



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 265 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

HAROUN NGENY KIPKEMBOI ARAP MENGECH.....1ST DEFENDANT

NOREEN SHARIFF CHOGE, EVA CHEROGONY AND

BYRON KIPNGETICH GAWON CHOGE (SUED AS ADMINISTRATORS OF THE ESTATE OF

JIM CHOGE (DECEASED)).....2ND DEFENDANT

NAKURU COSMETICS CENTRE LIMITED.....3RD DEFENDANT

DIAMOND TRUST BANK.....4TH DEFENDANT

WILSON GACHANJA.....5TH DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 23rd July 2018, 1st defendant's Notice of Preliminary Objection dated 18th October 2018 and 3rd defendant's Notice of Motion dated 5th March 2019.

2. Notice of Motion dated 23rd July 2018 seeks the following orders:

1. *Spent*

2. *Spent*

3. *Spent*

4. *THAT the 1st, 2nd and 3rd defendants by themselves, servants or any other person whatsoever be restrained from selling, advertising for sale, auctioning, transferring, further charging and/or in any other manner howsoever dealing with the parcel of land described as Nakuru Municipality Block 5/144, pending the hearing and final determination of this suit.*

5. *THAT the 4th defendant by themselves, servants or any other person whatsoever be restrained from alienating, selling, transferring, charging, developing, leasing, sub-dividing, wasting, entering and remaining upon, or in any other way dealing with the parcel of land described as Nakuru Municipality Block 5/144, pending the hearing and final determination of this suit.*

6. *That the costs of this application be provided for.*

3. Notice of Motion dated 23rd July 2018 is supported by an affidavit sworn by Jecinta Bungei, a forensic investigator employed by the applicant. She deposed that the parcel of land known as Nakuru Municipality Block 5/144 (the suit property) is government land which had been planned, reserved and used by the government for construction of housing for public officers and that on it stands government house number NKU/HOU/MG/24 which was built in the 1960s. That a land officer purportedly acting for the Commissioner of Lands offered the suit property to the 1st defendant and that on 30th May 1994 the 3rd defendant fraudulently or illegally caused a lease over the suit property to be issued to the 1st defendant and later to the 2nd and 3rd defendants despite the fact that the suit property was at all times a public utility

reserved for government housing. That on 16th July 2013 the 2nd defendants having obtained registration through transmission fraudulently transferred the suit property to the 3rd defendant who later charged it in favour of the 4th defendant to secure a loan of KShs 23 Million.

4. Counsel for the 1st defendant indicated that the 1st defendant does not oppose Notice of Motion dated 23rd July 2018. On their part, the 2nd defendants responded to the application through a replying affidavit sworn by Noreen Shariff Choge, the 3rd defendant opposed it through a replying affidavit sworn by its director Sammy Mwangi Kiguru while the 4th defendant opposed it through a replying affidavit sworn by its Legal Manager Amaan Kassam.

5. Notice of Preliminary Objection dated 18th October 2018 is based on the following grounds:

1. *THAT the suit is filed contrary to Order 4 Rule 1(f) as read together with Order 4 Rule 1(2) of the Civil Procedure Rules, 2010 of the Laws of Kenya;*

2. *THAT the suit is otherwise bad in law.*

6. Notice of Motion dated 5th March 2019 seeks the following orders:

1. *THAT this Honourable Court be pleased to strike out this suit as against the 3rd defendant/applicant for reasons that;*

a) *This Court lacks the jurisdiction to supervise, superintend, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other divisions of the High Court in Kenya.*

b) *The suit is res judicata as the fate of the subject matter has been determined on merit by a court of competent jurisdiction.*

2. *THAT costs of this application and suit be provided for.*

7. Notice of Motion dated 5th March 2019 is supported by an affidavit sworn by Sammy Mwangi Kiguru, a director of the 3rd defendant. He deposed that the 3rd defendant purchased the suit property following an order issued by the High Court on 2nd March 2016 in **High Court Succession Cause No. 934 of 2008 (Nairobi)** and following failure by the relevant government agencies to act on the orders issued in the said case, **Nairobi Judicial Review Application No. 570 of 2017** was filed to compel compliance. That judgment was delivered in **Nairobi Judicial Review Application No. 570 of 2017** on 20th March 2018 whereby the court directed the Principal Secretary Ministry of Lands and the Chief Land Registrar among others to comply with the order issued by the High Court on 2nd March 2016. That in view of the pronouncements, this court lacks jurisdiction to supervise or purport to mend the real or perceived mistakes of the High Court.

8. Parties were ordered to file and exchange submissions in respect of the two applications and the Notice of Preliminary Objection. The plaintiff filed submissions on 4th February 2019 and on 17th September 2019, the 3rd defendant on 25th February 2019 and again on 1st July 2019, the 2nd defendants on 25th April 2019 while the 4th defendant filed submissions on 16th April 2019. I have not seen any submissions from the 1st and 5th defendants.

9. I have carefully considered the applications, the affidavits filed, the preliminary objection and the submissions. I will deal with the Notice of Preliminary Objection first.

10. Since there are no submissions filed by the 1st defendant to advance its position in the preliminary objection, the said objection should generally fail. Even if I was to consider its merits I note that its gist is that there has been non-compliance with **Order 4 Rule 1(f)** as read together with **Order 4 Rule 1(2)** of the **Civil Procedure Rules, 2010**. **Order 4 Rule 1(f)** provides:

(1) The plaintiff shall contain the following particulars—

... (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

11. On the other hand **Order 4 Rule 1(2)** provides:

(2) The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.

