



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NUMBER 212 OF 2018**

**MAJESTIC SECURITY SYSTEMS LIMITED.....PLAINTIFF**

**VERSUS**

**MAGNATE VENTURES LIMITED.....1<sup>ST</sup> DEFENDANT**

**RAHAB KAREI MUKIAMA.....2<sup>ND</sup> DEFENDANT**

**TITUS KARAUKA MUKIAMA.....3<sup>RD</sup> DEFENDANT**

**RREGISTRAR OF TITTLES, NAIROBI.....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. This is a ruling in respect of three applications and a preliminary objection. The first application is dated 3<sup>rd</sup> May, 2018. It is brought by the plaintiff and it seeks the following orders: -

*a) Spent*

*b) Spent*

*c) That there be at temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves their servants or agents or any of them howsoever from dealing, entering into the suit premises ,fencing,alienating,damaging or demolishing structures belonging to the Plaintiff, building, selling, transferring and/or in any way interfering with the Plaintiff's lawful use of L.R. No. 21069 (Grant No. 78042 until hearing and determination of the suit.*

*d) That costs of this application be provided for.*

2. The second application is dated 22<sup>nd</sup> October, 2018. It is brought by the plaintiff and it seeks the following orders: -

*i) That the counterclaim and the 1<sup>st</sup> Defendant's Statement of defence be struck out in its entirety.*

*ii) That the counterclaim and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Statement of defence and counterclaim be struck out in entirety.*

*iii) That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Statement of Defence and Counterclaim be struck out in its entirety.*

*iv) That the costs of this application be provided for.*

3. The third application is dated 13<sup>th</sup> March, 2019. It is brought by the 1<sup>st</sup> Defendant and it seeks the following orders: -

*i) The plaint dated 3<sup>rd</sup> May, 2018 be and is hereby struck out and the suit dismissed in its entirety.*

*ii) Costs of this application and of the dismissed suit be borne personally by Esther Jeanet Ngenyi and Isaiah Kandie, Advocate.*

4. The Preliminary Objection is brought by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and it raises the following grounds: -

*a) That the same is incompetent as this suit is incompetent and void ab initio because the Plaintiff as pleaded has no shareholdings and has one director appointed posthumously;*

*b) That the same is frivolous, vexatious and otherwise an abuse of the process of the court as the legal instruments were admittedly handed over to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as well as possession of the suit land whose title was transferred to the 1<sup>st</sup> Defendant who was similarly placed in possession and the injunction would be late by 15 years.*

*c) The suit is res judicata as the issue of ownership of majestic Security Systems Limited was raised in HC.J.R No. 424 OF 2016 and the purported plaintiff through its advocates on record refused failed and or neglected to file any submissions on the matter after submitting to the Honourable Court's jurisdiction;*

*d) That the alleged Plaintiff director has no legal capacity to institute court proceedings as her capacity is not demonstrated and indeed being a posthumous director is perpetrating an illegality and it would be unlawful for this Honourable Court to aid in this illegality and Esther Jeanet Ngenyi should either withdraw this suit with costs or establish and how and when she became a non-shareholding director and her relationship to the deceased directors.*

5. At the centre of the suit filed by the Plaintiff and the counterclaims by the 1<sup>st</sup> Defendant on the one part and the counterclaim by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant on the other part is L.R. 21069 (suit property) which is currently registered in the name of the 1<sup>st</sup> Defendant. Prior to the transfer of the suit property to the 1<sup>st</sup> Defendant, the same was registered in the name of the Plaintiff. It is alleged that the directors of the plaintiff company signed a power of attorney which granted authority to Metra Investments Limited to sell the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are associated with Metra Investments Limited then sold the suit property to the 1<sup>st</sup> Defendant. At the same time, it is alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fraudulently presented themselves as directors of the Plaintiff company and thus sold the suit property to the 1<sup>st</sup> Defendant.

6. One of the directors of the plaintiff company made a complaint to the National Land Commission which led to the National Land Commission directing the Chief Land Registrar to register a caveat against the title to the suit property. It is this caveat which is the basis of the counter-claim by the 1<sup>st</sup> Defendant against the Land Registrar.

7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants allege that they were improperly removed as directors of the plaintiff company. This is the basis upon which they have filed a counter-claim in which they seek among other orders restoration of their names into the records of the company registry.

8. There was no response to the third application by the plaintiff. The court record shows that there were no directions given regarding the same and this explains why the plaintiff did not respond to it. The 1<sup>st</sup> defendant has however submitted on the same in its submissions.

### **The Preliminary Objection**

9. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contend that the issue of directorship of the Plaintiff Company was dealt with in High Court Judicial Review Application No. 424 of 2016 and that the matter was settled and that litigation has to come to an end.

10. The Plaintiff submitted that what the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have raised as a preliminary objection does not amount to one and ought to be dismissed. The Plaintiff also argues that the issue of res judicata does not arise as the issues being raised in this suit were not decided upon in the Judicial Review Application.

11. I have considered the submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the submissions by the plaintiff on the Preliminary Objections raised. In the case of **Mukisa Biscuit Manufacturing Company limited Vs West End Distributors Limited (1969) EA 696** a Preliminary Objection was defined in the following terms:

***“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. If cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion.”***

12. It is clear from the grounds raised particularly grounds numbers 1, 2 and 4 do not raise any pure point of law which can pass a test of a Preliminary Objection. This is because what is being raised requires ascertainment of facts and, therefore, they cannot form a basis of a preliminary objection.

13. On the issue of res judicata. It is clear that the High Court in the Judicial Review Application did not deal with the issue of ownership of the suit property as that was left for the Environment and Land Court and that is why this suit was filed before this court. In the application filed before the High Court, the issue before the court was whether the National Land Commission had jurisdiction to entertain an issue of ownership between two private entities where there was no issue of whether the suit property had been unlawfully or illegally converted to private land.

14. It is, therefore clear that the Preliminary Objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants lacks merit. The same is hereby dismissed with costs of the Plaintiff.

It is so ordered.

### **The First Application.**

15. The Plaintiff contends that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants used a fraudulent power of Attorney to transfer the suit property to the 1<sup>st</sup> Defendant. The plaintiff contends that the alleged Power of Attorney was not executed as required and that it was never registered and that the advocate who is purported to have signed the Sale Agreement which led to transfer of the suit property to the 1<sup>st</sup> Defendant denounced the said agreement and that the signature on the power of Attorney was found to be a forgery.

16. The purported change of directors in the company registry in respect of the Plaintiff Company was also found to have been fraudulent as the Plaintiff company's directors were never replaced by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiff, therefore, prays for an injunction to stop the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from employing the same fraudulent means to dispose of the suit property.

17. In its opposition to the application by the plaintiff, the 1<sup>st</sup> defendant contends that the directors of the plaintiff company died in 1998 and 2016 and therefore they could not be directors as per the CR. 12 dated 9<sup>th</sup> November, 2016. The 1<sup>st</sup> Defendant further argues that Esther Jeanet Ngenyi has not demonstrated that she is a legal representative of any of the estates of the deceased directors and cannot, therefore purport to bring a suit let alone a notice of motion.

18. The 1<sup>st</sup> defendant further argues that it is the registered owner of the suit property which it purchased for Ksh.48,000,000/- after carrying out due diligence which established that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were directors of the plaintiff company.

19. The investigations by the Directorate of Criminal Investigations later revealed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not criminally liable for the accusation made against them. The director of the 1<sup>st</sup> Defendant stated that one of the directors of the Plaintiff Company tried to extort money from him so that he could stop pursuing the land issue but that he refused. It is after this refusal that the same director went to complain before the National Land Commission which cancelled the title held by the 1<sup>st</sup> Defendant, a decision which was later quashed by the High Court.

20. In their opposition to the Plaintiff's application, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants question the capacity of the deponent of the Supporting affidavit to the application for injunction arguing that she has failed to disclose how she was appointed a director of the Plaintiff Company and who the other directors are. They also argue that the deponent is feigning ignorance of the fact that the suit property was given to them as a replacement of L.R. No. 209/12744 which her husband had intended to sell to them but which he sold to someone else before deciding to give them the suit property which was bigger than the one he had sold to a third party and that he asked to be added ksh.1.5 Million which was paid to him.

21. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants accuse the deponent of the supporting affidavit of using the company registry to frustrate them as well as the Directorate of Criminal Investigations and the National Land Commission which tried to nullify the title held by 1<sup>st</sup> Defendant but which action was reversed by the High Court.

22. I have considered the application of the Plaintiff as well as the opposition thereto by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The only issue for determination is whether an injunction should issue as prayed for by the Plaintiff. There is no contention that the suit property is currently registered in the name of the 1<sup>st</sup> Defendant. There is also no contention that it is the 1<sup>st</sup> Defendant which is in possession but there are no developments on the same.

23. There is also no contention that the plaintiff was the original allottee of the suit property and was the first registered owner. There are allegations that the ownership of the plaintiff changed hands to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who then sold the suit property based on their alleged directorship in the plaintiff company. The 1<sup>st</sup> Defendant claims to have purchased the suit property after carrying out due diligence and establishing that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were directors of the plaintiff company.

24. It is clear from a perusal of the documents presented before the court as well as the averments made in the affidavits filed herein that there are serious contested facts as to how ownership changed from the Plaintiff to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who then sold the suit property to the 1<sup>st</sup> Defendant. This being the case, the best the court can do is to order that the obtaining status quo be maintained. The suit property has not been developed. There should be no development of the suit property and there shall be no sale, charging or any other action as would change the character of the suit property until this case is heard and determined. The costs of this application shall be in the cause.

It is so ordered.

