



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 224 OF 2015

(FORMERLY KERUGOYA 922 OF 2013)

NTHUMBI MUCHUNGU & 12 OTHERS.....PLAINTIFFS

VERSUS

HERBERT NTHIIRI & 16 OTHERS.....DEFENDANTS

RULING

1. By a notice of motion dated 25th September 2018 brought under the provisions of **Order 40 Rule 1(a), (b), 2 (1) and Order 51 Rule 1** of the **Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap. 21)** and all **enabling provisions of the law**, the Plaintiffs sought an injunction restraining the Defendants from sub-dividing, selling, charging or dealing with various parcels of land which were said to be sub-divisions of the original *Title No. Mbeti/Gachuriri/172* (hereinafter *parcel 172*) pending the hearing and determination of an intended appeal to the Court of Appeal. They also sought an order to compel the Land Registrar, Mbeere to enter restrictions against parcel 172 and resultant sub-divisions until the intended appeal is heard and determined.
2. The said application was based upon the various grounds set out on the face of the motion. It was contended that although judgement was delivered in their favour on 5th April 2018 with respect to parcel 172, the Defendants had filed an application for extension of time within which to file an appeal to the Court of Appeal to challenge the said judgement. It was further contended that some of the Respondents had embarked on disposing of some of the sub-divisions of parcel 172 in a bid to defeat the cause of justice.
3. The said application was supported by an affidavit sworn by the 1st plaintiff on his own behalf and on behalf of his co-plaintiffs. He reiterated and expounded upon the grounds set out on the face of the notice of motion. It was contended that even though the Defendants' application for extension of time to file an appeal out of time was yet to be heard, some of them were already disposing of the properties the subject of the intended appeal. The court was urged to grant the orders sought in order to preserve the subject matter of the litigation pending the hearing and conclusion of the intended appeal.
4. The Defendants filed a replying affidavit sworn by Mr. Nganga Munene, who is one of the Defendants, on 26th October 2018 in opposition to the said application. It was contended that 3 of the Defendants were already deceased and that the plaintiffs were aware of their death. He stated that he was a *bona fide* purchaser for value of two (2) of the resultant sub-divisions of parcel 172 without notice of any defects in title. It was further stated that the plaintiffs had all along failed to preserve the various sub-divisions of parcel No. 172 through cautions, inhibitions or court orders so as to forewarn any third parties dealing with the respective registered proprietors. It was also contended that some of the persons whose titles would be affected were not made parties to the suit.
5. The record shows that the Defendants jointly filed grounds of opposition dated 1st October 2018 and a further statement of grounds of opposition dated 23rd October 2018 in opposition to the Plaintiffs' said application. The record further shows that the Plaintiffs' advocate filed a reply dated 22nd November 2018 to the Defendants' said grounds of opposition. The said reply was essentially in the nature of arguments or submissions to counter the Defendants' aforesaid two statements of grounds of opposition. The 1st Plaintiff also filed a further affidavit sworn on 22nd November 2018.
6. The court has fully considered the Plaintiffs' said application for interim orders of injunction and inhibition with respect to 129 sub-divisions of parcel 172. The court has also considered the grounds of opposition, the replying affidavit in opposition thereto as well as the Plaintiffs' further affidavit in response to the replying affidavit. The court has also considered the oral submissions of the parties.
7. The court finds the instant application to be curious and strange. This is because the Plaintiffs are seeking interim orders pending the hearing and determination of an intended appeal by the Defendants. The record shows that the Plaintiffs were the successful parties before this court. The record also shows that there is no order for stay of execution of the decree. It is, therefore, not clear why the Plaintiffs filed the instant application instead of seeking to execute the decree in their favour.

8. Be that as it may, the court is obliged to consider the Plaintiffs' application on merit. The plaintiffs are apprehensive that the Defendants may dispose of the various sub-divisions of parcel 172 before their intended appeal is heard and concluded thereby defeating the cause of justice. The court's understanding of the application is that the Plaintiffs are essentially concerned with the preservation of the subject matter of the litigation. That does not necessarily call for an injunction since an order of inhibition may serve the purpose.

9. The courts of law are usually inclined to preserve the subject matter of litigation pending final resolution of the dispute amongst the litigants. The court has a duty to prevent a barren result in litigation. In the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907** it was held, *inter alia*, that;

“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid...”

10. The court is therefore satisfied that it is necessary to preserve the subject matter of litigation amongst the litigants herein. However, the Plaintiffs have purported to irregularly expand the scope of the litigation by seeking orders with respect to 129 parcels of land whereas most of them were not directly the subject of litigation in the instant suit. By its judgement dated 5th April 2018 the court made orders only against the 17 Defendants who were parties to the suit. The court is, therefore, not inclined to make any orders which may adversely affect the current registered proprietors who are not parties to the suit.

11. The upshot of the foregoing is that the court finds merit in the Plaintiffs' said application for an order of inhibition against the Defendants in this suit only. Consequently, the court makes the following orders;

a. The Land Registrar Mbeere shall cause an order of inhibition to be registered against the following sub-divisions of *Title No. Mbeti/Gachuriri/172*, that is, *Mbeti/Gachuriri/456, 446, 426, 427, 428, 429, 435, 438, 439, 443, 462, 440, & 445* and any sub-divisions of the said parcels.

b. The prayer for an interim injunction is hereby declined.

c. Costs of the application to the Plaintiffs.

12. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 16TH day of MAY, 2019

In the presence of Ms Maina holding brief for Mr. A.P. Kariithi for the Plaintiffs and Ms Kioko holding brief for Mr Munene for the Defendants

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

16.05.19