12. A perusal of the plaint reveals that at paragraph 34 thereof there is an averment that there is no suit pending and there have been no prior proceedings in any court between the plaintiff and the defendants concerning the subject matter of the suit. The plaint is also accompanied by a verifying affidavit sworn by Jecinta Bungei. It is thus manifest that the preliminary object is without merit. I dismiss it with costs to the plaintiff.

13. I will deal next with Notice of Motion dated 5th March 2019. The 3rd defendant has argued that the intention of this suit is to invalidate the proprietorship of the suit property as sanctioned by the High Court in **High Court Succession Cause No. 934 of 2008 (Nairobi)** and **Nairobi Judicial Review Application No. 570 of 2017**. It further argues that has no jurisdiction to supervise the High Court and that this

case is *res judicata* in view of the decisions of the High Court in the said two cases.

14. Res judicata is founded on **Section 7** of the **Civil Procedure Act** which provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court..

15. The Court of Appeal stated as follows in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

16. This matter is part of a series of matters in which the plaintiff herein has brought similar suits to recover what it considers to be public utility land. The issue of res judicata in the context of the decisions in the two High Court matters is a common thread in all the matters. I delivered a ruling on 30th September 2019 in **ELC No. 266 of 2018 (Nakuru) Ethics and Anti-Corruption Commission v William Kimaru & 2 Others** where I stated thus:

I note that the proceedings in High Court Succession Cause No. 934 of 2008 (Nairobi) were under the Law of Succession Act while those in Nairobi Judicial Review Application No. 570 of 2017 were brought to enforce, by way of mandamus, an order issued on 2nd March 2016 in the former case. The issue of validity of the allotment of the suit property and ensuing titles was never determined. Res judicata is therefore not applicable herein.

17. The scenario in this matter is exactly as it was in **ELC No. 266 of 2018 (Nakuru)**. I have considered the arguments herein on the issue of *res judicata* and I am still of the same persuasion as above. This court will be called upon at the hearing of the suit to consider validity of the allotment of the suit property and ensuing titles. That is an issue that falls squarely within the jurisdiction of this court and which was never before the High Court. In considering the matter the court will not have any supervisory role or jurisdiction over decisions made by the High Court. In the overall scheme of things, it is in the interest of the parties herein and others who may in the future transact over the suit property to know whether or not the allotment of the suit property and ensuing titles were valid. I therefore find no merit in Notice of Motion dated 5th March 2019. It is dismissed with costs to the plaintiff.

18. The plaintiff seeks an interlocutory injunction in Notice of Motion dated 23rd July 2018. It must therefore satisfy the test in **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

19. The applicant's case is that the suit property is government land on which stands government house number NKU/HOU/MG/24 which was built in the 1960s. That the suit property was at all times a public utility reserved for government housing and that it was not available for allotment and issuance of title as the Commissioner of Lands purported to do in favour of the 1st defendant and 2nd defendants. The said 1st defendant and 2nd defendants have not denied that as at the date of the allotment, a government house number NKU/HOU/MG/24 stood and still stands on the suit property and that it still occupied by a government employee. They however maintain that the property was lawfully allocated and that proper procedure was followed in acquiring the suit property. The suit property has since been transferred to the 3rd defendant which has charged it in favour of the 4th defendant to secure a financial facility. The 4th defendant has argued that the 3rd defendant defaulted in its repayment obligations and that the 4th defendant was in the process of exercising its statutory power of sale. It further argues that it did due diligence in the registration of the charge and that it will be prejudiced if the orders sought by the plaintiff are granted.

20. Considering the non disputed public history of the suit property, there is a valid issue to be determined by the trial court whether or not its allocation and subsequent issuance of title document to the 2nd defendant and 3rd defendants as well as the charge in favour of the 4th defendant were valid and lawful. I am therefore satisfied that the applicant has established a *prima facie* case. There is need for the preservation of the suit property pending hearing and determination of the suit. I do not think that damages can be an adequate remedy in the circumstances of this case.

21. I therefore make the following orders:

a) Notice of Preliminary Objection dated 18th October 2018 and Notice of Motion dated 5th March 2019 are both dismissed with costs to the plaintiff.

b) I grant an injunction restraining the 1st, 2nd and 3rd defendants by themselves, servants or representatives from selling, advertising for sale, auctioning, transferring, further charging and/or in any other manner howsoever dealing with the parcel of land described as Nakuru Municipality Block 5/144 pending the hearing and final determination of this suit.

c) I grant an injunction restraining the 4th defendant by itself, servants or representatives from alienating, selling, transferring, charging, developing, leasing, sub-dividing, wasting, entering and remaining upon, or in any other way dealing with the parcel of land described as Nakuru Municipality Block 5/144 pending the hearing and final determination of this suit.

d) The inhibition which had been ordered at the ex parte stage shall also remain in force pending hearing and determination of this suit.

e) Costs of Notice of Motion dated 23rd July 2018 are awarded to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd defendant

No appearance for the 4th defendant

No appearance for the 5th defendant

Court Assistants: Beatrice & Lotkomoi