



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

HIGH COURT ELC 324 OF 2017

NANCY WANJIRA GATHURI.....PLAINTIFF

VERSUS

DAVID NDUNGU MBURU.....1ST DEFENDANT

SAMUEL KAHIA GIATHI.....2ND DEFENDANT

RULING

1. On 9th March 2017, Mr. Maina, Counsel for the Plaintiff/Applicant came before court under certificate of urgency vide his application dated the 8th March 2017 in ELC No. 324 of 2017, seeking temporal injunctive orders against the Respondents/Defendants herein. In his application, counsel stated that his client, the Plaintiff herein, one Nancy Wanjira Gathuri lay claim over parcel of land known as No. K34 opposite the hospital Juakali-Olkalou within Nyandarua County.
2. The said application was supported by the Plaintiff's affidavit in which she had averred that she was allocated the plot through the authority of the then Council of Olkalou during its meeting which was held on the 13th December 2006. This allocation, she went further to state, was in exchange with her own piece of land measuring 0.047 hectares known as NYANDARUA/OL-KALOU CENTRAL/909 which she had surrendered to be used by the Gikumbo Self- Help Water Project.
3. The Applicant's counsel further submitted that after the Plaintiff having been allocated the piece of land, the Defendants herein whom he named as David Ndungu Mburu (1st Defendant) and Samuel Kahia Giathi (2nd defendant) fraudulently encroached on the said parcel of land and started to erect structures thereupon, depriving his client off what she legally owned and had acquired.
4. The Applicant thus sought interim orders by way of temporal injunctive orders against the Defendants, pending the hearing and determination of the application and/or suit.
5. The court having heard the submissions, granted interim orders on the 9th March 2017 restraining the Defendants from interfering dealing, developing, trespassing on, constructing on the said piece of land, pending the hearing of the application inter-parties. The hearing inter-parties was then scheduled for the 3rd April, 2017.
6. On the 3rd April 2017 when the matter came up for hearing of the Applicant's application dated the 8th March 2017, inter-parties, counsel for the Applicant raised a preliminary objection to the effect that after the court had issued temporal injunctive orders against the Defendants/Respondents, to circumvent the said orders, having known that the ELC in Nyahururu was not sitting, they (Defendants/Respondents) filed a fresh suit vide ELC No 336 of 2017 and obtained similar orders as against the Applicant/Plaintiff in the ELC Nakuru. Counsel for the Applicant in ELC No 324 of 2017 informed the court that the act by the Defendants was in bad faith having had been served with the orders issued by this court on the 9th March 2017, and having been fully aware that there was another matter pending in court. Counsel relied on the affidavit of service sworn on the 22nd March 2017 showing that the defendant's had been served with the orders on the 13th March 2017 while they were on the Applicant/Plaintiffs piece of land, where they had gone to tell her to vacate. Counsel further submitted that the ELC No 336 of 2017 ought to be struck out.
7. Mr. Kaburu, Counsel for the Defendants/Respondents in ELC No. 324 of 2017 submitted that his clients were never served with the pleadings, summons or the court's orders dated 9th March 2017, issued in ELC No. 324 of 2017 and as such his clients were not aware that there had been a case filed. Further, that they came to learn of the existence of the present suit on the 28th March 2017 when the Plaintiff in ELC No. 324 of 2017 herein, served their office with the application dated the 22nd March 2017 in which they had sought to have orders obtained in ELC No.336 of 2017 vacated citing them to be an abuse of the court process since there was another suit in existence. The said application, he submitted was filed in ELC No. 336 of 2017. Counsel further submitted that the issue of service was very crucial and that they would require the process server to testify on oath on the service upon his clients as they had denied ever having been served with any pleadings or summons.

8. In contesting service, Counsel submitted that his client, the 1st Defendant, did not reside in Olkalou and as such there was no way he could have been served therein. On the other hand, the 2nd Defendant was bed ridden after having fallen down and sustained injuries. He too could not have been on the suit land where he was purportedly served.

9. Counsel went on to submit that only after determination of service could the court make an informed opinion as to whether there was knowledge by his clients of the existence of another suit or not.

10. Counsel informed the court that indeed ELC No. 336 of 2017 was filed in the Nyahururu Registry but because the court was not sitting he was advised to appear before the ELC Judge in Nakuru which they did, and obtained temporal injunctive orders against the respondent in ELC No. 336 of 2017.

