



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 502 OF 2017

(Formerly Machakos ELC Case No. 178 of 2016)

FRANCIS NGANGA MUNDIA.....PLAINTIFF

VERSUS

ISAAC GATHUNGU WANJOHI.....1ST DEFENDANT

JACKSON SIMEU NKARU PARTERU.....2ND DEFENDANT

SIMON MOLOMA NKARU.....3RD DEFENDANT

COUNTY LAND REGISTRAR KAJIADO.....4TH DEFENDANT

RULING

The applications before this court are two notice of motion applications dated the 16th November, 2016 and 15th December, 2016 respectively and a Preliminary Objection dated the 8th February, 2017 . In the notice of motion dated the 16th November, 2016 the 1st Defendant is seeking the following prayers:

1. Spent
2. Spent
3. That this Honourable Court be pleased to set aside/vacate the orders issued herein on 4th November, 2016
4. That this Honourable Court be pleased to suspend the orders made herein on 4th November, 2016 until further orders of this Honourable Court
5. That in the alternative, this Honourable Court be pleased to discharge the orders made herein on 4th November, 2016
6. That this Honourable Court be pleased to restrain the Plaintiff whether by himself, his servants and agents from entering into or remaining on or howsoever dealing with Kajiado/Kaputiei - North/3169 pending the hearing and determination of this suit.
7. That the costs of this application be provided for.

This motion is based on the grounds which in summary is that the Honourable Court do set aside suspend, or discharge the orders of the court granted on 4th November, 2016 until further orders. The Plaintiff

whether by himself, his servants and agents be restrained from entering into or remaining on or howsoever dealing with the suit parcel of land pending the outcome of the application and determination of the suit.

In the notice of motion dated 15th December, 2016 the 1st Defendant is seeking the following prayers:

1. Spent
2. Spent
3. That this honourable Court be pleased to set aside/vacate the orders issued herein on 1st December, 2016
4. That this Honourable Court be pleased to hear *ex parte* the notice of motion herein dated 16th November, 2016
5. That this Honourable Court be pleased to order that the Plaintiff's notice of motion herein dated 3rd November, 2016 be heard together *inter partes* with the 1st Defendant's Notice of Motion herein dated 16th November, 2016
6. That this Honourable Court be pleased to transfer this suit to the court which is in a position to hear it whenever justice demands.

This motion is based on the grounds which in summary are that the filing of this suit and application in Machakos ELC Division and subsequent prosecution of the application dated 3rd November, 2016 at the Nairobi ELC has caused confusion and this has contravened the 1st Defendant's rights under Article 50 of the Constitution. Following the order of the Court dated the 18th November, 2016, the Plaintiff failed to serve the 1st Defendant with the Hearing Notice for hearing of his application on 1st December, 2016. On 21st November, 2016 at the Machakos ELC Registry, the 1st Defendant/Applicant filed his memorandum of appearance, replying affidavit, defence and counterclaim, list of documents and list of witnesses but did not leave the documents as the Court file was at the Nairobi ELC Registry. Further, that Nairobi ELC registry failed to avail the court file to enable the 1st Defendant place the documents therein. The motion is supported by the affidavit of the 1st Defendant ISAAC GATHUNGU WANJOHI where he deposes among other issues that he craves leave of the court to refer to his pleadings that he had filed earlier, he is a victim of fraud perpetrated by the Plaintiff as he bought the suit land in 1994 and he is aggrieved by the phenomenon of filing of this suit in this court, the prosecution of the application dated 3rd November, 2016 at the Nairobi ELC Division and the orders which were made herein on 1st December, 2016. He avers that he has a right to a fair hearing as enshrined in article 50 of the Constitution.

In opposition to the application, the Plaintiff replied vide his replying affidavit dated 13th February, 2017 and deposed among other issues that he acquired the suit property on or about October, 2015 and was issued with a title deed on 5th November, 2015 and he is not a constructive trustee as alleged by the 1st Defendant. He avers that the orders of the court granted on 4th December, 2016 were issued based on facts and supported by all the necessary documents. He states that the 1st Defendant served the application 21 days after the said application was filed on 21st November, 2016 and the Deputy Registrar Machakos in a letter dated 19th January, 2017 which is annexure 'FNM4' and 'FNMS' respectively, stated that they were unable to trace the Mpesa Transaction for the payment allegedly made on 21st November, 2016 by the 1st Defendant at the time of alleged filing of documents. Further, that the Court file only returned to Machakos High Court Registry on 5th December, 2016 after the orders of 1st December, 2016 had been issued. He avers that the 1st Defendant was served personally by his advocates' process server but he failed to appear in Court on 1st December, 2016.

Issues and Determination

The Plaintiff and the 1st Defendant filed their written submissions in respect of the two motions dated 16th November, 2016 and 15th December, 2016 respectively and a Preliminary Objection dated the 8th

February, 2017. They combined their arguments on the three. Upon perusal of the two applications including the supporting/replying affidavits, the Preliminary Objection and the written submission, the following are issues for determination:

- Whether the 1st Defendant contravened the provisions of Order 7 Rule 1 of the Civil Procedure Rules
- Whether failure to serve Memorandum of Appearance and Defence filed by the 1st Defendant more than two weeks later is fatal
- Whether the 1st Defendant is entitled to the interlocutory injunction sought.

