



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO 216 OF 2018**

**PETER NJOROGE WAINAINA .....PLAINTIFF/RESPONDENT**

**VERSUS**

**PEMUGA AUTO SPARES LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RAJAA STONES LIMITED.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**PETER MUKIRI GATERI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AGNES WANJIKU MUKIRI.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE DISTRICT LAND**

**REGISTRAR THIKA.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**AND**

**HFC LIMITED.....1<sup>ST</sup> INTERESTED PARTY / APPLICANT**

**BENARD KIIHIKA KIMONDO.....2<sup>ND</sup> INTERESTED PARTY/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated 25<sup>th</sup> June 2019, by the 1<sup>st</sup> Interested Party/ Applicant seeking for orders that;-

- 1. This Honourable Court be pleased to issue Orders expunging the property known as Thika Municipality Block/14/975, from these proceedings.***
- 2. Upon granting of prayer no. 2 herein above, the 1<sup>st</sup> Interested Party/ Applicant be discharged from these proceedings.***
- 3. Costs be awarded to the 1<sup>st</sup> Interested Party Applicant.***

The Application is premised on the grounds that the 3<sup>rd</sup> Respondent has failed to service certain facilities advanced to it by the Applicant Bank, which are secured by inter alia the property known as **Thika Municipality Block 14/975**, by dint of a duly registered charge dated **13<sup>th</sup> November (the charged Property)** and as such, he is in default to the Applicant bank to the tune of **Kshs.35,063,34.59** . That the bank issued the requisite statutory notices and now seeks to exercise its statutory right of sale over the suit property. Further, that the Plaintiff/ Respondent has however instituted a suit based on the mistaken belief that the properties enumerated purportedly belong to the Estate of the late **Wainaina Kiharia** and the Plaintiff/ Respondent has sought orders of permanent injunction; a declaration that the titles be annulled with regards to the charged property.

It was further contended that a reading of the pleadings indicates that there is no cause of action or claim against the charged property.

Further that the Applicant was only a necessary party and proper party to these proceedings to the extent that the charged property is charged in its favour and thus the present proceedings involving the charged property prejudices the Applicant.

In her supporting Affidavit, **Eunice Kamau**, the Assistant Legal Manager of the Applicant Bank reiterated the contents of the grounds in support of the Application and further averred that there is no specific reference/ claim made by the Plaintiff/ Respondent nor any evidence regarding the charged property; that in listing the land parcels, which belonged to the Deceased estate, the same does not include the charged property, Further that the 2<sup>nd</sup> Defendant/Respondent previously instituted proceedings at the National Land Commission seeking review of grants issued to the 2<sup>nd</sup> to 5<sup>th</sup> Defendants/ Respondents with regards to the charged property and the same was heard and dismissed and a Court has already determined that the Deceased was entitled to only **20 acres** out of the government land that the Deceased occupied.

She further averred that the Charged property was included in these proceedings as mere afterthought and that the questions concerning the other suit properties would still be effectually and fully determined without the Applicant being a party to the proceedings. That it is in the interest of Justice that the prayers sought are granted.

The Application is opposed and the Plaintiff/ Respondent, **Peter Njoroge Wainaina** swore a Replying Affidavit on **16<sup>th</sup> July 2019**, and averred that the Applicant's suit is mischievous, dishonest and deliberately intended to mislead the Court. He averred that the Charged property was part of his father's Estate but has since been registered in his name as evidenced by Lease Documents dated **6<sup>th</sup> June 2016**; Certificate of lease dated **19<sup>th</sup> July 2016**, Certificate of official search dated **9<sup>th</sup> April 2019** and an extract of the green card dated **5<sup>th</sup> April 2019**. It was his contention that it is clear that there is no way the 2<sup>nd</sup> Respondent or any other party could have legally charged his property and that the chargee and chargor are criminally liable for using forged and fake documents in an attempt to dispossess him of his property. He further averred the 2<sup>nd</sup> Defendant/ Respondent having acted fraudulently cannot urge the Court to ratify their illegal activities by expunging the charged property from the suit. He further averred that it was upon the 1<sup>st</sup> Interested Party/ Applicant to undertake **all due diligence** to ensure that the security rendered was genuine.

