



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C CASE NO. 3 OF 2017

WANJIRU MUIRURI NDUATI.....APPLICANT

VS

ERASTUS NDUNGU THUNGU.....RESPONDENT

RULING

The background

1. This ruling relates to three applications filed as follows; - Notice of Motion filed on the 23rd October 2015 and amended on the 2nd September 2016, the Notice of Motion dated the 18th October 2016 and the Preliminary objection dated the 10th January 2017.
2. By way of background, the plaintiff filed suit seeking injunctive reliefs of permanent nature against the defendant, and a declaration that the plaintiff holds the land Loc 6/Gikarangu/207 in trust for the plaintiff and her dependents and a declaration that the suit land is both matrimonial and ancestral land. The plaintiff followed the suit with a Notice of Motion filed on the 23rd October 2015 claiming *inter alia* temporary injunctive orders or in the alternative an inhibition on registration of any dealings whatsoever in the suit Land Reference Number Loc 6/Gikarangu/4480,4481 and 4482 (referred to as the suit land) under section 68 of the Land Registration Act. By this time Land Reference Loc 6/Gikarangu/207 had been subdivided into three portions to wit; Loc.6 Gikarangu/ 4480,4481 and 4482.
3. On the 26th October 2015, the Court granted interim injunctive orders for a period of 14 days. In the same breadth, the Court granted inhibition orders against registration of any dealings on the suit land. On the 11th November 2015, the orders of the Court granted on the 26th October 2015 were not extended and invariably lapsed.
4. On the 9th February 2016, the plaintiff filed a Notice of Motion seeking leave to amend the plaint dated the 7th August 2015 and the Notice of Motion dated the 23rd October 2015. At the hearing of these applications, the parties, by consent, agreed to amend the Plaint but the application to amend the Notice of Motion was opposed and leave to amend was granted vide a Court Ruling delivered on the 12th July 2016. On the 28th October 2016, the defendant filed a Notice of Motion seeking orders to set aside/stay the inhibition orders issued by the Court on the 28th October 2015. The amended Notice of Motion was finally amended and filed on the 2nd November 2016. The defendant reacted by filing a Preliminary objection on the 10th January 2017.

5. When the matter came for hearing on the 2nd March 2017 the Court directed that the three applications be heard simultaneously. The parties have filed written submissions on all the applications. I will proceed to determine each application in turn;

The Preliminary Objection

6. Noting that the Notice of Motion dated the 2nd September 2016 was amended pursuant to the Ruling of the honourable Court delivered on the 12th July 2016, the defendant contends that it is the amendment out of time that is the bone of contention. The Notice of the Preliminary objection is worded as follows;

“ Take Notice that the defendant shall on the hearing date of the application by motion, purportedly amended on the 2nd September 2016, raise objection *in limine* on the ground that the said application is in flagrant violation of the laws of amendment”.

He cited the provisions of Order 8 Rule 6 of the Civil Procedure Rules to support his contention that the leave so granted by the Court on the 12th July 2016 had lapsed by the time the plaintiff filed her amended Notice of Motion on the 2nd November 2016. That as it stands now there is no application by way of amended Notice of Motion for the Court to consider. That the wording of Order 8 rule 6 is mandatory in nature and the Court should uphold the Preliminary objection and strike out the amended Notice of Motion filed on the 2nd November 2016 on account of it being fatally defective.

7. In response and opposition to the preliminary objection, Counsel for the plaintiff argued that a Notice of Motion is not a pleading and hence the provisions of Order 8 Rule 6 do not apply. He relied on the case of **Fredrick Mwangi Nyaga Vs Garam Investments & Another (2013) eKLR** where Justice Havelock (as he then was) pointed out that the definition of pleading in section 2 of the Civil Procedure Act does not include Notice of Motion. In the alternative, the learned Counsel urged the Court to exercise its power and extent the leave. He explained that the delay was occasioned by the negotiations between the parties which at some point fell through. He invoked the overriding objective of the Court as provided under section 1A, 1B and Article 159 (2)(d) of the Constitution which obligates the Court to do substantive justice without undue regard to technicalities.

