



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 63 OF 2012

CAROL CONSTRUCTION ENGINEERS LTD....PLAINTIFF

VERSUS

NAOMI CHEPKORIR LANGAT.....DEFENDANT

RULING

(Application by defendant to have other persons enjoined as co-defendants; suit by plaintiff seeking damages and permanent injunction against the defendant; land having been previously owned by defendant's husband who charged it to a bank which sold the land to a third party and third party transferred the land to the plaintiff; defendant now wishing to have her husband, the bank and the first buyer to be enjoined as co-defendants; defendant claiming that the bank wrongfully sold the land; it would be untenable to have the said persons enjoined as co-defendants for the plaintiff has no claim against them; in the event that defendant has any issue with the said persons, correct avenue is to have them brought to the suit as Third Parties or file a counterclaim against them; application dismissed)

1. The application before me is that dated 15 September 2017 filed by the defendant. The application is said to be brought pursuant to the provisions of Article 159 (2) of the Constitution, 2010, Section 3, and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 1 Rule 2 and Rule 10 of the Civil Procedure Rules, 2010. The application seeks orders that Kenya Commercial Bank, Ms. Martha Moraa Mayieka, and Mr. Joel Kimitet Langat be enjoined as co-defendants in this suit. The application is opposed by the plaintiff and by Kenya Commercial Bank whom I directed to be served with the application. There was no response by Martha Moraa Mayieka and Joel Kimitet Langat despite being duly served.

2. The issue in this case is over the ownership of the land parcel Njoro/Ngata Block 2/130. That property was initially registered in the name of Joel Kimitet Langat (Mr. Langat) who charged it to Kenya Commercial Bank (KCB). It seems as if Mr. Langat defaulted on his loan with KCB and KCB advertised the property for sale by public auction with the purchaser being Martha Moraa Mayieka (Ms. Martha). Ms. Martha became registered as proprietor of the property but thereafter transferred it to the plaintiff by way of gift and the plaintiff became registered as proprietor on 11 December 2009. What prompted the filing of this suit is that on 27 October 2012, auctioneers descended on the suit land on the instructions of the defendant, with intention to evict the plaintiff and some property was destroyed. In this suit, the plaintiff has asked that the defendant be permanently restrained from the suit property and for damages in the sum of Kshs. 4,250,000/=.

3. The applicant's reply to the plaintiff's suit is that she came into the property pursuant to a valid court judgment made in Nakuru CMCC No. 1857 of 2000. She also thought that the transfer of the land from Ms. Martha to the plaintiff was fraudulent. There was a reply that the applicant cannot claim benefit of any judgment in Nakuru CMCC No. 1857 of 2000 because the said case, where she had sued KCB, was dismissed with costs.

4. In this application, the applicant avers that at the time the property was sold to Ms. Martha, there was a court order against KCB stopping it from selling or dealing with the land. The said order is stated to have been issued in Nakuru CMCC No. 1857 of 2000. It is the position of the applicant that the sale by KCB was illegal and therefore it is necessary to enjoin KCB, Ms. Martha, and Mr. Langat to these proceedings as co-defendants. The applicant believes that they are necessary parties to this suit to enable the court effectively and substantially deal with the issues in this case.

5. The plaintiff has replied to the motion through the replying affidavit of its director Mr. Jeremiah Mayieka. He has inter alia deposed that the plea of res judicata applies to the joinder of KCB owing to the suit Nakuru CMCC No. 1857 of 2000. He has further deposed that the court order relied on by the applicant was issued on 10 September 2001 long after the property had been transferred to Ms. Martha on 26 March 2001. He has also deposed that the case Nakuru CMCC No. 1857 of 2000 was decided in favour of KCB.

6. KCB have responded to the motion through the affidavit of Gregory Vata. He has averred inter alia that KCB advanced to Mr. Langat a loan in the years 1991-1993, and the suit land was offered as security. There was default and the property was sold to Ms. Martha on 4 August 2000 by way of a public auction. He has stated that by the time the applicant got an injunction on 24 August 2000, the property had

already been sold. Title was thereafter transferred to Ms. Martha on 7 May 2001. He has mentioned that the applicant filed the suit Nakuru CMCC No. 1857 of 2000 against KCB which suit was dismissed. He is of opinion that the issue of legality of the sale was ventilated in Nakuru CMCC No. 1857 of 2000 and the said issue is now res judicata.

7. In his submissions, Mr. Aim learned counsel for the applicant, submitted that the sale of the suit land to Ms. Martha was tainted with illegality since there was a court order stopping the sale and Ms. Martha thus had no good title to pass to the plaintiff. He submitted that it is therefore necessary to enjoin KCB, Ms. Martha and Mr. Langat. Mr. Ojou, learned counsel for KCB, submitted inter alia that the issue of the sale to Ms. Martha is res judicata. He was not of the opinion that his client is a necessary party to this suit. Mr. Kagucia, learned counsel for the plaintiff, also raised the issue of res judicata. He further submitted that the application is misplaced, for if the applicant has an issue with KCB, Ms. Martha or Mr. Langat, she ought to file her own case, or apply for them to be enjoined as third parties to this suit, but not as co-defendants.

8. I have considered the matter. The application seeks joinder of the three mentioned persons as co-defendants. It should be remembered that this is a suit filed by the plaintiff seeking reliefs against the applicant who is sued as defendant. The person who is seeking the joinder of additional defendants is the defendant in the matter. What this means is that if the application is allowed, then KCB, Ms. Martha and Mr. Langat will be defendants, but the plaintiff in this matter has no claim or complaint whatsoever against the parties sought to be introduced as defendants. We will end up having an absurd situation where there are defendants in the matter but who the plaintiff has nothing against.

9. If the position is as articulated by the applicant, that she feels that the sale to Ms. Martha was improper, the proper way is for her to file her own suit to contest the sale. She may also consider Third Party proceedings. But I am already seeing challenges to this because she already filed suit in Nakuru CMCC No. 1857 of 2000 where I note that she had sought a declaration that the sale of the suit land by KCB was illegal, wrongful and invalid. That case was dismissed, and I think the plea of res judicata would apply. I however need not go too deeply into this because this is not what is before me.

10. My holding is that it will be wrong for this court to impose upon the plaintiff some persons as defendants when in fact the plaintiff has no issue with such persons.

11. For that reason, this application is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 25th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Kagucia present for the plaintiff.

Mr. Ojou present for KCB- intended Co-defendant.

No appearance on the part of M/s Wachira Wekhomba & Aim for the defendant.

No appearance for Ms. Martha Moraa- Intended Co- defendant.

No appearance for Mr. Joel Langat- intended Co- defendant.

Court Assistants- Nelima Janepher/Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU