



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. NO 23 OF 2016

CHARITY NGIO NYAGA.....PLAINTIFF

VERSUS

ZUHYRA JUMA KAVUTO.....1ST DEFENDANT

JOSEPHINE WANJA MURIUKI.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR EMBU.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. By an application dated and filed on 8th May 2017, the 2nd Defendant sought the following pertinent orders against the Plaintiff:

a. That pending the hearing and determination of this application the Plaintiff be restrained from collecting rent from rental houses on parcel No Gaturi/Weru/10472 and that the said rent be deposited in this honourable court.

b. That pending the hearing and determination of the main suit herein the monthly rental income from the suit property parcel No. Gaturi/Weru/10472 be deposited in this honourable court.

2. The grounds upon which the said application was based were that the 2nd Defendant was the current registered owner of the suit property; that the 2nd Defendant would suffer financially if the orders sought are not granted; and that it was not fair for one party to benefit from the rent while the case was pending.

3. The said application was supported by the affidavit of the 2nd Defendant sworn on 8th May 2017. It was conceded in the said affidavit that although she was the current registered owner of the suit property, the validity of her title was being challenged in the main suit. The rest of the affidavit simply reiterated the grounds in the Notice of Motion.

4. The Plaintiff filed a replying affidavit sworn on 26th May 2017 in opposition to the said application. She stated that the suit property was part and parcel of Title No. Gaturi/Weru/5163 which belonged to her deceased husband who had developed some rental houses thereon for the benefit of the entire family including the 1st Defendant. She also swore that sometime in 2014, the suit property was fraudulently and illegally transferred into the names of the 1st Defendant and her late husband one, Nyaga Kibande. The said property was later on fraudulently transferred to the 1st defendant who sub-divided it and

transferred parcel No. 10472 to the 2nd Defendant. The Plaintiff further stated that the orders sought were oppressive since the rental income was being utilized by her and the 1st Defendant.

5. I have perused the court file and noted that the Plaintiff's Notice of Motion dated 8th April 2016 was settled by consent of the parties whereby it was agreed, *inter alia*, that the 2nd Defendant shall be restrained either by herself, her agents, servants or anybody acting under her instructions from taking possession, occupying, selling, charging, evicting the Plaintiff and her family or other persons occupying the suit land as tenants or in any other way from dealing with the suit land pending the hearing and determination of the suit.

6. In my opinion, the effect of that order was to allow the Plaintiff quiet possession and enjoyment of the suit property pending the hearing and determination of the suit. The 2nd Defendant was by consent restrained from interfering with the Plaintiff and the Plaintiff's tenants. I do not think that in those circumstances, it was permissible for the 2nd Defendant to interfere with the rent collected from those tenants.

7. Turning to the instant application, the 2nd Defendant seeks orders which in effect run counter to the spirit of the consent orders recorded on 7th June 2016 before Hon Justice Boaz Olao. The Plaintiff now seeks to stop the Plaintiff from collecting rent from the tenants in occupation of the rental houses on the suit property. The Defendant, instead, wants the rent deposited in court pending the hearing and determination of the suit.

8. The court is not persuaded that there are compelling reasons or other justification why the status which has obtained for the last one year should be disturbed or altered. The fact that the 2nd Defendant is the current registered owner is not a sufficiently good reason to do so. She was still the registered owner as at 7th June 2016 when the Plaintiff's application dated 8th April 2016 was compromised. It must also be borne in mind that her title is being challenged in the main suit.

9. The fact that the Plaintiff is collecting the rent and could therefore be benefitting financially is not a sufficient reason either. The fact that the 2nd Defendant could be suffering a financial loss by being kept out of the rental income is not sufficient. It has not been demonstrated that the Plaintiff would not be able to make restitution or pay compensation should she lose the main suit.

10. For the foregoing reasons, the court is not satisfied that the orders sought by the 2nd Defendant should be granted. Accordingly, the 2nd Defendant's Notice of Motion dated 8th May 2017 is hereby dismissed with costs.

11. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **12th day of JULY, 2017.**

In the presence of Mr Okwaro for the Plaintiff and Mr Andande for the 2nd Defendant and in the absence of the 3rd and 4th Defendants.

Court clerk Njue

Y.M. ANGIMA

JUDGE

12.07.17