



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 501 OF 2017

(Consolidated with Nairobi ELC No 221 of 1999)

ELIAS BARAGU WAITHANJI.....PLAINTIFF

=VERSUS=

CHIEF LAND REGISTRAR - MINISTRY OF LANDS.....1ST DEFENDANT

JOSEPH MWANGI MAINA.....2ND DEFENDANT

RULING

1. On 20/12/2018, this court (Obaga J) consolidated the two suits herein, Nairobi ELC No 221 of 1999 and Nairobi ELC No 501 of 2017. The dispute in the two suits relates to the question of ownership of Land Reference Number 209/2279 situated along Crossroads in the Nairobi City Centre. Joseph Mwangi Maina and Elias Baragu Waithanji lay rival claims of title to the suit property. The suit property is developed and generates rental income.
2. Obaga J recused himself from handling this matter on 27/4/2019 following an application by Joseph Mwangi Maina (Mr Maina). Mr Maina had contested Judge Obaga's adjudication of the dispute on the ground that on 1/2/2001, Judge Obaga, then a practising advocate, commissioned an affidavit by Mr Azhar Khan who was counsel for one of the parties in Nairobi ELC No 221 of 1999. The two suits are scheduled for substantive hearing on **3/11/2019**.
3. Two applications fall for determination in this ruling. The first application is a notice of motion dated 29/11/2017 and brought by Mr Elias Baragu Waithanji (Mr Waithanji) in Nairobi ELC 501 of 2017. He seeks the following orders:
 - 1) *...(spent)*
 - 2) *That pending the hearing and determination of this application, the honourable court be pleased to grant an order of temporary injunction to restrain the 1st and 2nd respondents by themselves, their agents or servants from transferring, selling, leasing, using disposing or otherwise dealing with the suit property herein namely LR No 209/2279, Crossroads, Nairobi.*
 - 3) *That pending the hearing and determination of this suit, the honourable court be pleased to grant an order of injunction to restrain the 1st and 2nd respondents by themselves, their agents or servants from transferring, selling, leasing, using, disposing or otherwise dealing with the suit property herein namely LR No 209/2279, Crossroads, Nairobi.*
 - 4) *That pending the hearing and determination of this application/suit the honourable court be pleased to issue an order of temporary injunction to restrain the 2nd defendant/respondent by himself, his agents and servants from demolishing the premises on the suit property LR No 209/2279 Crossroads, Nairobi namely a four storey residential building, including a hotel.*
 - 5) *That pending the herein and determination of this application/suit the honourable court be pleased to grant and order of mandatory injunction to compel the 2nd defendant/respondent to surrender and/or give vacant possession of the suit property namely LR No 209/2279 to the plaintiff/applicant.*
 - 6) *That pending hearing and determination of this application/suit the honourable court be pleased to issue an order of injunction to restrain the first defendant/respondent from issuing a certificate of title to the 2nd respondent in respect of the suit property namely LR No 209/2279 and/or prohibit further dealings in respect of the said property.*
 - 7) *That such other or further orders and directions to prevent the miscarriage of justice occasioned upon the plaintiff/applicant from being aggravated and/or compounded.*

8) That the costs of this application be borne by the respondents.

4. The second application is the notice of motion dated 26/3/2019 brought by Mr Joseph Mwangi Maina (Mr Maina). He seeks the following orders:

1) ... (spent)

2) That the honourable Justice E O Obaga do recuse himself from further conduct of this suit.

3) That the application in ELC Suit No 501 of 2017 be placed before an independent arbiter for directions, considerations and determination

4) That the honourable court be pleased to set aside and expunge the entire proceedings and subsequent orders granted by the Learned Judge Hon E O Obaga in both Civil Suit No 221 of 1999 and ELC No 501 of 2017

5) That the costs of this application be provided for.

5. I have considered the responses to the two applications. I have also considered the submissions tendered in respect of the two applications. Similarly, I have considered the tenor and import of the two applications. I will make brief sequential pronouncements on the two applications in the above order.

Mr Waithanji's Application dated 29/11/2017

6. Through this application, Mr Waithanji seeks both ordinary and mandatory injunctive orders. The two suits are scheduled for substantive hearing on 3/11/2020, which is six working days away. The key issue in the two suits is the question of ownership of the suit property. This application does not settle that question. The applicant seeks a mandatory injunction order six working days away from the trial date.

7. The court takes the view that, in light of the hearing date which is only six working days away, it does not make legal sense to focus on the relief of mandatory injunction. Parties should instead prepare for the hearing of the main suit and have the dispute conclusively determined. In the meantime, pending finalization of the hearing and determination of the two consolidated causes, the suit property and the rental income therefrom shall be preserved in terms of Order 40 rule 1 of the Civil Procedure Rules.

Mr Maina's Application dated 26/3/2019

8. Mr Maina's application sought the setting aside and expunging of the interlocutory proceedings and orders made by Obaga J. Judge Obaga made a finding to the effect that the consent recorded in ELC No 221 of 1999 was procured from the court fraudulently. He proceeded to set aside the consent order.

9. In my view, the remedy available to any party aggrieved by that finding was an appeal to the Court of Appeal. Judge Obaga is a judge of equal jurisdiction. I have no jurisdiction to sit as an appellate court over his decision.

10. Secondly, the key issue in the two suits is the question of ownership of the suit property. That question will not be answered by the impugned interlocutory proceedings and orders. It will be answered by evidence of the rival litigants, demonstrating how they acquired the suit property.

11. For the above reasons, the setting aside orders sought in the notice of motion dated 26/3/2019 are declined.

Disposal Orders

12. In light of the foregoing, the notice of motion dated 29/11/2017 brought by Mr Elias Baragu Waithanji, and the notice of motion dated 26/3/2019 brought by Mr. Joseph Mwangi Maina, are disposed in the following terms:

a) The setting aside orders sought in the notice of motion dated 26/3/2019 by Mr Joseph Mwangi Maina are declined.

b) Pending the hearing and determination of the two suits herein, Land Reference Number No 209/2279, Crossroads, Nairobi, shall not be disposed or charged.

c) Pending the hearing and determination of this suit, all rental incomes (net of management fees) from the suit property shall be preserved in a savings bank account to be jointly opened and operated by the two law firms representing Mr Elias Baragu Waithanji and Mr Joseph Mwangi Maina, respectively.

d) The two parties shall, through their respective advocates on record, jointly appoint a reputable estate management firm to manage the suit property pending the hearing and determination of the suits herein.

e) Parties are directed to prepare for the hearing of the main suits.

f) Costs of the two applications shall be in the cause in which they were brought.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Court Clerk - June Nafula

Note

This Ruling was supposed to be delivered on 19/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE