



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 305 OF 2017**

**(FORMERLY NAIROBI ELC NO.834 OF 2012)**

**ELIZABETH WAMBUI KIRAGU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NDIRANGU MACHARIA.....DEFENDANT**

**TIRUS KAMAU MUTORU.....INTERESTED PARTY/PROPOSED 2<sup>ND</sup> DEFENDANT**

**RULING**

The matter for determination is the **Notice of Motion** Application dated **4<sup>th</sup> October 2018**, brought by the proposed interested party seeking for orders that;

- 1. The Court be pleased to Review and Set Aside the decree herein given on 6<sup>th</sup> July 2018.***
- 2. That the Applicant be and is hereby enjoined as a Defendant in this suit.***
- 3. The Applicant/ proposed Defendant be granted leave to defend the suit.***
- 4. Costs of this Application be provided for***

The Application is premised on the grounds that the Plaintiff/ Respondent misled the Court to issue the **Decree** dated **6<sup>th</sup> July 2018**, by concealing the fact that the suit property was registered in the name of the Applicant before the filing of this suit and that land parcel **No. Ruiru Kiu Block 2/2820**, had ceased to exist by reason of subdivision which had resulted in eleven parcels of land being **Ruiru Kiu Block 2/10723, 2/10724, 2/10725, 2/10726, 2/10727, 2/10728, 2/10729, 2/10730, 2/10731 and 2/10732**, six of which are still registered in the Applicant's name while **five** of them had been transferred to third parties before the filing of the instant suit. Further, that the Plaintiff misled the Court to issue a **decree** in the instant suit by concealing from the Court the fact that there was in existence **Civil Suit No. Milimani ELC 298 OF 2013, Elizabeth Wambui Kiragu Vs Tirus Kamau Mutoru**, filed by the Plaintiff/Respondent herein against the Applicant and that the subject matter is the subdivisions arising from the suit property herein.

He also contended that the Plaintiff/ Respondent filed the instant suit against the Defendant with full knowledge that he did not have any interest over the suit property having transferred it to the Applicant and failed to notify the Applicant of the suit. Therefore, the Applicant was prevented by reason of deliberate non joinder and non-service from presenting his case. Further that the Decree dated **6<sup>th</sup> July 2018**, affects the Applicant and **five** other parties who are registered proprietors of the subdivisions. That the Applicant only learnt of the **decree herein** in late **August 2018**, when he was approached by a land selling broker to purchase the suit property.

He also contended that the Plaintiff has constituted a parallel registry file at the **Thika Lands Registry**, and may defeat the Orders of this Court. It was further contended that there is new evidence laid by the Applicant before this Court which he could not tender by reason of non-joinder that warrants review and setting aside of the Decree herein. That unless the impugned **Decree** is set aside, it has potential of putting the Judiciary in an embarrassing position, wherein contrary orders may be issued by different Courts over the same issue or dispute. Therefore, it is in the interest of justice that the Application herein be granted.

In his **Supporting Affidavit**, the Applicant herein **Tirus Kamau Mutoru**, averred that vide a sale agreement dated **31<sup>st</sup> October 2012**, he purchased the suit property from the registered owner **Ndirangu Macharia**, who furnished him with a copy of sale agreement by which he had purchased the suit property from the original proprietor **Joseph Kimani** on **7<sup>th</sup> January 1997**, which suit property was originally owned

by **Githunguri Constituency Ranching Company Limited**. He further furnished him with a copies of documents evidencing transfer upon which he paid full purchase price and he was granted possession.

He also averred that on **1<sup>st</sup> March 2013**, he was served with suit papers for **Milimani ELC 298 of 2013**, and he instructed an advocate to defend him. Further that the Plaintiff/ Respondent's application for injunction was heard and dismissed by the Court. He also contended that the Plaintiff/ Respondent moved the Court for stay of execution, which application was not prosecuted. He further contended that though the application for injunction was dismissed, he did not dispose off the remaining properties in view of the pending case as the matter is yet to be heard and determined.

He reiterated the contents of the grounds on the face of the Application and averred that the Plaintiff/ Respondent retained the same advocate in both matters. Further that this case proceeded **ex parte**, and the Court therefore did not have the benefit of hearing and considering the case and evidence against the Defendant herein. He contended that once he became aware of the instant suit, he wrote to the **Land Registrar, Thika** and notified him of the pending case in **Milimani ELC**, and his interest. He thereafter conducted a search and found that a **decree** was registered against his titles. That when he visited **Githunguri Ranching Company Limited**, they confirmed that their records reflected that **Ndirangu Macharia** was the bonafide proprietor of the suit property herein. He urged the Court to allow the instant Application.

The Application is opposed and the Plaintiff/ Respondent filed grounds of opposition and averred that the suit is spent and the case is already heard and determined and there is nothing pending after Judgment. Further that the Applicant is not a party to the suit and neither are his Advocates properly on record as no leave has been sought for them to be enjoined in the suit. Further that there is another suit pending between the **Plaintiff** and the **Interested Party** herein and therefore lacks capacity to agitate any cause of action against the Plaintiff/ Respondent. Further that the issues raised in this Application are **res judicata**, since the Judgment delivered by the Court addressed all the grounds and the Court therefore lacks jurisdiction.

In her Replying Affidavit the Plaintiff, **Elizabeth Wambui Kiragu** reiterated the contents of her grounds of opposition and averred that the Applicant purports to be the registered owner of the suit property by virtue of having purchased it from the Defendant. However, the Court in its **Judgment** addressed the issue raised by the Applicant herein, and held that the Plaintiff was the rightful owner of the suit property. She further averred that the Applicant's rightful claim should be against the Defendant as the issue of ownership has already been dealt with. She denied claims by the Applicant that he only became aware of the suit in **August 2018** as her Advocates on record had indicated the existence of the suit herein in an Application dated **27<sup>th</sup> February 2018**, in **ELC 298 of 2013**, which the Applicant is a party. Further that there is a correspondence from her Advocate to the Applicant's Advocate on the existence of this suit. It was her contention that the Applicant is dishonest, as all along he was aware of the existence of this suit. She contended that this application is not made in good faith and is only meant to frustrate her and deny her justice. She urged the Court to dismiss the instant Application for the interest of justice.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered. The Court finds the issue for determination is **whether the Applicant is entitled to the orders s sought**.

The first issue is whether the Applicant was a necessary party in this suit so that he ought to have been enjoined in the suit in the first place. The Applicant has averred that he bought the suit property from the Defendant on the **31<sup>st</sup> of October 2012**, way before the suit was filed in Court. This Court has seen the sale agreement signed between the Defendant and the Applicant and it is indeed true that the same is dated **31<sup>st</sup> October 2012**. Further, from the said sale agreement, it is clear that the Applicant had performed all of his obligations under the contract so that what therefore remained was for the Defendant to transfer the suit property to the Applicant. From the pleadings in this matter, it is clear that the instant suit was filed on the **12<sup>th</sup> November 2012**. It therefore means that at the time of filing this instant suit, the Applicant had all beneficial rights over the suit property having bought the same from the Defendant and that the Defendant then held the suit property in trust for the Applicant.

In deciding whether the Applicant ought to be enjoined, this Court is guided by **Order 1 Rule 10 (2)** of the Civil Procedure Rules which provides that:-

*“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out. And that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

Further in the case of **Judicial Service Commission ...Vs... Speaker of the National Assembly & Another (2013) eKLR**, the court defined an Interested Party as:

*“From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly none partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”*

Further in the case of **Lucy Nungari Ngigi & 128 others ...Vs... National Bank of Kenya Limited & another [2015] eKLR**, the Court held that;

*“but one thing is clear from all these things: that the Plaintiffs and the intended Plaintiffs have an inextricable relief arising out of the subdivision and sale of the plots herein to them by the 2<sup>nd</sup> Defendant. Even if each of the Plaintiffs was to file a separate suit, a common issue of fact and law would emerge in relation to the subdivision and sale of the plots to each one of them.*

**Similarly, the validity of the addendum to the mortgage herein between the Defendants is in the center of the cases by the Plaintiffs and the intended Plaintiffs. Therefore, despite the fact that the plots are numerous and perhaps of different sizes or that they were sold to different persons, they are all deduced from the suit property, and derived in the same transaction: they are based on the addendum between the Defendants, and all form part of the mortgaged property. Invariably, the determination of the real issues in controversy between the Plaintiff and the intended plaintiffs on the one hand, and the Defendants on the other hand, will need all concerned parties to be before the court.”**