11. It was submitted that since the matter involved the same parties who were claiming the same piece of land, the same ought to be consolidated whereby one suit would be considered as a counterclaim of the other which issue was vehemently opposed by counsel for the Plaintiff, and rightly so as the law is clear on the procedure of filing of counter claim suits.

12. The record of the proceedings in ELC No. 336 of 2017 confirms that indeed on 21st March 2017, the Applicants/Plaintiffs in that matter appeared before my brother Hon Justice S. Munyao sitting in Nakuru (since the court in Nyahururu was not sitting) on their application dated the 20th March 2017 vide of a Notice of Motion under certificate of urgency, seeking temporal injunctive orders to bar the Defendant/Respondent from dealing in any manner with Land Parcel Plot No. K24 in Olkalou, pending the hearing and determination of the application/suit.

13. That pursuant to this application, Hon. Justice Munyao, sitting in Nakuru, granted them temporal orders of injunction as sought.

14. In essence thereof, what is on the court's records in both ELC No. 324 of 2017 and ELC No 336 of 2017, are orders barring both parties from dealing with land suit Plot No K34 Olkalou pending the hearing and determination of their respective applications.

15. The case before this court pits the Plaintiff against the Defendants in ELC No. 324 of 2017 and vice versa in ELC No. 336 of 2017 both parties who have rival claims to the suit property being plot No. K34 Olkalou.

16. The Plaintiff in ELC No.324 of 2017 has laid claim to the suit property to which she contends was allocated to her in 2016 through the authority of the then town council of Olkalou as compensation for having surrendered her own land to be used for construction of a communal water tank and borehole.

17. The 1st Plaintiff in ELC No. 336 of 2017 has also made a similar rival claim to the suit property claiming that he had bought it from the 2nd Plaintiff, who was the initial allottee from the Commissioner of Lands. That the said allottee was allocated the suit land in 1992 wherein he took possession of the same in 2003.

18. This court's evaluation of the rival claims made by the Applicant/Plaintiff and the Respondent/ Defendant clearly points to the fact that there exists a genuine dispute as to the ownership of the suit parcel of land.

19. That being the case, this dispute can only be resolved after the court has heard evidence by both parties to the suit as at this point, the Court cannot make definitive findings before the facts are canvassed.

20. It is for the above reason that at this juncture, I would not want to go into the details of whether there was service of the orders issued on the 9th March 2017 or not.

21. On the 6th April 2017 both parties consented, which consent was adopted by the court, to consolidate ELC No 324 of 2017 with ELC No 336 of 2017 with the former being the lead file.

22. Section 1A of the Civil Procedure Act, stipulates the overriding objective of the Act and the rules, and imposes upon this court a duty to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes as governed by the Act.

23. Further, section 1B of the Act is clear on the duty of the court to wit:

24.

(1) a. For the purpose of furthering the overriding objective specified in [section 1A](#), the Court shall handle all matters presented before it for the purpose of attaining the following aims—

b. (a) the just determination of the proceedings

c.

d. (b) the efficient disposal of the business of the Court

e.

f. (c) the efficient use of the available judicial and administrative resources

g.

h. (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

i.

j. (e) the use of suitable technology

k. .

24. Section 3A of the Act is clear on the inherent powers of court to wit:

‘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’

25. The court finds that both parties presented **prima facie cases respectively which included but did not confine to genuine and arguable cases, through the material presented to it by both parties, which a tribunal properly directing itself, would conclude that there exists a right which was apparently infringed by the opposite party so as to call for an explanation or rebuttal from the latter.**

26. The upshot of the above therefore is that since both parties have orders from two respective courts restraining them from dealing with the suit property, and so as not to make this dispute a protracted one, this court, pursuant to Section 3A of the Act directs as follows:

i. ELC No 234 of 2017 and ELC No.336 of 2017 do and are hereby consolidated with ELC No 234 of 2017 being the lead file.

ii. Both parties are hereby temporary restrained from dealing *and/or interfering* with the suit property in any way, pending the hearing and determination of the suit.

iii. The applications dated the 8th March 2017 and 20th March 2017 respectively are hereby marked as compromised.

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iv. Parties to comply with order 11 within the next 30 days, agreed issues to be filed within the same period.

Dated and delivered at NYAHURURU this 6th day of April 2017.

M.C. OUNDO

JUDGE OF ELC NYAHURURU