



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 70 OF 2017**

**FLORENCE NYAMBURA WAHOME .....PLAINTIFF/1<sup>ST</sup> RESPONDENT**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT /RESPONDENT**

**LUCIA NJOKI KIMANI..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. By a plaint dated **24<sup>th</sup> April, 2017** and filed on 25<sup>th</sup> April, 2017 Florence Nyambura Wahome brought the suit herein against the Honourable Attorney General and Lucy Njoki Kimani seeking the following reliefs against the defendants:

- a. A declaration that the parcel of land known as LR 17648/159 belongs to her;**
- b. A declaration that the certificate of title for LR 17648/159 issued to the plaintiff (read 2<sup>nd</sup> defendant as there appears to be a mistake in respect of that prayer) be cancelled and the same be reinstated in her name;**
- c. Costs of the suit;**
- d. Any other or further relief the honourable court may deem fit to grant.**

2. Simultaneously with the plaint, the plaintiff brought the notice of motion of even date seeking the following reliefs:

- 1. Certification of the application as urgent and deserving to be heard *ex parte* within the first instance;**
- 2. A temporary injunction to restrain the 2<sup>nd</sup> respondent (Lucy Njoki Kimani) from entering, occupying, selling, transferring, charging or dealing in any manner with plot No. 17648/159 pending the hearing of the application *inter partes*.**
- 3. A temporary injunction to restrain the 2<sup>nd</sup> respondent (Lucy Njoki Kimani) from entering, occupying, selling, transferring, charging or dealing in any manner with plot No. 17648/159 pending the hearing and determination of the suit;**

4. An order prohibiting the 2<sup>nd</sup> respondent (Lucy Njoki Kimani) from transferring or charging plot No.17648/159 and prohibiting all persons from taking any benefit from such purported transfer or charge until the suit is heard and determined.

5. Costs of the application.

3. On 26<sup>th</sup> April, 2017 the application was certified urgent and the applicant ordered to serve for *inter partes* hearing before this court.

4. On 15<sup>th</sup> June, 2017 this court directed that the application be served for *inter partes* hearing on 20<sup>th</sup> June, 2017 at Muranga ELC and if the court will not be sitting Kerugoya ELC on 16<sup>th</sup> June, 2017.

5. The court record shows that the applicant through a fresh application dated 14<sup>th</sup> April, 2017 moved the court (read **Angima J.**,) for hearing of the motion dated 24<sup>th</sup> April, 2017.

6. Upon considering the matter presented before him the court, **Angima J.**, rendered himself thus:-

**“I have perused the certificate of urgency dated 14/6/2017 and the affidavit in support of the urgency by counsel for the applicant. I have also perused the plaintiff’s notice of motion dated 24/4/2017 together with the supporting affidavit and annexures thereto and make the following orders-**

**a. An interim order is hereby issued to restrain the defendant from selling, transferring, charging, or dealing with plot No. LR 17648/159 pending *inter partes* hearing on 29 June 2017.**

**b. The defendants shall be served within 4 days for *inter partes* hearing on 29<sup>th</sup> June 2017 before the ELC at Embu.”**

7. When the matter came up for hearing on 19<sup>th</sup> June, 2017, in the absence of counsel for the 2<sup>nd</sup> respondent, counsel for the applicant informed the court that they had served counsel for the 2<sup>nd</sup> respondent and that they had filed an affidavit of service.

8. On the basis of the case urged by counsel for the applicant, in the absence of counsel for the respondents, the court rendered itself as follows:-

**“The court has considered the plaintiff’s notice of motion dated 24<sup>th</sup> April, 2017 together with the supporting affidavit and annexures thereto. The court notes that there is no opposition to the said application. The plaintiff’s averments in the supporting affidavit remain uncontroverted and unchallenged. I accept the plaintiff’s version of events.**

**In the premises the court is satisfied the plaintiff has satisfied the requirements for an interlocutory injunction as set out in the case of *Giella v. Cassman Brown & Co. Ltd (1973) E.A 358* and I hereby grant prayers 3 and 4 of the notice of motion dated 24/4/2017 pending the hearing and determination of the suit. Costs of the application shall be in the suit.”**

**The motion dated 19<sup>th</sup> July, 2017**

9. Aggrieved by the aforementioned determination, the 2<sup>nd</sup> respondent filed the notice of motion dated 19<sup>th</sup> July, 2017 seeking to set aside or discharge the orders cited in paragraph 6 above.