He also averred that the Interested Party's/Applicant argument that he has not laid any claim to the charged property in his pleadings and documents is deliberately misleading as the lease and certificate of lease registered in his name are included in his Amended list of documents dated **10<sup>th</sup> April 2019**, and he would therefore stand to suffer great prejudice and irreparable damage and loss if the property was expunged from the main suit. He further averred that he has been informed by his Advocates on record which advice he believes to be true that the issues raised in the Application and his response thereto can only be finally determined at the main hearing and not at this preliminary stage. Therefore, he urged the Court to dismiss the instant Application.

The 1<sup>st</sup> to 4<sup>th</sup> Defendants/ Respondents also filed a Replying Affidavit sworn on the **19<sup>th</sup> of July 2019**, by **Peter Mukiri Gateri**, the 3<sup>rd</sup> Defendant/ Respondent herein. He averred that he has been advised by his Advocates which advises he believes to be true that the Application is misconceived partly because it is a disguised Application for striking out the Plaintiff's suit which it had no *locus standi* and because the doctrine of *lis pendens* demands that the Interested Party either participates in the instant suit or waits until the suit is heard and determined when its rights will be clear.

He further averred that the Plaintiff/ Respondent is entitled to a fair hearing and have his day in Court . Further that his witness statement shows that the Plaintiff/Respondent has a wrong sense of entitlement. It was further averred that it is undisputed that the 1<sup>st</sup> Interested Party/ Applicant extended loan facilities to the 2<sup>nd</sup> Defendant/ Respondent and that only one statutory notice has been issued to the 2<sup>nd</sup> Defendant/Respondent dated **23<sup>rd</sup> May 2017**, and that the others are pre listing notifications of the intention of the 1<sup>st</sup> Interested Party/ Applicant to list adversely the 2<sup>nd</sup> Defendant/ Respondent with the Credit Reference Bureau. Further that the Interested Party/ Applicant has not explained why it did not exercise its power of statutory sale in **2017**, upon issuing the statutory Notice.

He contended that the 2<sup>nd</sup> Defendant's intention was to purchase the property for the purpose of developing the houses, but after obtaining the loan facilities and purchasing the property, it had challenges in developing the same as the issue of ownership arose and it was decided that the developments be halted. He further averred that the 2<sup>nd</sup> Defendant/ Respondent is still interested in the development plans, but that it is waiting for the determination of ownership of the suit property. He contended that the Plaintiff/ Respondent had taken its complaint to the National Land Commission and upon determination, he still filed another suit in this Court.

It was his contention that the Plaintiff/ Respondent alleges that his late father owned the subject matter of this suit which includes the charged land. Further that it is also alleged that the 1<sup>st</sup> to 4<sup>th</sup> Defendants/ Respondents did not have a good title in order to charge the Charged property to the 1<sup>st</sup> Interested Party and sell **Thika Municipality Block 14/975**, to the 2<sup>nd</sup> Interested Party/Respondent and it is thus clear that the issue of ownership is contentious and disputed. Therefore, the 1<sup>st</sup> Interested Party/ Respondent is seeking a piece meal resolution of the matter as summary judgment. He also averred that upon resolution of the matter, the 1<sup>st</sup> Interested Party/ Applicant shall still have a right to **statutory sale** upon determination of the entire suit. Further that he has been advised by his Advocates that section **90(3) of the Land Act** provides the remedies available to the 1<sup>st</sup> Interested Party/ Applicant which is in line with the doctrine of *lis pendens* that the 1<sup>st</sup> Interested Party/ Applicant awaits the determination of the issue of ownership that requires that the Court hears evidence of all the parties. Further that the 1<sup>st</sup> Interested Party/ Applicant shall not suffer any prejudice as the loan continues to accrue interest and penalties and that it shall have to be paid.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The Court has also read considered the pleadings of the parties, the Application , the Affidavits in support and the Replying Affidavit and finds that the issue for determination is; **whether the 1<sup>st</sup> Interested Party/ Applicant is entitled to the orders sought.**

The Court notes that the Applicant has submitted that the Purported Claim concerning the charged property being **Thika Municipality Block 14/975** has been barred by the doctrine of **Res Judicata** as it is well settled law that litigation must come to an end and that parties must be

allowed to enjoy the fruits of their Judgment. This Court is skeptical as to whether the 1<sup>st</sup> Interested Party/ Applicant have *locus standi* to bring the said Application, given that the Applicant has not provided any proof that it holds any right to the said charged property, The Court further notes that the issue was only brought up during submissions. Further that the Applicant never pleaded the issue of *Res Judicata*, in its Application and it is therefore not proper to bring it out during submissions as it denies the other parties an opportunity to respond to the same. See the case of **Daniel Toroitich Arap Moi & Another ...Vs... Mwangi Stephen Murithi & Another (2014) eKLR** where he Court held that:

