



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1302 OF 2014

(Formerly HCCC NO.5729 OF 1990)

AUSTIN RICHARD GATHOGO.....PLAINTIFF

VERSUS

EDWARD ALLAN ROBINSO.....1ST DEFENDANT

JOHN NJENGA GACHUCHU.....2ND DEFENDANT

ELIZABETH WANJIKU.....3RD DEFENDANT

SAMSON JUMA.....4TH DEFENDANT

HANNA WANJIRU NJUGUNA.....APPLICANT

RULING

The Applicant's case:

What is before me is a Notice of Motion application dated 10th June, 2020 brought by Hanna Wanjiru Njuguna (hereinafter referred to only as "the Applicant"). In the application, the Applicant has sought the following orders;

1. The Court be pleased to issue an order for joinder to allow the Applicant to be joined in the suit as the 5th Defendant.
2. The Court be pleased to order that the Chief Land Registrar be joined in the suit as the 6th Defendant.
3. Upon joinder of the Applicant and the Chief Land Registrar in the suit as 5th and 6th Defendants, the court be pleased to order that the suit be heard *de novo*.
4. The Court be pleased to order that the Draft Defence and Counterclaim by the Applicant (attached to this application) be deemed as duly filed upon payment of the requisite filing fees.
5. Costs of the application be in the cause.

The application is supported by the affidavit of the Applicant, Hanna Wanjiru Njuguna. In summary, the application is based on the following grounds;

- a) The Applicant and her late husband, Eliud Ngethe Njuguna purchased all that property known as L.R. No. 14931 situated at Karen (formerly Plot H and later assigned Plot K being a subdivision of L.R No. 2244/2) (hereinafter referred to as "the suit property") from the original registered owners, George Walter Alan Robinson and Eirene Rosetta Isobel Robinson (hereinafter referred to as "the original owners") who were the parents of the 1st Defendant through an agreement for sale dated 26th March, 1982.
- b) The Applicant and her husband took vacant possession of the suit property awaiting eventual transfer of the property into their name, constructed a house thereon and allowed the Plaintiff to occupy the property as a care taker.
- c) When the original owners and their heirs failed to transfer the suit property to them, the Applicant and her husband filed High

Court Civil Case No. 77 of 1998 (OS), Hannah Wanjiru Njuguna & Another v George Walter Allan Robinson & Irene Roseita Isabel Robinson in which they sought a vesting order in respect of the suit property which was subsequently issued in their favour on 26th September, 2008.

d) The Applicant and her husband later discovered that the land register for the suit property had disappeared and the vesting order could not be registered. This led to the reconstruction of the file and they were subsequently issued with the Certificate of Title for the property.

e) The Applicant thereafter subdivided the suit property into new parcels namely; L.R No. 14931/1, 14931/2, 14931/3, 14931/4, 14931/5 and 14931/6 (hereinafter referred to as “the subplots”) which were registered in her sole name following the death of her husband.

f) On or about 29th January, 2020, the Applicant went to the suit property and discovered that the Plaintiff whom she had entrusted with looking after the suit property had without any colour of right laid claim to the suit property and had through misrepresentation obtained injunctive orders restraining his eviction from the property.

g) The Applicant learnt also that the Plaintiff had filed the instant suit reiterating the same irregular interests over the suit property and seeking orders recognizing him as the legal owner of the suit property hence the filing of this application by the Applicant.

h) The Applicant has an identifiable legal and beneficial interest over the suit property as she is the current registered owner of the subplots that resulted from the subdivision of the suit property.

i) The Applicant risks being unlawfully dispossessed of the suit property if she is not made a party to the suit to assist the court in arriving at a just determination.

j) The Applicant has also learnt that her legal rights to the suit property were recognized in a Power of Attorney granted to the 1st Defendant by his father before his death and it was expected that he would carry out the mandate accordingly but he failed to do so. He instead purported to sell the land to the Plaintiff.

k) Since the suit property was jointly registered in the names of the original owners, the 1st Defendant could not purport to exercise the powers donated by only one of the original owners to sell the land to the Plaintiff.

l) The proposed 6th Defendant, the Chief Land Registrar is the custodian of all land records and is a necessary party to the suit to confirm the authenticity of any documents presented in Court by the parties.

m) The Applicant has a legitimate claim to the suit property which she acquired long before the Plaintiff and the 4th Defendant and her interests are recognized in the Power of Attorney the 1st Defendant purportedly used to sell the suit property to the Plaintiff.

n) If the orders sought are denied, the Applicant who is the current registered owner with valid titles will be condemned unheard.

