



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELC SUIT NO.1400 OF 2013

PRUDENZIO NICHOLAS GAITARA.....PLAINTIFF

VERSUS

PATRICK KARIUKI MUIRURI.....1ST DEFENDANT

THIKA DIARIES LTD.....2ND DEFENDANT

MAPEMA HOLDINGS LIMITED.....3RD DEFENDANT

RULING

What is before me is the 3rd defendant's application which was brought by way of Notice of Motion dated 4th February 2016. The application seeks leave of the court to join as a party to the suit, the Land registrar, Central Registry Nairobi and an order directing the said Land registrar to remove, vacate and/or set aside the caveat that was lodged by the said Land registrar on the title L.R No. 4953/2414 on 9th April 2015.

The application is supported by the affidavit of Viktar Maina Ngunjiri sworn on 4th February 2016. The 3rd defendant has averred that he is the registered proprietor of the property known as LR No. 4953/2414 situated within Thika Municipality (hereinafter "the suit property"). The 3rd defendant has contended that on 9th April 2015, the Land Registrar lodged a caveat on the title of the suit property claiming an interest under section 65(1)(f) of the Registration of Titles Act and section 76 of the Land Registration Act (hereinafter "the Act"). The 3rd defendant has contended that the Land Registrar failed in his duty to direct enquiries and to serve notices to it and proceeded to lodge the said caveat without hearing it as the registered proprietor of the suit property. The 3rd defendant has averred further that the impugned caveat has the net effect of prohibiting or restricting all dealings with the suit property indefinitely contrary to section 76(2) of the Act which sets out the periods and circumstances in respect to which a caveat should endure.

The 3rd defendant has averred that the registration of the said caveat on the title of the suit property is tantamount to the Land Registrar expropriating its property in contravention of its right to property enshrined under Article 40 of the Constitution. Finally, the 3rd defendant has contended that its earlier application dated 30th July 2017 was dismissed on 29th January 2016 mainly on the ground that it had sought orders against the Land Registrar Kiambu who the court held lacked jurisdiction over the suit property.

The application is opposed by the plaintiff and the 1st and 2nd defendants. In his grounds of opposition

dated 8th July 2016, the plaintiff has contended that the 3rd defendant's application is premature because this suit cannot proceed in any way until leave to proceed with the same as a derivative action has been granted. The plaintiff has averred that the 3rd defendant has not stated whether it is seeking the joinder of the Land Registrar as a plaintiff or a defendant as required under Order 1 Rule 10 of the Civil Procedure Rules. The plaintiff has averred further that the 3rd defendant has not shown that the joinder of the Land Registrar would assist the court in settling the issues raised by the parties herein.

The plaintiff has averred further that the 3rd defendant is not the absolute and indefeasible proprietor of the suit property and cannot therefore seek the court's assistance and/or protection under section 78 of the Land Registration Act. The plaintiff has contended that the interest of justice would be defeated if the application whose purpose is to remove the suit property from the court's reach is allowed.

The 1st and 2nd defendants opposed the application through a replying affidavit sworn by the 1st defendant on 5th August 2016. In response to the 3rd defendant's application, the 1st and 2nd defendants have reiterated the contents of the affidavit which the 1st defendant had sworn on 27th October 2015 in opposition to a similar application dated 30th July 2015 by the 3rd defendant. The 1st and 2nd defendant have also adopted the affidavit which was sworn by the 1st defendant on 24th June 2016 in opposition to the plaintiff's application dated 14th January 2016. Finally, the 1st and 2nd defendants have adopted the plaintiff's grounds of opposition dated 8th July 2016 which I have referred to above. The 1st and 2nd defendants have denied that the 3rd defendant is the registered proprietor of the suit property. The 1st and 2nd defendants have contended that the purported registration of the 3rd defendant as the proprietor of the suit property was procured by fraud and misrepresentation and that the Officer in charge Land Fraud Unit in the National Police Service has recommended the prosecution of those who were involved in the fraudulent transfer of the suit property to the 3rd defendant. The 1st and 2nd defendant have contended that allowing the 3rd defendant's application would enable the 3rd defendant to interfere with the suit property in respect of which it has no legitimate title. The 1st and 2nd defendants have contended that the 3rd defendant's application has not been brought in good faith and that the 3rd defendant has approached the seat of justice with unclean hands since it did not pay the consideration for the suit property.

