



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 43 OF 2017**

**BENJAMIN LEMASEI TUMPES.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK.....1<sup>ST</sup> DEFENDANT**

**JANE NYAMBURA MWANGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before me for determination is the Notice of Motion dated the 14<sup>th</sup> June, 2018 brought pursuant to Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 8 rules 3 and 4 of the Civil Procedure Rules, Sections 3, 4, 5(b) and 28 of the Contempt of Court Act and all the other enabling provisions of the law. In the Application, the Plaintiff is seeking leave to amend his Originating Summons and for the 2<sup>nd</sup> Defendant to be cited for contempt for subdividing land parcel number Kajiado/ Olchoro Onyore/ 1171 hereinafter referred to as the 'suit property.'

The application is premised on the grounds that the proposed amendments are necessary to enable the court determine the real issues between the parties. That the 2<sup>nd</sup> Defendant has caused to subdivide and transfer the suit property to third parties while the suit is still pending. The 2<sup>nd</sup> Defendant's action is deliberate intended to subvert the cause of justice and defeat the Plaintiff's claim.

The application is supported by the affidavit of BENJAMIN LEMASEI TUMPES where he reiterates the contents of his affidavit dated the 26<sup>th</sup> July, 2010 together with the originating summons.

The application is opposed by the 2<sup>nd</sup> Defendant JANE N. MWANGI who filed a replying affidavit where she deposes that the application is misplaced, a perfect abuse of the process of the court and ought to be dismissed with costs. She avers that the suit property was legitimately bought by her late husband in 1992 and a transfer effected to him. She states that her late husband WILSON MWANGI KAROGO passed away in 1998 and upon his demise she instituted a succession cause vide Nairobi HCSucc Cause No. 2254 of 1998 to administer his estate and the suit property comprised of the assets listed therein. She confirmed that in 2002, she was issued with a Certificate of Confirmation of Grant and during the pendency of the said succession proceedings, no objection proceedings were lodged therein. She insists that the Certificate of Confirmation of Grant remains a valid court order as the same has not been varied, set aside nor revoked. She is not aware that there is any order barring her from implementing the terms of the confirmed grant and insists she is not in contempt of court. She explains that in 2002, when she went to the suit property to effect subdivision, the Plaintiff and his sons who reside on the adjacent parcel of land NGONG/ NGONG/ 1170 objected to it claiming they had encroached on his land and hived off 40 acres. She avers that she instituted proceedings vide the Kajiado Land Disputes Tribunal and the Plaintiff participated in the said proceedings, where the said Tribunal directed the District Surveyor to proceed and determine the boundary between the two properties. She confirms the District Surveyor determined the boundaries and the Award of the Kajiado Land Disputes Tribunal was also adopted vide Land Disputes Tribunal Case No. 4 of 2009. She contends that she effected subdivision of the suit land in line with the terms of the Certificate for Confirmation of Grant and that the sale as well as subdivision was done legitimately. She reiterates that the Plaintiff has been aware of the succession proceedings since 1998 but failed to participate in it. Further, that in the event the Court finds merit in the application, it is imperative that the Plaintiff enjoins all the current owners of the resultant subdivisions.

Both the Plaintiff and the 2<sup>nd</sup> Defendant filed their respective submissions that I have considered.

**Analysis and Determination**

Upon consideration of all the materials presented in respect of the Notice of Motion dated the 14<sup>th</sup> June, 2018, the two issues for determination are:

- Whether the Plaintiff should be granted leave to amend his Originating Summons.

- Whether the 2<sup>nd</sup> Defendant is in contempt of Court for subdividing the suit property.

As to whether the Plaintiff should amend the Originating Summons, I note he only wants to include the new parcel numbers which were resultant subdivisions of the suit land. The 2<sup>nd</sup> Defendant has not opposed the prayer seeking leave to amend nor stated the prejudice she will suffer if the amendment was allowed.

Order 8 rule 3 (1),(5) and rule 4 of the Civil Procedure Rules provides as follows: ‘

**(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings. (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.**

**4. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint.**

In relying on the above cited legal provisions and the facts as presented, I will proceed to allow the amendment sought.

As to whether the 2<sup>nd</sup> Defendant is in contempt of Court, for having subdivided the suit property and disposed of it third parties. I wish to make reference to the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where **Justice Mativo** stated as follows: ' **writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

**' there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.'**

First, I note the Plaintiff has not indicated whether there was an express order of injunction barring the 2<sup>nd</sup> Defendant from subdividing the suit land.

Secondly, the 2<sup>nd</sup> Defendant is the administrator of the estate of her late husband and vide the Certificate for Confirmation of Grant, she proceeded to subdivide the estate as per the said Grant.

The Plaintiff has not stated whether he sought orders to bar the 2<sup>nd</sup> Defendant from subdividing and transferring the suit land and she proceeded contrary to the said Court Order.

Section 63 of the Civil Procedure Act stipulates as follows: '**in order to prevent the ends of justice from being defeated the court may, if it so prescribes ; (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and that his property be attached.'**

In so far as Contempt proceedings are civil in nature, the burden of proof is upon the Plaintiff to prove there was a Court Order barring the 2<sup>nd</sup> Defendant from her actions. Further, that the 2<sup>nd</sup> Defendant was well aware of the contents of the said Court Order and still contravened it. Since there is no indication of the above, and in the relying on the authority cited above, and Section 29 of the Contempt of Court Act, I find that in the current circumstances and with the facts as presented, I decline to find that the 2<sup>nd</sup> Defendant is in contempt of Court.

Since I have granted the Plaintiff leave to amend his Originating Summons, I direct that he does so within the next 14 days from the date hereof. I note that the 2<sup>nd</sup> Defendant admitted that certain resultant subdivisions had been disposed off and hence direct that the Plaintiff do serve the third parties with the amended Originating Summons within the next 28 days from the date hereof.

Costs will be in the cause.

**Dated signed and delivered in open court at Ngong this 14th day of November, 2018**

**CHRISTINE OCHIENG**

**JUDGE**