

REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 113 OF 2013

**FLORENCE WAIRIMU MBUGUA (Suing as the administratrix of the
Estate of the late Joseph Kiarie Mbugua).....PLAINTIFF**

VERSUS

ZAKAYO MAINA.....1ST DEFENDANT

JOHN OCHIENG.....2ND DEFENDANT

JOHN MUSILI.....3RD DEFENDANT

PAUL KARIUKI.....4TH DEFENDANT

SIMON KAMAU.....5TH DEFENDANT

JOHN NYAMU.....6TH DEFENDANT

JACOB MAINA.....7TH DEFENDANT

AND

GEORGE KAMAU NJUGUNA.....1ST INTERESTED PARTY

STEPHEN GATHECHA MBUGUA.....2ND INTERESTED PARTY

RULING

The Application

The application before the Court for determination is an amended Notice of Motion dated 4th July 2013 filed by the Intended Interested Parties (hereinafter referred to as “the Applicants”) and is brought under Order 1 Rule 3 and Order 40 Rule 7 of the Civil Procedure Rules and sections 1A, 1B, & 3A of the Civil Procedure Rules. The Applicants are seeking the following orders:

- a) Pending the hearing and determination of the application inter-partes, there be ordered a stay of execution in respect of the court orders issued on 3/7/2013.
- b) The Interested Parties be joined in the suit as Defendants
- c) The proceedings of the Court and its orders granted pursuant thereto on the 3/7/2013 in favour of the Plaintiff as respects the Plaintiff’s application dated 22/1/2013 be set aside, and the Interested Parties be allowed to be heard in opposition to the said application dated 22/1/2013 before a ruling thereon can be delivered.
- d) The Plaintiff herein do bear the costs of the application in any event.

The application is premised on grounds that the Applicants have recently learnt of the existence of this suit. Secondly, that the Plaintiff has failed to disclose to the court that the parcels of land subject matter of this suit namely L.R No. NBI/BLOCK 119/574 and 575 are the subject of a subsisting suit being HCCC No. 558 of 2008, in which the Applicants have sued the Plaintiff and other administrators for illegally taking over the parcels. Further, that there are injunctive orders restraining the Defendants therein from claiming ownership or undertaking anything on the subject parcels. Therefore, that the suit herein has been brought in bad faith to circumvent the orders made in HCCC No. 558 of 2008, and consequently, that it is in the interest of justice that the Applicants application be granted.

The application is supported by an affidavit sworn by the 1st Intended Interested Party on 28/6/2013, wherein he deponed that the Applicants hold valid titles to the said parcels of land, and that the Lands Registrar has confirmed in writing that the titles held by the Plaintiff were acquired illegally. The

deponent referred to an order made by Mbogholi – Msagha J. in HCCC No. 558 of 2008 on 19/11/2009 which he annexed, and stated that the court in the said orders restrained both parties from interfering with the subject parcels of land pending the determination of the case. It was further deponed that the Plaintiff could therefore not bring this suit claiming rights to the said parcels of land. The deponent contended that the Plaintiff was underserving of the orders sought in view of the material non-disclosure.

The Responses

The 2nd Defendant swore a Replying Affidavit on 10/7/2013 on behalf of the Defendants and in support of the Applicant's application. He deponed that it is only just that the issue of ownership be resolved before one can lay claim to the suit parcels of land.

The application was opposed who filed Grounds of Opposition dated 12/7/2013, wherein she stated that the orders sought by the Applicants were unreasonable for reasons that first, the orders issued in this suit on 3/7/2013 do not in any way contradict the orders granted on 19/11/2009 in HCCC 588 of 2008. The Plaintiff contended that the orders of 19/11/2009 was meant to maintain the status quo but did not in any way bar either of the parties from seeking appropriate remedies against third parties such as trespassers.

Secondly, that the order sought, if granted would have the effect of altering the status quo existing as at the time the order was made thereby her removal from possession of the said parcels. Thirdly, that the orders sought would only delay the hearing and determination of the suit as they will not in any way assist in the resolution of the issues between the parties herein. The Plaintiff contended that the Applicants would only raise extraneous issues that do not involve the issue of trespass to land.