The 3rd defendant's application was heard through written submissions. The 3rd defendant filed its submission on 25th August 2016. The 3rd defendant has submitted that under section 78(2) of the Act, the court has jurisdiction to order the removal and/or variation of a restriction upon the application of a proprietor affected thereby and upon notice to the registrar. The 3rd defendant has contended that it is the registered proprietor of the suit property and that the time limit for which a restriction placed by a registrar prohibiting dealings with land may endure is set out in section 76(2) of the Act. The 3rd defendant has submitted that in purporting to lodge a perpetual restriction on the title, the Land Registrar acted contrary to section 76(2) of the Act and Article 40(3)(a) and (b) of the Constitution of Kenya.

The 3rd defendant has submitted that due notice of the application was issued to the Land Registrar and a return of service filed in court. The 3rd defendant has referred the court to the case of R. vs. National Land Commission & another ex parte Esther Waringa Ndirangu JR Appl. No. 241 of 2014 and submitted that the burden is upon the Land Registrar to shed light on whether section 76(1) of the Act was complied with.

On joinder, the 3rd defendant has submitted that the court has discretion to join the Land Registrar in these proceedings to prevent multiplicity of suits. In support of this submission, the 3rd defendant has cited Article 159 of the Constitution and sections 1A and B of the Civil Procedure Act. The 3rd defendant has argued that any order issued by the court under the provisions of section 78(2) of the Act would be binding on the Land Registrar and as such the Land Registrar is a necessary party in these proceedings.

The 3rd defendant has submitted that the Land Registrar lodged the disputed caveat without granting it an opportunity to be heard contrary to the provisions of sections 76 and 77 of the Act and Article 47(1) of the Constitution. The 3rd defendant has submitted that in the absence of a replying affidavit by the Land Registrar, the factual averments in its supporting affidavit are unchallenged. For this submission, the 3rd defendant relied on the case of Emfil Limited vs. Registrar of Titles Mombasa & 2 others CA No. 312 of 2012.

The 3rd defendant has also cited the cases of Matoya vs. Standard Chartered Bank(K)Ltd & others (2003)1EA 140, Ezekiel Misango Mutisya vs. National Lands Commission & 5 others JR case No. 400 of 2013 and Itrade Company Ltd vs. Jane Mukami Mwanigi ELC Misc. 225 of 225 of 2014. The thread running through all these cases is the court's finding that before placing a restriction on a title, a Land Registrar must make enquiries and notify the affected proprietor that a restriction has been placed against his property.

As to whether the application is premature, the 3rd defendant has submitted that no order staying this suit has been issued. The 3rd defendant has contended that although the plaintiff's suit is incompetent for want of leave to bring a derivative action, the counterclaim filed by the 1st and 2nd defendants is still alive. The 3rd defendant has contended that the plaintiff's assertion that the application is premature negates the overriding objective of timely disposal of suits under section 1B of the Civil Procedure Act.

The plaintiff filed his submissions on 25th November 2016. The plaintiff has contended that a derivative suit is an exception to the rule in Foss vs. Harbottle which requires a company to file suit in its own name. The plaintiff has submitted that in exceptional circumstances, minority shareholders can institute a suit on behalf of the company where majority shareholders have sanctioned actions that bind the company to the detriment of the company. The plaintiff has contended that it is not mandatory that leave be sought before the filing of a derivative suit since leave can be granted up to the trial stage.

The plaintiff has submitted that where leave has not been sought and granted before the commencement of a derivative action, the suit is taken to have been stayed until leave is sought and obtained. In support of this submission, the plaintiff has cited the case of Dadani vs. Manji & 3 others Nairobi HCCC No. 913 of 2002 in which it was held that a plaintiff who has brought a derivative action without leave can only move to the other stages in the cause after leave to file a derivative action has been granted and until then, all proceedings are virtually stalled. The plaintiff has cited Black's Law Dictionary 5th Edn pg 1083 for the definition of 'proceedings' and 'stall' and argued that no action can be taken in a suit where no leave to continue with the suit as a derivative action has been sought and either granted or denied.

The plaintiff has argued that a contrary interpretation would mean that only the plaintiff was prohibited from taking steps in the suit including filing a response to any application while the 3rd defendant is at liberty to prosecute its application contrary to the constitutionally enshrined right to fair trial and right to justice. The plaintiff has urged the court to adopt an interpretation that keeps the plaintiff in the suit rather than one that drives the plaintiff away from the seat of justice. The court has been urged to find that the suit herein is and ought to be stayed pending the hearing of his application for leave to proceed with the suit as a derivative action. The court has been referred to the case of John Kamau Mbugua vs. The Standard Ltd & KTN Baraza Ltd Nairobi HCCC No. 270 of 2011 for the proposition that the policy for the court is to apply the principle of the rule of law and exercise latitude in its interpretation of the Constitution and other enabling laws so as to facilitate fair and just determination of disputes on merit thereby facilitating access to justice.

