



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO.440 OF 2012**

**NJERI MWAURA**

**STEPHEN MARIGI GATHIGI T/A KIHOTO MUNYAKA**

**BUILDING COMPANY.....PLAINTIFFS**

**VERSUS**

**JOHN SIRONIK.....1<sup>ST</sup> DEFENDANT**

**RAPHAEL GICHURU.....2<sup>ND</sup> DEFENDANT**

**ANTONY NDUNG’U MWANIKI.....3<sup>RD</sup> DEFENDANT**

**RULING**

(1) Before this Court are two applications for determination. The first is the Notice of Motion dated **9<sup>th</sup> April 2019** by which **JOHN SIRONIK** (1<sup>st</sup> Defendant/Applicant) **RACHEAL GICHURU** (the 2<sup>nd</sup> Defendant/Applicant) and **ANTHONY NDUNGU MWANIKI** (the 3<sup>rd</sup> Defendant/Applicant) seek the following Orders:

**“1. SPENT**

**2. THAT this Honourable Court be pleased to set aside or vary the Orders of the Court made on 26<sup>th</sup> February 2019, closing the Defendant/Applicant’s case with-out hearing the Defendant/ Applicants.**

**3. THAT this Honourable Court be pleased to allow the Defendant/ Applicants to present their case for a fair and just determination of the suit on merit.**

**4. THAT the costs of this Application be in the cause.**

(2) The Application which was premised upon **Sections 1A, 1B, 3A and 80** of the **Civil Procedure Act, CAP 21, Laws of Kenya, Article 50 of the Constitution of Kenya** and all other enabling provisions of law, was supported by the Affidavit of even date sworn by **KABERIA JACKSON KAIBUNGA**, an Advocate of the High Court of Kenya.

(3) The Plaintiff/Respondent **NJERI MWAURA and STEPHEN MARIGI GATHIGI T/A KIHOTO MUNYAKA BUILDING COMPANY** filed Grounds of Opposition dated **11<sup>th</sup> April 2019** to the said application.

(4) The second Application for determination is the Notice of Motion dated **18<sup>th</sup> April 2019** has also been filed by the Defendant/Applicants seeking the following Orders:-

**“1. SPENT**

**2. THAT the Honourable court to direct and summon the Land Registrar Ngong to furnish the Defendants and the court with the report in respect of land parcel number NGONG TOWNSHIP BLOCK 2/71, NGONG TOWNSHIP BLOCK 2/142, NGONG TOWNSHIP/BLOCK 2/80.**

**3. THAT a temporary injunction do issue to the Plaintiffs and servants and/or their agents or otherwise to restrict them from entering, trespassing and selling the suit properties or in other manner compromising unfettered interest of the Defendants in the Defendants pending hearing and determination of the suit.**

**4. THAT the Honourable court do issue a permanent injunction to restrain the plaintiff from interfering with the parcel of lands NGONG TOWNSHIP BLOCK 2/71, NGONG TOWNSHIP BLOCK 2/142, NGONG TOWNSHIP/BLOCK 2/80.**

(5) This second Application which was premised upon **Section 3A of the Civil Procedure Act, Cap 21, laws of Kenya** and all other enabling provisions of the law, was supported by the Affidavit dated **18<sup>th</sup> April 2019**, sworn by the 2<sup>nd</sup> Defendant. The Plaintiff/Respondents did not file any Replying Affidavit to this application. Both applications were canvassed by way of written submissions. The Defendant/Applicants filed their written submissions on **10<sup>th</sup> May 2019** while the Respondent did not file any submissions.

#### **Motion dated 9<sup>th</sup> April 2019**

(6) This was an application seeking to set aside the court orders made on **26<sup>th</sup> February 2019**, by which court closed the Defendants case and proceeded to give directions on filing of final submissions by the parties to the suit. The Defendant pleaded that they had no notice of the hearing date since their Advocates who were on record at the time **KIAI NUTHU and COMPANY ADVOCATES**, had by that date closed shop. For that reason they submit that although the hearing notice may have been sent to their erstwhile Advocate, that hearing date was not communicated to the Defendants hence their failure to appear in court for the hearing.

(7) The Plaintiff/Respondents in opposing the application submit that the Defendant has had a long history of non-attendance on dates set down by court for hearing and/or mention of the case. It is also submitted that vide the consent dated **7<sup>th</sup> April 2016** and filed in court on **14<sup>th</sup> April 2016** the 1<sup>st</sup> Defendant had already conceded to the Plaintiff's defence and denounced his defence and Counter claim dated **5<sup>th</sup> November 2015**.