The Plaintiff averred that whereas the issue in HCCC No. 588 of 2008 is based on a rival claim for ownership of the suit parcels, the present suit is purely on trespass and therefore; the claims made and the prayers sought are separate and distinct. Further, that the orders made by the court in both suits are different from one another; and that there is a reasonable expectation that the Applicants ought to support her because the suit is directed against the Defendants who are third parties. It was the Plaintiff's averments that there would be no justification of joining the Applicant's to the suit.

The Plaintiff also filed a Replying Affidavit sworn on 16/7/2013 wherein she deponed that her late husband is the registered proprietor of Nairobi Block/199/574 and 575 as confirmed by the Certificates of Lease issued on 9/3/2009, and that they have been in possession of the same since 1993 and developed a petrol station thereon. The Plaintiff deponed that she is aware of the orders made by Mbogholi-Msagha J. in HCCC 588 of 2008 which she outlined as follows:

- a) That both parties be and are hereby restrained from interfering with the property/properties in question being L.R. No. 199/574 and 575 to the prejudice of others.
- b) That to facilitate expeditious disposal of the case, parties would have to comply with the pre-trial steps so that this matter can be listed for hearing.

The Plaintiff stated that her understanding of the order was that status quo as at the date of the order be maintained between her family and the Applicants; no party to take any steps that are prejudicial to the other; and the need to dispose of the suit expeditiously.

The Plaintiff averred that there was no order of injunction restraining her from carrying out any business or running the petrol station on the suit premises. Therefore, that her right of ingress and egress was preserved by the said order and consequently her right to take any action to preserve their business and possession remained undisturbed. The Plaintiff further averred that the instant suit is directed at Defendants, being trespassers who have interfered with her right to possession of the suit parcels. It was her disposition that the Applicant's application has the effect of supporting the trespassers as they seek to have the orders issued against the Defendants stayed. The Plaintiff refuted the allegation that she is in breach of the court order granted on 19/11/2009, and deponed that the Applicants had not shown any reason why the Defendants should remain on the suit parcels.

The Submissions

The application were canvassed by way of written submissions. Namadi & Company Advocates for the Applicants filed submissions dated 16/8/2013 wherein counsel submitted that the Applicants' claim of

ownership of the suit parcels justifies their application of joinder. Further, that it was mischievous on the part of the Plaintiff to institute a suit without joining the Applicants who were her protagonists in a different suit. Counsel also submitted that the possibility of conflicting court orders emanating from the existence of two suits over the subject matter was inevitable.

L.M. Mbabu Advocate for the Plaintiff filed submissions dated 11/12/2014, wherein counsel reiterated the contents of the Plaintiff's pleadings that joinder of the Applicants would serve to convolute a simple suit of trespass between the Plaintiff and the Defendants. Counsel further submitted that the Applicants had not demonstrated how their rights, if at all, are likely to be infringed in the event the suit proceeded in their absence. It was also submitted that the Plaintiff did not see the need to disclose the existence of the suit between her and the Applicants on the basis that the two suits are unrelated. In respect to their application for joinder as Defendants, counsel submitted that the Applicants had failed to demonstrate that the Plaintiff has a claim against them. It was counsel's submission the Plaintiff did not wish to sue the Applicants because they are not trespassers, and that there were no orders sought against them.

The Issues and Determination

I have carefully considered the pleadings filed and submissions made by the Plaintiff and Defendant. There are three issues for determination raised by the Applicants namely:

1. Whether the execution of the orders granted herein by this Court on 3rd July 2013 should be stayed.
2. Whether the proceedings on the Plaintiff's application dated 22/1/2013 and consequent order given herein on 3rd July 2013 should be set aside.
3. Whether the Applicants should be joined to this suit as Defendants.

Stay of Execution

The grounds upon which an order of stay of execution can be granted are set out in Order 42 Rule 6 of the Civil Procedure Rules which requires an applicant to show that:-

Substantial loss may result to the applicant unless the order was made;

The application was made without unreasonable delay; and

Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.

The question that arises is whether there shall be any substantial loss that will be suffered by the Applicants in the event stay is not granted. It is an uncontested fact that the parcels of land which are subject matter of the suit herein are also the subject matter of HCCC No. 588 of 2008 between the Plaintiff and the Applicants. On perusal of the pleadings and the temporary orders made by the court in HCCC No. 588 of 2008, I note that of the fact that the Applicants herein and the Plaintiff both claim ownership of the suit properties known as LR. Nairobi/Block 119/574 and 575.

