



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 386 OF 2014

(Formerly Nyeri HCC No. 137 of 2010 (O.S))

AGNES MUTHONI MWANG.....1ST PLAINTIFF

PETER NDEGWA MWANGI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

PRISCILLA WANJI GATHONI..1ST DEFENDANT/RESPONDENT

PRIMO THUKU GATHONI.....ND DEFENDANT/RESPONDENT

SERAH WANGARI MBUGUA.....3RD DEFENDANT/ RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 10th January, 2012 through which the 2nd plaintiff (hereinafter referred to as the applicant), Peter Ndegwa Mwangi, moved the court seeking the following orders:-

(i) Leave to amend the pleadings filed in this matter (O.S) to include Serah Wangari Mbugua (herein after referred to as “the intended third respondent”);

(ii) An order of injunction to restrain intended 3rd respondent from evicting the plaintiffs from the parcel of land known as Thegenge/Karia/1682 (hereinafter referred to as “the suit property”) pending the hearing and determination of the suit herein;

(iii) An order compelling the Provincial Criminal Investigation Officer to avail to court the report of his investigations concerning the fraud perpetrated by the respondents in the transfer and registration of the suit property to the intended 3rd respondent;

(iv) Costs of the application.

2. The application which is expressed as having been brought under **Order 8 Rules 3 and 4; order 40 Rule 7** of the Civil Procedure Rules and **Sections 1A and 1B** of the Civil Procedure Act, is premised on the grounds that the plaintiffs instituted the suit herein seeking judgment against the 1st and the 2nd respondents herein on account of having been in adverse possession of the suit property; that during the pendency of the suit, the 1st and the 2nd respondent caused the suit property to be transferred to the intended third respondent; that the 1st and the 2nd respondent had no good title to the suit property which they could pass to the intended 3rd respondent.

3. It is further contended that the intended 3rd respondent was not an innocent purchaser of the suit property as she participated in the fraud perpetrated by the 1st and the 2nd respondent in the transfer of the suit property to her; that the intended 3rd respondent had issued the applicant with a demand letter requiring him to vacate the suit property; that the applicants had by operation of law acquired rights in the suit property which rights were not defeated by the registration of the intended 3rd respondent as the proprietor of the suit property and that the transfer of the suit property to the intended 3rd respondent was calculated at stealing a match against the

applicants.

4. The application is supported by the affidavit of the 2nd applicant in which the ground on the face of the application are reiterated.
5. In opposing the application, the intended 3rd respondent filed the grounds of opposition dated 17th February, 2012 in which she contends that the application is misconceived, incompetent, bad in law, untenable, frivolous, vexatious and an abuse of the process of the court.
6. When the application came up for hearing, counsel for the applicant informed the court that the intended 3rd respondent is the registered proprietor of the suit property having obtained title to the suit property during the pendency of this suit.
7. Explaining that the intended third respondent has been visiting the suit property with prospective buyers, counsel for the applicant informed the court that the applicants had applied to the Land Registrar to register a restriction on the suit property.
8. Counsel for the intended 3rd respondent submitted that the application is not proper as it is premised on the wrong provisions of the law. According to the counsel for the intended 3rd respondents, the respondents will be prejudiced if the application is allowed because they do not know the amendment the applicant intends to make.
9. Based on the decision in the case of **Rajput v. Barclays Bank of Kenya Ltd & 3 Others (2004) eKLR**, counsel for the intended 3rd respondent submitted that the orders sought in this application are incapable of being granted because the orders are governed by different provisions of the Civil Procedure Rules and statute.
10. In the case of **Rajput v. Barclays Bank of Kenya Ltd & 3 Others (supra)**, it was held:-

“...An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff’s application incurably defective, and a candidate for striking.”
11. For the foregoing reasons, counsel for the 3rd intended respondent, urged the court to dismiss the application with costs the respondents.
12. In a rejoinder, counsel for the applicant urged the court to consider the application on its merits.

Analysis and determination

13. As pointed out herein above, the 2nd applicant brought the application herein seeking the reliefs listed herein above against the respondents on among other grounds, the ground that the intended 3rd respondent gained interest in the suit property during the pendency of this suit and that the intended 3rd respondent had threatened him with eviction from the suit property and yet he had obtained proprietary rights over the suit property by operation of the law.
14. It is noteworthy that neither the 1st and the 2nd respondents nor the intended 3rd respondent addressed the issues of fact raised in the application. The only response to the application are the grounds of opposition filed by the intended 3rd respondent listed herein above through which it is contended that the application is bad in law for the reasons stated herein above.
15. I have considered the application, the affidavits the grounds of opposition and the submissions and I find the sole issue for the court’s determination to be whether the applicant has made up a case for being granted the orders sought or any of them.
16. With regard to this issue, I have carefully read and considered the submissions by counsel for the intended third respondent, and in particular the contention that the orders sought are in capable of being granted as they are premised on an omnibus application. I have also read and considered the persuasive authority of **Rajput v. Barclays Bank of Kenya Ltd & 3 Others (supra)** upon which the submissions of the intended 3rd respondent’s counsel are premised. My view of the matter is that unless the respondents can demonstrate that they have suffered or stand to suffer some prejudice on account of the manner in which the application is crafted, the mere fact that the applicants have sought more than one relief in the application cannot be a ground for denying the orders sought.
17. Have the respondents suffered any prejudice or are they likely to suffer any prejudice on account of the manner the application is crafted?
18. On this issue, no prejudice was demonstrated as having been occasioned on the respondents. The only issue the respondents raised concerning the plea for amendment of the plaintiffs’ pleadings is that they are not sure what amendment the plaintiffs intend to make on their pleadings. Whilst the plaintiff’s did not annex a draft amended O.S for consideration by this court, the prayer is categorical on what kind of amendment the applicants seeks. The apprehension by the respondents can be addressed by limiting the amendment to inclusion of the intended 3rd respondent into the suit for purposes of defending her interest in the suit by virtue of having gained interest in the suit property as a necessary party to the application and the suit.
19. As to whether the orders sought can issue yet the intended third party is not a party to the suit, because the intended 3rd respondent is represented in this application, I find and hold that the orders can be granted without any prejudice to the intended 3rd respondent.

20. As to whether the applicant has made up a case for being granted the orders sought or any of them, upon consideration of the circumstances that led to the filing of the instant application to wit, there was change of ownership of the suit property necessitating the inclusion of the 3rd intended respondent to the suit, I find and hold that the applicant has made up a case for being granted an order for inclusion of the intended 3rd respondent to the suit.

21. As to whether the applicant has made up a case for being granted an order of injunction to restrain the 3rd respondent from evicting the applicant from the suit property, based on the applicant's uncontroverted averment that the intended 3rd party was not an innocent purchaser of the suit property which averment has neither being denied nor controverted, I find that the applicant has made up a case for being granted an order of injunction restraining the 3rd respondent from evicting him from the suit property pending the hearing and determination of the suit.

22. With regard to the prayer for an order compelling the Criminal Provincial Investigations Officer to avail to the court the report of his investigation involving the fraud perpetrated by the respondents in the transfer of the suit property to the intended 3rd respondent, no justification was given for seeking such an order as it was not demonstrated that such a report exists and if it does, that the officer has refused to avail it.

23. The upshot of the foregoing is that the application is found to be merited and is allowed in terms of prayers 1 and 2.

24. The costs of the application shall abide the outcome of the suit.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 2nd day of August, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the applicant

N/A for the 1st and 2nd respondents/defendants

Mr. Kimunya h/b for Wahome gikonyo for the intended 3rd defendant

Court assistant - Esther