



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 393 OF 2017

NYOTE MUHIAPLAINTIFF/APPLICANT

VERSUS

LYDIAH WAIRIMU KAGODO.....1ST DEFENDANT/RESPONDENT

NYAKINYUA INVESTMENTS LIMITED....2ND DEFENDANT/RESPONDENT

WERU MACHARIA.....INTENDED 3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated 26th January 2017, brought by the Applicant herein under, **Order 1 Rule 10 (2), Order 8 Rule (3) and Order 40 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Code, Cap 21 Laws of Kenya** and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers;

- 1. That Weru Macharia be enjoined in these proceedings as a 3rd Defendant.**
- 2. That Leave be granted to the Plaintiff to amend the *Plaint* herein accordingly and in terms of the draft amended *Plaint* herein.**
- 3. Pending the inter parties hearing of this Application a temporary injunction do issue restraining the defendants generally and Weru Macharia specifically or anybody claiming through them or deriving a claim to the Title through them, their employees, servants or agents from transferring, constructing upon, developing or continuing with any commenced development or transfer in respect of land parcel LR.No.Ruiru/Mugutha 1/2251 and LR.No.Ruiru/ Mugutha 1/22652**
- 4. The costs of this Application be in the cause.**

This Application is premised on the grounds stated on the face of the application and on the supporting Affidavit of *Nyote Muhia*. These grounds are:-

- a) Initially the Plaintiff instituted this suit against the 1st and 2nd Defendants genuinely believing the 2nd Defendants to be the only ones interfering with the suit plots and has previously approached this court by way of Certificate of urgency seeking *inter alia* injunctive orders and declaration that she is the legal owner of the said suit plots and the injunctive orders were granted against the 1st and 2nd Defendants.**
- b) That further investigations at the time of the service of the orders have revealed that Weru Macharia is the owner and proprietor of the construction and developments continuing on the suit properties allegedly having purchased the land from the 1st Defendant.**
- c) The amendment sought will enable the court to determine all issues in dispute between all the parties concerned.**

The Applicant in her *Supporting Affidavit* averred that at the time of filing the suit she relied on the information she had pertaining the Defendants which related only to the 1st and 2nd Defendants. She further averred that upon further investigations it was discovered that the intended 3rd Defendant was the person carrying on construction activities on the suit properties having purchased the land from the 1st Defendant. It was her contention that for proper adjudication of the dispute, it is necessary that he be enjoined in the proceedings and the injunctive orders be issued against him. She reiterated that the title was acquired illegally and therefore follow up transfers is illegal as no valid title can pass.

The Application is opposed and the intended 3rd Defendant filed a Replying Affidavit on 20th November 2017. He averred that he is the registered owner of **LR.No.Ruiru/Mugutha Block 1/2251**, having purchased the same after a diligent search and following the proper and regular procedure as evidenced by **annexture VM-1**. He further averred that the land was registered in his name and he took possession and commenced development and that is where he lives. It was his contention that as of 3rd February 2016, when the Plaintiff was being issued with receipts by the 2nd Defendant for issuance of a title deed the land had already undergone several conveyance.

The Application was canvassed by way of written submissions and the Applicant through the **Law Firm of Namada & Co. Advocates** filed their written submissions on 17th May 2018. They submitted that the court has powers to order and allow amendment of pleadings at any instance before judgment for the real question of controversy to be determined. They relied on various provisions of law and decided cases among them **Order 8 Rule 3(5)** of the **Civil Procedure Rules** that provides:-

“leave to amend pleadings even where a new cause of action is introduced provided that the said cause of action arises from similar facts or substantially similar facts to the main cause of action is allowable”

They further relied on the case of **Central Kenya Ltd...Vs...Trust Bank & 4 Others, CA No. 222 of 1998** where the Court stated:-

“amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

The Applicant further submitted that the grant of injunctions are governed by the celebrated decision of **Giella...Vs...Cassman Brown & Co Ltd (1973) E.A 358** and as she has legally owned the suit property for many years the likelihood of her suit succeeding is very high. The Court was therefore urged to allow the Application.

The Intended 3rd Defendant through the **Law Firm of Wathira Mwangi & Co. Advocates** filed their rival submissions on 22nd June 2018. It was submitted that the Plaintiff having been allocated land by the 2nd Defendant already allocated to the 1st Defendant, her relief lies with the 2nd Defendant. They relied on the case of **Aster Holdings Limited v City Council of Nairobi & 4 Others (2017) eKLR**, where the Court held that:-

“the position in law is that once land has been allocated to an individual or an entity, that land is no longer available for alienation to a third party. What happened in this case was not a case of double allocation. What happened was actually an illegal allocation of a property which had already been alienated.”

It was further submitted that the intended 3rd Defendant having been shown to be a *bona fide* purchaser for valuable consideration, his rights should be protected and that his joinder to the suit is not only unnecessary but a move meant to prejudice him. It was also submitted that the law does not act retrogressively and as such neither do orders and the said orders having been granted as against the 1st and 2nd Defendants and also overtaken by events, the same would be prejudicial to the intended 3rd Defendant and therefore the Court was urged to strike out the intended third Defendant's name from the suit and disallow the Application.

