



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS

ELC.279 OF 2017

FRANCIS KARATU.....1ST PLAINTIFF/APPLICANT

GEOFFREY GACHERU WAIRIMU..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

THIKA GARISSA ROAD DEVELOPERS.....1ST DEFENDANT/RESPONDENT

THE COMMISSIONER OF LAND2ND DEFENDANTS/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** application dated **19th July 2016**, which is anchored under various provisions of law. The application is by the Plaintiffs herein and has sought for the following reliefs:-

1. Spent.

2. Spent.

3. That a temporary injunction do issue restraining the Defendants, interested parties and/or their servants, nominees and/or person acting under their authority from entering, encroaching, blocking access to, trespassing on to or in any way interfering with the quiet possession of the suit property LR.4953/1855 inclusive of illegal conversions registered in the land registry, Thika as Thika/Municipality Block 31/1 to 250 pending the hearing and determination of this suit.

4. That an injunction do issue restraining the 2nd Defendant from registering any transfer and or change of ownership of the suit property LR.4953/1855 and a further order directing that the deed file for the suit property be delivered in court for safe custody.

5. That this Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to amend their Originating Summons in terms of the draft amended Originating summons upon payment of the requisite fees.

6. That this Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to join other Defendants and interested parties in the Originating Summons namely;- The Attorney General, the National Land Commission, the Chief Lands Registrar and the County

Government of Kiambu as Defendants.

7. That costs of this application be in the cause.

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit of Geoffrey Gacheru Wairimu**, one of the Plaintiffs herein. These grounds are:-

- a. That the suit property herein is being fraudulently dealt with by being documentally mutilated and new certificates of lease being issued under the Registered Land Act (now repealed regime).**
- b. That emotions among the over 1,000 residents at the suit property who are the Plaintiffs are flaring.**
- c. That there is real and imminent danger of bloodshed at the suit property unless this Honourable court intervenes to curtail any clashes between the Plaintiffs, occupiers of the parcel of land, third parties herein and other parties that may be duped into buying non-existent parcels of land in the suit property.**
- d. That the actions of the Defendants and the proposed third parties are extremely prejudicial to the outcome of this suit and are aimed at rendering whichever judgement that may arise from this suit nugatory.**
- e. That the Plaintiffs herein and all the persons they represent are likely to suffer grave irreparable damage and harm if all transactions in the suit property are not halted.**
- f. That for the real issues in controversy to be determined it is apparent that the Plaintiffs be allowed to amend their Originating Summons.**
- g. That due to the nature of the litigation herein, it is crucial to have the Attorney General as a party, the National Land Commission and the Chief Land Registrar due to the operationalization of the Land Act, National Commission Act and the Land Registration Act.**
- h. That the Plaintiffs stands to suffer immensely if the amendments sought are not made as it may deprive them of any legitimate prospect of the success of their claims against the Defendants as currently sued.**
- i. That the real questions of controversy will be better addressed by the proposed amendments and the Defendants will not suffer any prejudice if the application for amendment is allowed.**

In his **Supporting Affidavit**, the deponent, **Geoffrey Gacheru Wairimu** averred that they have lately been faced with threats of eviction from the suit property despite the fact that they have been on the suit property since 1963. That it has come to their knowledge that fraudsters have acquired certificates of lease over the suit property which is illegal as the original certificate of title issued to the 1st Defendant is still intact and the record at the Ministry of Lands reflect that position.

He alleged that after they instituted this matter, other persons who are strangers to them have been claiming ownership of the suit property and have even fraudulently acquired certificates of lease. He also alleged that the suit property has been illegally subdivided into plots which position is not obtaining on the ground as the Plaintiffs are still in occupation. He therefore contended that the illegal registration concerning the suit property are supposedly being done and innocent third parties may be duped into transacting in these illegalities. He further contended that it is apparent that the Originating Summons ought to be amended to have all questions and issues in controversy be better determined.

Further that it is prudent to enjoin the necessary offices in charge of land administration and also the

Attorney General so that the issues in question can be properly determined. The deponent further contended that the amendments sought by the Plaintiffs/Applicants may not in any way prejudice the Defendants/Respondents and therefore the amendments are necessary in enabling the Court adjudicate on the real questions in contention. He urged the Court to allow the application for the interest of justice and proper administration of fair trial.

The application is contested and **Nelson Ndaru**, the Secretary of the 1st Defendant swore a **Replying Affidavit** dated **19th August 2016**. He averred that the instant application is **frivolous, vexatious, unmeritorious** and only meant to embarrass the Court. That the Plaintiffs herein are bent in inordinately delaying this matter and that action is detrimental to the interest of justice. Further that the Plaintiffs/Applicants do change their advocates whenever the matter is set for hearing with the new advocate always coming up with a new application. He denied that there is any threat to the Plaintiffs/Applicants eviction and that he is a stranger to the purported fraudsters who have acquired certificates of lease. The deponent alleged that such an action is a criminal offence which should be reported to the police. He further deposed that the Attorney General has always been a party to this suit and that the National Land Commission cannot be enjoined in this case as it involves a private land and not public land as envisaged by the law. He further deposed that there was no basis of seeking to enjoin the 5th Defendant, being County Government of Kiambu. Therefore the deponent urged the Court to dismiss the instant application with costs to the 1st Defendant.

The application was canvassed by way of written submissions. The **Law Firm of Ishmael & Co. Advocates** for the Plaintiffs/Applicants filed their submissions on **21st February 2017**, and urged the Court to allow the said application. The Applicants relied on Section 100 of the Civil Procedure Act which grants the court power to order and allow amendments of pleadings at any stage before judgement for the real question in controversy to be determined. Further they submitted that Section 3A of the same Act grants the Court inherent powers to make any orders that are necessary for the ends of justice to be met.

The Plaintiffs/Applicants relied on various decided cases among them the case of **John Nahashon Mwangi...Vs...Kenya Finance Bank Ltd (in liquidation) eKLR 2015**, where the Court held that:-

“The overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties like when mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments top leadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.”

The Plaintiffs/Applicants further relied on the case of **Mechanized Systems Ltd...Vs...Guardian Bank Ltd (2005) eKLR**, where the Court held that:-

“the power of the Court to allow amendments is intended to determine the true, substantive merits of the case; that amendments should be timeously applied for; that power to amend can be exercised by the court at any stage of the proceedings; and that as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side”.

Further on whether to allow injunction, the applicants relied on the case of **Giella...Vs...Cassman Brown & Co. Ltd (1973) EA 358**.

On the part of the 1st Defendant, the **Law Firm of Mwhia & Mutai Co. Advocates** filed their written submissions on **15th March 2017**, and urged the Court to dismiss the instant application. The 1st Defendant submitted that the prayers sought by the Plaintiffs/Applicants are not tenable and should not be granted. It was submitted that the 1st Defendant is the registered owner of the suit property and cannot therefore be enjoined. Further that a registered proprietor cannot encroach and/or trespass on its own

parcel of land.

This Court has now carefully considered the instant **Notice of Motion Application**, the court records, and the pleadings in general. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and it will render itself as follows:-

There are basically three prayers sought by the Plaintiffs/Applicants herein. These prayers are:-

- 1. injunction**
- 2. Amendment of the Originating Summons**
- 3. Joinder of parties.**

The prayers are opposed by the Defendants. I will deal with the above stated prayers sequentially.

a) Joinder of other parties

The Plaintiffs in their **prayer No.6** have asked this Court to order for joinder of other Defendants and interested parties in the **Originating Summons**. The parties named are **Attorney General**, the **National Land Commission**, the **Chief Lands Registrar** and the **County Government of Kiambu**.

The Plaintiffs have alleged that the above stated parties are necessary parties in determination of the real questions in controversy. The order of joinder of parties is governed by Order 1 Rule 10. For our purpose Order 10 Rule 10(2) is crucial which provides that:-

“The court may at any stage of the proceedings either upon or without the application of either party and or such terms as may appear to the court to be just to 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 effectively and completely to adjudicate upon and settle all questions involved in the suit beaded.”

From the above provision of law, it is clear that the Court has discretion to order joinder of any party either on its own motion or upon application by party or at any stage of the proceedings. The reason for such joinder should be that the said party or parties are necessary for the effectual and complete determination of the matter.

The Plaintiffs/Applicants filed this Originating Summons in the year **2009**. By the time of filing the Originating Summons, the matters related to allocation and management were under the docket of the Commissioner of Lands. However, with the promulgation of the Constitution 2010, these matters are now governed by the National Land Commission and registration of titles is done by the Chief Lands Registrar. The Plaintiff has alleged that new titles under the repealed regime of Registered Land Act Cap

300 (now repealed) have been issued to third parties by the County Government of Kiambu. The Plaintiffs/Applicants have attached a sample of such title deed issued to one **Kennedy Gathogo Karuri** on **8th December 2015**. If that is true, then the said title was issued during the subsistence of this suit. The Court finds that the **National Land Commission**, the **Chief Lands Registrar** and the **County Government of Kiambu** are necessary parties and they would assist the Court to effectively and completely adjudicate upon this matter. In the same breadth, the Court finds that the office of the Attorney General as the legal representative of the Government institution is also a necessary party so that he can bring out the actual views from his clients. Therefore the Court finds and hold that the **Attorney General** is also a necessary party herein.

The Court also finds and holds that the joinder of the above stated parties would not prejudice the Defendants at all. Instead, their joinder will assist the Court to effectively and completely adjudicate this

matter.

b) Amendment of the Originating Summons

The Applicant has sought to amend the Originating Summons and include the joined party and also include particulars of the misdeeds or breaches committed by third parties. The Defendants have opposed the said amendments.

The issue of amendments is governed by Order 8 and in particular to this application Order 8 Rule 3(1) which provides that:

“...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct allow any party to amend his pleadings.”

Further, it is trite that court has discretionary power to amend pleadings at any stage before judgement for purpose of determining the real question or issues raised by the parties. See Order 8 Rules 5 of the Civil Procedure Rules which provides:-

“For the purpose of determining the real question in controversy between the parties or of correcting any defects or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to cost or otherwise as are just”.

