



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 84 OF 2013

BENJAMIN ABILA NDUNGU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MIRIAM WAMBUGU

PLAINTIFF

VERSUS

JOHNSON NDUNGU

KARANJA.....DEFENDANT

DISTRIC LAND REGISTRAR

NAKURU.....DEFENDANT

ATTORNERY

GENERAL.....DEFENDAN

T

NANCY WANJIKU GITHUGO.....

...DEFENDANT

AND

DAVID KARANJA

MWANGI.....INTERESTED PARTY

ANDREW CHEGE WAINAINA T/A POINT A COMMERCIAL AGENCIES.....INTERESTED PARTY

RULING

1. The application before me is that dated 30th April 2015 filed by the plaintiff. It is an application filed pursuant to the provisions of Order 40 and Order 51 of the Civil Procedure Rules. It seeks the following substantive orders which are (paraphrased):-

(i) That the property of the 2nd defendant be attached due to the 2nd defendant's disobedience of the court orders made on 30th June 2014.

(ii) That in the alternative and without prejudice to the prayer above, the Honourable Court be pleased to order for the 2nd defendant's detention in prison for a term of 6 months.

2. The application is based on the following grounds :-

(a) That the 2nd defendant contemnor has disobeyed this court's orders issued on 30th June 2014.

(b) That in blatant disobedience of the said orders the 2nd defendant proceeded to deal adversely with parcel number Kampi Ya Moto/Menengai Block 1/602 by allowing issuance of title deeds to third parties.

(c) That the defendant was duly served with the order of 3rd July 2014, well before the further deals were on new title deed for the illegal subdivisions (sic).

3. The application is supported by the affidavit of the plaintiff. He has deposed that on 24th June 2014, he filed an application under certificate of urgency seeking preservatory orders. He has stated that on 30th June 2014, the court issued orders that preserved the property Kampi Ya Moto/Menengai Block 1/602. The order issued was as follows :-

That the 2nd defendant is hereby ordered and restrained from removing the restriction over Kampi Ya Moto/Menengai Block 1/602 or if he has removed the said restrictions, this order be registered against the title pending the hearing and determination of this application.

4. The applicant has deposed that the order was issued on 2nd July 2014 and was served upon the District Land Registrar and the State Law Office, and the 1st defendant's advocates, on 3rd July 2014 and 7th July 2014 respectively. On 21st July 2014, he conducted a search on the said property and confirmed that the restriction had been removed but the court order of 30th June 2014 had not been acted upon. He has annexed a copy of the search. On realizing this, his advocates on 28th July 2014, wrote to the District Land Registrar and their advocate. The suit came up for interpartes hearing on 16th July 2014, and the interim orders were extended. The order was booked on 11th August 2014, paid for and a receipt issued. On 23rd October 2014, the applicant conducted a search and the same confirmed that the order had been registered but the land was now subdivided and new numbers, being numbers 1984 to 2004, issued. He has annexed a copy of the search.

5. He has further averred that dealings have been going on in the subdivided parcels despite the stay orders. It is his view that the 2nd defendant has blatantly and in full knowledge of the existence of the court orders disobeyed and/or disregarded the same thus reducing this suit into an academic exercise.

6. Mr. Caleb Sunguti, the District Land Registrar, Nakuru, filed an affidavit to reply to the said application. He has deposed that he was transferred to the Nakuru registry on or about the 17th day of April 2015 from Eldoret, where he was previously working. He has stated that at the time of the allegations, another registrar was in office. According to his records, the land Kampi Ya Moto/Menengai Block 1/602 was subdivided and registered on 21st July 2014 and new parcel numbers 1984- 2004 prepared. He has stated that they received instructions to register the interim orders on 24th July 2014 from the Attorney General when the subdivision had already been registered. He has denied that the District Land Registrar disobeyed the order as he acted before the said order was formally served in his office. He has stated that at the time the order was issued, the restriction had already been removed. He has deposed that his office did write to the applicant's advocate on 10 July 2014 informing them of the intention to remove the restriction but there was no response.