On the Preliminary Objection raised by the Plaintiff dated the 8th February, 2017 regarding the entry of interlocutory judgement against the Defendants, the Court notes that a request for judgement dated the 2nd December, 2016 was indeed filed on 6th December, 2016 but there was no interlocutory judgement entered in this matter, instead the Deputy Registrar Machakos ELC indicated the following on the face of the Request for Judgement: '**No interlocutory judgement can be entered as there is no liquidated/pecuniary claim sought in the plaint. Plaintiff can fix matter for Pre Trial Conference.**' The Court notes there is nowhere in the Court file where there is an order stating interlocutory judgement was entered against the Defendants.

I will handle the two applications together. The 1st Defendant submitted that the filing of this suit and application in Machakos ELC Division and subsequent prosecution of the application dated 3rd November, 2016 at the Nairobi ELC Division on 1st December, 2016 caused confusion. Further that he was not served with the Hearing Notice for hearing of the Plaintiff's application on 1st December, 2016. He submitted that on 21st November, 2016 at the Machakos ELC Registry, he filed his memorandum of appearance, replying affidavit, defence and counterclaim, list of documents and list of witnesses but did not leave the documents as the Court file was at Nairobi ELC Registry. Further that the Nairobi ELC Registry failed to produce Court file to enable him place the filed pleadings therein. He insists it is this confusion that culminated in the turn of events and is contravening his right to fair hearing as enshrined under Article 50 of the Constitution.

The Plaintiff on the other hand submits that the 1st Defendant and subsequently filed pleadings at the Machakos ELC Registry, however the Deputy Registrar indicated vide a letter dated 19th January, 2017 that they were unable to trace the Mpesa Transaction for the payment allegedly made on 21st November, 2016 by the 1st Defendant at the time of alleged filing of documents. The Court however notes that the Deputy Registrar also indicated in the said letter that '**From their records the dates indicated in the receipts align with the Court receipt books.**' The Court finds that the Deputy Registry Machakos ELC indeed confirms from the said statement, the 1st Defendant's pleadings were paid for at the Machakos ELC Registry. The Court finds that issue of transfer of the Court file between Machakos and Nairobi ELC registries and failure of the Nairobi ELC registry to avail the Court file to enable the 1st Defendant place the filed pleadings therein could have contributed to the confusion and the 1st Defendant should not be punished for this.

In determining the two motions, the Court is guided by the Overriding Objective of Proceedings in the Environment and Land Court as stipulated within the PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, as follows"

'In the exercise of its authority and Jurisdiction, the Environment and Land Court shall at all stages of any trial be guided by Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act No. 19, 2011 so as to facilitate:

- (a) Just;
- (b) Expeditious;
- (c) Proportionate; and

(d) Accessible resolution of disputes.

The Court further relies on article 159 (2) (d) of the Constitution that states as follows:

'In exercising judicial authority, the courts and tribunals shall be guided by the following principles - (d) justice shall be administered without undue regard to procedural technicalities'

The Court also relies on Section 19(1) of the Environment and Land Court Act that stipulates as follows: ***' Procedure and powers of the Court (1) in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.'***

From the foregoing it is clear the Court should act expeditiously without undue regard to procedural technicalities. In the instant case, failure by the 1st Defendant's to serve the Memorandum of Appearance and Defence as stipulated by Order 7 Rule 1 of the Civil Procedure Rules is a rule of technical procedure which should be disregarded as the pleadings are already properly on record.

On the issue of interlocutory injunction sought by the 1st Defendant as against the Plaintiff, the Court notes that the principles for granting the same were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

The Court notes that on 1st December, 2016 the Plaintiff was already granted interlocutory injunction against the Defendants pending the hearing and determination of the suit. The Court further notes that both Plaintiff and 1st Defendant stake a claim on the suit parcel Kajiado/Kaputiei North/3169 having bought the same for valuable consideration and each producing documents of title. Both parties claim fraud on the part of each respective party. The Plaintiff claims he bought the suit parcel of land from the dependants of the late Nkaru Ole Ntekee and was issued with a title on 5th November, 2015. The 1st Defendant on the other hand claims he bought the suit parcel of land from Nkaru Ole Ntekesa and was issued with a title in 1994. These are triable issues which can only be best determined at a full trial so that the issue of ownership of the suit parcel can be deciphered once and for all. No amount of technicalities raised should bar the Court from making a final determination as to the ownership of the suit land. The Court hence finds that the 1st Defendant has established a prima facie case with a probability of success.

In the circumstances, the Court disallows the Preliminary Objection raised by the Plaintiff and finds merit in the 1st Defendant's applications dated 16th November, 2016 and 15th December, 2016 making the following Order:

- a) An inhibition order be registered against land title no. Kajiado/Kaputiei North/3169 pending the hearing and final determination of this suit.
- b) The Plaintiff and 1st Defendant, whether by themselves, their servants and agents are hereby restrained from entering or remaining on or howsoever dealing with Kajiado/Kaputiei North/3169 pending the hearing and final determination of this suit.
- c) The costs of the Preliminary Objection, Notice of Motions dated 16th November, 2016 and 15th December, 2016 respectively be in the cause.

The Parties are urged to comply with Order 11 and set down the suit for hearing and final determination

Dated signed and delivered in open court at Kajiado this 30th day of June, 2017.

CHRISTINE OCHIENG

JUDGE