



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.MISC.APP.31 OF 2017

ERIC TIMOTHY BALONGO.....APPLICANT

-VERSUS-

LAND REGISTRAR,

KIAMBU LAND DISTRICT.....1ST RESPONDENT

CHIEF LAND REGISTRAR2ND RESPONDENT

DAVID WANGONYA KURIA3RD RESPONDENT

RULING

The Applicant herein *Eric Timothy Balongo*, filed this Misc. Appl. on **21st April 2017** and sought for the following orders:-

1. Spent.

2) The Land Registrar, Kiambu Land District do forthwith remove the restriction registered on 9th June 2016, against the title of LR.No.Dagoretti/Thogoto/T.373 upon the application of Kangethe & Mola Advocates, on behalf of their client David Wangonya Kuria, the 3rd Respondent herein.

3) The Honourable Court do restrain the 1st Respondent herein by way of a permanent injunction from registering any further restrictions and/or cautions against the title of LR.No.Dagoretti/Thogoto/T/373, at the request or upon the application of the 3rd Respondent, his servants and/or legal representatives.

4) The Costs of this application be provided for and be paid to the Applicant by the 1st and 3rd Respondents.

The application is premised on the grounds stated on the face of the application being that:-

a) The 1st Respondent has without just and lawful reasons registered a restriction against the title of Dagoretti/Thogoto/ T.373, upon the application of Kangethe & Mola Advocates on behalf of their client David Wangonya Kuria, the 3rd Respondent herein.

b) The 1st Respondent has in contravention of Sections 76(1) and 78(1) of the Land Registration Act No.3 of 2012, as amended by Act No.28 of 2016, Section 25, failed, refused and/or neglected to remove the said restriction.

c) The 1st Respondent has failed, refused and/or neglected to perform his statutory duties demanded of him by the law.

d) The 1st Respondent continues to maintain the said restriction even where the court has variously disallowed an application for temporary injunction against the said title in favour of the 3rd Respondent.

e) The 1st Respondent is thus abusing his powers in maintaining the said restriction against the said title as aforesaid.

f) The Applicant, the registered proprietor of all that parcel of land known as Dagoretti/Thogoto/T.373, has suffered and continues to suffer prejudice, injury and/or damage by the continued existence of the said restriction as he cannot deal with the title as he deems fit including charging the same to a bank for a loan facility to meet his business, development and personal needs.

g) It is only fair and in the interests of justice that the Honourable Court do allow this application.

The application is also supported by the **Supporting Affidavit** of the Applicant, **Eric Timothy Balongo**, who averred that he is the registered sole and absolute proprietor of the suit property **LR.No.Dagoretti/Thogoto /T.373**, having purchased the same in a public auction on **13th February 2015**. However, before paying the full purchase price, the 3rd Respondent obtained a temporary injunction in **CMCC No.654 of 2015**, wherein the Applicant was not a party. However, the said suit was later dismissed for want of jurisdiction and upon payment of the full purchase price, he was registered as the proprietor on **8th February 2016**, and he was issued with a title deed. He however learnt that on **9th June 2016**, the 1st Respondent via an application by the 3rd Respondent, the previous registered proprietor placed a restriction, on the said parcel of land. He further averred that though his advocate has written to the 1st and 2nd Respondent to remove the said restriction, no action has been taken. He therefore urged the Court to allow his application.

The 1st and 2nd Respondents though served did not enter appearance nor file any Response to the instant application. However, the 3rd Respondent filed a **Notice of Preliminary Objection** on **22nd September 2017** on the following grounds:-

1) That the applicant's Notice of Motion is subjudice and/or Res Judicata in view of Nairobi ELC No.544 of 2016.

2) That the application is an abuse of court's process, unprocedural, fatally defective, contravenes express substantive provisions of law and should be struck out with costs.

The Court directed the parties to canvass the **Preliminary Objection** first by way of written submissions.

The 3rd Respondent through the **Law Firm of Wambui Ngugi & Co. Advocates**, filed the written submissions on **23rd October 2017** and submitted that the 3rd Respondent was the registered owner of **LR.No.Dagoretti/Thogot/T.373**, but it changed hands under unclear circumstances and 3rd Respondent filed **CMCC No.654 of 2015**, at **Milimani Chief Magistrate's Court**. However, due to jurisdiction hurdles, the said suit was dismissed for want of jurisdiction but the 3rd Respondent filed **ELC.No.544 of 2016**, at **Milimani Environment and Land Court**, which suit is still pending and on-going. He further

submitted that the Applicant has misled the court as the grant of this order will affect the *status quo* of the land herein though the ownership dispute has not been resolved and is the subject of ***Milimani ELC.No.544 of 2016***. That the grant of orders herein might end up conflicting the orders that might be granted by the Milimani Environment and Land Court in ***ELC.No.544 of 2016***.