In the alternative, the plaintiff has submitted that in an earlier application dated 30th July 2016, the 3rd defendant had sought similar orders against the land registrar, Kiambu County which application was dismissed by the court. The plaintiff has submitted that like in the application dated 30th July 2016, the 3rd defendant has in the instant application failed to show whether the registrar is to be joined as a plaintiff or a defendant and further, how the joinder of the Land Registrar would assist the court in determining the issues in dispute. The plaintiff has submitted that the joinder of the Land Registrar is sought only for the

purposes of having the caveat lifted and would not in any way assist the court in determining the issues in controversy in this suit.

The plaintiff has submitted that the 3rd defendant's title has been challenged on grounds of illegality and fraud and as such, the 3rd defendant cannot seek the court's protection under section 78 of the Act. The plaintiff has submitted that the Land Registrar had power and authority to register a caveat against the title of the suit property under section 76(3) of the Act and section 65(1)(f) of the Registration of Titles Act (now repealed) to prevent improper dealing with the suit property. The plaintiff has contended that if the 3rd defendant's application is allowed, the suit property risks being sold, transferred or in any other way dealt with so as to keep the property from the other parties' reach.

The plaintiff has submitted that the court is enjoined by sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution to ensure that justice is administered expeditiously without undue regard to procedural technicalities. The plaintiff has submitted that section 78(2) of the Act empowers the court to remove, vary or make such orders as it may deem fit in an application for the removal of a caveat. The plaintiff has urged the court to bear in mind the consequence of removing the caveat as sought by the 3rd defendant and ensure that the suit property is preserved pending the determination of the issues raised in the suit.

The 1st and 2nd defendants did not file submissions as had been directed by the court.

I have considered the 3rd defendant's application. I have also considered the grounds of opposition and replying affidavit which were filed by the plaintiff and the 1st and 2nd defendants in opposition to the application. Finally, I have considered the written submissions by the 3rd defendant and the plaintiff together with the authorities cited in support thereof. As I mentioned earlier in this ruling, the 3rd defendant has sought two orders. The first order sought is the joinder of the Land Registrar, Central Registry, Nairobi in this suit. Secondly, the 3rd defendant has sought the removal of the caveat which was registered against the title of the suit property on 9th April 2015 during the subsistence of this suit. The principles upon which this court exercises its discretion on applications for joinder of parties are well settled. The limb of the 3rd defendant's application which has sought joinder of the Land Registrar to the suit has been brought under Order 1 rule 10(2) of the Civil Procedure Rules. Order 1 rule 10 (1) to (4) of the Civil Procedure Rules provides as follows:-

1. Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

2. 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.

3. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

4. Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

I am of the view that under Order 1 rule 10(2) of the Civil Procedure Rules, the court can only join a

person as defendant or plaintiff to an existing suit in two instances, first, where such person ought to have been joined in the suit as a plaintiff or a defendant under Order 1 rules 1 and 3 of the Civil Procedure Rules and was not so joined and secondly, where the presence of such person before the court may be necessary in order to enable the court to adjudicate and settle all questions involved in the suit.

The onus was upon the 3rd defendant to satisfy the provisions of Order 1 rule 10 of the Civil Procedure Rules. I am in agreement with the submission by the Plaintiff that the 3rd defendant has not met the threshold for joinder set out in Order 1 rule 10 of the Civil Procedure Rules. In the case of Deported Asians property Custodian Board vs. Jaffer Brothers Limited (1999)1E.A 55 (SCU) which was cited with approval in the case of Pravin Bowry vs. John Ward and another (2015) eKLR, the court stated among others that:-

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application by a defendant) to be joined as a co-defendant where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

In the case of Werrot and Company Ltd. and others vs. Andrew Douglas Gregory and others, Nairobi(Milimani) HCCC No. 2363 of 1998(1998)LLR2848(CCK), Ringera J.(as he then was) stated that,

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.

In the case of Kingori vs. Chege & 3 others [2002]2 KLR 243, Nambuye J.(as she then was) held that,

“An applicant seeking to be joined in a suit must demonstrate that he is a necessary and proper party and in the case of a defendant, there must exist a relief flowing from that defendant to the plaintiff.”