In her submissions filed on 28th December, 2020, the Applicant argued that she is a necessary party to this suit. In support of this submission, the Applicant relied on Order 1 Rule 3 and Rule 10 of the Civil Procedure Rules and the case of Lilian Wairimu Ngatho & another v Moki Savings Co-operative Society Limited & another [2014] eKLR. The Applicant argued further that she has approached the court in good time before judgment is entered in the matter. The Applicant cited Attorney General v Kenya Bureau of Standards & another [2018] eKLR and argued that since judgement has not been entered, the other parties will not be unduly prejudiced by the joinder sought as they can be compensated by costs. The Applicant submitted further that she has a right to be heard and to give her side of the story concerning the suit property.

With regard to the joinder of the Chief Land Registrar, the Applicant submitted that it was necessary to join the Chief Land Registrar for the complete and effectual determination of the suit property as the keeper of land records. She argued that the Chief Land Registrar is in a position to help the court determine which of the titles held by the 4th Defendant and the Applicant is genuine.

The Applicant relied on Articles 159 and 50 of the Constitution, the overriding objective of the Civil Procedure Act and the case of Farmwine Distributors Ltd v Simeon John Muthuma [2005] eKLR and submitted that although the suit is old, the hearing of the same should start *de novo*. She argued that the issue of the power of attorney used to sell the suit property to the Plaintiff, sale of land that she had already purchased and the existence of different titles raised such weighty matters that all parties ought to be heard on them and this can only be achieved if the hearing starts *de novo*.

The Applicant argued that she was not aware of the proceedings herein until she subdivided the suit property and sought possession from the Plaintiff. She also argued that her defence and counter-claim raises triable issues. In support of the submissions on the issue, she relied on the cases of Jade Petroleum Limited v Kobil Petroleum Limited [2014] eKLR and Fidelity Shield Insurance Co. Ltd & 4 Others v Rafia Bags (K) Ltd. [2010] eKLR.

The Applicant argued that she could not have brought the present application earlier as she was not aware of the proceedings. She contended further that after she got wind of the case it took her time to request for the file from the registry and get copies of the proceedings and pleadings. She contended that this delay was further compounded by the Covid-19 pandemic which affected the judiciary as well as law firms' operations. She relied on the case of Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR in support of her contention that that the delay was not inordinate.

The Plaintiff's case:

The application is opposed by the Plaintiff through a replying affidavit sworn by the Plaintiff on 26th November, 2020. In his affidavit, the Plaintiff has stated as follows: The Applicant has never been in possession of the suit property as the Plaintiff has been occupying the same since 1986 when he entered into an agreement with the 1st Defendant for the sale of a portion of L.R No. 2244/2 (Plot No. H later designated as Plot No. K) (the suit property) for Kshs. 250,000/-. At the time of entering into the said agreement of sale, the suit property was vacant. He paid an initial sum of Kshs. 50,000/- through his advocates (Susan Munyi & Co. Advocates) to the 1st Defendant's advocates (D.M Kinyua Advocates). The 1st Defendant through his advocates granted him permission to take possession of the suit property if he could raise the deposit to Kshs. 100,000/-. He raised the required deposit and the parties signed the Sale Agreement which was sent to the 1st Defendant's advocates for stamping. Despite being sent several letters, the 1st Defendant's advocates never provided his advocates with a copy of the stamped Sale Agreement. He was later informed that the said agreement could not be traced. Sometime in May/June 1986, he put up a semi-permanent house on the suit property where he lived with his wife and children. He eventually put up a permanent house. He has continuously lived on the suit property for more than 34 years.

He waited for a transfer of the suit property by the 1st Defendant but the same has never materialized. The 1st Defendant instructed him to pay him the balance of the purchase price directly and not through the 1st Defendant's advocates. He was waiting for the property to be transferred to him so that he could pay the balance of the purchase price of Kshs. 150,000/-.

