



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E 275 OF 2021

HANNAH MUMBI KARIUKI.....PLAINTIFF/APPLICANT

VERSUS

MILCAH WANJIRU MWIRI KAMAU.....1ST DEFENDANT/RESPONDENT

ELIJAH MWEGA.....2ND DEFENDANT/RESPONDENT

RULING

1. There are two applications filed before court, the Plaintiff/Applicant's Notice of Motion dated 22/07/2021 and the 2nd Defendant's Notice of Motion dated 19/10/2021.

2. The Plaintiff/Applicant Notice of Motion dated 22/07/2021 is filed under Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 the Laws of Kenya and Order 40 rule 1,3, 4(1) and 5 of the Civil Procedure Rules and Article 159(2)(d) of the Constitution. In the application the Plaintiff/Applicant is seeking for the following: -

i. Spent.

ii. THAT this Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Defendants/Respondents whether by themselves, their agents and/or servants from proceeding with the intended sale, transfer, alienation or otherwise interfering or dealing with the property being Plot No. Dagoretti/Riruta/378 pending the hearing and determination of this Application.

iii. THAT this Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Defendants/Respondents whether by themselves, their agents and/or servants from proceeding with the intended sale, transfer, alienation or otherwise interfering or dealing with the property being Plot No. Dagoretti/Riruta/378 pending the hearing and determination of the suit herein.

iv. THAT the honourable court be pleased to grant a mandatory injunction to preserve the status quo that is currently subsisting pending the hearing and determination of the suit herein.

v. THAT costs of this application be provided for.

vi. THAT the honourable court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.

3. The 1st Defendant/Respondent herein opposed this application vide a Replying Affidavit dated 19th October 2021 seeking the court to dismiss the Application and the main suit as the same does not have a cause of action.

4. The 2nd Defendant/ Respondent herein filed a Notice of Motion dated 19th October 2021 under Order 1 Rule 10 sub-rule (2) of the Civil Procedure Act cap 21 and Section 3A of the Civil Procedure Act cap 21 Laws of Kenya. The 2nd Defendant/Respondent is seeking for the following: -

i. Spent.

ii. That the 2nd Defendant/Applicant be struck out from this suit proceedings having been a misjoinder and improperly sued and his name be removed from this suit.

iii. That costs be provided for.

A. The Applicant's Case

5. The grounds of the Application are cited at the foot of the Application, and it is further grounded on the Supporting Affidavit sworn by Hannah Mumbi Kariuki, on 22nd July 2021.

6. The Applicant avers that the Applicant together with her family have been residing and is the rightful beneficial owner of all that property known as Plot No. Dagoretti/Riruta/378 where she has built her home.

7. It is her contention that the Defendants/Respondents have been threatening and have interfered with the Plaintiff/Applicant's said property by wrongfully and illegally presenting the same to unknown third parties purporting to cause a sale of the said property to the exclusion of the Plaintiff/Applicant who is the sole beneficiary of the said plot.

8. That on 9th September 2016, the Applicant made an application to the National Lands Commission for regularization of the suit property in her name. On 22 November 2016 the National Land Commission wrote to the County Executive Committee, Nairobi City County seeking for comments/recommendations regarding the Applicant's request for regularization of the suit property.

9. On 23rd January 2019 the Nairobi City County through its County Secretary and Head of County Public Service wrote to the National Land Commission and recommended that the Applicant be issued with a title deed for the suit property after conducting a ground inspection and establishing that indeed the Applicant was in possession of the suit property and had built her home on it.

10. The Applicant states that on 7th October 2020, the Defendants herein threatened her that they would instigate her eviction and/or removal from the suit property and thereafter dispose off the suit property by way of sale to third parties.

11. In the month of November 2020, the Applicant avers that she was again informed by the 1st Defendant's daughter that she should not worry about the intended sale of the suit property as she would be given a bigger share from the proceeds of sale by the Defendants. These threats and/or intention of the Defendants to sell off the suit property have subsisted to date with the latest information reaching her through friends and neighbors on or about the month of July 2021.

