



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 303 of 2017**

**SAMMY NDEGWA MURIITHI.....PLAINTIFF**

**VERSUS**

**RICHARD GACHAGWA THAIRU.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 1<sup>st</sup> September 2021 by the Plaintiff which seeks the following orders:

***i. Spent***

***ii. That Mr. S.G. Mwangi, the chief officer of lands, department of urban design planning, City Hall Annex and who wrote the letter dated 21.06.2019 be hereby summoned to appear before this honourable court and confirm the authenticity of the letter confirming the certificate of lease over Nairobi Block 1751 which was obtained through forgery of his signature.***

***iii. That pending the hearing and determination of this Application, the rental income from the structures erected on Plot No. Umoja Innercore Sector V (Plot No. 122) of which a certificate of lease was derived as Nairobi/Block 1751 be hereby deposited in a joint interest earning account in the names of the Advocates of both parties.***

***iv. That the proceeds acquired and held in the joint interest account and obtained through the proceeds of a fraudulent scheme be hereby released in favour of the Plaintiff herein as part of the compensation on irregular acquisition of land.***

***v. That the 1<sup>st</sup> Defendant's statement of defence be hereby struck out and/or dismissed and a summary judgment thereof be entered in favour of the Plaintiff as prayed for in the plaint lodged herein.***

***vi. That the costs of the Application be provided for in favour of the Plaintiff.***

2. The application supported by the sworn affidavits of the Plaintiff dated 1<sup>st</sup> September 2021 and 5<sup>th</sup> November 2021 are premised on grounds that the 1<sup>st</sup> Defendant fraudulently acquired title to the suit property stating that plot no. Nairobi/ Block 83/616 and Nairobi/ Block 83/1751 was one and the same land noting that both titles have allotment number (Plot No. 122 Umoja Innercore) emanating from the same allotment letter. The plaintiff also indicated that the 1<sup>st</sup> defendant obtained title to the suit property fraudulently pointing out that the bearer of the signature on the title document Mr. S.G. Mwangi had denounced the signature terming it as a fraud and pushed for legal action against the impostors.

3. In his submissions dated 10<sup>th</sup> November 2021, Plaintiff abandoned prayers 3 and 4 of the application averring that the same had been overtaken by events. He sought for summary judgement in his favour arguing that the 1<sup>st</sup> Defendant had obtained title to the suit property fraudulently and had also lied to court thus committing perjury.

4. It was also submitted that Mr. S.G Mwangi should be summoned to court to confirm the title documents in possession of the 1<sup>st</sup> Defendant which bear his signature. He noted that the 1<sup>st</sup> Defendant in 2018 and during pendency of this suit produced lease title bearing S.G. Mwangi's signature that confirmed his ownership to the suit property. The plaintiff allegedly visited Mr. S.G. Mwangi to confirm the status of the title, but Mr. Mwangi disowned the signature in the title document claiming the same had been forged. Based on this, the Plaintiff filed criminal report and investigations into the fraud allegation were undertaken.

5. In support of his arguments, the Applicant cited the provisions of **Order 36 Rule 1 Civil Procedure Rules** as well as the case of **ICDC vs Daber Enterprises Limited 2000 1EA75** which held: “...*The purpose of the proceedings in an Application for summary judgment is to enable the Plaintiff to obtain a quick judgement where there is plainly no defence to the claim...*” It was further stated that a defence that raises no triable issues cannot sustain a defence on record as cited in **Jam v Bos (2019) eKLR**. The Applicant also relied on the case of **Westmont power (Kenya) Limited versus Westmont Power (Kenya) Limited [2003] eKLR**.

6. The 1<sup>st</sup> Defendant in his replying affidavit dated 22<sup>nd</sup> September 2021 stated that the Plaintiff’s claim was for parcel of Land known as Nairobi/ Block 83/616 in which he was not claiming ownership because his property was LR No. Nairobi/ Block 83/1751 as per his lease certificate. He added that Boma Survey Co. Ltd who he hired to confirm the portions of land also reported that the two parcels of land were distinct from each other. He averred that the 2<sup>nd</sup> Defendant’s legal officers (Patrick Murage and Lydia Kwamboka) had also confirmed that he was the lawful owner of the said parcel and as such, there was no case against him and the application should be dismissed.

