



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 26 OF 2016

MERCY WATAR NDERITU.....1ST DEFENDANT/APPLICANT

SYMON WANJEMA MUGWIRA.....2ND DEFENDANT/APPLICANT

PAUL KIHARA NG'ANG'A.....3RD DEFENDANT APPLICANT

MOSES GITAHU MUGO4TH DEFENDANT/ APPLICANT

VERSUS

SUSAN WAIRIMU WAHORO.....PLAINTIFF/RESPONDENT

EUNICE MUTHONI WANJOHI.....4TH DEFENDANT

PATRICK THEURI.....6TH DEFENDANT

RULING

1. This ruling is respect of the chamber summons dated **1st July,2016** through which the 1st to 4th defendant/ applicants (hereinafter referred to as “the applicants) seek leave to issue a third party notice upon Alleygram Consultants Limited and Albert John Muchiri (hereinafter jointly referred to as “the intended third parties).
2. The application is premised on the grounds that the subject matter of the suit to wit L.R No.Thegenge/Karia/ 870 was sold to the applicants by the intended third parties and that in order to properly and effectively determine the issues raised in the suit, the intended third parties are necessary parties to the suit.
3. Although under **Order 1 Rule 15(1)** of the Civil Procedure Rules the application ought to be heard *ex parte*, owing to opposition by counsel for the plaintiff/respondent, the court allowed the application to be heard *inter partes*.
4. When the matter came up for hearing, counsel for the applicants pointed out that the intended 3rd parties are the ones who sold the suit property to the plaintiff and submitted that joining them to the suit will not affect the plaintiff/respondent in any way.
5. Besides arguing the application, counsel for the applicants informed the court that the suit property was transferred to a third party, Peter Gicha Mwangi, during the pendency of the suit and urged it to inhibit further dealings with the property.
6. Counsel for the plaintiff/respondent, Mr. King’ori, opposed the application on the grounds that his client has no interest in the claim between the defendants and the intended third parties; that allowing the application will not only amount to a misjoinder but will also be illegal in that the applicants’ occupation of the suit property is under **Section 22** of the Land Control Act and is under **Section 91** of the Penal Code a criminal offence.
7. Concerning transfer of the suit property during the pendency of the suit, counsel for the plaintiff/respondent submitted that as there are no orders restraining the plaintiff/respondent from dealing with the suit property, the plaintiff/respondent owes a duty to the new owner of the suit property to deliver vacant possession.
8. Concerning the plea for an order of inhibition, he submitted that granting such an order would fly in the face of the law as it is the defendants/applicants who are committing an illegality.

9. In a rejoinder, Mr. Gikonyo referred to **Section 28** of the Land Registration Act and submitted that an inhibition should be granted because the applicants, as persons in occupation of the suit property, have a right to urge their claim.

Analysis and determination

10. It is not in dispute or controverted that the defendants/applicants entered into the suit property pursuant to an agreement entered between them and the intended third parties. It is also not in dispute that the intended third parties had entered into an agreement with the plaintiff/respondent, which agreement the plaintiff/respondent allegedly rescinded following breach by the intended third parties.

11. Whereas the plaintiff/respondent contends that she is not interested in any arrangements between the applicants and the intended third parties, given the fact that the applicants are on the suit property allegedly pursuant to an agreement entered between them and the intended third parties pursuant to the rescinded sale agreement, and given the fact that the plaintiff, *inter alia*, seeks general damages against the applicants, I am satisfied that the applicants have a genuine reason for seeking to have the intended third parties enjoined to the suit so that all the issues touching on the subject matter of the suit can be fairly and effectually determined not only as between the plaintiff and them but also as between them and the intended third parties. In this regard see **Order 1 Rule 15(1)** of the Civil Procedure Rules (CPR) which provides as follows:-

“Where a defendant claims as any other person not already a party to the suit (hereinafter called the third party)-

(a) That he is entitled to contribution or indemnity; or

(b) That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) That any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should be properly determined not only as between the plaintiff and the defendant but between the plaintiff and the defendant and the third party or between any or either of them,

He shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect; and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

12. Concerning the contention that the court should not allow the application because neither the applicants nor the intended third parties can sustain a claim against the plaintiff/respondent for want of the consent of the Land Control Board, upon considering the provisions of **Section 8** as read with **Section 9** of the Land Control Act (hereinafter referred to as the Act) which suggest that it is not the mere lapse of the time stipulated in **Section 8** of the Act which renders a controlled transaction void and there being no evidence that the transaction entered into between the plaintiff/respondent and the intended third parties has, in accordance with the provisions of **Section 9(2)** of the Act become void, I am, at this stage of the proceedings, unable to agree with the plaintiff/respondent’s contention that the applicants’ occupation of the suit property is illegal. In this regard see **Section 8(1)** and **9(2)** of the Act, which provide as follows:

“8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit....

(9) (2) Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void -

(a) On the expiry of the time limited for appeal under Section 11; or

(b) Where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under Section 13; or Cap. 287.

(c) Where a further appeal is entered under Section 13 and dismissed, on that dismissal.”

13. In the absence of any evidence that the transaction allegedly entered into between the plaintiff and the intended third parties was subjected to the procedures contemplated under **Section 8** and **9** of the Act and the consent denied and despite the 6 months within which the consent ought to have been applied for having lapsed, I am of the considered view that the lapse of the 6 months months within which the application for consent ought to have been made merely made the controlled dealing voidable as opposed to being void. I say this because **Section 8** of the Land Control Act provides a window of opportunity through which the transaction can still be validated, despite the lapse of the 6 months. In my view, it cannot have been the intention of the parliament to render the controlled dealing void merely by lapse of the time stipulated in **Section 8** of the Act. A reading of the proviso to **Section 8(1)** and **Section 9(2)** of the Act suggests that its refusal to accede to the application by the Board which renders the transaction void as opposed to the lapse of the time contemplated in **Section 8**.

14. Being of the view that the intended parties are necessary parties to the suit for purposes of assisting the court to fairly and effectually

determine all the issues raised in the suit, I find the application to be merited and allow it as prayed.

15. On whether the court should inhibit dealings with the suit property, since title to the suit property is now held by a person not a party to this suit/application, I am of the considered view that it would not be fair to issue the inhibition without affording the current proprietor an opportunity to be heard on that issue.

Dated, signed and delivered in open court at Nyeri this 9th day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muchiri wa Gachoni h/b for Mr. Wahome for the respondent

Mr. Kobor h/b for C.N. Kingori advocate

Patrick Theuri Mararo – 6th defendant

Court clerk - Esther