12. Upon learning about the intended sale, the Plaintiff/Applicant made and is still making follow ups with the National Land Commission to get to know the progress of the process of getting her title to the suit property. The Plaintiff/Applicant was duly informed that the process had been finalized but the file CF 4976 at the National Lands Commission in regard to the suit property was missing and has not been traced to date.

13. The Plaintiff/Applicant has been living on the suit property and enjoying quiet possession of the same and has never been threatened with eviction or any other action from any authority or person and has never at any one point entered into any agreement whatsoever or executed any agreements for sale or plot transfer forms in regards to the suit property to the Defendants herein or to any other person or entity for that matter.

14. The Plaintiff/Applicant is yet to be issued with her title to the suit property and she is not aware of any title held by the Defendants to the suit property and if any exists then the same was issued irregularly through a wrongful and fraudulent scheme orchestrated by the Defendants herein to deprive her of the suit property.

15. The Defendants together with other persons unknown to the Plaintiff/Applicant herein have been threatening to evict her from the suit property wherein she lives with her family, and it has come to her notice that the said parties intend to sell, transfer and alienate the suit property to the detriment of the Plaintiff/Applicant and her family.

16. That unless restrained, the Respondents will make their threats true by wrongfully and illegally selling the suit property thus causing the Plaintiff/Applicant irreparable damages as she has not been made party to any transactions involving the suit property nor appointed the Defendants/Respondents herein as her agents.

17. The Applicant avers that unless the matter is heard expeditiously, ex-parte and the orders sought herein granted, the Plaintiff/Applicant will completely be prejudiced.

18. That it is in the interest of justice that the application be allowed.

B. The 1st Respondents case

19. The 1st Defendant/Respondents has opposed this Application vide a Replying Affidavit sworn by Milcah Wanjiru Mwiru Kamau on 19th October 2021 seeking that the suit be dismissed on the following grounds: -

i. That the entire Application and the suit against the 1st Defendant is misconceived, incompetent, fatally defective which should not be entertained by this Honorable court when the conduct of the Applicant is fraudulent and failed to disclose materials facts.

- ii. That the 1st defendant is an elderly Mother/Citizen of the Republic of Kenya.
- iii. That she is a widow to the late Joseph Mwiri Kamau who before his demise and even now he is the registered owner of the said Title No. Dagoretti/Riruta/5378 until his demise.
- iv. Upon the demise of her late husband as a family together with her Children they filed for succession before the High Court in Nairobi being succession cause Number 588/2017 in which a grant on the same was issued on 30th July 2019.
- v. The succession cause was not challenged and has never been challenged to date and the same was duly gazetted in the Kenya Gazette.
- vi. The property in issue is the Title Number Dagoretti /Riruta/S.378 which was listed as one the properties belonging to the estate of the 1st defendant's late husband.
- vii. Under the succession cause, the 1st defendant was to receive a life interest and thereafter she bequeaths in equal shares to her Children.
- viii. That she has conducted the current search and the land in question is registered in the name of his late husband Joseph Mwiri Kamau.
- ix. The 1st defendant is currently the one who has been paying the land rates and rents over the property in issue.
- x. The 1st defendant knows the Plaintiff has been a Squatter in their land and before the death of her husband attempts had been made to remove her out of the said land and she kept promising to move.
- xi. The 1st defendant's late husband has been engaging her since the year 2007 to move out of the said parcel of land and all the efforts to move her bore no fruit as his sons became violent and threatened her late husband.
- xii. The Plaintiff herein cannot purport to seek for adjudication for land with an already existing title and the land in which she resides does not belong to her and the same belongs to the 1st defendant's late husband.
- xiii. Being an elderly widow, the 1st defendant does not have any power to forcefully evict the Plaintiff all that she could ask that she moves out of her land.
- xiv. The 1st defendant has not transferred the said title Dagoretti/Riruta 5378 to her name as she has been unwell taking into consideration the challenges they have had as a country like COVID-19 pandemic.
- xv. The Applicant/Plaintiff is not the 1st defendant's co wife and they are not related either in affinity or consanguinity.
- xvi. The 1st defendant prays that the orders issued by this Honorable Court should be set aside and allow me to enjoy her property.
- xvii. This Court should honor and respect the sanctity of the title and revoke the orders so granted on basis of misrepresentation of the facts and evidence before this Honorable Court.
- xviii. The 1st defendant avers that the orders sought do not meet the criteria /degree made in **Geila-vs-Cassman Brown [1973] EA** as to grant injunctive orders.
- xix. The 1st defendant therefore seeks and prays that this Honorable Court dismiss the current application together with the main suit as the same does not disclose a cause of action.