### **The Second Application**

25. In this application, the Plaintiff contends that the 1<sup>st</sup> Defendant's defence and counterclaim ought to be dismissed as the 1<sup>st</sup> Defendant has counter-claimed against the 4<sup>th</sup> Defendant only and that the Plaintiff has no opportunity to respond to the Counterclaim.

26. In response to the Plaintiff's application, the 1<sup>st</sup> Defendant contends that it has filed a counterclaim against the 4<sup>th</sup> defendant and did not

have to direct its claim to the Plaintiff from which it does not have a relief to claim against. The 1<sup>st</sup> Defendant cannot be expected to file a notice of claim against a co-defendant as it is not claiming any indemnity against the 4<sup>th</sup> Defendant.

27. In their response to the application by the Plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants state that, it is the husband of Ngenyi who surrendered the original title to the suit property to them and that he signed a power of Attorney and M/s Ngenyi cannot, therefore, claim that the title was given to them to enable them subdivide the suit property for purposes of hiving off one acre which they intended to purchase.

28. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants argue that they would not have been given a PIN by Kenya Revenue Authority if they did not have evidence that they were Directors of the Plaintiff Company. They argue that the plaintiff company only had the suit property as its asset and that it became convenient to file change of Directors to avoid incurring stamp duty.

29. I have considered the plaintiff's application as well as the opposition to the same by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The only issue for determination is whether the defences and counterclaims by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should be struck out. It is trite law that striking out of a pleading should be done sparingly considering the peculiar circumstances of each case. This a contested litigation involving how a property changed ownership. There are allegations that the directorship of the plaintiff company was achieved through fraudulent means.

30. The 1<sup>st</sup> Defendant alleges to have purchased the suit property after it was convinced that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were directors in the plaintiff company. There is no contention that there is a caveat which was registered against the title at the behest of the National Land Commission. The defence of the 1<sup>st</sup> Defendant is not so hopeless as to be struck out. Its counter-claim is also not without merit. It should not be struck out.

31. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claim that they lawfully became directors of the Plaintiff Company. Their counterclaim is not so hopeless as to be struck out. In matters to do with land, it is in very rare cases that a defence or claim can be struck out. The fact that the plaintiff has no opportunity to answer to a counter-claim which is not directed at it is no ground for seeking to strike out the counter-claim by the 1<sup>st</sup> Defendant. A party cannot compel another to seek a relief against it if such relief cannot be directed at it. I find that the application by the plaintiff lacks merit. The same is dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

It is so ordered.

### **The Third Application**

32. This application seeks to have the plaintiff's suit struck out with costs being borne by Esther Jeanet Ngenyi and Isaiah Kandie personally. As I said hereinabove, the court did to give directions on this application but because the 1<sup>st</sup> defendant decided to address the same. I will proceed to deal with it so that we do not have to come back to it.

33. There was no response filed by the Plaintiff and the reason is clear. There are weighty issues to be determined in this suit. The plaintiff's suit is not so hopeless as to be struck out. The 1<sup>st</sup> Defendant was contending that there was no board resolution made authorizing the filing of this suit. The Plaintiff Company has demonstrated that there was such a resolution and the 1<sup>st</sup> Defendant cannot claim that the resolution was made after the suit had been filed and was backdated.

34. The 1<sup>st</sup> Respondent also took issue with the advocate failing to demonstrate that he had instructions to act for the plaintiff. The plaintiff demonstrated through affidavit that the advocate had instructions to act for the plaintiff. There is therefore, no basis upon which the 1<sup>st</sup> Defendant can claim that the instructions were backdated. I find no merit in this application which is dismissed with no order as to costs as there was no response to the same or even mention about the application in the plaintiff's submissions.

It is so ordered.

### **Disposition**

35. In summary thereof, I make the following final orders: -

***1) The Preliminary objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is dismissed with costs to the Plaintiff.***

***2) An order of maintenance of status quo is granted in respect of Notice of Motion dated 3<sup>rd</sup> May, 2018. For avoidance of doubt, it is the 1<sup>st</sup> Defendant which is in possession of L.R. No. 21069. There shall be no development on the suit property, no sale, no charging or carrying out any act which will alter the status of the suit property by any party until the hearing and determination of this suit.***

***3) The costs of the Notice of Motion dated 3<sup>rd</sup> May, 2018 shall be costs in the cause.***

***4) The Notice of Motion dated 22<sup>nd</sup> October 2018 is dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.***

***5) The Notice of Motion dated 13<sup>th</sup> March, 2019 is dismissed with no order as to costs.***

**Dated, signed and delivered in Nairobi on this 11<sup>th</sup> day of November, 2020.**

**E .OBAGA**

**JUDGE**

In the Virtual Presence of:-

Mr. Njeru for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Mr. Kamau for 4<sup>th</sup> and 5<sup>th</sup> Defendants.

M/s Ang'awa for Mr. Havi for 1<sup>st</sup> Defendant

Court Assistant : Hilda

**E .OBAGA**

**JUDGE**