined in a suit as hereunder:

(a) He must be a necessary party;

(b) He must be a proper party;

(c) In the case of the Defendant, there must be a relief flowing from the Defendant to the Plaintiff;

(d) The ultimate order or decree cannot be enforced without his presence in the matter.

(e) His presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

14. The Plaintiffs too cited the holding in **Jackline Kemuma Orioki v Jackline Nyaboke Gichana and Another [2017] eKLR** whereby the court held that it was fatal for a Plaintiff to fail to join a third party in whose name the property was registered in a claim for rectification of the register. It was held that it would amount to condemning the said party unheard were such an order to issue.

15. In justifying the grant of orders of a temporary injunction the Plaintiffs’ submissions were that they had been in continuous occupation of the suit land for a long period of time and they stood to suffer irreparable loss should their possession be interfered with before the determination of this suit. The Plaintiffs cited the provisions of **Article 40 of the Constitution**, and the case of **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, **Giella v Cassman Brown Co. Limited [1973] E.A 358**, **Naftali Ruthi Kinyua v Patrick Thuita Gachure and Another [2015] eKLR**, **Sundiata Nathan Mutende v Willy Mwololo Muindi [2012] eKLR** and **Robert Mugo wa Karanja v Ecobank (K) Limited and Another [2019] eKLR** in support of their application.

16. The Plaintiffs’ submission in respect of their prayer for inhibition orders against the Land Registrar was based on **Section 68 of the Land Registration Act, No. 3 of 2012**. The section empowers the court to make an order inhibiting for a particular time or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge. The Plaintiffs relied upon the decision by the Environment and Land Court in **Wilson Mwirigi Manyara and Another v Moffat Gichuru Manyara 92020] eKLR** whereby the court held that such an order would ordinarily be granted where the court was convinced that there was a real danger of the subject matter being disposed off before the determination of the suit.

17. The Plaintiffs also relied on the decision of **Japheth Kaimenyi Madatho v M’Ndatho M’Mbwiria [2012] eKLR** whereby the court observed that it would be unfair and unjust for a court to refuse to grant an order of prohibition to protect the interests of an applicant in occupation and who had his home on the said parcel of land.

G. DEFENDANT’S SUBMISSIONS

18. The Defendant’s submissions were concise and addressed three points only:

(a) That all the orders sought by the Plaintiffs were against a party who was yet to be joined in the suit i.e the intended 2nd Defendant.

(b) That the Plaintiffs had been indolent and had failed to prosecute this suit for the last 11 years hence should not be granted the injunctive orders.

(c) That the court’s discretion should only be limited to allowing the amendment to join the intended 2nd Defendant. Any further orders be canvassed upon the 2nd Defendant coming on board.

H. ANALYSIS AND DETERMINATION

(a) Whether the application for leave to amend the originating summons and join the intended 2nd Defendant in the suit should be allowed

19. The court has carefully considered the Plaintiffs’ application, the response by the Defendant, the submissions by all the parties including the cited precedents and provisions of the law. The court is persuaded that joining the intended 2nd Defendant is necessary for the effectual and final determination of the suit.

20. The Plaintiff demonstrated that a search on the title of the suit land confirmed that the title had since been transferred by the existing Defendant to the intended 2nd Defendant. This is a fact that has been confirmed by the Defendant in his response. Accordingly, it would be fatal for the Plaintiffs to proceed with the suit as it is without joining the intended 2nd Defendant in whose name the suit land is now registered.

(b) Whether the injunctive orders sought against the intended 2nd Defendant should issue

21. The court notes that these orders were also being sought against the intended 2nd Defendant. The said intended 2nd Defendant is not yet a party to the suit and has no notice of the action since he has not been served with the instant application. The court agrees with the submissions of the Defendant that issuing any such orders at this stage of the proceedings would be tantamount to condemning the intended 2nd Defendant unheard. The court is of the opinion that the 2nd Defendant ought to be joined in the suit first as party, served with both the amended originating summons and the application by the Plaintiffs and accorded an opportunity to respond thereto before a determination is made on the prayer for a temporary injunction. The court will, therefore, not go into the merits of those prayers sought at this stage.

(c) Whether the Plaintiffs are entitled to orders of prohibition

22. In regard to this issue, the court adopts its reasoning above and is of the view that this issue be considered *inter partes* once the intended 2nd Defendant has been enjoined and served with all the pleadings including the application.

I. CONCLUSION AND DISPOSAL

23. The upshot of the foregoing is that the Plaintiffs’ application succeeds in part. Accordingly, the court makes the following orders for disposal thereof:

(a) The Plaintiffs’ prayer for leave to amend the originating summons dated 9th February, 2010 to join Moses Karingithi Maregwa as a 2nd Defendant in this suit is hereby allowed.

(b) The Plaintiffs shall file their amended originating summons within fourteen (14) days and serve the Defendants.

(c) The application dated 26th January, 2018 shall be served for inter partes hearing for the consideration of the remainder of the prayers on 5th October, 2021.

(d) Costs on the prayer for amendment shall be in the cause.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 14TH DAY OF JULY 2021.

In the presence of:

Mr. Wabwire for the Plaintiffs

No appearance for the Defendant

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE