



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 46 OF 2018

PAUL LABOSO & 34 OTHERS.....PLAINTIFFS

VERSUS

WILSON JACK MAGETO & OTHERS.....DEFENDANTS

RULING

Before are two Chamber Summons dated 10/9/2018 and a Notice of Motion Application dated 4/2/2019.

The first Chamber Summons dated 10/9/2018 is brought under Order 26 Rules 1 and 2 of the Civil Procedure Rules and it seeks the following Orders:-

- 1. That this Honourable court order the Plaintiffs to provide security for costs of the 1st Defendant for the subject matter amounting to Kshs. 100,000,000/=;**
- 2. That cost be in cause.**

The Application is supported by the Affidavit of the 1st Defendant / Applicant and is premised on the grounds that the Respondents have caused the Applicant to suffer financial damage and loss through filing of the instant suit. That the Respondents are unknown to the Applicant and is therefore completely unaware of the means of the Respondent's. That the Respondent's claims are unverifiable causing the suit to be frivolous which suit would expose him to costs, loss and damage without recourse. That Mara Coffee Millers Ltd have further developed the [property and this may expose the Applicant. That the Security for costs will help the Applicant and Mara Coffee Millers protect their financial interest in this case. In his Supporting Affidavit the Applicant avers that he entered into a Sale Agreement with Mara Millers sometime in December, 2017 and Mara Coffee Millers has since entered possession of the suit property. That since Mara Coffee Millers has proprietary interests, their dealings in the property would be affected. He contends that he acquired the suit property legally from his late father who had purchased THE suit property legally from his late father who had purchased the suit property from one **Thomas Mareka Tome** sometime in the year 1986. That due process was followed in demarcating and adjudicating the various land sections in Transmara. That he stands to suffer immensely should the Order for security for costs are not granted.

The Application is opposed by the Replying Affidavit of the 1st Respondent dated 9th October, 2018 in which he avers that the applicant's alleged title to the suit property was acquired fraudulently. That if indeed the Applicant had taken actual possession of the suit land the same would be known to the neighbours if at all he was utilizing the same. That the Applicant would not be prejudiced at all since he has already proceeded to sale the suit property therefore, he must have received some deposit towards purchase of the suit property. The suit herein raises pertinent issues of fraud and the issue for costs can only be determined after the matter has been heard and determined. It is the 1st Respondent's contention that the Applicant has no knowledge of the Respondents financial capabilities to conclude that they would not be in a position to pay costs in any event. That the application is misconceived and brought in bad faith. For the above reasons the same should be dismissed.

The Applicant in his further Affidavit dated 29/10/2018 avers that the Respondents are portraying ethnic arrogance and chauvinism on claims that he is a non – resident of the suit property. That his property is TRANSMARA / MOYOI / 195 and that the Respondents should look for their property in Angata Baragoi and not Moyoi. That the Respondents allegation of fraud and acquisition of land from the Maasia to Kipsigis are best addressed during trial. He further avers that the Respondents are evading the main issue being the subject of this Application and that being for deposit of security for costs. That security for costs is a surety to the Defendants and the same has been brought in good faith to secure his economic interest. That he is apprehensive that the interest of justice will not be sufficiently met if the Orders are not granted.

I have read and analysed the Application, Replying Affidavit, Further Affidavit, annexed documents and Submissions made by both parties

herein. I do note that the 2nd and 3rd Respondent have not filed any documents in opposition to the Application. The issue for determination at this juncture is whether the Order for security for costs of the Applicant of Kshs. 100,000,000/= should be granted.

Order 26, Ruler 1 of the Civil Procedure Rules provides that: -

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

Order 26, Rule 2 provides that:-

“If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent’s belief in the truth of the facts alleged.”

In the case of **Kihiumwiri Farmers Company Limited =vs= Breeze Investments Company Ltd & 3 others [2019] eKLR**, the court observed that:-

“... The purposes of the order is to protect the Defendant from situations in which he is dragged to court, and made to lose even the costs of litigation. It is also meant to prevent frivolous and useless litigation by persons. Having said that, courts however must ensure that parties with just claims are not prevented from accessing the seat of justice for their claims to be determined. The balance to discourage useless litigation and provide access to justice by just claimants is the thin equilibrium that the court must strive to achieve.”

It is trite law that security for costs can be ordered by a trial court in its discretionary power. In the case of **Marco Tools & Explosives Limited =vs= Mamujee Brothers Ltd [1988] KLR 730** held:-

“... The court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest.”

The Applicant herein has stated that he does not know the Plaintiffs individually and therefore their financial capabilities to pay costs in any event is also unknown. I wish to state that a party seeking security for costs must lay basis that the plaintiffs would not be in a position to pay costs in the event that the Defendant is awarded the same. The contention by the Applicant that the Plaintiffs either individually or collectively are unknown to him is not sufficient to warrant grant of security for costs. There is need to support such allegations with evidence. In this case, the Application has not adduced any evidence in support thereof. Having stated the above, I find that the application lacks merit and the same is dismissed.

I will proceed to the second Chamber summons filed on even date in which the Applicant is seeking grant leave for Mara Coffee Millers Ltd to be enjoined as an interested party and costs. This Application is premised on the grounds and the Supporting Affidavit of the Applicant in which he avers that he had already sold the suit property to Mara Coffee Millers (proposed interested party) and that the Interested Party has been in possession since December 2017. That this suit directly affects the financial and proprietary interest of the proposed interested party. That the Respondents started causing nuisance and disturbance and proceeded to lodge caution on the suit property when they acquired information that the suit property had been sold to the proposed interested party. That it is in the interest of justice that the prayers as sought are granted herein in order to secure the financial interest of the Applicant and that of the proposed interested party.

The Application is opposed by the 1st Respondent through his Replying Affidavit sworn on 9/10/2018 in which he avers that the individuals the Applicant purports to have sold the land to are not known to him and the other Respondents since they have been in occupation of the suit property for more than 60 years. That the proposed interested party herein does not have an accrued interest. That the proposed interested party is not keen in participating in this litigation from a reading of his Affidavit. That the Applicant’s attempt to drag the proposed interested party is in bad faith and meant to delay the determination of this suit. In addition, the Application in his annexed documents has deliberately failed and or omitted to disclose the amounts received as deposit from the Sale Agreement, an act amounting to concealing of material evidence. That the Applicant is keen on disposing the suit property whose title has been acquired fraudulently, instead he should refund the 10% deposit to the proposed interested party.

The Application is also opposed by the Replying Affidavit of the Director of the proposed interested party sworn on 29/9/2018 in which he avers that on 29/6/2017, he entered into a sale Agreement with the Applicant for purchase of the suit property for a consideration of Kshs. 84,500,000/= in which a deposit of Kshs. 8,450,000/= was paid to the Applicant. That a fresh Sale Agreement was entered into between them and the Applicant on 1/12/2017. The Applicant herein did not complete part of his obligation within the stipulated period of 90 days which prompted the proposed interested party to issue a termination Notice on 22/8/2018. That owing to the issues surrounding the suit property the proposed interested party’s bank called off the loan facility earlier granted to them. That the Applicant herein has been unable to lodge and register the transfer in favour of the proposed interested party and as such there exists no financial and proprietary interests affecting them either directly or indirectly in the suit property. That the terms and conditions of the Sale Agreement that have been breached by the Applicant shall be addressed in a different forum. The proposed interested party has attached a copy of the Sale Agreement date d 1/12/2017 marked as ‘SKS 2’ in support thereof.

In reply, the Applicant in his Further Affidavit sworn on 29/20/2018 avers that the instant suit has not vitiated the Sale Agreement, that the transaction is ongoing and issues of termination and remedies are provided in the Agreement. That the proposed interested party is unwilling and unable to pay the full purchase price. The Applicant also concurs with the proposed interested party that issues relating to the Sale Agreement should be dealt with in a different forum. That it is only fair that the interested party is enjoined on this suit since it is their property which is at a risk.

I have read and analysed the Application, the documents in reply thereof filed by the parties herein. The issue for determination now is whether the proposed interested party should be enjoined in this suit.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides: -

“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(emphasis mine).

The purpose of this Order is on two levels: -

- a) That justice is effectively administered to all parties who appear before court; and
- b) That parties do assist courts in delivery of justice.

Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 defines an interested party as follows:-

“interested party” means a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

In the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others vs Attorney General & 4 others** [2017] eKLR the court observed that:-

“...It is a fundamental consideration that before a person can be joined as party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the suit would directly and legally affect the party seeking to be enjoined. It must be emphasized that, among others, the purpose of joinder of parties is to avoid multiplicity of suits. It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided.”

The Court also in the above case pointed out the elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-

- a) *the intended interested party must have ‘an identifiable stake’.*
- b) *or legal interest*
- c) *or duty in the proceedings*

The test in this instant case is rather that the Applicant / Defendant seeks that the proposed interested party be enjoined in the suit since it has an interest in the suit property. I have perused the documents annexed by the proposed interested party more particularly the Notice to issue Termination of Contract and the Sale Agreement. The proposed interested party has also contended in his Replying Affidavit that it has no financial or proprietary interest whatsoever in the suit property and any matters relating to the sale agreement would be addressed in a different forum. It appears to me that the Applicant wants for lack of a better word ‘force’ the proposed interested party to be enjoined for reasons best known to him. In my view, I find no identifiable stake in which the proposed interested party has in this suit more particularly in the suit property in which they have expressed intention of Terminating the Sale Agreement. Having found that the proposed interested party has no identifiable stake, the subsequent elements follow automatically. The proposed interested party has no duty in the proceedings and I find no reason to enjoin them. I therefore decline to grant the Orders sought in the Chamber Summons dated 10/89/2018. The same is hereby dismissed.

The third application is a Notice of Motion dated 4/2/2019 filed by the Applicant / Plaintiff herein seeking the following Orders:-

1. Spent

2. That this Honourable Court be pleased to grant temporary injunction restraining the Respondents whether by themselves, their agents and or servants or employees or persons intending to purchase the suit property from ploughing, dealing, interfering, alienating or otherwise disposing of suit property parcel number LR NO. Transmara / Moyoi / 195 situated within Angata Barakoi ward pending the hearing and determination of this Application.

3. That this Honourable court be pleased to grant temporary injunction restraining the Respondents whether by themselves, their agents and or servants or employees or persons intending to purchase the suit property from ploughing, dealing, interfering, alienating or otherwise disposing of suit property parcel number LR. NO. Transmara / Moyoi / 195 situated within Angata Barakoi ward pending the hearing and determination of this suit.

4. The costs of this application be in the cause.

The Application is supported by the Affidavit of the 1st Applicant / Plaintiff with the authority of the other Plaintiffs. The application is premised on the grounds that they are the lawful owners of the suit land having been in possession of the same for over 60 years. That on 29/1/2019 the 1st Respondent brought unknown people to the suit land to plough the suit property in total disregard to the caution registered on April, 2018. Further, the 1st Respondent has attempted to evict the Applicants from the suit property with the aid of police officers causing fear and tension among the residents. That the Applicants are apprehensive that the 1st Respondents will proceed to till the land if not stopped and the same will occasion them loss as they have occupied the suit property with their families for decades. The Applicants contend that the title obtained by the 1st Respondent was fraudulent since he has never occupied the land and neither have his predecessors. That there is urgent need to protect the rights and interests of the applicants and their families to avoid further intimidation and eviction.

The Application is opposed by the Replying Affidavit of the 1st Respondent sworn on 22/2/2019 in which he avers that the Applicants are misleading this court by making frivolous claims. That the Applicants must have mistaken the suit property since his property is TRANSMARA / MOYOI / 195. That he acquired the suit property legally. That the Applicants are misguided in their approach that only land can be acquired by a person of their ethnicity. As such the application is ill advised, unmeritorious and should be struck out with costs. In reply thereof the 1st Applicant has in his Supplementary Affidavit sworn on 4/3/2018 (I believe it was intended to read 4/3/2019) dismissed claims of the 1st Respondent in his Replying Affidavit. He has further buttressed the issues raised in his application and Supporting Affidavit. More particularly, there is clear contradiction on the 1st Respondent's allegations as to how he acquired the suit property from his father who acquired it through an adjudication process on one hand and through sale on the other hand. That one of Applicants herein has also been accused by the 1st Respondent of forcible entry of the suit property through criminal case Number 873 of 018 filed in Kilgoris Law Courts. In reply, the 1st Respondent has in his Further Replying Affidavit sworn on 3/4/2019 refuted claims of intimidation with the use of Police officers and has in summary, reiterated his averments as contained in his Replying Affidavit.

I have read and carefully analyzed the Application, the various replies thereof and the Submission filed by both parties. The issue for determination now is whether the grant of temporary injunction should be granted at this stage.

Order 40 Rule 1 of the Civil Procedure Rules provides a basis upon which a temporary injunction may issue and states:-

“Where in any suit it is proved by affidavit or otherwise –

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
- b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the [plaintiff will or may be constructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”**

In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an Injunction may be exercised if it is just and convenient to do so. In the case of **Giella vs Cassman Brown & Co Ltd**, the court set out the principles for interlocutory injunction which are:-

- a) The Plaintiff must establish that he has a prima facie case with high chances of success;**
- b) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;**
- c) If the court is in doubt, it will decide on a balance of convenience.**

In addition, an injunction is a discretionary remedy. As we held in **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another:-**

“ To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.

The Applicant in this case has contended that the 1st Respondent has with the aid of police officers attempted to intimidate the Applicants with threats of eviction. That the 1st Respondent has brought unknown people to plough the suit property despite them lodging a caution. It is also the Applicant's contention that they have lived on the suit land for over sixty (60) years. Having analysed the facts and the law, and balancing the interest of the parties to the best I can, I hereby Order and direct that status quo of the suit property be maintained pending hearing and determination of the suit herein. I also hereby order that costs be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 30TH DAY OF NOVEMBER 2021

MOHAMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Nonappearance for the Plaintiff

Nonappearance for the Defendnt

Tom Maurice-Court Assistan