(8) I have perused this file and I note that a consent dated **7<sup>th</sup> April 2016** was indeed filed on **14<sup>th</sup> April 2016** By that Consent the **1<sup>st</sup> Defendant** conceded to the Plaintiff's suit and denounced his Defence and counter claim dated **13<sup>th</sup> August 2012**. However this consent referred **only** to the **1<sup>st</sup> Defendant** and therefore does not bind the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants in the matter. Accordingly I will proceed to determine this application in relation to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/Applicant.

(9) It was further submitted for the Plaintiffs in opposition to this application to this application that the deponent of the Supporting Affidavit dated **1<sup>st</sup> April 2019** is a stranger to the suit. The Deponent of that Supporting Affidavit **MR KABERIA JACKSON KAIBUNGA**, is an Advocate of the High Court. I note from the record that vide a Notice of Appointment dated **11<sup>th</sup> April 2019**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants appointed the firm of **KIMATHI KABERIA & MUNYUNGU ADVOCATES** to act on their behalf. Thus the Deponent was the Advocate on record for the Defendants and deponed to matters within his own knowledge.

(10) The reasons given for the failure of the Defendants to appear in court to present their defence was the fact that they had no notice of the hearing date. I am not persuaded by this excuse. The record clearly indicates that on **23<sup>rd</sup> July 2018** when the hearing date of **26<sup>th</sup> February 2019** was given by the court **Mr. Kaberia** was in court holding brief for the Defendants. I have no doubt that this is the same **Mr. Kiberia** who later came on record for the Defendants in the matter. Therefore the question of service of a hearing notice on an Advocate who later closed shop does not arise. The hearing date was given in court in the presence of counsel for the Defendants. There was therefore no excuse for the failure of the Defendant and/or his Advocate to attend court on that date. The failure to attend can only be attributable to laches on the part of Defence Counsel. The claim that the Defendants were unaware of the hearing date is not borne out by the record and the facts. The truth of the matter is that Counsel dropped the ball in failing to attend court for defence hearing on **26<sup>th</sup> February 2019**. The Defendants cannot shift the blame to their previous lawyers.

(11) Having said the above I am mindful of the provisions of **Article 50(1) of the Constitution of Kenya 2010**, which provide that each person shall be accorded a fair hearing, I am also mindful of the fact that it is the fundamental duty of any court to do substantive justice in any matter before it. **Sections 1A and 1B of the Civil Procedure Act** exhort courts to make such orders as are necessary to render substantive justice.

(12) It is the fundamental duty of Court to do justice as between the parties appearing before it and in order to achieve this it is imperative that insofar as reasonably possible each party must be accorded an opportunity to put forward its case. In the Indian Case of **SANGRAM SINGH -VS- ELECTION TRIBUNAL, KOTEH, AIR 1995** the Supreme Court of India held:-

**“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”**

(13) Counsel for the Plaintiff submitted that it is too late to reopen the case as the Plaintiffs have already filed their written submissions and the matter is pending judgment. However I place reliance on **Sections 3A of the Civil Procedure Act** which provides:-

**“3A Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”**

(14) I find that there is no prejudice the Plaintiff stands to suffer if the Defendant is allowed an opportunity to present its defence. In light of the above and in order not to shut out the Defendant from the seat of justice I will allow the present application. Accordingly I do grant prayers (1) and (2) of the Notice of Motion dated **1<sup>st</sup> April 2019**. The costs of this application will be borne by the Defendant/Applicants.

**Notice of Motion dated 18<sup>th</sup> April 2019**

(15) By the application dated **18<sup>th</sup> April 2019** the Defendant/Applicant sought various orders relating to the following parcels of land:-

- (i) Ngong Township/Block 2/71
- (ii) Ngong Township Block 2/142
- (iii) Ngong Township Block 2184
- (iv) Ngong Township Block 2/80

(16) The record indicates that the legal proprietor of above parcels of land was **Kihoto Munyaka Building Society**. The company is run by partners whose consent was to be sought in respect to any dealing with the above properties. The Plaintiff took issue with the manner in which the Defendants were running the company and vide this suit filed on **10<sup>th</sup> July 2012**, sought injunctive orders to restrain the Defendants from engaging in the day to day running of the Company, and also sought to have all the Company property surrendered to the Plaintiffs. The suit was partially heard when the Defendants filed this application seeking interlocutory orders to preserve the suit properties and orders to summon the Land Registrar to give a Report on the status of the suit properties.

