



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT E216 OF 2021

PAUL GATHURU KARIUKI 1ST PLAINTIFF

JAIWE WAMBUI KARIUKI2ND PLAINTIFF

VERSUS

EENS LIMITED.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

RULING

Introduction

1. The Plaintiffs filed a Notice of Motion dated 16th June 2021 in which they prayed for the following orders:

a. That a temporary injunction do issue against the 1st Defendant, its agents, servants or any other persons claiming title through the 1st defendant from selling, transferring, assigning, building, entering, charging or in any other way dealing with all that parcel of land known as Land Reference No.15083/39 Muthaiga North Nairobi (hereinafter referred to 'suit property') pending the hearing and final determination of the suit.

b. That all further registration of change or registration in ownership, charging, mortgaging, leasing, subleasing, allotment, user occupation or possession in any kind of right, title or interest over the suit premises within the Nairobi registry, government department and all other registering authorities be and hereby prohibited by way of a temporary injunction pending the hearing and determination of the suit.

c. Spent.

2. The application is premised on the grounds on the face of it as well as the Supporting Affidavit sworn by Paul Gathuru Kariuki, the 1st Plaintiff, who deponed that him and the 2nd Plaintiff, his wife, are lawfully registered as owners of **Land Reference No.15083/39 Muthaiga North Nairobi**, the suit property, since 16th December 1991, when they obtained the title from Nyari House Limited and that they immediately took actual possession of the suit property and have remained in possession of the land to date.

3. The 1st Plaintiff deponed that he discovered the suit property was registered in the name of the 1st Defendant when he conducted a search on the suit property on 22nd February 2021 and that the registration of the suit property in favour of the 1st Defendant was fraudulent and irregular as the alleged transfer and registration in favor of the 1st Defendant was unknown to them.

4. The 1st Plaintiff averred that the 1st Defendant was unknown to the Plaintiffs; that they have never sold the suit property nor signed a sale agreement with the 1st Defendant or any party; that the national identity cards, personal identification numbers and the photographic impressions used to transfer the suit property to the 1st Defendant do not belong to the Plaintiffs and that the original title has at all times been in their possession. According to the Plaintiffs, any documents lodged by the 1st Defendant to facilitate the registration of the suit property in his name were forged, fraudulent and constitute a criminal offence.

5. It was deponed by the 1st Plaintiff that the 2nd Defendant was negligent and reckless in registering the transfer in favor of the 1st Defendant by: registering the title in favour of the 1st Defendant while the original title was held by the Plaintiffs; failing to detect or suspect

the fraud within reasonable time to avoid the fraudulent transfer; failing to take adequate precautions to avoid registering the said transfer; failing to cancel the transfer upon being notified that the same was fraudulent; failing to exercise due care, skill, diligence or competence in registering the said fraudulent transfer; and registering a clearly fraudulent transfer without caution or care.

6. The 1st Plaintiff stated that he is reasonably apprehensive that unless this court protects and preserves the suit property by way of an injunction, the 1st Defendant is likely to sell or deal with the property in a manner that will get the property further away from them and expose them to irreparable loss and damage; that the unlawful and fraudulent registration of the suit property in the 1st Defendant's name denies the Plaintiffs the use and enjoyment of their investment and that the said transfer has unjustly taken away their lawful proprietary interest in the suit property.

7. The 1st Plaintiff stated that he is a state witness in a pending criminal case being **Criminal Case No. 482 of 2012 Republic v John Gitau Kung'u and others** in which the accused persons have been charged with fraudulently selling the suit property to the 1st Defendant.

8. The 1st Defendant responded to the application through a Preliminary Objection dated 13th September 2021. The 1st Defendant averred that the application was *res subjudice* pursuant to **Section 6** of the **Civil Procedure Rules** as there is a suit in respect of the same subject matter pending determination in **Criminal Case No. 482 of 2012 Republic v John Gitau Kung'u and others**, in which the 1st Defendant is a complainant; that changes in the registration status of the suit property would jeopardize the ongoing criminal case; and that the proceedings in this matter may lead to parallel decisions in multiple forums to the 1st Defendant's detriment.