The Plaintiff wondered why the Applicant and her husband sued the original owners of the suit property in their suit in the High Court while they were aware that the Plaintiff was occupying the suit property. The Plaintiff has stated that the Applicant has always been aware of both the instant suit and his occupation of the suit property. He however denies knowing her or ever seeing her on the suit property. He further contends that the application should not be allowed as; the Applicant is guilty of inordinate delay in bringing the application, the delay has not been explained, the Applicant has no claim in the suit property and that the hearing is at an advanced stage and as a result allowing the application will serve no useful purpose.

The Plaintiff filed his submissions on 29th January, 2021. On the Applicant's allegation that she purchased the suit property in 1982 and employed the Plaintiff as a caretaker, the Plaintiff submitted as follows: It is unbelievable that for 38 years (1982 -2020) the Applicant left her prime land in Karen to an alleged caretaker without visiting it or getting any income from it. He argued that it is absurd that a land owner would allow a caretaker to develop and build a permanent house on his land. The Plaintiff contended that he is a retired civil servant and has never worked as a caretaker.

On the issue of joinder, the Plaintiff contended that the Applicant and the proposed 6th Defendant should not be joined in the suit because the Plaintiff has not sought any relief against them. The Plaintiff contended that joining the Applicant and the Chief Land Registrar to the suit would amount to forcing new parties on him. Further, he contended that the joinder sought would blur and confuse the issues for adjudication seeing that the case is at its tail end. In support of his submissions on the issue, the Plaintiff invited the court to look at the cases of Samuel Mburu Gichanga v Peter Ndungu Kinuthia & 4 others [2018] eKLR and Evanson Waitiki v Kenya Power & Lighting Co. Ltd [2019] eKLR where caution in joining new parties to a suit was urged.

The Plaintiff finally argued that a delay of 30 years in bringing the application was inordinate and that the application is meant to derail the final determination of the suit.

The 4th Defendant's case:

The 4th Defendant also opposed the application. He swore a replying affidavit on 11th December, 2020 in which he has stated as follows: He is the registered owner of the suit property which he bought from the 2nd and 3rd Defendants in January 1990. He has since held the title for the property. He paid Kshs. 250,000/- for the suit property at the 2nd and 3rd Defendant's advocates' (D.M Kinyua advocates) office. Part of the purchase price was paid by his employer Industrial and Commercial Development Corporation (ICDC). ICDC conducted a search and confirmed that the suit property was registered in the names of the 2nd and 3rd Defendants and it was also free of any encumbrances. Further, the land was vacant. ICDC instructed one of its officers to lodge a caveat on the suit property. He visited the suit property severally with officers from ICDC. When the title was ready, it was collected from the 2nd and 3rd Defendants' advocates' office and kept by ICDC officer until the 4th Defendant had repaid his loan from ICDC.

During one of his site visits, he found that a semi-permanent structure had been constructed on the suit property. The said advocates informed him that it was a worker's house. Later the said advocates informed him that the structure belonged to an intending purchaser who had been unable to complete the purchase. He paid the advocate some money to have the structure removed but that did not happen. He instructed his advocates to send a demand letter to the person who had put up the structure. What he received in return was an injunction barring him from interfering with the suit property.

He stated that the application is full of falsehoods and contradictions. He stated that it was dishonest for the Applicant to state that the parcel file for the suit property got lost at the Land Registry while he carried out a transaction on the same file with the 2nd and 3rd Defendants. He stated that the file could not have disappeared as the 4th Defendant and other purchasers of land from the 1st Defendant procured their titles from the land office. The 4th Defendant stated that, it was improbable that for 38 years (1982 - 2020) the Applicant had left her prime land in Karen in the hands of a caretaker and did not realize during her routine checks that the said caretaker had built on the land. The 4th Defendant stated further that, if the suit property belonged to the Applicant, the Plaintiff as a caretaker would not have been allowed to lodge a caveat on the suit property as he did on 9th September, 1987. The 4th Defendant stated that, it appears that the Applicant and her husband were unable to complete the purchase of the suit property and hence were not put in possession of the same.