The Court has considered the instant Notice of Motion application and the annexures thereto. The Court too has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and makes the following rendition.

It is evident that the Plaintiff/applicant filed this claim against the 1st and 2nd Defendants/Respondents on 11th March 2016 and sought for several prayers among them;- **A declaration order that the Plaintiff is the legal owner of the parcel of land known as parcel Nos.Ruiru/Mugutha 1/2251 and Ruiru/Mugutha 1/2152.**

Simultaneously, the Plaintiff/Applicant filed a **Notice of Motion** application even dated and sought for restraining orders by way of temporary injunction against the 1st and 2nd Defendants wherein the Plaintiff alleged that she is the proprietor of the two parcels of land which was allocated to her by the 2nd Defendant – **Nyakinyua Investment Ltd**. However, in **March 2016**, she noticed a construction being undertaken on the said parcels of land which construction was illegal and thus the instant suit and said application. She averred that she was the rightful owner of the suit properties.

The said **Notice of Motion** application was opposed by the 1st Defendant herein **Lydia Wairimu Kagondo** who averred that contrary to the Plaintiff's assertion, she was the legal and registered owner of the two parcels of land. Further, that she sold **LR.No.Ruiru/Mugutha 1/2251** to one **Weru Macharia** in 2014. She annexed **copies of titles** in respect of the two parcels of land as **annextures LWK-1A & B**. She also contended that she had successfully balloted for the two parcels of land in 1989 and she has been in possession and occupation of the same since then. It was also her contention that she was one of the founder members of **Nyakinyua Investment Ltd** and she knows that Plaintiff has never been the owner of the suit properties.

The 1st Defendant filed her Defence too on 4th April 2016 and reiterated the contents of her **Replying Affidavit** to the **Notice of Motion** application dated 11th March 2016 and further reiterated that she had sold **Ruiru/Mugutha Block 1/2251** to one **Weru Macharia**. She denied any forgery as alleged by the Plaintiff.

From the court records, it is evident that the Plaintiff had filed another **Notice of Motion** dated 21st November 2016, wherein she had sought for temporary injunctive orders pending the hearing of **Notice of Motion** dated 11th March 2016. However, on 22nd November 2016, the Court directed that the **two Notices of Motion** applications dated 21st November 2016 and 11th March 2016 be heard together on 7th December 2016.

It is also evident from the court record that on **7th December 2016**, when the matter came for hearing of the two applications, **Mr. Juma** for the Plaintiff/Applicant informed the court that the Defendants had not filed any **Replying Affidavit** to the **Notice of Motion** dated **11th March 2016**. I have indeed perused the court file but I have not seen any **Replying Affidavit** to the **Notice of Motion** dated **11th March 2016** in terms of **prayer No.3** which was for **grant of injunctive orders restraining the Defendants from interfering or dealing with the suit property whatsoever until the suit is heard and determined.**

However, immediately after the grant of the said orders, the 1st Defendant filed a **Notice of Motion** application dated **15th December 2016** and sought to Stay the **Court Order** of **7th December 2016**. In the said application, the 1st Defendant annexed her **Replying Affidavit** in opposition to the **Notice of Motion** dated **11th March 2016**, and the said **Replying Affidavit** had been filed on **4th April 2016**, together with her defence. It seems like these two pleadings were not placed in the file and so on **7th December 2016**, it appeared like the 1st Defendant had not opposed the **Notice of Motion** application filed by the Plaintiff on **11th March 2016**.

It is from the above background that came to the realization by the Plaintiff that one of the suit property had already been sold to one **Weru Macharia** and that realization prompted the filing of the instant **Notice** of application dated **26th January 2017**.

In the said application the Plaintiff has sought for **joinder of Weru Macharia**, as a 3rd Defendant, amendment of the **Plaint** as per the annexed **draft Plaint** and for injunctive orders. The said application is opposed by the Intended 3rd Defendant.

The issue now for determination is whether the application is merited.

The Court will start with the issue of joinder of **Weru Macharia** to the proceedings as a 3rd Defendant herein. The 3rd Defendant has submitted that the dispute herein is between the Plaintiff and the 1st & 2nd Defendants and therefore he is not a necessary party herein. **Order 1 Rule 10(2)** provides as follows:-

“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”.

It is evident from the above provisions of law that the court is empowered to enjoin all the parties that are necessary for effective and complete adjudication of a matter before it.

As the Court had observed earlier, the dispute herein is over ownership of land parcels **No.Ruiru/Mugutha Block 1/2251** and **No.Ruiru/Mugutha Block 1/2252**. It is also evident that **Ruiru/Mugutha Block 1/2251**, has already been sold to **Weru Macharia**, the Intended 3rd Defendant. The said **Weru Macharia** admitted to have purchased the suit property from the 1st Defendant and also admitted that he has built on the suit property and that he lives on the suit property.