Analysis

8. In the case of **Mukisa Biscuit Company Vs Westend Distributors Limited (1969) EA 696** the Court stated that a preliminary objection if raised *in limine* must be in the nature of a demurrer. It must be a pure point of law to be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Law J stated as follows;

“ so far as I am aware, a preliminary objection consists of a point of law which has been pledged or which has arose by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. ...”

In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** expressed himself in greater detail on the subject. The two cases cited here embody the salient rules that must be met before a Preliminary Objection can be held; first it must be purely on a point of law and must be admitted by both sides of the controversy; thirdly it must be not call on the Court to exercise its discretion.

9. As stated earlier the Court granted the plaintiff leave to amend the plaint and the Notice of Motion dated the 23rd October 2015. Order 8 rule 6 of the Civil procedure rules provides that:-

“Where the Court has made an order giving any party leave to amend, unless the party amends within the period specified or if no period is specified, within fourteen days the order shall cease to have effect, without prejudice to the power of the Court to extend the period.”

10. In compliance with the Court order, it follows that the plaintiff ought to have amended the Notice of Motion within 14 days from the date the order to amend was granted by the honourable Court. The Court record reveals that the amended Notice of Motion was filed on the 2nd September 2016, approximately 3.5 months later. The plaintiff states that the delay was occasioned by the attempts to settle the matter out of court which involved the parties with the help of the family, church and the local administrators. Though no evidence has been adduced on this, I find no reason to disbelieve the plaintiff on this account. Though the period between the time the Plaintiff ought to have complied with the court orders and when she filed the Amended Plaintiff is significant, the same did not occasion any suffering or prejudice to the Defendants, that cannot be ameliorated through costs. In any event if there was any prejudice, the Defendants did not present any evidence to this Court.

11. Order 8 rule 6 gives the Court the opportunity to exercise discretion to extend the period within which a party may amend a pleading. This therefore negates the Preliminary Objection. It therefore ceases to be a point of law in my view.

12. Article 159 (2) of the Constitution states that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- a. justice shall be done to all, irrespective of status;
- b. justice shall not be delayed;
- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- d. justice shall be administered without undue regard to procedural technicalities; and
- e. the purpose and principles of this Constitution shall be protected and promoted.

The above article mandates this Court to administer justice without undue regard to procedural technicalities. Order 8 rule 6 is on procedural justice and yet the Constitution obligates the Court to do substantive justice. It is now established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

In the case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC & 6 others CA 2013, eKLR**, the Court held that ;

“The general trend, following the enactment of Sections 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated.”

13. In **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others**, the Court of Appeal stated as follows on the effect of Article 159 of the Constitution on the oxygen principle: -

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending

document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

14. Based on the above reasons, the Preliminary objection is unmerited and is hereby dismissed with costs to the plaintiff. The Notice of Motion filed on the 2nd September 2016 be and is hereby deemed to have been duly amended within time and is properly on record.

The amended Notice of Motion dated the 2nd September 2016.

15. This Notice of Motion which is brought under Section 1A, 1B and 3A of the Civil Procedure Act, section 150 and 160 of the Land Act , Section 68 & 93 of the Land Registration Act , Section 6 (1) , 9 and 17 of the Matrimonial Property Act 2013, Order 40 rule 1,2 & 4(1(, order 50 Rule 1 of the Civil Procedure Act seeks the following orders;

“

a) Spent

b) That pending hearing and determination of this application *interpartes*, this honourable Court be pleased to grant a temporary order of injunction restraining the defendant by himself, his servants and employees from doing any of these acts that is to say, from advertising for sale, selling whether by public auction or private treaty, leasing, letting, charging, gifting or disposing in any manner all that parcels of land known as **Loc. 6/GIKARANGU/4480, Loc. 6/GIKARANGU/4481, Loc. 6/GIKARANGU/4482** or any part thereof.

c) That this honourable Court be pleased to enter summary judgement against the Defendant in terms of prayers appearing on the plaint;

d) That this honourable Court be pleased to revoke the registration of the mutation registered on 18th September 2015 and the subsequent subdivision of all that parcel of land formerly known as **Loc.6/GIKARANGU/207**.

e) That pending hearing and determination of this suit, this honourable Court be pleased to grant a temporary order of injunction restraining the defendant by himself, his servants and employees from doing any of these acts that is to say, from advertising for sale, selling whether by public auction or private treaty, leasing, letting, charging, gifting or disposing in any manner all that parcel of land known as **Loc. 6/GIKARANGU/4480, Loc. 6/GIKARANGU/4481, Loc. 6/GIKARANGU/4482** or any part thereof;

f) That an order be made under the doctrine of *lis pendens* and section 106 of the Land Registration Act, previously enshrined under section 52 of Indian Transfer of Property Act (1959)(repealed)that during the pendency of this suit all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the charged properties with any land registry, government department and in all other registering authorities is hereby prohibited in all that parcels of land known as **Loc. 6/GIKARANGU/4480, Loc. 6/GIKARANGU/4481, Loc. 6/GIKARANGU/4482** .

g) That in alternative, this Court inhibits registration of any dealings whatsoever in all that parcels of land known as **Loc. 6/GIKARANGU/4480, Loc. 6/GIKARANGU/4481, Loc.**

h) That cost of this application be borne by the respondents”.

15. The application is premised on the grounds *inter alia*; That the suit land is both matrimonial and ancestral land; that the defendant is intent on selling the land without the consent of the plaintiff despite her protests; that she has contributed to the development of the suit land and her livelihood and that of her children and step children depend on it and if the sale is allowed she stands to be rendered homeless and destitute.

16. The application is supported by the affidavit of Wanjiru Muiruri Nduati sworn on the 2nd September 2016. She has rehashed the grounds stated in the Notice of motion. In addition she states that she married the defendant in 1959 and together have lived on the suit land since. That she contributed both financial and non-financial resources to the development of the suit land and has cultivated both cash and food crops on the land.

17. In opposing the application, the defendant urged this Court to dismiss the application on grounds that the plaintiff has failed to show a prima facie case with a probability of success; that the plaintiff is a masquerader and a busy body who is attempting to steal a match from the defendant who is sickly old and frail and the suit is a tactic to frustrate him. That there exists a number of triable issues in the application which cannot be granted by way of interim order as it would be extremely prejudicial. He cited the triable issues such as the marriage status of the parties.

18. I have considered the prayers in the Notice of Motion as enumerated above and I cannot agree more with the learned Counsel for the Defendant that granting prayer 3, 4, and 6 would be both prejudicial and premature at this early stage. These prayers require evidence which should be tendered at the trial and canvassing them at the current level would amount to condemning a party unheard in a summary manner. The Court has no business driving a party away from the seat of justice at the interlocutory stage. I am fortified by Article 159(2)(d) of the constitution which mandates the Court to deliver substantive justice without undue regard to technicalities. For that reason I therefore decline to entertain prayer No. 3, 4, 6 of the application. I now turn to prayers 2, 5, 7 and 8 which I shall consider in this ruling.

19. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, 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, and thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

20. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eK.L.R)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

21. Has the plaintiff demonstrated a prima facie case with a probability of success? The plaintiff claims proprietary, equitable and beneficial and overriding interests in the suit land arising from monetary and non-monetary contribution to the acquisition of the same. That the property was a gift from their parents and as such she claims equal rights. Laying claim on her right to matrimonial property, she relied on the case of **Njoroge Vs Ngari (1985) KLR 480** where the Court held that in matrimonial property disputes, both parties have proprietary interests in that property. The plaintiff claims that she is the wife of the defendant while the defendant has cast doubt on same. The fact of the marriage status between the plaintiff and the defendant is a matter that needs to be canvassed at the trial. The same can be said of whether the property is matrimonial or ancestral.