7. The submissions of the 1<sup>st</sup> Defendant are dated 15<sup>th</sup> November 2021. He contends that an application seeking court to compel attendance of a witness was a waste of judicial time and without merit since the Plaintiff should have sought court’s summons to compel attendance of the witness. He also stated that the plaintiff’s prayer for mesne profits could not stand because it had assumed that a final determination had been made and the plot awarded to the Plaintiff. He added that the said building had been put up by the 1<sup>st</sup> Defendant noting that the plaintiff had initially prayed that the building be demolished on grounds that it was an illegal structure. It was thus amusing and uncanny for him to seek rent from the same structure.

8. Finally, the 1<sup>st</sup> Defendant prayed that the Plaintiff’s written submissions be struck out for being filed outside the given timelines.

9. This court has considered the application, affidavits, the rival submissions and the ruling delivered by this court on 3.11.2021. Further the court has taken into account that prayers 3 and 4 in the application have been abandoned. What is left is the issue of summoning a certain person to appear in court as well as the issue of striking out the defence and costs.

10. On the issue of summons in prayer 2 of the application, I make reference to the provisions of Section 22 of the Civil Procedure Act which stipulates that

**“ Subject to such conditions and limitations as may be prescribed, the court may at any time either of its own motion or on the application of any party-**

**(a) ...;**

**(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;**

**(c) ....**

11. The above proviso does not prescribe the manner in which the application is to be made, whether orally in court or through an application. What is clear is that the court retains the discretion to grant such an application.

12. The Plaintiff desires that summons be issued to Mr. S.G. Mwangi to attend court to confirm authenticity of the letter of lease over Nairobi/Block 1751. I have weighed this prayer in the entire context of the dispute. In particular, I have taken into account the manner in which the prayer is framed, where the Applicant wants Mr. S.G.Mwangi to come and “ **confirm the authenticity of the letter confirming the certificate of lease over Nairobi Block 1751 which was obtained through forgery of his signature**”. This court further takes into account that the 1<sup>st</sup> Respondent in paragraph 12 alludes to having obtained confirmation from the county government that he is the owner of the suit land. What I discern is that there are competing interests as between the two parties, where each of them is relying on a particular officer of the 2nd Defendant to buttress their claim of ownership of the suit property. The court should strive to remain as an impartial arbiter by allowing each side to present their case in an orderly manner.

13. To this end, I decline to grant the orders in the manner framed in the Application. Instead, I direct that each party avails their list of witnesses in the usual manner as directed under clause 2 in the directions given on 3.11.2021. The parties can then flag out the witnesses upon whom they require summons to compel attendance of such witness without making further elaborations, of which the court will be happy to grant such summons.

14. On the issue of summary judgement, and the cancellation of 1<sup>st</sup> defendant’s title, I make reference to paragraph 17 of my ruling delivered on 3.11.2021, where the court noted that the issue of ownership is contested. The court shall not deal with such issues at this interlocutory stage. Additionally, it is the court’s discretion to decide whether to enter summary judgement based on evidence before it which should be sparingly exercised and only in the clearest of cases. See **Zacharias Mwireri Baya v Mohammed Sheikh Abubaka (2010) JELR 92740 (CA)**.

15. I also make reference to the case of **Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR**, where the court stated that;

**“...In the circumstances, like the learned trial Judge, we are of the view that the best forum for all the parties is a trial which would afford all parties an equal forum and for the court to make a determination of all issues raised ...Accordingly, having found as we have there are triable issues, it goes without saying, this appeal lacks merit..”**

16. I have already pronounced myself in the ruling of 3.11.2021 to the effect that parties should focus on the main trial of which the court duly gave a hearing date. I decline the prayer for summary judgment. However, the court will give a mention date for purposes of assisting the parties to get their witnesses as well as ensuring compliance with the orders given on 3.11.2021.

17. The upshot of this court's findings is that the application dated 1.9.2021 is dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**IN THE PRESENCE OF:-**

**KOKUL FOR THE PLAINTIFF/APPLICANT**

**KIMATHI FOR THE 1ST RESPONDENT**

**COURT ASSISTANT: EDDEL BARASA**