The Plaintiff has sought to be declared the owner of these two parcels of land, **Ruiru/Mugutha Block 1/2251**, which is now occupied by the Intended 3rd Defendant included. It is evident that if the court was to find for the Plaintiff, then the said **Weru Macharia** would be affected by the Court Orders. That would happen without having heard the evidence of **Weru Macharia** and thus against the rule of **Natural Justice**. The Court finds that **Weru Macharia**, the Intended 3rd Defendant is a necessary party herein for effective and complete adjudication of the dispute herein and therefore he should be enjoined to the suit as a 3rd Defendant.

Having found that **Weru Macharia** is a necessary party and there is need to enjoin him herein, then the natural event that follows is that the **Plaint** has to be amended. **Order 8 Rule 3(5)** provides as follows:-

“An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the

same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment”.

Further it is trite that amendment should be freely allowed at any stage of proceedings so long as the said amendments are not prejudicial to other parties. See the case of **Central Kenya Ltd...Vs...Trust Bank & 4 Others, CA 222 of 1998**, where the Court held that:-

“All amendments should be freely allowed at any stage of the proceedings provided that the amendments or joinder as he case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

Further as was held in the case of **John Nahashon Mwangi...Vs...Kenya Finance Bank Ltd (in liquidation) eKLR 2015**:-

“The overriding consideration in application for leave to amend is whether the amendments are necessary for the just determination of the controversy between the parties”.

In the instant suit, the Court finds that the amendment is necessary as the 3rd Defendant will be enjoined in the suit and his presence will aid the court in the just and effective determination of the dispute between the parties. The courts have always held that ***'leave to amend pleadings should only be denied as a last resort with good or sufficient cause so long as the amendments will not occasion any prejudice to any of the parties'***. See the case of *Joseph Ochieng & 2 Others v/a Aquiline Agencies...Vs...First National Bank of Chicago (1995) eKLR*.

Taking into account the relevant provisions of law, and being guided by *Section 3A* of the *Civil Procedure Act*, the Court finds that the necessary Order herein is to allow the amendments as sought by the Plaintiff/Applicant since no prejudice will be occasioned to the Defendants.

On the issue of injunction which is an equitable remedy granted at the discretion of the court and which discretion must be exercised judicially. See the case of *Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554*, where the Court held that:-

"Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised".

The Court finds that there is no doubt that 3rd Defendant herein was allegedly sold the suit property ***Ruiru/Mugutha Block 1/2251*** by the 1st Defendant. It has been alleged that he has put up his home on the suit property and that is where he lives with his family.

There is a dispute on who between the Plaintiff and 1st Defendant was the rightful allottee of the suit properties. The 1st Defendant alleged that she acquired the suit properties in ***1989*** and the Plaintiff alleged that she acquired the same in ***1991***. Even without going into the merit of the main suit, it is evident that the 1st Defendant was the first in time.

Further, even by the time the Plaintiff was issued with a ***Clearance Letter*** dated ***26th February 2016***, by the 2nd Defendant, the 1st Defendant had already sold the suit property to the 3rd Defendant. The 3rd Defendant is allegedly in possession and occupation of the suit property and therefore cannot be restrained from entering into the said parcel of land. Injunctions are issued to prevent occurrence of an event but not to prevent what has already occurred or overtaken by events. See the case of *Jane Kemunto Mayaka...Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005*, where the Court held that:-

"Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an event has taken place...."

The issue of who is the rightful or legal owner of the two parcels of land can only be resolved after calling of evidence and especially evidence from the 2nd Defendant. For now the Court finds that the 3rd Defendant is in occupation and the 1st Defendant had titles to the two parcels of land and it would not be prudent to injunct a title holder unless it is proven that the said titles were acquired fraudulently.

For the above reasons, the Court finds that the Plaintiff/Applicant has not established that she has a *prima-facie* case with probability of success as was held in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358*, where the Court held for injunctive orders to issue:-

- a) ***The Applicant must establish that he has a prima facie case with probability of success.***
- b) ***That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) ***When the Court is in doubt, to decide the case on a balance of convenience.***

Having found that the Plaintiff/Applicant has not established a *prima-facie* case, the Court finds no reasons to deal with the other limbs of *Giella...Vs...Cassman Brown case (supra)* since they are sequential. See the case of *Kenya Commercial Finance & Co. Ltd...Vs...Afraha Education Society (2001) 1EA 86*, where the Court held that:-

"The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella.vs.Cassman Brown & Co. Ltd 1973 EA pg.360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."

Having now carefully considered the pleadings in totality, the Court finds that the ***Notice of Motion*** application is merited in terms of ***prayers No.2 and 3*** only and the said prayers are allowed entirely.

However, the Court finds ***prayer No.4*** is not merited and the same is disallowed in its entirety with costs being in the cause.

The parties herein to prepare the main suit for hearing expeditiously and avoid too many interlocutory applications for the sake of expeditious disposal of this matter.

It is so ordered.

Dated, Signed and Delivered at Thika this 17th day of May 2019.

L. GACHERU

JUDGE

17/5/2019

In the presence of

Mr. Njoba holding brief for Mr. Namanda for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for Intended 3rd Defendant/Respondent

Diana - Court Assistant

L. GACHERU

JUDGE

17/5/2019