



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 261 OF 2017

DAVID MWANGI TATEI.....1ST PLAINTIFF/RESPONDENT

MARGARET NJERI WANJIKU.....2ND PLAINTIFF/RESPONDENT

VS

ABIGAEEL WANJIRU TATEI.....1ST DEFENDANT/APPLICANT

JOSEPH KIMANI TATEI.....2ND DEFENDANT/APPLICANT

ANTHONY NJOGU TATEI.....3RD DEFENDANT/APPLICANT

MBUGUA TATEI.....4TH DEFENDANT/APPLICANT

ALICE MUTHONI MBUGUA.....5TH DEFENDANT/APPLICANT

AND

JANE WAMBUI MUNGAI.....1ST INTENDED PARTIES/ RESPONDENTS

PHILIP SALIM MUTUMA MBAYA.....1ST INTENDED PARTIES/ RESPONDENTS

RULING

1. The Defendant's Applicants herein filed a Notice of Motion application dated 19/04/2017 seeking the following orders;

a. Spent

b. That the Honourable Court be pleased to grant leave to amend their defence to include a counterclaim against the plaintiff's herein and the intended parties and if so allowed the annexed amended defence and counterclaim be deemed to be duly filed and served upon the payment of the requisite fees.

c. That the amended defence and counterclaim be served on the intended parties.

d. A temporary injunction to issue to restrain the intended parties/Respondents or their representatives from intimidating the Applicants, alienating, selling, transferring or dealing with parcels of land No. LOC.7 GAKOIGO/5152,5126,5127,5128,5129 and 5130 being the resultant

subdivision from the original land parcel number LOC.7 GAKOIGO.715 (the suit land) pending hearing and determination of the application and the suit hereafter.

e. Costs to be provided.

2. The application is supported by the affidavit of Anthony Njogu Tatei who depones that the suit land belonged to JOHANA TATEI KAGIKI who is their late father and husband of the 1st applicant. That the suit property has been the subject of a protracted succession cause in HCCC Succession Cause No. 133 of 1998 as the main asset of the estate. He claims that the 1st applicant was the only wife of the deceased while in that succession cause the mother of the Respondents was confirmed to be the administrator of the estate and the protest of the 1st applicant herein was dismissed when the Court rejected her application for adjournment to call her witnesses.

3. As a result, the Applicants were disinherited of their father's estate. That having been dissatisfied with the decision the applicant applied for review which was denied thereafter she preferred an appeal and filed a notice of appeal to the Court of Appeal and a request for certified copies of proceedings and ruling has been made. That the Respondents later filed an application to prevent the Applicants from utilizing the land which was allowed on 28th October 2016 and the Applicants have preferred an appeal to that decision as well. That the Applicants have been living on the suit land during the lifetime of their deceased father to date. That the Applicants learnt that the suit land was subdivided into six parcels and sold to strangers who are the intended parties herein. He claims that the sale to the intended parties was irregular as there were pending appeals of the two decisions. That the present application seeks to enjoin the intended parties herein (who are the current registered owners of the suit lands) and to restrain them from dealing with the suit land any further.

4. The Respondents filed their replying affidavit sworn by Philip Mutuma Mbaya the 2nd intended party in opposition to the application who states that injunctive orders cannot be granted against intended parties who are yet to be parties to the suit. That similar orders were sought by the Applicants herein which were denied by the ELC High Court in Nyeri before the matter was transferred to Murang'a. That the prayers 3, 4 and 5 in the present application were determined in Nyeri Succession Cause No. 133 of 1998 hence they are res judicata. That the intended parties are the current owners and in actual possession of the suit land hence the prayers sought are impractical. That when they bought the suit land it was registered in the names of David Mwangi Tatei and Margaret Njeri Wanjiku with no notice of any dispute or encumbrances. That the only available legal redress for the Applicants herein is an appeal of the decision of Ngaah J in Succession Cause No. 133 of 1998.

5. The Applicants then filed a supplementary affidavit stating that the sale of the suit land by the Respondents herein to the intended parties was irregular as they had already been issued with notice of appeal. That the intended parties were not parties to the ELC case in Nyeri hence the prayers sought cannot be res judicata. That the intended parties are not innocent purchasers as they were aware of the ongoing disputes over the suit land. That cautions placed on the suit land by the Applicants were mysteriously removed.

6. When the application came up for hearing, parties choose to canvas the same by way of submissions. The Applicants filed their submissions save for the Interested parties who did not. The applicant's submissions are to the effect that the Applicants are seeking for preservatory orders to preserve the suit land from being disposed further by the intended parties. That their appeal is yet to kick off as they are yet to be supplied with copies of the proceedings and judgment since 2015.

Determination

7. It is on record that the Plaintiffs succeeded the suit property pursuant to Succession Cause No.133 of 1998. It is also on record that the suit property is now registered in the names of the intended parties who have subdivided the suit land into 6 portions to wit LR Nos. Loc. 7 Gakoigo/5125, 5126, 5127, 5128, 5129 and 5130 (hereinafter called the suit lands).

8. The Applicants plea to the Court is premised on the following; -

- a. They have filed an appeal to challenge the determination of the Plaintiffs as beneficiaries in Succession Cause No. 133 of 1998.
- b. The suit land has been registered in the names of the intended parties; that the registration was intended to defeat their claim in the suit land, it having been undertaken during the pendency of the current suit and appeal.
- c. Amend their defence to include a Counterclaim and enjoin the intended parties for two reasons; they are registered proprietors of the suit land and are likely to be affected by the outcome of the suit herein.

9. Order 1 rule 3 of the Civil Procedure Rules states that all persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise. On the other hand Order 1 rule 10(2) provides; the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

10. As regards joinder of the intended party to the suit, I am guided by the decision of **Gikonyo J in the case of Lucy Nungari Ngigi & 128 Others vs. National Bank of Kenya Limited & Anor. Civil case No. 517 of 2014 (2015) eKLR** which stated as follows;-

“Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule. The Court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties”.

11. The Plaintiff Respondent filed suit against the Defendants Applicants seeking an Order for vacation of the Defendants from the suit property and in default forceful eviction be issued. On the 28/10/16 they obtained an interim injunction restraining the Defendants from committing acts of waste or any other way interfering with the Applicant’s possession and use of LR Nos. Loc. 7 Gakoigo/715 pending the hearing and determination of the suit. As would happen on the 17/1/17 the suit property was registered in the names of intended parties who subsequently subdivided it into 6 plots which were registered in their names on the 15/3/17. This was undertaken during the subsistence of the interim Court Orders.

12. The common issue of fact and law that arises between the Defendants Applicants and the intended parties is that both have an interest in the suit property. Contrary to the contentions made by Philip Salim Mutuma Mbaya, the joinder of the intended parties will enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Furthermore, any Orders emanating from the

suit herein will have an effect adverse or otherwise upon the intended parties and therefore their presence in this suit is necessary. In the case of **Kingori vs. Chege (2002) eKLR 243 Warsame J** (as he was then) said:-

“In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however the Court must guard against the frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before Court for determination”.

It is the view of this Court that allowing the joinder of the intended parties is in the best interest of justice and would not prejudice the interest of either the intended parties or the Plaintiffs in this case.

13. As regards the prayer for amendment of the defence to include a counterclaim, Order 1 Rule 10 (4) applies. Upon joinder being allowed the party may with the leave of the Court amend his pleadings as is necessary. In this case the Applicant Defendant has sought to amend the defence to include a counterclaim. Section 100 of the Civil Procedure Act gives the Court inherent powers to amend pleadings at any time in the proceedings in a suit as long as such amendments are necessary and are aimed on determining the real issue or question raised in the proceedings.

14. Order 8 Rule 3 gives the Court Powers at any stage of the proceedings on such terms as to costs or otherwise as may be just to allow any party to amend his pleadings. Under Order 8 Rule 5, the Court on its own volition or on application of a party may Order an amendment for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings. The above provisions show that the amendment of pleadings is allowed liberally so as not to shut out a party and also so as to afford the Court the opportunity to determine the real issues in the controversy to meet the ends of justice.

15. Order 7 Rule 8 provides as follows:-

“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence”. [emphasis is mine].

Contrary to the above provision I note that the Applicant has not adhered to the above Rule. The question then is whether the amended defence and counterclaim is fatally incompetent before this Court for want of form. The Court is enjoined by Article 159(2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to procedural technicalities. In that regard the defence and counterclaim is admitted despite the glaring procedural lapse which can be cured by an appropriate amendment. I see no prejudice in that. In the end the prayer for amendment of the defence and counterclaim is granted subject to the necessary amendments as aforesaid.

16. As regards the prayer for injunction against the intended parties, it is only logical in my view and given the findings set out above that the suit property be preserved pending the determination of the suit. Section 63 (e) of the Civil Procedure Act empowers the Court to make such other interlocutory Orders that may appear to the Court to be just and convenient in Order to prevent the ends of justice from being defeated. Likewise, under Order 40 Rule 1 the Court may order a grant of a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting damaging alienation sale removal or disposition of the property as the Court thinks fit until the disposal of the suit or further Orders. I find that such is a case that requires the suit property to be preserved by the Orders of this Court.

17. Contrary to the disposition by the intended parties that the issue of interim injunction is now

resjudicata, the same having been granted by the Honourable Court in Nyeri on 28/10/16. I have carefully read the said ruling of the Court and note that the interim injunction issued was to restrain the Applicants from committing wasteful acts on the land. I can infer that at that point the Defendants were in possession/occupation of the suit property. Paragraph 3(3) of the 2nd intended party Replying Affidavit states that the intended parties are not only registered owners but have physical possession of the property. It therefore means that the injunctive Orders issued by the Court are now spent as far as the Defendant Applicant was to be bound by them. In any event the introduction of a new party (intended party) to the question removes the said determination from the principles of Resjudicata. In my considered view the prayer for interim injunction is not resjudicata on account of the previous ruling aforestated or at all.

18. The issues on ownership of the suit property are issues reserved for the trial Court and will steer clear of it at this stage.

19. In the circumstances I find and hold that the Applicants application is meritorious and allow it in the following terms;

a. Jane Wambui Mungai & Philip Salim Mutuma Mbaya are joined as Defendants/Intended parties to the suit.

b. The amended defence to include the Counterclaim is allowed subject to further and appropriate amendments to conform with Order 7 Rule 8 and subject to payment of requisite fees, the same is deemed to be properly on record.

c. A temporary injunction be and is hereby issued restraining the intended parties/Respondents, their agents, servants or anybody claiming under them from alienating, selling, transferring, leasing, charging or any other dealing with the ALL those properties namely Loc.7 Gakoigo/5125 5126,5127, 5128, 5129 & 5130 until the hearing and determination of this suit or such other Orders of the Court.

d. Costs in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF FEBRUARY 2018.

J.G. KEMEI

JUDGE