In addition, the Applicants' in their Complaint in HCCC No. 588 of 2008 do admit that the Plaintiff herein is in occupation of the suit properties and continues to operate a petrol station. In fact one of the prayers therein is to have the Plaintiff demolish the structures developed thereon. In the interim, this Mbogholi – Msagha J. on 19/1/2009 in a bid to preserve the suit properties pending the determination of the suit, held in HCCC No. 588 of 2008 that both parties shall be restrained from interfering with the property/properties in question to the prejudice of the other.

From the foregoing, it is my view that the orders made against the Defendants herein does not in any way occasion substantial loss to the Applicants. I agree with the submissions of the Plaintiff that the orders by Mbogholi - Msagha J. in HCCC No. 588 of 2008 did not restrain the Plaintiff from continuing to operate its business, and did not give any directions to preserve the suit property from trespassers. It follows therefore that there is no reasonable ground to stay execution of the order made on 3/7/2013 because the said order was in respect of the Defendant's interruption of the Plaintiff's possession of the suit which this court did find was without good cause. In addition the Applicants did not provide any security for costs as required by law.

Setting Aside of Proceedings and Order

The applicable laws on setting aside of orders are the provisions of section 80 of the Civil Procedure Act

and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) of the Civil Procedure Rules in addition spells out conditions that must be met in an application for review of a decree or order as follows:

There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made, mistake or error apparent on the face of the record, or for any other sufficient reason, the application must be made without unreasonable delay.

I have perused the pleadings and proceedings in the Plaintiff's application dated 22/1/2013, and the ruling thereon delivered by this court on 3/7/2013. The salient aspects of the said ruling were that the Plaintiff was found to have shown her title and entitlement to the suit properties, and that the Defendants had not established that the suit property is public land that had been allocated to them. This Court therefore restrained the Defendants from further interfering with the Plaintiff's ownership and directed the Defendants to remove themselves and their vehicles from the suit property.

The Applicants have not shown how the said proceedings and order made on 3rd July 2013 meet the conditions for review and setting aside. In addition, as has been found in the foregoing, no prejudice has been shown to have been suffered by the Applicants as a result of the said proceedings and order so as to make them amenable to setting aside.

Joinder of Applicants

On the last issue of the joinder of the Applicants as Defendants in this suit, Order 1 Rule 3 of the Civil Procedure Rules provides as follows as regards parties who may be joined as defendants:

“ All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

The Plaintiff has opposed the application for joinder on the basis that the remedies sought is as against the Defendants herein, the cause of action being one of trespass, and not as against the Applicants.

I am in this regard persuaded by the decision of Sila Munyao J. in the case of Joseph Leboo & 2 Others v Director Kenya Forest Services & Another, Eldoret E&L NO. 273 OF 2013 [2013] eKLR in which the Honourable Judge opined as follows:

I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacunae in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an application which is not coming from the plaintiff, may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue. Where there is an application for a person to be joined as defendant, and the plaintiff objects to such joinder, the court should even be more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings, actually ought to be directed against the party sought to be enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party.

In the circumstances of this case, I find the Applicants cannot be joined as Defendants herein as the Plaintiff is not seeking any right or relief against them. In any event the Applicants can effectively canvass their claim as against the Plaintiff in HCCC No. 558 of 2008. These findings notwithstanding, I

concede that it is just and fair that the Applicants be joined in this suit as interested parties, in view of the undisputed fact that they have a claim over the suit properties.

This court accordingly orders as follows arising from the reasons given in the foregoing :

1. George Kamau Njuguna and Stephen Gathecha Mbugua be and are hereby respectively joined as the 1st and 2nd Interested Parties to this suit.
2. The prayers in the Applicants' Amended Notice of Motion dated 4th July 2013 for stay of execution of the order granted herein on 3rd July 2013 is hereby denied.
3. The prayer in the Applicants' Amended Notice of Motion dated 4th July 2013 for the setting aside of the proceedings of the Plaintiff's application dated 22nd January 2013 and order granted herein on 3rd July 2013 is hereby denied.
4. The interim order of stay of execution of the order of 3rd July 2013 granted herein on the 4th July 2014 be and is hereby discharged.
5. The Applicants shall meet the costs of their Amended Notice of Motion dated 4th July 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 5th day of February, 2015.

P. NYAMWEYA
JUDGE