



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 113 OF 2014

JANE WANGRI MURAYA.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED

SHALLOM HOMES LIMITED.....DEFENDANTS

RULING

1. The plaintiff has moved the Court vide the application dated 16.5.16 under the provisions of article 159 of the Constitution and Sections 1A, 1B & 3A of the Civil Procedure Act together with Order 8 and Order 40 of the Rules seeking for orders:

1. That the Plaintiff/Applicant be granted leave to amend the Amended Plaintiff in the manner shown on the annexed proposed further amended plaintiff and the same be deemed a having been filed.

2. That the Plaintiff/Applicant be granted leave to join Dorcas Gathoni and Jador Enterprises Limited in these proceedings as additional Plaintiffs.

3. Spent

4. That pending the hearing and determination of this suit, the Court be pleased to grant the Applicant an Injunction Order restraining the Defendants from alienating, dealing, adversely or dealing in any manner with the plot of land known as Sub-division No. 12101/III/MN, hereafter referred to as the suit property.

5. That costs of this Application be provided for.

2. The application is supported by 14 grounds listed on the face of it and the affidavits of Jane Wangari Muraya and Dorcas Gathoni together with the annexed documents. The said application is opposed by the first defendant through a replying affidavit sworn by Kennedy Kasamba on 31st August 2017. The affidavit narrated facts which summarized points to two main grounds i.e. that the orders of injunction sought by the plaintiff is resjudicata. Secondly that joining additional parties is only meant to circumvent the doctrine of res judicata and will not add any value in assisting the Court to determine the issues in controversy.

3. The parties advocates agreed to file written submissions. Therefore there is filed and on record

submissions by the Plaintiff/Applicant filed on 18.8.17, 1st defendant submissions filed on 7th September 2017 and 2nd defendant's submissions filed on 29th September 2017. The submissions were highlighted on 9th October 2017. I have read the facts set out by the pleadings, the submissions and the case law cited in support and opposition to the application. I need not repeat their contents herein. In opposing the grant prayer 1 and 2 of the motion on joinder the 1st defendant stated that their joining the suit will not add any value and or in the alternative, they be served with a properly amended plaintiff. The 2nd defendant on its part submits that the new parties to be joined do not qualify under the provisions of Order 1 rule 1 of the Civil Procedure Rules.

4. In paragraph 13 and 14 of Ms Gathoni's affidavit dated 16th May 2015, she deposed that the plaintiff and herself are co – directors of Jador Enterprises Ltd. She states that she is apprehensive that the 2nd defendant may adversely deal with the suit property while this matter is pending. In paragraph 3, she deposed that their company Jador Enterprises Ltd borrowed a loan of Kshs 60,000,000 from the 1st defendant. On the basis of the averment that both the plaintiff and Dorcas Gathoni were directors of Jador Enterprises Ltd who is the borrower and also the basis of particulars of loss itemized in paragraph **15 B** of the **draft** further amended plaintiff. Further taking into consideration that the parties sought to be joined were co-guarantor and borrower respectively, I find the two have a connection to the resent plaintiff and do hereby exercise my discretion to grant the plaintiff leave to join them in these proceedings. There will be no prejudice occasioned to the defendants as any such prejudice can be cured by they also being given leave to file an amended defence upon being served with a properly amended and filed further amended plaintiff. The plaintiff is directed to so amend and file the new plaintiff and serve the defendants and the new plaintiff within 21 days of the delivery of this ruling.

5. The second issue for determination is whether prayer 4 of the motion seeking injunction relief can be granted or if the said prayer is resjudicata. The plaintiff/applicant has pleaded both on the face of the motion and on the two affidavits sworn in support of the reof that the plaintiff had by an application dated 20th May 2014 sought **“orders of temporary injunction restraining the 1st defendant from proceeding with sale of the suit property. The sale was slated to take place on 21st May 2014. The other limb of the prayer was seeking to stop the completion of the conveyance by transfer of any sale concluded by public auction or leasing or howsoever inferring with the plaintiff's ownership of L. R sub-division 12101/MN/1.”**

6. The present application seeks orders that **“pending the hearing and determination of this suit, the Court do grant to the Applicant an injunction order restraining the defendants from alienating, dealing, adversely or dealing in any manner with L. R No subdivision 12101/MN/III hereinafter referred to as the suit property.”** In ground 10, the applicant pleaded that following the sale, she filed for contempt proceedings. That both the application for injunction and the contempt application was heard by myself and a ruling delivered on 27th May 2015 dismissing both. Being aggrieved with my decision, the applicant herein filed an appeal against the dismissal of the injunction application to the Court of Appeal vide Mombasa Civil Application No 41 of 2015. The Court of Appeal heard and dismissed the appeal by the judgement rendered on 27th November 2015.

7. In ground 11 of the motion, it is pleaded that both Dorcas Gathoni and Jador Enterprises who also have an interest in the suit property are apprehensive that the defendants may adversely deal with the suit property while this matter is still pending. In considering whether a matter is res judicata or otherwise, Section 7 of the Civil Procedure Act lays out the issues to be taken into consideration to wit;

(i) Where the matter directly and substantially in issue has been directly and substantially in issue in the former suit (read application).

(ii) Between the same parties or between parties under whom they or any of them claim litigating under the same title.

(iii) Heard by a Court of competent jurisdiction.

(iv) The matter in issue has been finally decided.

8. The matter currently in issue is a prayer for injunctive relief stopping the defendants from dealing with the suit property. This was also in issue in the previous application of 20.5.2014. The defendants are the same. The plaintiff is the same save for a prayer to join additional plaintiffs which one of the new parties has deponed that she is co-directors in Jador Enterprises Ltd – the same borrower. Secondly both Jane & Dorcas were co-guarantors. Therefore the new parties fall under the explanation given in No 4 and 6 of Section 7. It is not disputed that this Court was competent in hearing and determining the former application and lastly that the said application was heard on merits and is finalized by this Court and the Court of Appeal.

9. In responding to the issue of res judicata, Mr Gikandi submitted that an order of status quo to preserve the suit property will not prejudice the Defendants. However, the application is specific in the orders being sought and even before granting an order of status quo, the same cannot be given where it will be in conflict with the existing orders and where no basis is laid. The property is registered in the name of the plaintiff Jane Wangari Muraya. She admits that the sale already took place and the 2nd defendant took possession. The 2nd defendant submitted that the property having been given as security, its value can easily be ascertained and if any loss is proved at the conclusion of the case, then an award of damages can be made to compensate the plaintiff.

10. For the reasons given, I find that prayer 4 of the motion is Res judicata and therefore refuse to grant it. The motion therefore succeeds in terms of prayer 1 & 2. I order each party to bear their respective costs of the application.

Dated, signed & delivered at Mombasa this 30th November 2017.

A. OMOLLO

JUDGE