C. The 2nd Defendant's/Respondent's Application dated 19th October 2021

- 20. The Applicant and the 1st Defendant/Respondent have not filed a response to this Application of the 2nd Defendant/Respondent dated 19/10/2021.
- 21. The grounds of the Application are cited at the foot of the Application, and it is further grounded on the Supporting Affidavit sworn by Elijah Mwega, on 19th October 2021.
- 22. The 2nd Defendant avers that he runs a non-governmental association known as KARIKA AGING & HIV AIDS PROGRAM in Riruta satellite area.
- 23. He avers that he knows the 1st Defendant and the Plaintiff/Applicant herein having helped them being elderly members of the community within which his institution operates.

24. The 2nd Defendant avers that he does not have either beneficial or proprietary interest on the suit property referred by the plaintiff as Dagoretti/Riruta/s.378 but indeed the plot number is Dagoretti Riruta /s.378 and the same has a title deed belonging to one Joseph Mwiri Kamau now deceased.

25. It is his contention that he does not have any interest on the piece of land referred as Dagoretti/Riruta/s.378 which has been erroneously referred to as 378 by Plaintiff in suit concerning the said piece of land.

26. The 2nd Defendant contends that he does not operate or run any company that deals with land transactions through selling or in any other manner and thus the claim of me threatening the Plaintiff does not arise.

27. He contends that he has not interfered with the suit property as he does not live nor stay on the suit land, and he has not threatened the Plaintiff herein as pertaining the land in question. That he has no ground of any claim for title as such to warrant him being a party in this suit at all.

28. That it is therefore fair and just to struck out and remove the name from this suit proceedings as demonstrated.

D. Submissions

29. The parties' advocates did not file any written submissions, but a Ruling date was reserved.

E. Analysis and Determination

30. I must at this stage pause and remind litigants and their Counsel of the importance of proper pleadings especially when it comes to the description of the property in dispute. The Plaintiff and the Replying Affidavit of the 1st Defendant/Respondent herein describes the suit land as "**Dagoretti/Riruta/378**" when it is clear from the Certificate of Search that it is infact **Dagoretti /Riruta/S.378**. The Court had to amend the pleading on its own motion. Even where Counsel delegate the drafting of pleadings to their Assistant, it is their responsibility to confirm that the pleadings are properly drawn before they are filed. I doubt if the wide powers granted to this Court by **Article 159(2)** of the **Constitution** include the powers to draft pleadings for the parties or their Counsel.

31. The Plaintiff/Applicant since filing her application dated 22/07/2021 has not been enthusiastic in prosecuting it. On the day when the application was mentioned in court on 20/09/2021 she did not attend court, neither did she attend on the subsequent date of 27/10/2021.

32. Only the 1st and 2nd Defendant/Respondents attended court on 15/11/2021 when through their Counsel they moved the court to consider the application filed by the 2nd Defendant dated 19/10/2021.

33. The court will therefore not consider the application dated 22/02/2021 because it has not been prosecuted and the Plaintiff has failed to attend court. The court will therefore limit its findings to the Application filed by the 1st Defendant/Respondent dated 19/10/2021.

34. After going through the Application, the affidavits and pleadings the main issue for determination in this application is whether the applicant is properly joined in this suit as a necessary party.

35. **Order 1 Rule 10 (2)** Civil Procedure Rules is to the effect that: -

"the court may at any stage of any proceedings order any name of party improperly joined as Defendant be struck out."

