



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
ELC CASE NO.180 OF 2017
(FORMERLY NAIROBI ELC CC.NO.297 OF 2014 [lead file]
consolidated with NAIROBI ELC CC.NO.1282 OF 2014)

ROSE WANGARI NDUNGU &

ROSE WANJIKU NDUNGU

(Suing on their own behalf and for their own benefit

and on behalf of and for the benefit of the Estate of

the late STANLEY NDUNGU NJOROGE.....PLAINTIFFS/RESPONDENTS

-VERSUS-

CATHERINE NJERI

(Suing on behalf of the benefit of Estate of the

late GABRIEL KUNGU KAMUNU (Deceased)...DEFENDANT/APPLICANT

RULING

The Applicant herein *Catherine Njeri* (Suing on behalf and benefit of the Estate of the late *Gabriel Kungu Kamunu* (deceased) filed this *Notice of Motion* application dated 2nd October 2017 and sought for various orders. These sought orders are:-

- 1) Pending the hearing and determination of this suit, an injunction be issued restraining the Intended Defendants either by themselves, their agents and/or servants or any other person acting on their authority, mandate and or instructions from evicting the Plaintiff, disposing or dealing in any way with the subject property known as LR.No.Dagoretti/Riruta/6213.***
- 2) That the court be pleased to review the orders issued on the 23rd May 2017.***
- 3) That the Applicant be granted leave to join Stelluc Limited as Co-defendants in this matter.***
- 4) That the Plaintiff be granted leave to amend the Plaint in terms of the annexed Amended Plaintiff.***
- 5) That costs be in the cost.***

The application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of the applicant. These grounds are:-

- a) There is a discovery of new evidence that is material to the case and which was not available at the time of filing this matter.***

- b) That the suit land LR.No.Dagoretti/Rurita/6213 has now been transferred to a third party Stelluc Limited.
- c) That the third party has issued an eviction notice to the Plaintiff which lapses on the 30th September 2017.
- d) That the transfer and registration of the suit property to the names of the third party has altered the whole substratum of the Plaintiff's case herein.
- e) The Intended Defendants are necessary parties to be enjoined in the proceedings herein having been registered as owners of the suit land.
- f) It is important that all parties be enjoined so that the court can make a determination based on all the facts and hearing all the parties.
- g) There is high likelihood that the Plaintiff may be evicted from the suit property or the suit property will be disposed off before the hearing and determination of this suit.
- h) No prejudice shall be suffered by the Intended Defendants.
- i) That it is in the interest of justice that the Defendants be enjoined.

In her **Supporting Affidavit**, the Applicant averred that her earlier application for injunctive orders was dismissed vide a ruling of the court issued on **23rd May 2017**. However, she has learnt that the Defendants have transferred the suit property to a third party (intended 3rd Defendant) who have threatened to evict the Applicant herein as is evident from **CN-1**. Therefore it is imperative that she be allowed to amend the **Plaint** to reflect the changes aforesaid. She sought for amendment of the **Plaint** to include the 3rd Intended Defendant who is now the registered proprietor of the suit property and that the court do review the orders dismissing her application for injunction which injunction was meant to preserve the subject suit property. She further averred that no prejudice will be occasioned to the Intended 3rd Defendant as they will get an opportunity to defend the suit and can be compensated with costs.

The application is vehemently opposed and **Rose Wangari Ndungu** and **Rose Wanjiku Ndung'u** filed their **Replying Affidavits** and averred that they are the genuine Plaintiffs herein and that the Applicant is a Defendant and only masquerading as a Plaintiff/Applicant vide the instant applications. Further that the suit sought to be amended **ELC No.1282 of 2014** does not exist as the said suit was consolidated with **ELC No.297 of 2014** and **ELC NO.297 of 2014** became the lead file. Further the said **ELC No.297 of 2014** was later transferred to **Thika Environment and Land Court** and it is now **ELC No.180 of 2017** and the Applicant herein is the Defendant.

They further averred that they have been advised by their advocate on record that the instant application is misconceived, mischievous and an abuse of the court process as it is **Res Judicata**, **vexatious** and brought in **bad faith**. That the Applicant's earlier application was dismissed vide a court **Ruling** on **23rd May 2017**. Further that since they are the rightful owners of the suit property, they had a right to deal with the suit property **Dagoretti/Ruruta/6213** as they so wished.

Further since the Applicant is not a Plaintiff in the lead file, she had no capacity to purport to amend the **Plaint** and include another party. It was their contention that the Applicant's application has no merit and should be dismissed with costs.

On the issue of review, that the Applicant has not shown discovery of any new and important matter or evidence which was not within her knowledge. Further that the injunctive orders cannot be issued to a party who is not yet a party to this suit.

The proposed 3rd Defendant also contested the application and **Stephen M. Githiga** filed a **Replying Affidavit** and contended that he is the Director of the 3rd Defendant. He averred that the application is seriously misconceived and misplaced and an attempt by the Applicant to mislead the court and cloud the issue. Further that the Applicant has brought an omnibus application with mixed prayers which cannot be granted. Further that the 3rd Defendant is yet to be enjoined in the suit and prayer for injunction cannot be issued against it. It was his allegation that there is not error apparent on the face of the record and/or discovery of new matters or evidence which with due diligence was outside the knowledge of the Applicant or existence of any sufficient reason to justify the review sought.

