



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 499 OF 2015

MWANAISHA KASSIM MWALULU

(Suing as the administratrix of the

Late Zacharia Mwadembwe Zani).....PLAINTIFF

VERSUS

HAMISI ZACHARIA ZANI.....1ST DEFENDANT

KINANGO FILLING STATION LIMITED.....2ND DEFENDANT

THE LAND REGISTRAR, THIKA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The plaintiff brought this suit against the defendants on 8th June, 2015 seeking the following reliefs:

1. A declaration that the registration of the parcel of land known as Ruiru/Ruiru East Block 3/2698 (“the suit property”) in the name of the 2nd defendant is illegal and should be cancelled so that the property reverts to the estate of Zacharia Mwadembwe Zani.
2. A declaration that the suit property still belongs to the estate of the late Zacharia Mwadembwe Zani.
3. An order of injunction restraining the 1st and 2nd defendants from further dealing with the suit property.
4. Costs of the suit.

The 2nd defendant filed a defence on 13th August, 2015 denying the plaintiff’s claim in its entirety. The 2nd defendant averred that it was a bona fide purchaser of the suit property for valuable consideration. The 2nd defendant averred that the suit property was transferred to it lawfully. The 1st, 3rd and 4th defendants neither entered appearance nor filed statements of defence. It is not clear whether they were served with summons to enter appearance.

On 5th April, 2016, the plaintiff and the 2nd defendant filed in court a consent letter dated 2nd March, 2016. The said consent letter provided that the plaintiff and the 2nd defendant had agreed to sub-divide the suit property into four portions of various sizes to be registered in the names of the 2nd defendant and three (3) other persons who are not parties to this suit. The consent is yet to be adopted as an order of the court. On 19th August, 2016, the plaintiff and the 2nd defendant filed in court another consent letter in which they agreed that the Land Registrar, Thika be directed to prepare a Green Card for the suit property with the 2nd defendant as the proprietor of the property.

When the matter came up for mention on 20th April, 2017 the court noted that the 1st and 3rd defendants were not parties to the consents the plaintiff and the 2nd defendant had entered into which they wanted the court to endorse as an order of the court. The court directed the plaintiff to file a formal application for an order compelling the Land Registrar, Thika to prepare a new Green Card and to have the same served upon the Land Registrar, Thika. That is the application which is now before the court.

The plaintiff's application was brought under Order 51 rule 1 of the Civil Procedure Rules and Section 1A and 2A of the Civil Procedure Act, 2010 and Article 159 of the Constitution of Kenya. In the application, the plaintiff sought only one prayer namely;

“THAT the 3rd defendant does issue a fresh Green Card for the property registered as Plot No. Ruiru/Ruiru East Block 3/2698 whereby the proprietor is Kinango Filing Station Limited.”

The application which was brought by way of Notice of Motion dated 27th October, 2017 and supported by the affidavit of the plaintiff was brought on the grounds that the plaintiff and the 2nd defendant had reached an agreement in relation to the suit property which they had reduced into a consent and filed in court and that the terms of the said consent could not be implemented due to the loss of the Green Card for the suit property at Thika Land Registry. The plaintiff averred that the order sought in the application was necessary to enable her realise the terms of the said agreement which she had reached with the 2nd defendant in relation to the suit property.

The application was served upon the respondents none of which responded to the same. When the application came up for hearing on 29th October, 2018, Mr. Nyoike who appeared for the plaintiff urged the court to allow the same as prayed as it was not opposed. I have considered the application together with the affidavit filed in support thereof. I have at the beginning of this ruling set out in detail the nature of the plaintiff's claim herein against the defendants. The claim is for the recovery of the suit property from the 2nd defendant who is alleged to have acquired the property through fraudulent acts of the 1st defendant. The issue concerning the alleged loss of the Green Card for the suit property is not raised in the plaint or in the defence filed by the 2nd defendant.

What is before the court is an interlocutory application. An application of this nature must be based on the pleadings and the orders sought must have some resemblance with the reliefs sought in the main suit. In this particular case, the plaintiff has sought in an interlocutory application an order which has no basis in the pleadings and is incongruent with the reliefs sought in the plaint. The court cannot grant such order since granting the same would be against the rules of pleadings. None of the provisions of the law cited by the plaintiff empowers the court to grant the order sought.

I wish to add that even if the application was considered on merit, I would not have granted the same. No evidence has been placed before the court showing that the Green Card for the suit property is lost and that a request has been made to the Land Registrar, Thika to prepare a new Green Card and he has failed to do so. The plaintiff's allegation that she will not be able to implement the terms of the consent which she has entered into with the 2nd defendant because of the loss of the Green card for the suit property at Thika Land Registry is in my view speculative. First, the said consent has not been adopted as an order of the court so that it can give rise to an order that can be implemented. Secondly, as I have already mentioned, no evidence of whatsoever nature has been placed before the court of any request made to the Land Registrar, Thika to avail the said Green Card. The plaintiff has annexed to the affidavit in support of the application a certificate of official search on the title of the suit property which is an indication that the Green Card for the property was available when the search was done. There is no intimation as to when the said Green Card went missing.

Due to the foregoing, I am of the view that the plaintiff's application has no basis and that no sufficient grounds have been put forward to warrant the grant of the orders sought. I therefore find no merit in the Notice of Motion application dated 27th October, 2017. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 27th day of June 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Apolot for the Plaintiff

N/A for the 1st Defendant

Ms. Namulala for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

Mr. Waweru-Court Assistant