***“Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid--Submissions are generally parties “marketing language....”***

Further Parties are bound by their pleadings as was elicited in the case of **Joseph Mbuta Nziu ....Vs... Kenya Orient Insurance Company Ltd [2015] eKLR** where the court referring to a decision of Nigerian Supreme Court stated-**“In ADETOUN OLADEJI (NIG) LTD ... Vs... NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. stated as follows;**

***‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’***

It is further the Interested Party’s / Applicant’s contention that the Plaintiff’s/ Respondent’s pleadings do not reflect its evidence and that it has not made any attempt to amend its pleadings to include the specific references to the charged property. It is upon this backbone that the Applicant has also contended that the Plaintiff does not reveal any cause of action as against the charged property and therefore the Court should consider expunging the charged property from the proceedings and thus discharging it also from the proceedings.

It is the Court’s considered view that the very fact that the Interested Party/ Applicant is seeking to expunge the Charged property from the proceedings, it would primafacially mean that they are part of the proceedings. From the Plaintiff dated **23<sup>rd</sup> July 2018**, it is clear that the Plaintiff/ Respondent had sought a permanent injunction against the Defendants/ Respondents with regards to suit properties, **Thika Block 14/968-983 and Titles Nos Block 14/1287-1417**. The Charged property being **Thika Municipality Block 14/975(the charged property)** falls within the purview of **14/968-983**.

Further, in his Plaintiff, the Plaintiff/ Respondent alleged that the said properties were allocated to his Deceased father and that the 1<sup>st</sup> to 4<sup>th</sup> Defendants/ Respondents have illegally encroached upon the said properties. Further the Plaintiff’s Amended Plaintiff dated **10<sup>th</sup> April 2019**, and filed on **12<sup>th</sup> April 2019**, has retained the Contents seeking to have a permanent Injunction issued against the 1<sup>st</sup> to 4<sup>th</sup> Defendants/ Respondents in respect to the suit properties and the charged property being one of them. Though the 1<sup>st</sup> Interested Party/ Applicant has alleged that the Amended Plaintiff was an afterthought, the Court is not persuaded by the said reason. First because the law allows a party to amend its pleadings at any stage before close of pleadings. Further the Plaintiff was filed on **12<sup>th</sup> April 2019**, way before the instant application was filed

In the case of **Susan Rokih ...Vs... Joyce Kandie & 6 others [2018] eKLR** the Court stated that:

***‘.....The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint.’***

With the above definition of a Cause of action in mind, It is this Court’s considered view that the Plaintiff/ Respondent having alleged that the charged property was illegally acquired, it sure did raise a cause of complaint, hence a cause of action with regards to the charged property. Whether or not the same is merited, that is not for the Court to decide at this time. It is trite that the Court should always strive to give a party a chance to be heard no matter how weak its case may be . See the case of **Susan Rokih ...Vs... Joyce Kandie & 6 others(supra)** where the Court held that;

***“In my view, the plaintiff has disclosed in the plaintiff the facts which found her complaint against the 2<sup>nd</sup> defendant. Whether the same presents a strong or weak case, is not for me to consider or determine at this juncture in the instant application. A reasonable cause of action is not one that must succeed in the trial of the action but one which has some chance of success”***

Having carefully considered the facts of this case, the affidavits filed by all parties, the rival submissions herein and the relevant provisions of law, and authorities cited, the Court finds that the **Notice of Motion** Application dated **25<sup>th</sup> June 2019**, is **not** merited and the same is dismissed entirely with costs to the Plaintiff/ Respondent and the 1<sup>st</sup> to 4<sup>th</sup> Defendants/ Respondents herein.

It is so ordered.

**Dated, signed and Delivered at Thika this 14<sup>th</sup> day of May 2020**

**L. GACHERU**

**JUDGE**

**Court Assistant.....**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of :**

..... for the Plaintiff/Respondent

M/s Kamau Kuria advocates for the 1<sup>st</sup> – 4<sup>th</sup> Defendant/Respondent

..... for the 5<sup>th</sup> Defendant/Respondent

..... for the 6<sup>th</sup> Defendant/Respondent

.....for the 7<sup>th</sup> Defendant/Respondent

.....for the 1<sup>st</sup> interested Party/Applicant

.....for the 2<sup>nd</sup> interested Party/Applicant

L. GACHERU

JUDGE