9. The 1st Defendant averred that the application is in bad faith because the Plaintiffs are privy to Criminal Case No. 482 of 2012 and as such should be struck out.

Submissions

10. The parties canvassed the Notice of Motion dated 16th June 2021 and the Preliminary Objection dated 13th September 2021 via written submissions. The Plaintiffs' Counsel relied on the case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358** where the Court of Appeal highlighted the principles to be satisfied in an application for an injunction.

11. The Plaintiffs' advocate submitted that it was only fair and equitable that injunctive orders be granted to preserve the property pending hearing of the main suit; that if the order of injunction is not granted, the 1st Defendant is likely to transfer the property to a 3rd party, rendering this suit and the application nugatory and that the application and the facts set out in the supporting affidavit remain unchallenged and uncontroverted.

12. The Plaintiffs' Counsel submitted that the 1st Defendant's preliminary objection was a non-starter, untenable, misconceived and lacked any basis in law and that in accordance with **Section 193A** of the **Criminal Procedure Code**, a civil suit is not a bar to criminal proceedings. Counsel relied on the case of **James Mutisya & 5 others v Alphayo Chimwanga Munala & 2 others [2021] eKLR** where it was held as follows;

“Firstly, that the fact that there exist civil proceedings emanating from the same subject matter is not a bar to institution and continuation of criminal proceedings. This is the dictate of Section 193 A of the Criminal Procedure Code (Cap 75) Laws of Kenya it provides thus:

“Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings...”

As rightly submitted by the claimants criminal and civil proceedings can run concurrently. We agree with the Holding of the court in the case of Alfred Lumiti Lusiba -vs- Pethad Pank Shantilal & 2 others[2010] eKLR that:

“...The conclusion that one can draw from Section 193 A of the Civil Procedure Code together with the decisions of the learned Judges in the aforementioned cases is that both civil and criminal jurisdiction can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse the due process of the court in whatever manner..”

We could not agree more with the holding of the court in the Alfred Lumiti Lasiba case above. These are civil proceedings governed by civil procedure rules and also different evidential and legal standards. On the other hand, Criminal Case No. 2066/18 is governed by the Criminal Procedure Code with a different set of evidential standard and outcome. While the central component of both cases is guarantorship, the legal burden of proof is totality different in both cases. It cannot this be said that these proceedings an sub-judice the criminal proceedings. We thus do not find merit in the Notice of Preliminary Objection and the Application dated 23.1.2020.”

13. Counsel also relied on the case of **Alfred Lumiti Lusiba vs Pethad Pank Shantilal & 2 others [2010] eKLR** where the court held that:

“The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction... The conclusion that one can draw from Section

193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner. The upshot of this discussion is that the learned magistrate misdirected herself on law by staying the civil case against the respondents on the ground that the case was based on a judgment which was a subject of an appeal that was pending for determination. I find merit in the appellant's appeal and I hereby allow it. The appellant will also have the costs of the appeal.

14. The 1st Defendant's advocate submitted that the Plaintiff's case falls short under Section 6 of the Civil Procedure Act which sets out the *sub judice* rule; that the purpose of this rule is to prevent the filing of multiple suits between same parties or those claiming under the same subject matter and that they have satisfied the definition of a preliminary objection having raised a pure question of law.

15. Counsel for the 1st Defendant argued that the subject matter of this case is the same subject matter in **Criminal Case No. 482 of 2012** in which the 1st Defendant is a complainant and that the 1st Defendant would be prejudiced if this matter was to proceed as it would jeopardize the criminal case. Counsel relied on the case of **Republic v Registrar of Societies-Kenya & 2 others ex-parte Moses Kirima and 2 others[2017] eKLR**, which set out the principle of *sub judice* as follows:

“Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Analysis and Determination

16. The issues for determination before this court are:

a. Whether this suit is *sub judice*.

b. Whether orders of temporary injunction should issue against the 1st Defendant pending hearing and determination of this suit.

17. The 1st Defendant raised a preliminary objection in which he sought that this suit be struck out as it contravenes the *sub judice* rule. The preliminary objection is based on the ground that this suit is *sub judice* **Criminal Case No. 482 of 2012, Republic v John Gitau Kung'u and others**, where the 1st Defendant is the complainant while the 1st Plaintiff is a state witness.

18. The definition of a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd –Versus- West End Distributers Limited [1969] E.A 696** as follows:

“A Preliminary Objection raises point of law which is argued on the assumption that all facts pleaded by both parties are true. If argued, a Preliminary Objection, may dispose the suit without going to the merits of the application or matter. Where there are points of law and facts, the facts require proof of evidence.”

19. In **Oraro v Mbaja (2005) KLR 141**, Ojwang J. (as he then was) quoted the **Mukisa Biscuit Case (Supra)** and expressed himself thus:

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...”

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

20. It is not dispute that the suit property herein is a subject matter in **Criminal Case No. 482 of 2012 Republic v John Gitau Kung'u and others**, where the accused persons have been charged with fraudulently selling the suit property to the 1st Defendant. The *sub judice* rule is articulated in **Section 6 of the Civil Procedure Act** as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

21. Courts have established certain conditions that must exist for the principle of *res sub-judice* to apply. In the case of **Republic vs. Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** the court held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or

proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...

22. To buttress this position, the court in Edward R. Ouko vs. Speaker of the National Assembly & 4 Others [2017] eKLR held as follows:

“18. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

(1) There must exist two or more suits filed consecutively.

(2) The matter in issue in the suits or proceedings must be directly and substantially the same.

(3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.

(4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

23. In the case of David Ndi & Others vs. Attorney General & Others, Nairobi High Court Petition No. 282 of 2020, the court held as follows:

“The rationale behind this provision is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts, and the Court will, if necessary, stay one of the claims. Ordinarily, it is the second suit that will be stayed. (See Thames Launches Ltd v Trinity House Corporation (Deptford Strond) [1961] 1 All ER 26; Royal Bank of Scotland Ltd v Citrusdal Investments Ltd [1971] 3 All ER 558) 509).

Two obvious pre-requisites necessary to stay a suit under this provision of the law are one, the matter in issue in the subsequent suit must be ‘directly and substantially in issue’ in the previously instituted suit and, two, the parties in the two suits must be the same parties or are parties claiming under them or litigating under the same title.”

24. The law on concurrent civil and criminal proceedings is set out in Section 193 A of the Criminal Procedure Code, Cap 75:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

25. The Court of Appeal in Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR stated that Section 193A should be exercised responsibly, lawfully and in good faith. The court stated as follows:

“While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith.”

26. In Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others [2016] eKLR, Ngaah J opined as follows with respect to the applicability of Section 193 A of the Civil Procedure Act:

“But even so, the viability of a cause of action in a civil claim does not necessarily stem from the conviction of a defendant in a criminal trial. Further still, the success or failure of a civil suit based on facts similar to those that a criminal prosecution is mounted does not necessarily depend on the conviction or acquittal of the defendant in the criminal trial; the outcome of a civil suit is independent from that of a criminal trial largely because the standard of proof required of a prosecutor in criminal prosecution is higher than that required of a claimant in a civil suit. To sustain a conviction, the prosecution must discharge the burden of proof beyond all reasonable doubt that the accused committed the offence with which he is charged. On the other hand, the claimant in a civil suit will only need to demonstrate on a balance of probability that the defendant is the tortfeasor and as a result of his tortious act or omission, the claimant suffered some sort of loss or damage that would warrant a remedy...The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction.... the conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

27. As stated in the above decisions, the pendency of a criminal suit is not a bar to civil proceedings, provided that such concurrent matters are filed and pursued lawfully and in good faith. The reading of the Plaintiff in this matter shows that the subject matter herein is in respect to ownership of the suit land, while the core issues in Criminal Case No. 482 of 2012 Republic v John Gitau Kung'u and others are the purported fraudulent acts of the accused persons with respect to the suit property. The outcomes of these two suits are independent of each other and unlikely to be parallel or contradictory, as the jurisdiction of the Criminal Court does not extend to nullification of title documents which have been acquired unlawfully.