The 3rd Respondent relied on ***Section 6 of the Civil Procedure Act*** which provides:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The 3rd Respondent further submitted that the Applicant has sought for permanent injunction relief in the absence of substantive suit and special circumstances as was held in the case of ***Kenya Breweries Ltd & Anco..Vs..Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109*** that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted.

However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.

The 3rd Respondent urged the Court to dismiss the instant application.

The Applicant filed his written submissions on ***19th October 2017*** and ***20th November 2017***, and urged the Court to dismiss the instant ***Notice of Preliminary Objection***. He submitted that the application is not ***subjudice*** in view of ***ELC.No.544 of 2016***, as *subjudice* applies only where an instant suit deals with a matter in issue that was directly and substantially in issue in a previously instituted suit or proceedings between the same parties litigating under the same title wherein such suit or proceeding is pending in the same or other court having jurisdiction in Kenya. It was further submitted that the parties herein and in ***ELC.No.544 of 2016*** are different. Further that the relief sought herein is different from the one sought in ***ELC.No.544 of 2016***. Therefore the matters and issues in the two suits are not substantially and directly the same.

Further, the Applicant submitted that his application is not an abuse of the court’s process as it is procedural and not fatally defective and it is properly brought under the Laws of Kenya. Further, the application has merit and has high chances of success and so the ***Preliminary Objection*** should be dismissed as it does not meet the stringent ingredients set out in the case of ***Mukisa Biscuit Manufacturing Ltd...Vs...West End Distributors Ltd (1969) EA 697***, where the Court held that:-

“A Preliminary Objection is in the nature of what used to be called demurrer. It raises pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse issues”.

The Applicant urged the Court to overrule the ***Preliminary Objection*** by the 3rd Respondent, dismiss it with costs and allow the Applicant to proceed with his instant ***Notice of Motion***.

This Court has now carefully considered the instant ***Notice of Preliminary Objection***, which is an objection to the effect that the application herein offends the clear provisions of Section 6 of the Civil

Procedure Act. The objection herein stems from the pleadings and it is a pure point of law. It is capable of bringing this application to an end. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Therefore the **Preliminary Objection** herein is a pure point of law and it meets the ingredients of what constitutes a **Preliminary Objection** as described in the **Mukisa Biscuits Case (supra)**.

Is the **Preliminary Objection** merited?

It is not in doubt that there exist an **ELC.No.544 of 2016**, at **Milimani Environment and Land Court**. The Applicant has not objected to that. The 3rd Respondent has averred that the said suit was filed by him challenging the ownership of the suit property by the Applicant who allegedly purchased it through a public auction. The 3rd Respondent alleged that is the reason why he applied for a restriction on the suit property to preserve the same before the ownership dispute is resolved.

The Applicant has alleged that the subject issue in dispute in his application is totally different from the disputed issue in **ELC.No.544 of 2016**. Further that the parties are not the same. However, the Applicant wants removal of the restriction on the suit property which was allegedly placed on the suit property after the 3rd Respondent applied to the Registrar due to the on-going **ELC.No.544 of 2016**. The Applicant therefore cannot allege that the issue herein is different from the issue in **ELC.No.544 of 2016**. The title that is being litigated over is the same and the Applicant should have waited until conclusion of **ELC.No.544 of 2016**, to file this application. Indeed the removal of restriction as prayed by the Applicant would affect the *status quo* of the suit property before conclusion of **ELC.No.544 of 2016**. Further, the Applicant should have filed the instant application in the said **ELC.No.544 of 2016**.

The Court finds that the subject matter herein being title for **LR.No.Dagoretti/Thogoto/T.373**, is a matter issue that is directly and substantially in issue in **ELC.No.544 of 2016**. The instant application herein is affected by the *subjudice* rule as provided by Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya.

Even with the knowledge that the 3rd Respondent had filed a suit challenging the acquisition and ownership of the suit property, the Applicant went ahead and filed this application before determination of the suit dealing with ownership and challenge of the title held by him. This suit is therefore an abuse of the court process. Consequently, the Court finds that the **Notice of Preliminary Objection** as filed by the 3rd Respondent is merited. The said **Preliminary Objection** is upheld and the Applicant’s application is found to offend the clear provisions of Section 6 of Civil Procedure Act and is an abuse of the court process.

For the above reasons, this application is struck out with costs to the 3rd Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Wamiti Njagi for Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Mr. Njoroge holding brief for M/S Wambui for 3rd Respondent

Diana - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

23/2/2018