It was his allegation that the proposed 3rd Defendant is not a necessary party herein and therefore the Applicant has not laid sufficient grounds to warrant joinder of the Intended 3rd Defendant herein. Further that **ELC No.1282 of 2014** wherein the Applicant has sought to enjoin the Intended 3rd Defendant was consolidated with **ELC No.297 of 2014** and it does not exist as **ELC 297 of 2014** was later transferred to Thika Environment and Land Court and it is now **ELC NO.180 of 2017**. It was further contended that the determination of the issues raised in **ELC No.180 of 2017** do not require the presence of the proposed 3rd Defendant in this suit as the Intended 3rd Defendant has nothing to do with the dispute between the said parties herein.

The application was canvassed by way of written submissions which this Court has carefully sought and considered. The Court has also considered the whole pleadings and it renders itself as follows:-

Indeed the Applicant herein has filed this application as **ELC No.180 of 2017, formerly ELC No.1282 of 2014**. The court has perused the proceedings herein and has noted that on **14th July 2015, ELC No.1282 of 2014** was **consolidated** with **ELC No.297 of 2014** and the **lead file** is **ELC No.297 of 2014**. Therefore the Applicant herein is the Defendant in the suit herein which was transferred to this Court on **7th February 2017**, and it acquired a new number **ELC.No.180 of 2017**. The question that will be determined later by the court is whether the Applicant herein as a Defendant can purport to amend the Plaintiff?

It is also very clear that the Applicant herein has sought for various prayers in this application and it is correct to state that this is an omnibus application which has sought for various prayers. Various courts have always frowned on litigants who file omnibus kind of applications mixing prayers which would require filing of separate applications. See the case of **Bahriya Petroleum Limited...Vs...Gulf Oil Co. Ltd & Giro Bank Commercial Bank Ltd (2003) eKLR**, where the Court held that:-

“What is clear is that the Applicants have filed an omnibus kind of an application mixing applications which the law requires them to be brought by way of Chambers and others by way of Notice of Motion. This is undesirable in law. Even if the same was to be held that it would save costs, the situation cannot be excused in this instance because certain applications must be dealt with first before others are considered. No court of law can deal with the application seeking for leave to join another party to the suit without first considering the application seeking to set aside existing orders and Judgement against the Applicants. Litigants must choose to come to a court of law in a systematic manner instead of filing applications which appear premature mixed with ripe ones. In the final analysis I am in agreement with the submissions of Mr. Kyampia that the application by way of Chamber Summons dated 4th September 2003 is incurably defective. Consequently, the same is ordered struck out with costs to the Respondent.”

However, being guided by **Article 159** of the **Constitution of Kenya** and **Sections 1A & 1B** of the **Civil Procedure Act**, the Court will consider the substance of the application and not the technicalities.

Applicant herein has sought for injunctive orders to issue against the Intended 3rd Defendant to restrain it from dealing at all with **LR.No.Dagoretti/Riruta/6213** and or to issue any instructions to evict the Applicant herein. However, the Court has noted that the Intended 3rd Defendant is not yet a party to this suit. The Applicant cannot seek to injunct a party who is not yet made a party to the proceedings. The application herein is pre-mature and thus this Court declines to grant the same.

Further more the court had in its earlier ruling declined to issue an Order of Injunction and bringing another application for injunction offends the Res Judicata Rule. See the case of **Mwambeja Ranching Co. Ltd & Another...Vs...Kenya National Capital Corporation Ltd [Kenya] & 6 Others (2015) eKLR**, where the Court of Appeal held that:-

“It will not escape anybody’s observation that although this application was brought under several provisions of the law, the main thrust is that it was essentially an application seeking another injunction order. A rose flower by any other name will smell the same. The application was heard by the superior court (Okwengu, J) who in a ruling dated and delivered on 29th February 2008 dismissed it with costs stating inter alia as follows:-

To date, almost 10 years after the Plaintiff’s suit was filed, the Plaintiff has made no effort to have this suit finalized nor has it made any payment. The upshot of the above is that the Plaintiff has failed to establish a prima-facie case with a probability of success. The Plaintiff has also proved unworthy of any equitable relief. The Plaintiff’s prayer for an interlocutory injunction must therefore fail. As regards the prayer to withdraw the suit against the 2nd Defendant, the same was not opposed and is accordingly granted. The upshot of the above is that the Plaintiff’s application dated 13th October 2006 is dismissed except prayer 3 which is granted.”

The Applicant has also sought for review of the Orders made on **23rd May 2017**. The Applicant has sought for review of the Orders made on **23rd May 2017** dismissing her application for injunction on the ground that there is new additional evidence as the suit property has now been sold to the Intended 3rd Defendant herein and she is now faced with imminent eviction by the Intended 3rd Defendant and thus the need to review the said Orders.