7. Before this application could be heard inter partes, two persons, namely David Karanja Mwangi and Andrew Chege Wainaina both trading as Point A Commercial Agencies, applied to be enjoined to the application as interested parties. The application was allowed after which they filed a replying affidavit sworn by Mr. Mwangi. He has deposed that the orders sought are incapable of being granted as the office of the 2nd defendant is ran by different persons. He has stated that he is aware that the restriction against the suit property was removed before the court order was served upon the 2nd defendant. Upon removal of the restriction, they proceeded to deal with the suit land without any information that there was a suit in existence. He has averred that he has perused the court file and has not found any order of injunction

issued stopping any dealings in the property. It is his view that for the applicant to succeed, he needs to show that the restriction had not been removed by the time the court order was served.

8. In her submissions, Mrs. Mukira, learned counsel for the applicant, submitted inter alia that the District Land Registrar proceeded to deal with the property despite the orders of this court. She submitted that there was no proof that the Lands Registrar received instructions on the order on 24th July 2014. She submitted that the Lands registrar was served on 3rd July 2014 before the dealings took place. She further wondered why the Registrar continued with dealings even after being informed on 24th July 2014.

9. On behalf of the interested parties, Mr. Waiganjo, learned counsel, inter alia submitted that there was no evidence to show who in the office of the Lands Registrar was served with the orders in issue. He further pointed at the letter of 10th June 2014, from the Land Registrar, informing the parties that the restriction will be removed and submitted that there was no evidence that the same was responded to. He submitted that the applicant was given time to object to the removal of the caution but failed to do so. He was of the view that the Land Registrar acted within his powers to remove the restriction. He submitted that the order was issued on 2nd July 2014 by which time the restriction had already been removed and the suit land sold to the interested parties.

10. No submissions were filed on behalf of the Land Registrar.

11. I have considered the application and the reasons tabled opposing the same and I have perused the court record.

12. I can see that this suit was commenced on 29th January 2013. The 1st defendant is Johnson Ndungu Karanja, the 2nd defendant is the District Land Registrar Nakuru, the 3rd defendant is the Attorney General, and the 4th defendant is Nancy Wanjiku Githugo. In the plaint, it was pleaded that the plaintiff is the grandson of Mariam Wanjiru Wambugu (deceased) and that he has filed this suit on behalf of her estate. He pleaded that on diverse dates between 24th July 2009 and 6th July 2009, the 1st defendant in cahoots with the 2nd defendant, illegally and fraudulently transferred to himself and the 4th defendants, two parcels of land known as Kiambogo/Kiambogo Block 2/ 680 and Kampi Ya Moto/Menengai Block 1/ 602, which were registered in the name of the deceased. It was pleaded that as a consequence, the 4th defendant purchased the land parcel Kiambogo/Kiambogo Block 2/680. In the suit, the plaintiff sought a nullification of the two titles.

13. On 24th June 2014, the plaintiff filed an application of even date, under certificate of urgency. The application sought the following orders :-

(a) That this application be certified urgent and be heard ex-parte in the first instance due to the nature of its urgency.

(b) That pending hearing of this application inter partes, the defendants/respondents be restrained by way of an injunction by himself, itself, herself, his/her agents and or servants from entering, remaining in, trespassing , dealing or in any other way interfering with the land parcel No. Kampi Ya Moto/Menengai Block 1/602.

(c) That pending hearing of this suit, the defendants/respondents be restrained by way of an injunction by himself, itself, herself, his/her agents and or servants from entering, remaining in, trespassing , dealing or in any other way interfering with the land parcel No. Kampi Ya Moto/Menengai Block 1/602.

14. It was explained in the application, that the plaintiff had lodged and registered a restriction with the District Land Registrar on 8th July 2013 but through a letter dated 10th June 2014, the Land Registrar had threatened to remove the caution.

