



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 49 OF 2014

JOYCE WAMBUI MACHARIA..... PLAINTIFF/RESPONDENT

-VERSUS-

JOHN KARIUKI WAIGWA..... 1ST DEFENDANTS/RESPONDENT

JEAN WANGECHI NJIMU..... 2ND DEFENDANTS/RESPONDENT

MICHAEL MURITHI WAMBUGU...3RD DEFENDANTS/RESPONDENT

BRAVIAN NATALE4TH DEFENDANTS/RESPONDENT

DOUGLAS MUYA GIKONYO..... 5TH DEFENDANTS/RESPONDENT

PATRICK NDUNGU KIARIE..... 6TH DEFENDANTS/RESPONDENT

SAMSON KAMAU CHEGE..... 7TH DEFENDANTS/RESPONDENT

PETER MWANGI NGUNJIRI..... 8TH DEFENDANT/APPLICANT

NATAO COMPANY LIMITED..... 9TH DEFENDANTS/RESPONDENT

RULING

1. Peter Mwangi Ngunjiri, the applicant herein, filed the notice of motion dated **6th September, 2016** to restrain Joyce Wambui Macharia, the respondent herein, by herself, her servants and/or her agents from interfering with his quiet possession of **Mugunda/Nairutia Block 1/1245** (hereinafter referred to as the suit property) pending the hearing and determination of the suit.
2. The application is premised on the affidavit of the applicant and the grounds on the face of the application.
3. In the affidavit the applicant swore in support of the application, the applicant has deposed that he is the registered proprietor of the suit property together with the developments thereon; that the respondent has interfered with the suit property by erecting structures and bringing tenants to occupy the structures.
4. Arguing that it is just and mete to grant the orders sought, the applicant is apprehensive that unless the orders sought are granted, he may suffer irreparable loss and damage. The applicant urges the court to, in the interest of justice grant the orders sought.

5. The application is opposed through the respondent's grounds of opposition dated 10th October, 2016 in which it is contended that the application is *res judicata* the orders made on 26th June, 2014; a none starter and an abuse of the process of the court.
6. When the matter came up for hearing, the applicant's counsel, **Mr. Nderi**, relied on the grounds on the face of the application and the affidavit sworn in support thereof. He pointed out that by consent of the parties, an order was made for tenants to be depositing rent to the Business Premises Tribunal (BPRT).
7. Concerning the issues raised in the grounds of opposition, he explained that the applicant was not a party to the proceedings that led to issuance of the orders of this court on 19th March, 2014 nor was he aware of those proceedings.
8. Arguing that the order of 19th March, 2014 was for maintenance of *status quo* and that the applicant was at the time in possession of the suit property, he urged the court to allow the application.
9. Counsel for the respondent, **Mr. King'ori**, maintained that the application is *res judicata* the consent orders issued on 26th June, 2014. He explained that the orders restrained dealings with the properties listed therein pending the hearing of this suit.
10. According to Mr. King'ori, granting the orders sought would nullify the orders of 19th March, 2014 without first setting aside those orders. Mr. King'ori further submitted that if the applicant was aggrieved by those orders, he should have sought review of the orders, as a person affected by those orders.
11. Mr. King'ori further submitted that the *status quo* maintained by the orders of 19th March, 2014 is that the respondent was in possession.
12. With regard to the case preferred before the BPRT, Mr. King'ori submitted that it is in breach of the orders of this court and *sub judice* the proceeding in this court.
13. Concerning the consent order recorded before the BPRT for tenants to be paying rent to the BPRT, he pointed out that the respondent is not a party to the consent and accused the applicant for having approached the court with dirty hands.
14. In a rejoinder, counsel for the applicant maintained that the applicant was not a party to the consent order or the suit.

Analysis and determination

15. I have read and considered the rival arguments concerning the application herein.
16. It is not in dispute that this court made orders on 26th June, 2014. Vide those orders, the defendant/respondents (at that time the 1st to 4th defendants) were restrained from dealing with the parcels of land known as Mugunda/Naituria/1444, 1245, 1366, 1367, 1368 and 1369 pending the hearing and determination of the suit herein.
17. It is also not in dispute that the applicant was not a party to the suit when the orders of 26th June, 2014 were made. A review of those orders affected the applicant in that the orders also restrained dealings in the suit property which the applicant claims to have had beneficial interest pursuant to a sale agreement executed between himself and the 1st defendant/ respondent.
18. On account of the said beneficial interest in the suit property, the applicant has moved this court to restrain the respondent from interfering with that parcel of land pending the hearing and determination of this suit.
19. As pointed out herein above, on behalf of the respondent, it is submitted that issuing the order sought would amount to reviewing and/or setting aside the orders issued on 26th June, 2014 yet the applicant has

not moved the court for setting aside and/or review of those orders.

20. Having read and considered the orders of 26th June, 2014 which had the effect of restraining dealings with the suit property pending the hearing and determination of this suit, I agree with the respondent that allowing the instant application would be tantamount to setting aside or reviewing those orders when the applicant has made no application for review or setting aside of those orders.

21. I also agree with the respondent's counsel's submission that if the applicant was aggrieved by those orders, the right thing to do was to move the court for review or setting aside of those orders as a person affected by the orders.

22. In my view, granting the orders sought would existance of two parallel orders over the same parcel of the land, which is inappropriate.

23. With regard to the proceedings began before the BPRT, I agree with the respondent's advocate that the proceedings are *sub judice* the proceedings began in this court and to that extent irregular.

24. In view of the foregoing, I find the application herein to be lacking in merit and dismiss it with costs to the plaintiff/respondent.

Dated, signed and delivered in open court at Nyeri this 29th day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Gathegu h/b for Mr. Nderi for the applicant

N/A for respondent

Court clerk - Esther