It is evident that by the time this suit was filed, the Applicant had already purchased the suit from the Defendant. In her Complaint, the plaintiff had sought for an injunction against the Defendant and all other people claiming under him. It is also clear that on **27<sup>th</sup> Feb 2013**, the plaintiff herein filed **ELC No.298 of 2013**, at Milimani. The court is left wondering why she chose to file a separate suit instead of enjoining the applicant herein as a party to this suit. Further, the court has also considered the Judgment it delivered on **6<sup>th</sup> July 2018**, and it is clear that the Defendant did not attend court to adduce evidence. Much as the Court found that the Plaintiff's title was the first in time, the said determination affects the Applicant herein who was not a party to this suit. The rule of natural justice requires that such a party who is affected by the outcome of a determination ought to have been granted an opportunity to present his case. However the Court did not understand why the applicant herein did not choose to be enjoined in this suit earlier given that his advocate on record had been made aware of existence of this suit vide a letter dated **8<sup>th</sup> April 2015**. Be that as it may, it's prudent and in the interest of justice to grant him an opportunity to ventilate his case before the suit is determined.

On the next issue as to whether or not the **ex-parte Judgment** delivered on **6<sup>th</sup> July 2018**, ought to be set aside, the Court is guided by the findings in the case of **John Mukuha Mburu ....Vs...- Charles Mwenga Mburu [2019] Eklr, where** the Court held that:-

**"It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another —versus Shoka [1990] 1KLR 463**

In the instant case, it is not in doubt that the Applicant was never served with the suit papers. Even if at the time of filing this suit, the Plaintiff only knew of the Defendant's interference, she later filed a suit against the Applicant being **ELC no 298 of 2013**. The best she could have done thereafter was to seek to consolidate the two suits. The Applicant was a necessary party in the suit as his interest were to be affected by the outcome of the determination herein. Therefore, the Decree herein prejudices him more than the Plaintiff/Respondent herein. The Plaintiff will still have an opportunity to ventilate her case, but with the applicant as a party too. Consequently, the Court finds that the Plaintiff herein will not suffer any prejudice if the Judgment is set aside. This is so as a Judgment only becomes proper when all the parties to the suit have been given a chance to ventilate on the issue. See the case of **Mungai ...Vs...Gachuhi & another [2005]eKLR, cited** with approval in the case of **Signature Tours & Travel Limited ...Vs... National Bank of Kenya Limited; where the Court held that**

**"a court's decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their presentations concluded unless they elect to forego the opportunity".**

Having carefully considered the facts of this case, the affidavits filed by both parties, the rival submissions by both advocates and the relevant provisions of law, and authorities cited, the Court finds that this is a proper case for exercise of the its discretion in favour of the applicant herein. However, this does not mean that the Court has already made its mind that the applicant is the owner of the suit property. But with the present judgment, then the Court's hands in **ELC NO, 298 of 2013**, which is still pending will have been tied as the Court herein had already determined that the Plaintiff herein who is also the Plaintiff in **ELC NO. 298 of 2013**, is the owner of the suit property. Accordingly the Court hereby **sets aside** the **ex parte judgment**, delivered on **6<sup>th</sup> July 2018**, and all the consequential orders thereof.

The Applicant is granted an opportunity to defend the suit and the matter be heard interparties expeditiously and be determined on merit. For the above reasons, the Applicant is granted leave to file his Defence within a period of **14 days** from the date hereof.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **4<sup>th</sup> October 2018**, is found merited and is allowed entirely with costs being the cause.

Further, the Court finds that since the issues in dispute herein are the same as the issues in dispute in **ELC no 298 of 2013**, pending at **Milimani Court**, if the same is not yet determined, the two suits should be consolidated and heard and determined together. This will prevent a situation where two Courts might find themselves issuing conflicting determinations over the same suit property, thus embarrassing the Judiciary.

It is so ordered.

**Dated, signed and Delivered at Thika this 15th day of June 2020.**

**L. GACHERU**

**JUDGE**

**15/6/2020**

**Court Assistant – Jackline**

**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 :**

**No consent for the Plaintiff/Respondent**

**No consent for the Defendant**

**No consent for the Proposed Defendant/Applicant**

**L. GACHERU**

**JUDGE**

**15/6/2020**