



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1400 OF 2013

PRUDENZIO NICHOLAS GAITARA.....PLAINTIFF

VERSUS

PATRICK KARIUKI MUIRURI.....1ST DEFENDANT

THIKA DAIRIES LTD.....2ND DEFENDANT

MAPEMA HOLDINGS LIMITED.....3RD DEFENDANT

RULING

This suit was brought by the Plaintiff against the three (3) defendants on 19th November 2013. The subject matter of litigation is all that parcel of land known as LR No. 4953/2414 (hereinafter referred to as “**the suit property**”). The Plaintiff contended that at all material times, the 1st defendant was one of the directors of the 2nd defendant which was registered as the owner of the suit property. The plaintiff contended that through acts of fraud deceit and dishonesty, the 1st and 2nd defendants caused the suit property to be transferred to the 3rd defendant without the authority and/or consent of the shareholders and other directors of the 2nd defendant.

The Plaintiff sought the cancellation of the transfer of the suit property to the 3rd defendant and a permanent injunction restraining the 3rd defendant from dealing with the suit property. Together with the Plaintiff, the plaintiff brought an application by way of Notice of Motion dated 14th November 2013 seeking among others, a temporary injunction to restrain the defendants from dealing with the suit property in whatsoever manner pending the hearing and determination of this suit. The application was opposed by the defendants on various grounds. The application was heard by Nyamweya J. who struck out the same in a ruling that was delivered on 1st August 2014. The court made a finding that the application was incompetent because the plaintiff who had brought the suit in respect of the suit property had not obtained leave of the court to bring a derivative action on behalf of the 2nd defendant.

What is now before me is the Chamber Summons application by the 3rd defendant dated 30th July 2015 seeking an order to join the land registrar, Kiambu County as a party to this suit and an order directing the said land registrar to remove the caveat that is said to have been lodged on the title of the suit property on 9th April 2015. The application was brought on the grounds that the 3rd defendant is the registered proprietor of the suit property and that the land registrar, Kiambu County has unlawfully and irregularly lodged a caveat on the title of the suit property. The 3rd defendant has contended that the said caveat has

infringed on its constitutional right to acquire and own property which is guaranteed under Article 40 of the Constitution of Kenya 2010.

The application was opposed by the plaintiff and the 1st and 2nd defendants. The 1st and 2nd defendants contended that the suit property was transferred and registered in the name of the 3rd defendant fraudulently and as such the lifting of the caveat which has been registered against the title of the suit property would be prejudicial to the 1st and 2nd defendants as it will enable the 3rd defendant to deal with the said property in any manner deemed fit by them. The plaintiff filed neither grounds of opposition nor replying affidavit in response to the application.

When the application came up for hearing on 28th October 2015, Mr. Odera appeared for the 3rd defendant/applicant, Mr. Wakwaya for the plaintiff and Mr. Onyancha for the 1st and 2nd defendants. In his submission in support of the application, Mr. Odera adopted the contents of the affidavit that was sworn by the 3rd plaintiff's director, Viktar Maina Ngunjiri in support of the application. He submitted that the land registrar has power to register a restriction against title to land only where there is fraud or other sufficient reason to do so. He submitted that before a restriction is registered, the land registrar must make inquiries and serve appropriate notices to those who may be affected by the restriction.

Counsel submitted further that when registered, a restriction must be for a definite period. He submitted that the registrar's power to registrar a restriction is not supposed to be exercised capriciously. He pointed out that the land registrar did not respond to the application although served. Counsel submitted that the replying affidavit that was filed by the 1st and 2nd defendants provided no answer to the application as it raised issues which are not relevant to the application before the court.

On behalf of the 1st and 2nd defendants, Mr. Onyancha submitted that the 3rd defendant's application has been directed against a wrong land registrar and this explains why no response has been received from the said registrar. He submitted that the suit property is registered at the Central Registry, Nairobi and not at the Kiambu County Land Registry. On the merit of the application, Mr. Onyancha submitted that the 3rd defendant has come to court with unclean hands. He submitted that the 3rd defendant did not pay the balance of the purchase price for the suit property and caused the property to be transferred to its name fraudulently. Mr. Onyancha submitted that the 2nd defendant is still the owner of the suit property. He submitted that a restriction was placed on the title of the suit property because the circumstances under which the 3rd defendant acquired the property is under police investigations.

On his part, Mr. Wakwaya who appeared for the plaintiff submitted that the 3rd defendant's application is an abuse of the process of the court. He submitted that if the 3rd defendant was aggrieved by the decision of the land registrar, it should have approached the court by way of an application for judicial review and not through the present application. He submitted that the land registrar is not a party to this suit and as such no order can be issued against it.

I have considered the 3rd defendant's application together with the affidavit filed in support hereof. I have also considered the affidavit in reply filed by the 1st and 2nd defendants in opposition thereto. Finally, I have considered the submissions by the advocates for the parties and the authorities that were cited in support thereof. The 3rd defendant's application is seeking two reliefs. The first order sought is for leave to join the land registrar, Kiambu County as a party to this suit. The second order sought is for the lifting of the caveat/restriction that is said to have been registered by the said land registrar against the title of the suit property. I will consider the two reliefs together. Order 1 Rule 10(2) of the Civil Procedure Rules gives the court power of its own motion or on application by either party to order the name of any person who ought to have been joined in the suit whether as a plaintiff or defendant or whose preference before the court may be necessary to enable the court to completely adjudicate upon the question involved in the suit to be added. This suit was brought by the plaintiff, Prudenzi Nicholas Gaitara. The 3rd defendant is one of the three defendants who have been sued. As I stated at the beginning of this ruling, the plaintiff's complaint is that the 1st and 2nd defendants fraudulently

transferred the suit property to the 3rd defendant. In his averments in the plaint, the plaintiff has not accused the land registrar, Kiambu or any other land registrar for that matter of any wrong doing. I have not seen a copy of the statement of defence that was filed by the 1st and 2nd defendants to the plaintiff's claim. The 3rd defendant however filed its defence on 19th March, 2014. In its statement of defence, the 3rd defendant maintained that the suit property was acquired by the 3rd defendant lawfully. Again, there is no accusation leveled against any land registrar.

It is not clear from the application and submissions by counsel whether the 3rd defendant is seeking the joinder of the land registrar in this suit as a defendant or as a plaintiff. The 3rd defendant has also not come out clearly as to how the joinder of the land registrar will assist this court in settling the issues that have been raised by the parties to this suit which revolves around the validity of the transfer of the suit property by the 2nd defendant to the 3rd defendant.

The 3rd defendant's complaint in the present application is that the land registrar, Kiambu County registered a caveat/restriction against the title of the suit property on 9th April 2015 unlawfully. The alleged caveat/restriction the evidence of which has not been placed before the court was lodged while this suit was pending. The 3rd defendant has not established any nexus between the said caveat/restriction and the dispute between the parties herein. Furthermore, the 3rd defendant has not shown any evidence of the alleged caveat/restriction and the fact that it was lodged by the land registrar, Kiambu County who is sought to be joined in this suit.

A copy of the transfer dated 5th March 2011 annexed to the affidavit in support of the 3rd defendant's application shows that the suit property is registered "in the Land Titles Registry at Nairobi as I.R 72606". The transfer itself was also registered at the Land Titles Registry by the Registrar of Titles on 14th March 2012. The land registrar, Kiambu County does not have jurisdiction over the suit property and I am unable to see how the said registrar could have registered a caveat or a restriction with respect to a parcel of and which is not registered in its registry. In the face of the evidence that the suit property is not registered at the Kiambu County Land Registry and in the absence of any evidence that the alleged caveat/ restriction was lodged by the land registrar, Kiambu County, I am unable to see any connection between the said land registrar and the acts complained of by the 3rd defendant that would justify its joinder in this suit even if the 3rd defendant had established that the registration of the said caveat/restriction had some link with the dispute herein. The issue in my view is not where the suit property is situated as was submitted by the 3rd defendant's advocate but where the land registry in which the suit property is registered is situated and who registered the alleged caveat/restriction. On the material before me, I am not satisfied that the 3rd defendant has laid any basis for the orders sought.

For the foregoing reasons, I find no merit in the application dated 30th July 2015. The same is accordingly dismissed with costs to the 1st and 2nd defendants.

Delivered, Dated and Signed at Nairobi this 29th day of January 2016

S. OKONG'O

JUDGE

In the presence of

N/A for Plaintiff

N/A for 1st and 2nd Defendants

Mr. Mwangi for Odera for the 3rd Defendant