The Plaintiffs/Applicants have averred that the amendments sought are necessary so that the court can be in a better position to determine the real question in controversy. Infact, the amendments sought are the inclusion of the joined parties and also stating out the alleged misdeeds of third parties. It is not in doubt that the discretion to amend pleadings is exercised so that justice can be done since the said amendments would assist the Court on determining the real issues in controversy.

The principles upon which the Court should rely upon while determining whether to amend the pleadings or not were set out in the case of **Eastern Bakery....Vs...Castelino (1958)EA 461**. These principles were summarized as hereunder.

- i. Amendment sought before hearing should be freely allowed if they can be made without injustice to the other side.**
- ii. There is no injustice carried to the other side if it can be compensated with costs.**
- iii. The Court will not refuse an amendment simply because it introduces a new case.**

With the above principles in mind and relying on the submissions of the parties herein and considering the draft Originating Summons, the Court finds that the amendments sought are necessary and they will not cause any injustice to either party. Further, the said amendments will assist the court in determining the real question in controversy.

The Court will concur with the findings in the case of **John Nahashon Mwangi...Vs...Kenya Finance Bank Ltd (in liquidation) eKLR 2015**, where the Court held that”-

“The overriding consideration in applications for leave are whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground of declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.”

The Court finds that in this matter, the amendments sought are necessary for just determination of the

issues in controversy. Therefore, this Court would not hesitate to allow the amendments sought.

c) Injunctions

The Applicants have sought for two sets of injunctions; temporary injunction to issue to restrain the Defendants, interested parties and/or their servants, agents, nominees and/or any person acting under their authority from entering, encroaching, blocking access to, trespassing unto or in any other way interfering with the quiet possession of **LR.No.4953/1855**; Further on injunction to issue to restrain the 2nd Defendant from registering any transfer or change of ownership of the suit property **LR.No.4953/1855** .

The Court has noted that the dispute involving the Plaintiffs and the Defendants herein has been pending in court since the year **2005**, when the 1st Defendant filed **Civil Suit No.1291 of 2005** at the **Thika CM's Court** seeking for an eviction order. The Plaintiffs/Applicants subsequently filed this Originating Summons seeking to be declared the rightful owners of the suit property for having lived thereon for a period of more than **12 years**. The issue of who is the rightful owners of the suit property is yet to be determined.

The Plaintiffs have claimed that they are in possession of the suit property having been allocated the same in the year **1964** by **Delmonte Co. Ltd formerly** known as **Kenya Cannery Ltd**. The Defendants are claiming ownership as they have a certificate of title issued to them in the year **1991**. The issue of who is the rightful owners of the suit property is yet to be determined. The Plaintiffs have alleged that the Defendants have subdivided the land and are in the verge of selling the illegally subdivided and registered plots to third parties. That if the above position is allowed to subsist, then the Plaintiffs will lose the land before the suit is heard and determined. That they will suffer irreparably which loss cannot be compensated by an award of damages. The Defendants have not denied that issue of subdivision of the suit property and issuance of new title deeds under the Registered Land Act 300 (now repealed).

The principles to be considered herein are the ones laid down in the case of **Giella...Vs...Cassman Brown Co.Ltd (1973)EA 358**. These principles are:

- a. The Applicant must establish that he has a prima facie case with probability of success.**
- b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c. When the Court is in doubt, to decide the case on a balance of convenience.**

The Plaintiffs have been on the suit land for long and that is the reason why the 1st Defendant had filed **CMCC No.1291 of 2005** at **Thika Court** seeking their eviction. If the land will be subdivided and sold to third parties before this suit is finalized, then this suit will only be an academic exercise. The Plaintiffs have attached a title deed for one **Kennedy Gathogo Karuri** issued on **8th December 2015**. The 1st Defendant did not explicitly deny the existence of the said title deed as a subdivision of the suit property herein. The Court finds that the Plaintiffs have established that they have a prima facie case with probability of success at the trial.

Further, the Plaintiffs have lived on this suit property allegedly from **1964**. If the land is subdivided and registered to new owners, they will have to be evicted to give way to the new owners. The above action will cause irreparable loss to the Plaintiffs/Applicants which cannot be compensated by an award of damages.

On the balance of convenience, the Court finds that it tilts in favour of maintaining the status quo at the moment. The status quo herein is that Plaintiffs are in occupation of the suit property. See the case of **Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Further since the issue of ownership is not yet resolved, there should be no subdivision and further registration of the allegedly subdivided plots. The Chief Land Registrar is hereby restrained from carrying out any further registration of the resultant subdivisions of the suit property until the matter is heard and determined.

Having now carefully considered the **Notice of Motion** dated **19th July 2016**, and the written submissions herein, the **Court finds it merited** and it is **allowed entirely in terms of prayers no.3, 4. 5 & 6**. Further **costs of the application be in the cause**.

It is so ordered.

Dated, Signed and Delivered at Thika this 27TH day of October 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Tumu holding for Mr. Nguringa for Plaintiffs/Applicants

No appearance for Defendant/Respondent though served.

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocate.

L. GACHERU

JUDGE

27/10/2017