



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 404 OF 2014**

**AMOS KIBURU WAINAINA & OTHERS.....PLAINTIFF**

**VERSUS**

**ROSE MUTHONI T/A MANJING ENTERPRISES.....DEFENDANT**

**ALEXANDER WAINAINA NJOROGE.....PROPOSED 1<sup>ST</sup> INTERSTED PARTY**

**VIPRO LIMITED.....PROPOSED 2<sup>ND</sup> INTRESTED PARTY**

**COMMISSIONER OF LANDS.....PROPOSED 3<sup>RD</sup> INTERESTED PARTY**

**REGISTRAR OF TITLES.....PROPOSED 4TH INTERESTED PARTY**

**CONSOLIDATED BANK OF KENYA.....PROPOSED 5<sup>TH</sup> INTERESTED PARTY**

**RULING**

What is before me is the proposed 1<sup>st</sup> interested party's application which was brought by way of Notice of Motion dated 25<sup>th</sup> June, 2014 under Order 40 Rules 1,2 and 3 of the Civil Procedure Rules and sections 1A,1B and 3A of the Civil Procedure Act seeking among other orders, a temporary injunction restraining the defendant and the 2<sup>nd</sup> interested party either by themselves or through their servants, employees and/or authorized agents or howsoever from selling, charging, alienating, disposing, excavating, constructing, interfering with and/or doing anything prejudicial to L.R 209/2788/15 Mwimbi Road, Nyamakima, Nairobi (herein referred to as "the suit property") pending the hearing and determination of this suit.

The application was supported by an affidavit sworn by the proposed 1<sup>st</sup> interested party. The application was brought on the grounds that, the proposed 1<sup>st</sup> interested party was the owner of the suit property having purchased the same from one, Lakamshi Popat in 1969 and that he had been paying all statutory charges in respect thereof. The proposed 1<sup>st</sup> interested party averred that he made an application on 26<sup>th</sup> March, 2015 through his son to register a caution on the title of the suit property in order to protect his interest therein but was advised at the land office to obtain a court order. He annexed a copy of the application to register a caution as exhibit "AWN1" to his affidavit sworn on 11<sup>th</sup> August, 2015. He contended that the defendant and the proposed 2<sup>nd</sup> interested party had borrowed money using the suit property as a security. He annexed to the said affidavit as exhibit "AWN2" a copy of a search on the register of the suit property showing that a charge was registered against the title of the suit property on 2<sup>nd</sup> February 2015 in favour of the proposed 5<sup>th</sup> interested party to secure a sum of Kshs.20,000,000/-. He averred that the defendant acquired the suit property through misrepresentation and fraud.

In his further affidavit sworn on 15<sup>th</sup> September 2015, the proposed 1<sup>st</sup> interested party stated that after the suit property was transferred to the defendant, the defendant filed a suit (CMCC No.3903 of 2012) purportedly against the persons who were in occupation of the suit property. The proposed 1<sup>st</sup> interested party stated that the said suit was brought against people who had no interest in the suit property and that the orders which the defendant obtained therein were used to evict the proposed 1<sup>st</sup> interested party's lawful tenants from the suit property. He stated that the defendant thereafter demolished the building which was standing on the suit property. The proposed 1<sup>st</sup> interested party stated that although he obtained orders in the said suit (CMCC No.3903 of 2012) restraining the defendant from interfering with the suit property, the defendant disobeyed the same and proceeded to transfer the suit property to the proposed 2<sup>nd</sup> interested party. The proposed 1<sup>st</sup> interested party annexed to his affidavit, the pleadings which the defendant filed in the said suit and the order which he (the proposed 1<sup>st</sup> interested party) obtained therein on 17<sup>th</sup> August 2012 restraining the defendant from demolishing the buildings and structures which were standing on the suit property. The proposed 1<sup>st</sup> interested party stated that he purchased the suit property from Lakamshi Popat in 1969 with a loan which he obtained from G.S. Sandhu & Company Advocates. He stated that he repaid the loan in full together with interest. He stated that the instrument of transfer was thereafter executed in his favour and handed over to the firm of G.S. Sandhu & Company Advocates for registration. He stated that the registration of the said transfer in his favour was frustrated by a clerk at the office of G.S. Sandhu & Company Advocates who took off with money which he had paid to the said firm for the said transfer.

The proposed 1<sup>st</sup> interested party annexed to his affidavit several receipts issued by G.S. Sandhu & Company Advocates for the payments he made towards the settlement of the said loan. He stated that he remained in occupation of the suit property from 1969 paying all statutory and other charges until he was evicted by the defendant and his building demolished. He annexed to his affidavit several receipts for the payments he made to various parties for the services rendered to him on the suit property. To demonstrate that he had tenants on the suit property, the proposed 1<sup>st</sup> interested party annexed as exhibits a bundle of documents comprising of correspondence with advocates regarding the cases he had at the Business Premises Rent Tribunal with tenants who were occupying the suit property, a list of tenants, court orders issued by the said tribunal and the leases he entered into with various tenants to whom he had rented the premises. The proposed 1<sup>st</sup> interested party averred that if the defendant was the owner of the suit property, she could have protested his occupation of the property for all those years he was in possession thereof. He urged the court to grant the orders sought to preserve the suit property which was at the risk of being sold.

The application was served upon the plaintiff, the defendant and the other proposed interested parties. The same was however opposed by the defendant only. The defendant filed a replying affidavit sworn on 14<sup>th</sup> July, 2014. In her affidavit the defendant contended that she was wrongly joined in the application since she had no proprietary interest in the suit property.

On 10<sup>th</sup> December, 2015, the court gave directions that the application be argued by way of written submissions and gave timelines within which the parties were to file their submissions. Only the proposed 1<sup>st</sup> interested party filed written submissions which were served upon all the parties to the suit. The other parties failed to file their submissions even after time was extended for them to do so. I have considered the proposed 1<sup>st</sup> interested party's application together with the two affidavits which were filed in support thereof. I have also considered the defendant's affidavit in reply to the application. Finally, I have considered the proposed 1<sup>st</sup> interested party's written submissions on record and the various authorities which were cited in support thereof. What the proposed 1<sup>st</sup> interested party has sought in his application is a temporary injunction pending the hearing of the suit.

The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury

which would not be adequately compensated by an award of damages. In the said case, it was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal stated as follows:-

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”*

On the material before me, I am not satisfied that the proposed 1<sup>st</sup> interested party has made out a case for the orders sought for various reasons. First, the only parties to this suit at the moment are the plaintiffs and the defendant. The 1<sup>st</sup> to 5<sup>th</sup> proposed interested parties are yet to be joined in the suit as parties. It follows therefore that no substantive orders can issue in their favor or against them in this suit. I have noted from the record that the proposed 1<sup>st</sup> interested party’s applications seeking his joinder and the joinder of the proposed 2<sup>nd</sup> to 5<sup>th</sup> interested parties to the suit are still pending. It is no wonder that the 1<sup>st</sup> to 5<sup>th</sup> interested parties are referred to in the proceedings as “proposed” interested parties. The court cannot grant orders in favour of the proposed 1<sup>st</sup> interested party in a suit in which he is not yet a party. Secondly, in the application before me, orders of injunction are sought only as against the defendant and the 2<sup>nd</sup> interested party. From the material placed before the court by the proposed 1<sup>st</sup> interested party, the defendant transferred her interest in the suit property to the 2<sup>nd</sup> interested party on 18<sup>th</sup> July 2012. Since the defendant no longer has any interest in the suit property, the orders of injunction sought against her in the present application are unnecessary and cannot be issued since the court never acts in vain.

For the reasons given above, I find the application dated 25<sup>th</sup> June, 2015 bad in law and incompetent. Since the application is not properly before the court and has not been considered on merit, the same is struck out with costs to the defendant.

**Delivered and Signed at Nairobi this 15<sup>th</sup> day of September, 2017**

**S. OKONG’O**

**JUDGE**

**Ruling read in open court in the presence of:**

No appearance for the Plaintiffs

No appearance for the Defendant

Mr. Ondieki for the 1<sup>st</sup> interested Party

No appearance for the 2<sup>nd</sup> interested Party

No appearance for the 3<sup>rd</sup> interested Party

No appearance for the 4<sup>th</sup> interested Party

No appearance for the 5<sup>th</sup> interested Party

Catherine Court Assistant