



**Ikumbi Estate Investment Limited v Nyambura (Environment and Land  
Case 332 of 2017) [2018] KEELC 4920 (KLR) (8 March 2018) (Judgment)**

*Ikumbi Estate Investment Limited v John Mbogo Nyambura [2018] eKLR*

Neutral citation: [2018] KEELC 4920 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ENVIRONMENT AND LAND CASE 332 OF 2017**

**JG KEMEL, J**

**MARCH 8, 2018**

**BETWEEN**

**IKUMBI ESTATE INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**JOHN MBOGO NYAMBURA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff, a Limited Liability Company, filed suit on 6/4/17 claiming that on an undisclosed date the Defendant wrongfully illegally and without color trespassed and without the consent of the Plaintiff entered and took possession of the suit land, erected temporary structures and has remained in possession. The Plaintiff sought orders interalia for eviction of the Defendant from the suit property Loc 12 /Sub Loc 4/1166 and an order for demolition of all the illegally erected structures thereon.
2. The Plaintiff applied for and obtained judgment against the Defendant on 8/6/17. On the 15/11/17 the Defendant applied to the Court for orders interalia;
  - a. Spent
  - b. That the exparte judgement entered against the Defendant and all consequential orders thereof be set aside and the matter to start denovo.
  - c. That leave be granted to the Defendant to defend this suit and to raise a counterclaim.
  - d. That an order for temporary injunction be issued against the Plaintiff their agents servants employees and or anybody claiming at their behest from alienating the suit property or interfering with the Defendants peaceful occupation of Loc 12/Subloc 4/1166 and or interfering with status quo pending the hearing and determination of the suit.



- e. That an order be issued calling before this Court Kangema SRMCC NO 33 of 1994 – *Esther Nyambura Mbogo v Gidraph Mbogo Babu & Anor* to form part of these proceedings for final dispensation as directed by the High Court at Nyeri in Civil Appeal No 92 of 2001.
  - f. That the costs of this suit be awarded to the Defendant
3. The application is supported by the Supporting affidavit of the Defendant sworn on 13/11/17. The grounds of the application that require consideration are that the Defendant was not served with the summons to enter appearance and that the Plaintiff sought to evict him from the suit land.
  4. The Plaintiff has opposed the application on the basis that it is a limited liability Company whose rights are distinct from those of its proprietors and or shareholders. In the Applicant's affidavit he has annexed a judgment and order dated the 19/4/85 and 28/6/95 in Kangema SRMCC No 33 of 1994. He has also annexed a copy of the judgement in HCCC Civil Appeal No 92 of 2011 dated the 16/12/13. In the two cases the Courts made the following findings;
    - a. In *SRMCC No 33/94* the Court held that the suit land was registered in the name of Gidraph Mbogo Babu who is the Defendant's Uncle to hold in trust for himself Esther Nyambura Mbogo and Eunice Mwangi Mbogo (the Defendant's mother and grandmother respectively). Secondly that ½ share of the suit land was given to Esther Nyambura Mbogo, the Defendants mother as a life interest and the rest of the land to be shared equally between the above.
    - b. In *HCCC Civil Appeal No 92/2011*, the High Court upheld the finding of the lower Court that the suit land was held by Gidraph Mbogo Babu, the Defendants Uncle in trust for himself and Esther Nyambura Mbogo and Eunice Mwangi Mbogo. Further the High Court set aside the order of the lower Court in respect to the sharing of the property more particularly the ½ share given to the Defendant's mother. The High Court directed that the matter of the sharing the suit land be heard afresh at Kangema before the Hon H N Ndungu who was at the 16/12/13 was the Chief Magistrate at Garisa.
  5. As at the time of the Applicants Notice of Motion it is common ground that:-
    - a. The Defendants mother and grandmother had died.
    - b. The Defendant's uncle Gidraph Mbogo Babu had transferred the suit land to Wagitaha Holdings Limited who subsequently transferred to the Plaintiff.
    - c. The Defendant had applied for and obtained a grant of administration ad litem to prosecute the case at Kangema Court No 33 of 1994, as a representative of the estate of his deceased mother.
    - d. The case in Kangema No 33 of 1994 had not been heard and determined in respect to the sharing of the suit land.
    - e. The Defendant's Uncle the said Gidraph Mbogo Babu had disposed himself of the suit land.
  6. In the proposed Defendant's defence and counterclaim the Defendant denies trespassing onto the suit land and asserts occupation of it as family land where he has grown up and brought up his family. In the Counterclaim the Defendant asserts that his Uncle Gidraph Mbogo Babu held the land in trust for the family and was not entitled to transfer it from himself to Wagitaha Holdings Limited and /or the Plaintiff.



7. The parties have filed written submissions. I have considered the submissions, the authorities cited by the parties and the pleadings in totality as appearing in the case file. In the Courts opinion, the following are the issues for determination; -
  - a. Whether the interlocutory judgment should be set aside.
  - b. Whether the Plaintiff should be enjoined
  - c. Whether the case in 33/94, Kangema should be transferred to this Court
  - d. Who pays the cost of this application?
8. As to whether the interlocutory judgment should be set aside, going by all case law cited by the parties it is settled that for a party to succeed in setting aside a judgment one or more of the following matters should be answered to the satisfaction of the Court; whether the Applicant has given satisfactory explanation as to why he did not enter the record of the Court and defend the suit; whether the Applicant in its proposed defense has raised any triable issue(s); whether the party which had obtained interlocutory judgment would suffer any prejudice if the said judgment is set aside.
9. The basis of the Defendant's application is that he was not served with the summons to enter appearance and file his defense or any other pleading in the case by the interlocutory judgment. It is expressed under Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya states that; -

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

That is to say that any party that wishes the Court to give judgment on known facts by the Court should place the facts before the Court. The onus is on the Defendant to show that he was not served. Various case law state that he can do so by challenging the process server on cross examination in relation to his affidavit of service. In the case of *Mobamed Munye Omar v Shee Athman Shee* (2015) eKLR stated as follows;

“The jurisprudence in respect of the disputed service is that the process server should always be called for purposes of cross examination by the party disputing service.”

The Defendant did not satisfy this legal requirement.

10. With regard to the matter of whether or not there are triable issues in the proposed statement of defence, the Court finds that there is need to know how the suit property held by the Defendants Uncle Gidraph Mbogo Babu determined by the High Court case in *HCCC Civil Appeal No 92/2011* to be held in trust for himself and Esther Nyambura Mbogo and Eunice Mwangi Mbogo was transferred from the said Gidraph Mbogo Babu to Wagitaha Holdings Ltd and later to the Plaintiff. The date of incorporation of the said Wagitaha Holdings Ltd and Plaintiff vis a vis the death of the Defendant's mother and grandmother and the pendency of the Kangema SRMCC 33 /94 suit are relevant facts to be ascertained at the trial of the case in order to achieve the primary objective of this Court which is substantive justice to the parties. In the circumstances the Court finds that the Defendant has raised issues which can only be determined at the full trial of the case.
11. On the last limb under this subheading the Court has to determine whether the Plaintiff will suffer any prejudice if the interlocutory judgment is set aside. The Defendant's case is that he is in occupation lawfully of the family land where he has grown up and brought up his family. He has constructed residential houses and other structures on the suit land. The Plaintiff is a Limited Liability Company. It has not demonstrated that it has done any of the acts of occupation, development or improvements



of the suit land, at least none has been stated by the Plaintiff. The Court does not find any prejudice that the Plaintiff will suffer by the reason of the judgment being set aside.

12. As to whether the Plaintiff should be enjoined, the rules for granting a temporary injunction are settled. See *Giella v Cassman Brown Co Limited* E.A 73. On the face of it, it would appear that the Defendant has a beneficial interest to the land which was held by Gidraph Mbogo Babu now said to have been transferred to Wagitaha Holdings Limited and the Plaintiff. The Defendant has a case that requires proper and careful consideration as to whether Gidraph Mbogo Babu discharged the trust bestowed on him and that the property was transferred to the correct recipients. The Defendant has established a prima facie case with a probability of success.
13. The claim by both the parties relate to land more particularly the Defendants beneficial claims (ownership with emotional attachment, given his claim that it belonged to his late mother) even though the value of the land is not known now or may be known at a future date the Court is not satisfied that an award of damages can satisfactory compensate the Defendant.
14. The Court has made a finding in the positive on the 1<sup>st</sup> two limbs on settled law on injunctions. There may not be necessity to proceed in consideration of the matter of balance of convenience. Nevertheless, the Court finds it important due to the fact that the Defendant is in occupation of the suit land. The Plaintiff except for being the registered owner has not taken possession of the suit land. Even if the Court were therefore in doubt (which is not) on the 1<sup>st</sup> and 2<sup>nd</sup> limb, the balance of convenience would fall on the Defendant.
15. In the circumstances, the Court finds that the Defendant has established a case for interim injunction to issue against the Plaintiff until the hearing and determination of the suit.
16. The Defendant has urged for the transfer of the *SRMCC No 33/94* Kangema to this Court for hearing and disposal. The settled law under this heading is that the case pending in another Court must be raising similar issues of fact and law which may be determined effectively by one Court. The case in *SRMCC No. 33/94* has only the issue remaining for determination which the High Court directed; that is the subdivision of the suit land and the same be heard before a specific judicial officer. That order has not been stayed or set aside. It is common ground between the parties that this case is pending hearing and determination.
17. The case before this Court relates to alleged trespass and illegal transfer of land allegedly held in trust. These matters by both fact and law are different in the two cases. In the circumstances the Court declines the invitation to order the transfer of the case *SRMCC No.33/94* to this Court.
18. On the issue of costs of the application it should be noted that the Defendant has succeeded in prosecuting two of the major issues for determination and lost in one. The Court will revisit this issue and make an appropriate order with finality later.
19. This case appears interlinked with the case in *SRMCC No. 33/94* in so far as it relates to the subject suit land, so much so that if this case were heard to its conclusion and the Plaintiff succeeds in its claim the orders made by the Courts in Kangema and the High Court will be rendered nugatory. The Court observes this because with respect to the Kangema 33/94 case Gidraph Mbogo Babu would not have discharged the burden of disposal of trust property which forms the basis for which Wagitaha Holdings Limited and /or the Plaintiff could acquire title. Further Miriam Njoki and Irene Waithera will not have been heard/considered for purposes of sharing the suit land as directed by the High Court in *HCCA 92/2011* at Nyeri. In addition to the above matters raised, the Plaintiff would retain ownership of a trust asset without clarity of its legal basis for accessing and causing the same to be registered on its name. For that reason, this Court stays the proceedings in this case until the hearing and determination



of *SRMCC No 33/94* as proceeding with the instant case in its current form offends section 6 of the *Civil Procedure Act*.

20. In the upshot the Court makes the following orders;
- a. The interlocutory judgment entered against the Defendant be and is hereby set aside as well as the proceedings undertaken thereto.
  - b. That the proposed statement of defense of the Defendant filed on 15-11-2017 is deemed to have been properly filed and served upon payment of the requisite Court fees.
  - c. An order for temporary injunction be issued against the Plaintiff, their agents, servants, employees and or anybody claiming at their behest from alienating the suit property or interfering with the Defendant's peaceful occupation of Loc 12/Subloc 4/1166 and or interfering with status quo pending the hearing and determination of the suit.
  - d. Prayer No 5 is declined for reasons stated in the ruling
  - e. That this suit remains stayed until the hearing and disposal of SRMCC No. 33/94, Kangema.
  - f. The costs of the application shall abide the result of the main case.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH 2018.**

**J G KEMEI**

**JUDGE**