In the same case, Nambuye J. stated that parties cannot be added so as to introduce a new cause of action or to alter the nature of the suit and that a proper party to a suit *“is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation. An interest which will be cognizable in the court of law. That is an interest which the law recognizes and in which the court will enforce”.*

In the present case, the 3rd defendant has not demonstrated that the Land Registrar, Central Registry Nairobi has any legal interest in the subject matter of this suit or the issues arising for determination in the suit. As stated in the replying affidavit by the 1st and 2nd defendants and the submissions by the plaintiff, the 3rd defendant had brought an earlier application seeking the joinder of the Land Registrar, Kiambu to the suit. The application was dismissed by the court for various reasons which are set out in the ruling dated 29th January 2016. The application was not dismissed solely on ground that the Land Registrar Kiambu County whose joinder had been sought had no jurisdiction over the suit property as claimed by the 3rd defendant. In the ruling dismissing the application, the court stated in part as follows:-

“As I stated at the beginning of this ruling, the plaintiff’s complaint is that the 1st and 2nd defendants fraudulently transferred the suit property to the 3rd defendant. In his averments in the plaint, the plaintiff has not accused the land registrar, Kiambu or any other land registrar for that matter of any wrong doing. I have not seen a copy of the statement of defence that was filed by the 1st and 2nd defendants to the plaintiff’s claim. The 3rd defendant however filed its defence on 19th March, 2014. In its statement of defence, the 3rd defendant maintained that the suit property was acquired by the 3rd defendant lawfully. Again, there is no accusation leveled against any

land registrar.

It is not clear from the application and submissions by counsel whether the 3rd defendant is seeking the joinder of the land registrar in this suit as a defendant or as a plaintiff. The 3rd defendant has also not come out clearly as to how the joinder of the land registrar will assist this court in settling the issues that have been raised by the parties to this suit which revolves around the validity of the transfer of the suit property by the 2nd defendant to the 3rd defendant.

The 3rd defendant's complaint in the present application is that the land registrar, Kiambu County registered a caveat/restriction against the title of the suit property on 9th April 2015 unlawfully. The alleged caveat/restriction the evidence of which has not been placed before the court was lodged while this suit was pending. The 3rd defendant has not established any nexus between the said caveat/restriction and the dispute between the parties herein."

It is clear from the foregoing portion of the ruling that the issue of the joinder of the Land Registrar in this suit was considered by the court and the court made a finding thereon. The present application is a replica of the 3rd defendant's application of 30th July 2016 save that the Land Registrar now sought to be joined in the suit is the Registrar of Lands, Central Registry Nairobi. I am of the view that the present application is to some extent *res judicata*. In the case of Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others Nairobi CA No. 36 of 1996 the court stated as follows in respect to the application of the doctrine of *res judicata* to interlocutory applications:-

"...That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."

There is nothing new placed before the court which can make the court change its view on the 3rd defendant's quest to join the Land Registrar to this suit. As I had said in the earlier ruling, the 3rd defendant has not satisfied me that the Land Registrar, Central Registry Nairobi is a necessary party to these proceedings or that his presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. It is apparent from the 3rd defendant's application that the joinder of the Land Registrar as a party to the suit is sought solely for the purposes of enabling the 3rd defendant to seek the removal of the caveat which was registered against the title of the suit property on 9th April 2015 after the filing of this suit. I am of the view that since the Land Registrar is not a party to this suit and the issue of the said caveat is not before the court for determination in this suit, the 3rd defendant is at liberty to institute separate proceedings against the Land Registrar, Central Registry Nairobi for the removal of the said caveat instead of making these proceedings convoluted. Such proceedings cannot in my view be termed as multiplicity of suits. As I had mentioned in the earlier ruling, the 3rd defendant has also failed once again to indicate whether the said Land Registrar, Central Registry Nairobi should be joined in this suit as a plaintiff or a defendant.

I have said enough to show that the order sought by the 3rd defendant for the joinder of the Land Registrar, Central Registry Nairobi to this suit is not for granting. With regard to the second limb of the application, the same was dependent on the outcome of the first limb. The court cannot make orders against parties not before it. Since I have declined to join the Land Registrar, Central Registry Nairobi to the suit, the order for the removal of caveat sought by the 3rd defendant is similarly refused. As I have already stated, nothing stops the 3rd defendant from instituting separate proceedings against the said registrar for the removal of the said caveat.

The upshot of the foregoing is that the 3rd defendant's application dated 4th February 2016 fails. The same is dismissed with no order as to costs.

Delivered and signed at Nairobi this 26th day of July, 2017

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

Mr. Ongoro h/b for Wakwaya for the Plaintiff

N/A for the 1st Defendant

N/A for 2nd Defendant

Mr. Kiprono h/b for Ms. Migiro for the 3rd Defendant

Catherine Court Assistant