The 4th Defendant stated further that, the Applicant could not have sued George Walter Allan Robinson in 1998 for a vesting orders since he

was non-existent at the time. He stated that in any event, the said George Walter Allan Robinson in 1998 had already given his son, the 1st Defendant, a power of attorney enabling him to transact in the suit property. Relying on Order 1 Rule 3 of the Civil Procedure Rules, the 4th Defendant contends that the Applicant's alleged transaction is not in the same series as that of the 4th Defendant. The 4th Defendant's transaction concerned the 2nd and 3rd Defendants who sold him the suit property in 1990. The Applicant dealt with the original owners who sold her the property in 1982. Further, the Applicant is claiming to have bought 4.2 hectares while the suit property is 2.5 acres. Consequently, there should be no joinder. The 4th Defendant submitted that the Applicant has not sufficiently demonstrated a claim or interest in the suit property and that because she has no claim or interest in the suit property she would not be prejudiced if the joinder is not granted.

The 4th Defendant argued that the courts should exercise discretion in a judicious manner. He pointed out that in the present case, it would not be in the interest of justice to join the Applicant to the suit 31 years after the suit commenced and after the Plaintiff and the 4th Defendant have closed their testimonies.

In conclusion the 4th Defendant stated that the behaviour of the Applicant amounted to inordinate delay and that the application revealed no identifiable interest that should be protected. The 4th Defendant urged the court not to allow the application.

Determination:

I have considered the application together with the supporting affidavit. I have also considered the replying affidavits in opposition to the application and the submissions by the advocates for the parties.

Order 1 Rule 3 of the Civil Procedure Rules provides that:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Order 1 Rule 10 of the Civil Procedure Rules provides 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.

There is no dispute from the foregoing that the power to join a party to an existing suit is discretionary. It is settled law 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 [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.”

What this means is that even where a case has been made out for the grant of the order for joinder, the order may be refused where the court is convinced that the applicant does not deserve the exercise of the court's discretion. In Deported Asians Property Custodian Board v Jaffer Brothers Limited (1999)1E.A. 55 (SCU) that was cited with approval in Pravin Bowry v John Ward and another [2015] eKLR, the court stated that:

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seek in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit.”

In Werrot and Company Ltd. and others v Andrew Douglas Gregory and others, Nairobi(Milimani) HCCC No. 2363 of 1998(1998)LLR2848(CCK), Ringera J.(as he then was) stated that:

“For determining the question who is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.

It is on the foregoing principles that the Applicant's application falls for consideration. On the material before me, I am not persuaded that this is a proper case in which the court should exercise its discretion to join the parties seeking joinder to the suit. What I gather from the facts brought forward in the application before me and from the case as a whole is that; although the applicant's case as presented to this court suggests that the applicant is staking a claim to the suit property pursuant to an agreement of sale dated 26th March, 1982, that seems not to be the case from the evidence placed before the court by the Applicant.

The Applicant's claim to the suit property arises from a judgment that was entered in her and her husband's favour on 26th October, 1999 in Nairobi HCCC No. 77 of 1998(O.S) (hereinafter referred to as "the High Court case"). In the High Court case, the Applicant had sued the original owners of the suit property claiming to own the suit property by adverse possession. In that suit, the Applicant did not claim the suit property pursuant to the agreement of sale dated 26th March, 1982. The court made a finding that the Applicant has acquired the suit property by adverse possession and ordered that the property be registered in the names of the Applicant and her deceased husband. That judgment pursuant to which the Applicant was registered as the owner of the suit property on or about 26th February, 2019 has not been varied or set aside.

As at the time the Applicant and her deceased husband filed adverse possession claim in the High Court in 1998 claiming that they had been in possession of the suit property from April, 1982, the original owners of the suit property against whom the adverse possession claim was brought had ceased to be the owners of the suit property and the property had changed hands three times. The registered owner of the suit property as at 1998 was the 4th Defendant who was so registered on 26th January, 1990. The 4th Defendant was not a party to the High Court case and in any event, the Applicant and her deceased husband would not have sustained an adverse possession claim against him.

Following that judgment, the High Court made an order on 20th February, 2001 that the Deputy Registrar executes a transfer of the suit property in favour of the Applicant and her deceased husband. This was followed by an order made on 31st July, 2008 vesting the suit property on the Applicant and her deceased husband. As I have mentioned earlier, it is not clear as to when the Applicant and her husband were registered as owners of the suit property. The Applicant has not placed before the court a copy of the lease provisional or otherwise that was issued to her in respect of the suit property following the said judgment of the court.