10. The motion is premised on grounds that the 2<sup>nd</sup> respondent’s advocate was served with hearing notice of the application on the evening of 29<sup>th</sup> June, 2017, a day before the application was due for hearing

in Embu; that counsel for the 2<sup>nd</sup> respondent received the hearing notice and the documents attached thereto under protest because he had another matter coming up for hearing on the material day before the Nyeri ELRC Court to wit ELRC Cause No. 202 of 2017; that to his surprise, the 2<sup>nd</sup> respondent's counsel was served with orders issued on 29<sup>th</sup> June, 2017 restraining the 2<sup>nd</sup> respondent from entering, occupying, selling, transferring, charging or dealing in any manner whatsoever with the suit premises.

11. Explaining that by the time he was served with the orders the 2<sup>nd</sup> respondent was in occupation of the suit premises and effecting developments thereon, counsel for the 2<sup>nd</sup> respondent avers that he was not served with any hearing notice in respect of the motion dated 24<sup>th</sup> April, 2017 for 29<sup>th</sup> June, 2017.

12. Because the 2<sup>nd</sup> respondent is the registered proprietor of the suit property, it is contended that the applicant was not entitled to the orders issued by the court.

13. Terming the orders issued in favour of the plaintiff prejudicial to the 2<sup>nd</sup> respondent, as they had the effect of stopping the developments the 2<sup>nd</sup> respondent had began on the suit property, the 2<sup>nd</sup> respondent urges the court to set aside and/or discharge those orders.

14. The application is supported by the affidavit of the 2<sup>nd</sup> respondent/applicant, Lucy Njoki Kimani, in which the grounds on the face of the application are reiterated.

15. The application is opposed through the replying affidavit of the applicant/respondent (Florence Nyambura Wahome) sworn on 9<sup>th</sup> August, 2017.

16. From the averments contained in the motion hereto, the affidavit in support thereof and the replying affidavit sworn in opposition to the affidavit, the sole issue for consideration is whether the 2<sup>nd</sup> respondent/applicant has made up a case for setting aside or discharging the orders issued on 29<sup>th</sup> June, 2017.

17. In considering that issue, I begin by pointing out that it is not in dispute that the orders sought to be set aside were issued in the absence of the 2<sup>nd</sup> respondent/applicant and/or her advocate.

18. The court record shows that the court had ordered that the application be served for *inter partes* hearing on 29<sup>th</sup> June, 2017.

19. On 29<sup>th</sup> June, 2017 when the matter came up for hearing, counsel for the applicant/respondent informed the court that he had served the application as ordered by the court.

20. According to the 2<sup>nd</sup> respondent, her counsel was not served with hearing notice of the application dated 24<sup>th</sup> April, 2017 but the application dated 14<sup>th</sup> June, 2017 which was slated for hearing on 30<sup>th</sup> June, 2017 as opposed to 29<sup>th</sup> June, 2017. That averment by the 2<sup>nd</sup> respondent/applicant is said to be admitted by the applicant/respondent vide paragraph 26 of the applicant/respondent's replying affidavit where the applicant/respondent deposed as follows:-

**“That I am informed by my advocates on record which information I belief to be true that, that date was fixed by the court and none was required to serve. The file was available for perusal in the Embu registry. My advocate was not ordered to serve.”**

21. Having pointed out hereinabove that the plaintiff's advocate was ordered to serve the respondents for *inter partes* hearing, I find the above averment to be untrue.

22. There being no evidence that the 2<sup>nd</sup> respondent was served with a hearing notice of the application, I find the proceedings that took place on 29<sup>th</sup> June, 2017 to have been irregular.

23. By failing to serve the respondent with a hearing notice as ordered by the court, the applicant/respondent denied the 2<sup>nd</sup> respondent/applicant an opportunity to be heard before a decision that affected her rights to the suit property could be made against her. To make matters worse, counsel for the applicant lied to the court that he had served the respondents and filed a return of service something the applicant was unable to prove.

24. Although the applicant/respondent has given a number of reasons as to why the orders issued in her favour should stand, being of the view that the orders were issued on account of none disclosure of material fact to wit none service of a hearing notice to the 2<sup>nd</sup> respondent/applicant and/or her advocate and being of the view that proceeding with the matter in the absence of the 2<sup>nd</sup> respondent/applicant or her advocate was tantamount to denying the 2<sup>nd</sup> respondent/ applicant an opportunity to be heard on the case urged against her before any orders that could adversely affect her rights could be made, I find and hold that the 2<sup>nd</sup> respondent/applicant has made up a case for setting aside or discharging the orders issued against her on 29<sup>th</sup> June, 2017. In this regard see the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others [1995] e KLR** where it was observed:-

**“... With regard to the *ex parte* order the judge found that UHDL had failed to make a full and frank disclosure of material facts. Among the material facts the judge found to have been concealed by UHDL were that at the date of the order there were still 5 days to go before the bids were to be opened; it did not disclose and concealed from the judge the fact that 2 out of the 3 cheques which UHDL had issued to CBK in settlement of the debt had been dishonoured; it did not disclose to the judge the letter from the advocates acting for CBK dated 28th November, 1994 addressed to Mr Jim Choge. In that letter Murgor & Murgor Advocates pointed out that Pattni had defaulted on the agreement of 29th September, 1994 as he had failed to facilitate the transfer of the assets of agreed companies to CBK. The assets agreed to be transferred included Pan African Bank in Nairobi and Karachi, Pan African Finance, UHDL, Safariland Hotel Club Ltd with 150 acres of land and Plaza Investments with 20 acres of land at Embakasi. In the letter it was made clear that as a result of Pattni’s failure or refusal to perform his part of the agreement the parties reverted back to the position prior to 29th September, 1994. The judge also found that the service of the statutory notice had been concealed by UHDL. He held that the facts which UHDL had concealed, or failed to disclose, were of sufficient materiality to entitle CBK to an order discharging the *ex parte* injunction. He expressed the view that the concealment was deliberate as the facts which were not disclosed were known to UHDL.**

In reaching that conclusion, the learned judge had relied on the decision of this Court in the case of *The Owners of the Motor Vessel “Lillian S”* (Civil Appeal No 50/89) (unreported) where after reviewing a number of authorities including the well known case of *R v Kensington Income Tax Commissioners ep Princess Edmond De Polignac* [1917] 1 KB 486, I said:

**“This rule applies with equal force in Kenya and looking at the substance of the two telexes, I entertain no doubt at all that Caltex failed in its duty to make a full and frank disclosure of material facts and the application by the appellants to set aside the writ and the warrant of arrest of the ship ought to have been allowed because quite clearly the original order made by Githinji J, for the arrest of the ship was improperly obtained.”**

I had referred to two passages in *Princess Edmond’s* case. The first was from the judgment of Warrington LJ at page 509 where he said:

**“It is perfectly well settled that a person who makes an *ex parte* application to the Court, that is to say, in the absence of the person who will be affected by that which the Court is asked to do, is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage**

**he may have already obtained by means of the order which has thus wrongly been obtained. That is perfectly plain and requires no authority to justify it.”**

25. In the circumstances of this case, the applicant/respondent through her advocates lied to the court that it had served the application that was before court for hearing, when it had not done so.

26. Although none of the parties addressed me on whether the orders issued in favour of the plaintiff could lawfully issue in the absence of a prayer of a permanent injunction in the plaint, noting that the plaintiff had not sought a permanent injunction in her plaint, I am also of the considered view that the prayer for temporary injunction amounted to a departure from the plaintiff's pleadings. As such it ought to have been denied as without a prayer for a permanent injunction in the main suit, it beats logic to issue an order which the court would be unable to confirm at the conclusion of the suit.

27. The upshot of the foregoing is that the 2<sup>nd</sup> respondent/applicant's application dated 19<sup>th</sup> July, 2017 has merit and is allowed in terms of prayers 3 and 4.

28. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 21st day of February, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Kinuthia h/b for Mr. Gori for the plaintiff/ applicant

Mr. Muthuri h/b for Mr. Nderitu for the 1<sup>st</sup> defendant

Lucia Njoki Kimani

Court assistant - Esther