22. However in her supporting affidavit sworn on the 2nd September 2016, she deponed that she has lived on the suit land since 1959 with the defendant and her 14 children, 8 of whom are here biological children and 6 are step children. The defendant has corroborated the evidence that the property was inherited from the plaintiff's father-in-law, his father. Though he confirms that the plaintiff is his wife; but estranged, no evidence of divorce or separation has been adduced to show that she is not a wife. It is her case that she, together with the defendant have built 2 permanent houses and 2 semi-permanent houses on the suit land and over the years she has cultivated both food and cash crops such as 2000 coffee trees, avocado, maize and beans. It is instructive to note that the defendant has not controverted the affidavit evidence of the plaintiff at all. In my view, the long possession and occupation of the suit land by the plaintiff for over 58 years is evidence upon which this court can infer possessionary rights to the plaintiff, unless controverted by evidence. In view of the above I find that the plaintiff has established a prima facie case with a probability of success.

23. on the issue whether the plaintiff will suffer irreparable harm that cannot be compensated by damages? The Court of Appeal case of **Muiruri Vs Bank of Baroda Kenya Limited 2000 KLR 183** captures the emotional aspect of land in Kenya and in this particular case the plaintiff having occupied it for over 58 years, there are sentimental feelings that may not be compensated by damages. I find that the plaintiff has met the second ground in the Giella Case.

24 Ultimately the application dated the 2nd September 2016 is merited.

The Notice of Motion dated the 18th October 2016

24. This application sought to set aside the inhibition order granted on the 28th October 2015 on grounds that the same was granted exparte, on account of errors apparent on the face of the record and with no sufficient reasons. I have examined the record and it reveals that the orders of the honourable Court issued on the 28th October 2015 were granted exparte and worded as follows;

“

- a) That the Notice of Motion dated 23rd October 2015 be and is hereby certified as urgent.
- b) That an order of temporary order of injunction be and is hereby granted for 14 days only restraining the defendants by themselves, their servants and employees from doing any of these acts that is to say, from advertising for sale, selling whether by public auction or private treaty, leasing, letting, charging, gifting or disposing in any manner all those parcels of land known as **Loc. 6/GIKARANGU/4480, Loc. 6/GIKARANGU/4481, Loc. 6/GIKARANGU/4482** or any part thereof;
- c) That an order be and is hereby granted inhibiting registration of any dealings whatsoever in all those parcels of land known **Loc. 6/GIKARANGU/4480, Loc. 6/GIKARANGU/4481, Loc. 6/GIKARANGU/4482** under Section 68 of the Land Registration Act.
- d) That the Notice of Motion dated 23rd October be served upon the respondents for *interparties* hearing on 4th November 2015.
- e) That cost of this Application be in the cause”.

25. From the above it is clear that the orders granted were to last upto and until the 4th November 2015 when the matter was coming up for interparties hearing. On the 4th November 2015, the plaintiff was unrepresented and though the defence counsel applied orally for the dismissal of the application for non-attendance, the Court declined to go that route and instead did decline to extend the orders. The orders then lapsed on the 4th November 2015. It is not available for consideration by this Court. This application is therefore moot and is hereby dismissed.

26. In conclusion, the Court makes the following orders;

“

- a). **The Preliminary objection dated the 10th January 2017 is hereby dismissed with costs in favour of the plaintiff.**
- b). **The Notice of Motion dated the 2nd September 2016 is granted in the following terms;**
 - i). **That pending the hearing and determination of this suit the defendant by himself, his servants and employees from advertising for sale, selling whether by public auction or private treaty leasing letting charging or disposing in any manner all that parcel of land known as Land reference No Loc 6/Gikarangu/4480,4481 and 4482.**
 - ii). **An order of inhibition inhibiting the registration of any dealing on the Land Reference No Loc 6/Gikarangu/4480,4481 and 4482 under section 68 of the Land Registration Act, until the hearing and determination of the suit or such other orders of the Court.**
 - ii). **Prayers 3, 4 and 6 are declined for the reasons stated above.**
 - iii). **Costs to be paid by the Defendants.**
- c). **The Notice of Motion dated the 18th October is dismissed with Costs in favour of the plaintiff”.**

DELIVERED, DATED AND SIGNED AT NAIROBI, THIS 18TH JULY 2017.

J. G. KEMEI

JUDGE