36. Whereas the plaintiff did not file any response to the Application the court is under obligation to ensure that the perusal of the Plaintiff confirms the existence of serious triable issues. In the case of **Peter Ngugi Kabiri v Esther Wangari Githinji & another [2013] eKLR** it was stated that ***"In judging whether a plaintiff discloses triable issue the court will assume all the allegations in it to be true... The court cannot strike out pleadings on grounds that it does not raise triable issues unless it is clear and obvious that the action will not lie in law."***

37. It is apparent from the plaintiff of the Plaintiff/Applicant herein that she is claiming ownership of the suit property and alleging a collusion by the 1st and 2nd Defendants/Respondents to take over this suit property to her exclusion.

38. I have considered the application herein together with the affidavit in support which is not opposed. Although the application is not opposed, the court is duty bound to make due consideration of the prayers sought and arrive at the necessary finding. The fact that an application is not opposed does not mean that it will automatically succeed. See **Supreme Court, Civil Appeal No.26/2018, Gideon Sitelu Konchellah –vs- Julius Lekakeny ole Sunkuli, & 2 Others [2018] eKLR**, where the court held that:-

"... the upshot is that as the 2nd and 3rd respondents had stated categorically that they do not oppose the application, the court will be excused for therefore deeming the application as being unopposed entirely. Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted..."

39. A perusal of the Plaintiff confirms the existence of triable issues. The plaintiff alleges that the Defendants with unknown persons have been threatening to evict her from the land where she alleges that she is the rightful owner.

40. The plaintiff avers that on or about 7/10/2020 the Defendants threatened that they would instigate the removal of the plaintiff from the suit property and thereafter dispose it by way of sale.

41. In considering whether the applicant should be enjoined in the suit, what must therefore be determined is whether the applicant is a necessary party to the suit. The case of *Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273*, cited in *Pizza Harvest Limited v Felix Midigo [2013] eKLR* sought to establish who a necessary party is. **Devlin, J** held at p. 286-287:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

42. The 1st Defendant/Respondent has broadly submitted that he has no interest in the suit property and that he has worked with both the plaintiff and the 1st Defendant/Respondent through the Non-governmental organization he runs in the same area where the suit property is situated. My finding is that at this stage, the Court cannot delve into determination of the issues in the main suit. Whether the 2nd Defendant/Respondent is involved in the disposal of the suit property or threatened to sell it jointly with the 1st Defendant/Respondent is a matter which can only be determined upon hearing the parties in the main suit. The action against the 2nd Defendant/Respondent lies in law and it is my finding that the innocence or otherwise of the 2nd Defendant/Respondent can only be determined upon a full hearing of the suit.

43. Order 1 rule 10 (2) of the Civil Procedure Rules, 2010 gives the court the discretion, on terms that appear just, to order the name of a party improperly joined to be struck out and the name of any person who ought to have been joined or whose presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involving the suit to be added. This may be done at any stage of the proceedings.

44. The question therefore is whether it is in the interest of justice for the 2nd Defendant/Respondent to be removed as a defendant in these proceedings and whether his removal will hinder the Court from effectually and completely adjudicating and settling all questions involved in this suit. On this Order 1 Rule 10 (2) gives the court discretion to order joinder or removal of a party.

45. The 2nd Defendant does not deny knowing and being involved in the lives of both the 1st Defendant/Respondent and Plaintiff/Applicant. He admits knowing both parties. In my view, the 2nd Defendant is a necessary party whose presence will assist this court in effectually and completely adjudicate upon and settle all issues arising in this dispute.

46. It is therefore my considered opinion and finding on this application that the 2nd Defendant was not improperly enjoined in the suit. This suit discloses a cause of action against the Defendants and the application therefore fails and the same is hereby dismissed. Costs shall be in the cause.

It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021

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MOGENI J

JUDGE

IN THE PRESENCE OF:

N/A FOR THE PLAINTIFF/APPLICANT

MR. ONKANGI FOR THE 1ST AND 2ND DEFENDANTS/RESPONDENTS

MR. VINCENT OWUOR.....COURT ASSISTANT