15. The applicant's counsel appeared before my predecessor, Waithaka J, on 30th June 2014 with the

above application. After considering the matter, the learned Honourable Judge made the following orders :-

1. The application is certified urgent.

2. The 2nd defendant is restrained from removing the restriction over Kampi Ya Moto/ Menengai Block 1/ 602 or if he has removed the said restriction this order be registered against the title pending the hearing and determination of this application.

3. Serve for inter partes hearing on 16th July 2014.

(4) Costs in the cause.

16. The interim orders were seamlessly extended on 16th July 2014, 16th December 2014 and 19th January 2015 when the application was first placed before me and I fixed it for hearing on 12th May 2015 and extended the interim orders to this date.

17. I have seen that the order, after being first issued, was served upon the State Law Office representing the 2nd defendant and directly upon the 2nd defendant on 3rd July 2014 and upon counsel for the 1st defendant on 7th July 2014. I have also perused the certificate of official search to the property in issue. I have seen that the property Kampi Ya Moto/Menengai Block 1/602 was transferred to David Karanja Mwangi and Andrew Chege Wainaina, on 17th June 2014. This certainly was before the application of 24th June 2014 was filed and before the orders granted on 30 June 2014. On 11th July 2014, the title to parcel No. 602 was closed on subdivision and new numbers being numbers 1984 to 2004 issued. On 11th August 2014, the order of 2nd July 2014 was registered.

18. I have looked at the replying affidavit of Mr. Sunguti, the current Land Registrar. He does not deny that the order of 2nd July 2014 was served upon their offices on 3rd July 2014 as deposed by the applicant. He only states that their office received instructions from the State Law Office to register the interim orders on 24th July 2014. I am afraid that Mr. Sunguti cannot hide behind the letter of 24th July 2014. The Lands office did not have to wait for a letter from the State Law Office before registering the order. The order ought to have been registered immediately it was received, and that is on 3rd July 2014. A person must obey an order of court immediately he becomes aware of it and there is no excuse for disobedience on the argument that his counsel had not advised him on how to act on the order. The order ought to immediately provoke a response.

19. It may be correct that the restriction in issue was removed before the order was served. But the learned judge covered for this situation by stating that if the restriction has been removed, then the order of 2nd July 2014 be registered in its place. In my view, the learned judge intended for the order of 2nd July 2014 to act as a restriction and to bar any further dispositions in the title of the parcel No. 602.

20. In my opinion, the Lands office erred in not acting on the order promptly upon being served on it. What then should I do?

21. It is not clear to me who in the Lands office was served with the order and who proceeded to subdivide the property. I do not know who was served with the order and which person was supposed to act on it. If the person was named, I would have directed that he be served for an explanation and possible punishment. Mr. Sunguti has explained that he is now in charge, but he came into the picture after all the activities complained of herein had taken place. In the circumstances, I hesitate to punish Mr. Sunguti and not being clear on who failed to act on the order, I am a bit handicapped as to who to punish. I also note that the property has changed hands to several other persons.

22. I think the best thing to do in the circumstances, is to direct the plaintiff to amend his plaint and put in all parties who purchased the land parcel No. 602 and its subdivisions. He can then attempt to maintain a

suit for cancellation of the subdivided titles and return to the original parcel No. 602 which he can seek to have further reverted back to the name of the deceased.

23. I give the plaintiff 14 days to do so. In the interim, I make a specific order that there be no registration of any disposition in the land parcels Kampi Ya Moto/Menengai Block 1/ 602, 1984 - 2004. I also order that there be no construction of any structures on these parcels of land. I make these orders so as to preserve the said properties pending amendment of the plaint. If the plaintiff does not amend his plaint within 14 days as directed, the stay order will lapse.

24. There was good reason for this application and I award costs to the plaintiff as against the 2nd defendant.

25. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 16th February, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Waiganjo Mwangi for interested parties

No appearance on part of M/s Elizabeth Wangari & Co Advocates for plaintiff/applicant

No appearance on part of M/s Mirugu Kariuki & Co for 1st defendant

No appearance on part of State Law Office for 2nd & 3rd defendants

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU