

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 251 OF 2017

AGNETA MASHA MSECHU.....PLAINTIFF

VERSUS

NAOMI WANJIRU KAMAU.....DEFENDANT

RULING

1. For determination is the notice of motion dated 29.11.2017 brought under the provisions of section 1A, 1B, 31 & 63 (e) of the Civil Procedure Act. The defendant/applicant is asking for grant of the following orders:

- 1. That this application be certified urgent and service hereof be dispensed with at the first instance.**
- 2. That the Honourable Court be pleased to issue an order staying the proceedings in this instant suit pending the hearing and determination of this application inter parties.**
- 3. That this Honourable Court be pleased to refer this matter to the DCIO, Urban for investigation since the legality of the Certificates of Title issued on 15/9/2015 for KWALE/GLAU KINONDO/1258 & 1259, plus the copies of the GREEN CARDS for the above parcels of land annexed to the Notice of Motion Application dated 7/7/2017 pending in Court filed by the plaintiff is questionable as the defendant is also in possession of the same documents but bearing different names and different entries as well.**
- 4. Costs of the application be in the cause.**

2. The motion is supported by the grounds listed on its face and the affidavit of Naomi Wanjiru Kamau. Meanwhile the application is opposed by the plaintiff/Respondent through the grounds of opposition dated 29th January 2018 and filed in Court on the same date.

3. The parties argued the motion by filing of written submissions. The orders being sought in prayer (2) was pending inter parties hearing of the application. It is also dependent on the outcome of prayer (3) of the motion. It follows that the only issue for determination is prayer (3) seeking orders whether or not to grant the orders directing the DCIO Urban Police Station to investigate the legality of the titles held in by the plaintiff.

4. In Kenya, the Civil and Criminal jurisdiction are governed by separate legal regimes. The rule of evidence on proof of facts is however the same i.e. that the burden of proof is on the person who alleges the fact to prove its existence (section 107 & 109 of Evidence Act). What is different is the standard of proof. For civil cases, the standard is lower as it is on a balance of probabilities while in criminal cases it is to be beyond reasonable doubt.

5. The applicant by bringing this motion is questioning the legality and/or authenticity of the plaintiff's title. Her obligation under the Evidence Act is to lay a background for that line of evidence/allegation. This Court's role is to remain impartial throughout the process of hearing evidence & determination. By the applicant asking the Court to give an order for investigations to be done amounts to acting in partially and assisting the applicant to collect evidence to rely on to support her claim. This in itself contravenes the doctrine of fair hearing and impartiality. Secondly, this Court though being asked to use its discretionary powers to issue the orders does not in my considered opinion and I so hold have such powers. Such orders can only be made where a party has complained to the relevant public body which public body then fails and or neglects to perform its duties. Such a party can then move the Court appropriately for such a public body to be compelled to perform its functions.

6. Consequently, it is my finding that the orders sought in prayer (3) is not capable of being granted in the manner it is sought. No evidence has been put before the Court to prove that a complaint was lodged and the DCIO Urban Police Station failed and or neglected to carry out its functions. For this reason, I find the present motion as having no merit and the same is hereby dismissed with costs in the cause.

Dated, signed & delivered at Mombasa this 20th September 2018

A. OMOLLO

JUDGE