(17) The Plaintiff's contention is that the Defendants have fraudulently sold off part of the suit land. That a search of land parcel **Ngong Township/Block 2/71** revealed it to have been fraudulently disposed of one **Joseph Kariuki Ngugi** and a Certificate of lease issued without the consent of the Company. The Defendants fault the Registrar of lands for failing to authenticate (by signing) the search of the said property. They are apprehensive that unless prohibited by the Court, their Plaintiffs would continue to deal with company property to the detriment of the Defendants before the suit is fully determined.

(18) The Plaintiff opposed the application on the basis that the Land Registrar against whom the orders were being sought was not a party to the suit. The following are the two issues which arise for determination in this application:-

- (i) Are the Defendant/Applicants entitled to grant of the interlocutory orders being sought?
- (ii) Should the Court issue Orders compelling the Registrar of Lands to appear in this matter?

**(i) Grant of Interlocutory Orders**

(19) The conditions for a grant of interlocutory orders were set out in the case of **GIELLA –VS- CASMAN BROWN [1937] E.A** are as follows:

- (a) An Applicant must show a prima facie case with a probability of success.
- (b) The applicant must satisfy the court that unless the orders sought are granted he will suffer irreparable harm which would not be adequately compensated by damages.
- (c) In event of any doubt the court will decide the case on a balance of probability.

(20) The Defendant avers that the Plaintiff has already disposed of two out of the four (4) parcels of land belonging to the Company. They further aver that a search of land parcel **Ngong Township/Block 2/171** revealed the proprietor to be one **Joseph Kariuki Ngugu** with a certificate of lease having been issue on **16<sup>th</sup> November 2018**. However that Land Registrar declined to sign or stamp the certificate of search leading the Defendants to read mischief on the part of the Registrar.

(21) On their part the Plaintiffs have not disputed the sale of the two (2) properties despite there being a caution in place. The Plaintiffs aver that the Defendants are not partners in the Company but are merely heirs to the Company. The issue of partnership is one of the issues to be resolved in the main suit. In that regard it would be prudent to ensure the preservation of the remaining properties until a final judgment is rendered by the Court. For this reason I am satisfied that a prima facie case has indeed been established.

(22) On the issue of irreparable harm, the Defendants must show that any harm they stand to suffer cannot be quantified in monetary terms and cannot be adequately compensated by an award of damages. The aim of the court is to avoid greater harm by opting for the lower risk. In **NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 OTHERS 2015 eKLR**, it was held as follows:-

**“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that**

**cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.” [own emphasis]**

(23) In this case the anticipated harm is not merely speculative. A search conducted on the company property has already revealed that the proprietorship of one of the Company’s properties has been transferred to a third party. Although that search was not properly authenticated it is clear that something is amiss. This transfer obviously occurred during the pendency of this trial. Clearly if not prevented by way of injunction this type of activity may occur again. There is a real risk that the entire suit may be rendered nugatory. Although the properties values are quantifiable in monetary terms, this court cannot ignore the fact that much time and resources have already been expended in progressing this suit to where it has now reached. The suit is now at its tail end therefore in my view it serves the interests of justice to grant the injunction prayed for by the Defendants.

(24) The Defendants have sought for orders to compel the Registrar to appear in court and give a report on the status of the parcels of land belonging to the Company. This arises from the Defendants suspicion that the Land Registrar may be complicit in any underhand dealings with respect to the suit land. The Defendants allegations and insinuations against the Land Registrar are weighty and cannot be dealt with at this interlocutory stage. In any event as pointed out by the Plaintiffs the Registrar is not a party to this suit and has not been granted any opportunity to respond to the Defendants allegations. In these circumstances it may not be appropriate for the Court to issue the summons being sought. Accordingly I decline to grant this prayer.

(25) Finally in respect to the Notice of Motion dated **18<sup>th</sup> April 2019** I make the following Orders:-

(i) Prayer (2) of the Motion is dismissed.

(ii) A temporary Injunction is hereby issued to the Plaintiffs and their servants and/or agents or otherwise to restrict the sale, transfer dealing with the suit properties, or in any other manner comprising unfettered interest of the Defendants in the said properties pending hearing and determination of the suit.

(iii) Each party to bear its own costs for this application.

Dated in **Nairobi** this **14<sup>th</sup>** day of **February 2020**.

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**Justice Maureen A. Odero**