28. Considering that **Section 193 A** of the **Criminal Procedure Code** allows for concurrent litigation of civil and criminal proceedings arising from the same issues, this court finds that the 1st Defendant's preliminary objection is unfounded.

29. The conditions for the grant of temporary injunctions are well established and set out in the *locus classicus* case of ***Giella vs. Cassman Brown (1973) EA 358*** as follows:

“The conditions for the grant of interlocutory injunction are now; I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

30. The first condition that the Plaintiffs herein must satisfy is that there is a prima facie case with a probability of success. In the case of ***Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125***, “a prima facie case” was described as follows: -

“A prima facie case in a civil application includes but is not confined to a “genuine and equitable case.” It is a case which, on the matter presented to the Court, a tribunal properly directing itself, will conclude that there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter.”

31. The second condition is that the applicant would suffer irreparable injury which cannot be adequately compensated by an award of damages. In ***Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018)eKLR*** the court defined ‘irreparable injury’ and ‘balance of convenience’ as follows:

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury...The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

32. The Plaintiffs case is that despite being the lawful owners and occupants of the suit property, their title was fraudulently transferred to the 1st Defendant. The Plaintiffs deponed that this fraud was effected through the negligence or recklessness of the 2nd Defendant in registering the title for LR No. 15083/39 in favour of the 1st Defendant.

33. The 1st Defendant has not denied the Plaintiffs' assertion that they were the registered proprietors of the suit property, and that indeed the Plaintiffs have never transferred the suit property to him. Indeed, the fact that the 1st Defendant is a complainant in a criminal case in which he has alleged that the accused persons fraudulently sold to him the suit property is an admission that the Plaintiffs did not sell to him the suit property.

34. That being the case, it is the finding of this court that the Plaintiffs have established that they have a prima facie case with chances of success. Indeed, considering that the suit property has since been transferred in favour of the 1st Defendant, if the court declines to grant the Plaintiffs an order of temporary injunction, the 1st Defendant may deal with the suit property in a manner that could occasion the Plaintiffs irreparable injury that may not be compensated by way of damages.

35. Indeed, it is not disputed that it is the Plaintiffs who are in possession of the suit property. That being the case, the balance of convenience in leans towards the Plaintiffs. For those reasons, it is the finding of this court that the application dated 16th June, 2021 is meritorious. The application is allowed as follows:

a. A temporary injunction be and is hereby issued restraining the 1st Defendant, its agents, servants or any other persons claiming title through the 1st Defendant from selling, transferring, assigning, building, entering, charging or in any other way dealing with all that parcel of land known as Land Reference No.15083/39 Muthaiga North Nairobi pending the hearing and final determination of the suit.

b. That all further registration of change or registration in ownership, charging, mortgaging, leasing, subleasing, allotment, user occupation or possession in any kind of right, title or interest over the suit premises within the Nairobi registry, government department and all other registering authorities be and are hereby prohibited by way of a temporary injunction pending the hearing and determination of the suit.

c. The 1st Defendant's Notice of Preliminary Objection dated 13th September, 2021 is dismissed with costs.

d. The 1st Defendant to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

MR. MURIITHI FOR WAITHAKA FOR THE PLAINTIFFS

MR. WAITHAKA FOR THE 1ST DEFENDANT

NO APPEARANCE FOR THE 2ND DEFENDANT

COURT ASSISTANT: JOHN OKUMU