An application for review is governed by **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** which provides:-

Section 80

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by

this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The Applicant therefore needed to prove discovery of new and important matter or evidence which after the exercise of due diligence was not within his/her knowledge or could not be produced by him/her at the time of the Decree.

However, in this case, the **Ruling** was delivered on **23rd May 2017**, and the suit property was allegedly sold to the Intended 3rd Defendant on **14th June 2017**. The sale of the suit property to the Intended 3rd Defendant is not discovery of new and important evidence which had not come to the knowledge of the Applicant at the time of issuing the Intended Order for Review. Further, the Applicant has not attached the Intended Order that is to be reviewed. If the applicant was not satisfied with the said **Ruling of 23rd May 2017**, she sought to have appealed against the same but not seek review of the said Ruling. See the case of **Pancras T. Swai...Vs...Kenya Breweries Ltd**, where the Court held that:-

“It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review....the learned judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own Judgement which is not permissible in law”.

The Applicant herein has not established the grounds for review of the orders stated by her as she has not fully established the existence of or discovery of new evidence which was not in her knowledge and also has not attached the order to be reviewed.

On the issue of joinder of **Stelluc Ltd** as a Co-defendant, the Applicant has alleged that the dispute herein is over the ownership of the suit property **Dagoretti/Riruta/6213** which has now been transferred to the Intended 3rd Defendant. She has alleged that if the Intended 3rd Defendant is not enjoined herein, then prosecution of this case will just be an academic exercise.

Joinder of parties is governed by **Order 1 Rule 10(2)** of the **Civil Procedure Rules** which 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.”

It is trite that Court has discretion to allow joinder of a party to a suit where it is deemed such party is a necessary party to the suit and whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. See the case of **Meme...Vs...Republic (2004) 1EA 124**, where the Court held that:-

“A party could be enjoined in a matter for the reasons that:-

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings.***
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law.***

iii. Joinder to prevent a likely course of proliferated litigation.

Though the court has discretion to issue an order for joinder of a necessary party, it may also refuse such joinder where such joinder would lead to difficulties in handling the existing cause of action and the party being sought to be enjoined is unnecessary party.

The Applicant has claimed that the suit property herein has now being sold to the Intended 3rd Defendant. If that is the case, this Court finds that the orders as sought herein by the Applicant might affect the suit property which is now allegedly in the hands of a 3rd Party. The Applicant has also alleged fraud in the manner the suit property was sold to the 3rd Intended Defendant. The Court finds that the Intended 3rd Defendant is a necessary party. However, since the Applicant is not the Plaintiff in ***ELC No.180 of 2017***, she may enjoin the Intended 3rd Defendant in her Defence which she may choose to amend and include a Counterclaim.

Therefore the Court finds that the ***Stellus Ltd*** who is now allegedly the title holder of the suit property is a necessary party in the suit and its presence is necessary in the final settlement of the matter. However, the Applicant can only enjoin it in a Counter-claim. The Applicant is thus granted leave to amend her Defence and include a counter-claim but not the annexed Amended Plaintiff as the Applicant is not the Plaintiff and she cannot amend the Plaintiff's Plaintiff or claim herein.

As provided by ***Order 8 Rule 3(1)*** of the ***Civil Procedure Rules***, the Court has discretion to order for amendment of pleadings at any stage of the proceedings, so long as such discretion is exercised judicially. See the case of ***Central Kenya Ltd...Vs...Trust Bank & 4 Others CA No.222 of 1998***, where the Court held that:-

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”.

For the above reasons, the Court finds that the Applicant's application succeeds only to the extent of amending her Defence to include a Counter-claim against the enjoined party ***Stelluc Co. Ltd***, and the said joinder and amendment to be effected within a period of 21 days from the date hereof.

However, the Court declined to allow the Applicant's ***prayer No.3, 4 and 6*** herein and the said prayers are dismissed entirely with costs to the Respondents.

However, the Court finds that the suit property herein ***Dagoretti/Riruta/6213*** is now allegedly in the hands of ***Stelluc Co, Ltd***. The Defendant/Applicant ***Catherine Njeri*** is laying claim to the said suit property. The Court finds that the doctrine of ***Lis Pendens*** applies herein. The said ***Stelluc Co. Ltd*** is at liberty to use and/or utilize the suit property. However it is prohibited from selling or alienating the same to other third parties until the suit is heard and determined. See the case of ***Benedette Muriu...Vs...National Social Security Fund Board of Trustees & 2 Others (2012) Eklr***

“As for doctrine of ‘Lis pendens’, this is enshrined in Section 52 of the ITPA (Indian Transfer of Property Act). It provides:-

During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the governor-general in council of a contentional suit or proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the right of any party thereto under any decree or order which may be made therein except under the authority of the court and in such terms as it may impose...”

The above orders are issued for the purpose of preserving the suit property.

It is so ordered.

Dated, Signed and Delivered at Thika this 26th day of October 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Ngugi for the proposed 3rd Defendant and holding brief for Mr. Kinyanjui for the Plaintiffs/Respondents

No appearance for the Defendant/Applicant

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court.

L. GACHERU

JUDGE

26/10/2018