What the applicant has produced in court are copies of the certificates of titles for the subplots which were allegedly issued following the subdivision of the suit property. From the material on record, the Applicant seems to have acquired for herself a new lease and certificate of title for the suit property different from the one that was issued following the subdivision of the mother title, L.R No. 2244/2. The particulars of the suit property in the title held by the 4th Defendant which they are fighting over with the Plaintiff in this suit are as follows:

Parcel: L.R No. 14931.

Grant No. I.R 48156.

Tenure: Lease hold for a term of 99 years with effect from 1st September, 1989.

According to the titles for the subplots produced in court by the Applicant, the subplots came about following subdivision of a parcel of land known Grant No. I.R 208485/1. The subplots are also leasehold for a term of 999 years with effect from 1st July, 2019. As I have stated above, the suit property already had a title Grant No. I.R 48156 which is leasehold for a term of 99 years. How a property leased for 99 years with effect from 1st September, 1989 gave rise upon subdivision to subplots with 999-year-old leases is a mystery. What I am trying to say in many words is that the transaction through which the Applicant acquired her title to the suit property and subplots arising therefrom is distinct, unique and separate from the transactions that gave rise to this suit. The Applicant acquired her title by adverse possession in a suit that did not involve any of the parties to this suit. The Applicant also seems to have acquired a title for the suit property different from the one in dispute in this suit. The legality of the Applicant's claim to the suit property was determined in the High Court case whose proceedings have not been set aside nor the judgement made therein varied.

Having perused, the draft defence and counter-claim by the Applicant annexed to the affidavit in support of the instant application, I get the impression that the Applicant wishes to commence a fresh suit against the Plaintiff and the Defendants in this suit based on the agreement for sale that she and her deceased husband entered into with the original owners of the suit property on 26th March, 1982. I am of the view that the Applicant and her deceased husband having moved the High Court and obtained an order that they had acquired the suit property by adverse possession, it would be an abuse of the process of the court to allow the Applicant to open a new case based on the agreement of sale dated 26th March, 1982 that the Applicant did not rely on as a basis of their claim when they filed the High Court case. I am tempted to agree with the 4th defendant that the Applicant and her husband did not complete the payment of the full purchase price for the suit property and that is why they were never granted a title and possession. Otherwise how can they explain their suit for adverse possession rather than specific performance of the agreement of sale that they entered into with the original owners? Even in the present application, the Applicant has not placed any evidence before the court showing that they paid the full purchase price. The power of attorney dated 18th November, 1983 which the Applicant claims to be supporting her case was made more than a year after the sale agreement that the Applicant and her deceased husband entered into with the original owners of the suit property on 26th March, 1982. In that power of attorney, it is stated expressly that the Applicant and her husband still owed the original owners some money on account of the purchase price.

I am also not persuaded that the Applicant was not aware of these proceedings. From the material on record, the Plaintiff has been residing on the suit property from 1990s. When the 4th Defendant was being registered as the owner of the suit property in early 1990s, the Plaintiff was in possession. The Applicant has not convinced me that it was until January, 2020 that the Applicant realized that the Plaintiff had a claim over the suit property and that he had filed this suit and obtained an order of injunction against his eviction from the suit property. Like the Plaintiff and the 4th Defendant, I find it difficult to believe that for 30 years the Applicant did not bother to find out what was happening on her parcel of land on a prime area in the City of Nairobi.

I am of the view that a case has not been made out for the joinder of the Applicant and the Chief Land Registrar in this suit. I am of the view that having regard to the issues that will arise regarding the manner in which the Applicant acquired her title to the suit property and titles to the subplots that I have highlighted above, joinder of the Applicant to this suit would not assist the court in determining the real issues in question in the suit but would rather convolute the matter and confuse the issues thereby unnecessarily prolonging the hearing of the suit which has been heard substantially. It should also be noted that this suit has been pending in court for the last 31 years. Public policy demands that there must be an end to litigation.

In view of the foregoing, it is my finding that the application dated 10th June, 2020 has no merit. The same is dismissed with costs to the Plaintiff and the 4th Defendant.

DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

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

Mr. Wangira for the Applicant

Mr. J.B.Machira for the Plaintiff

N/A for the 1st, 2nd and 3rd Defendants

Mr. Keyonzo for the 4th defendant

Ms. C. Nyokabi - Court Assistant