



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 40'A' OF 2012

WILSON NDEGWA KAMAU.....PLAINTIFF/APPLICANT

(SUING AS THE LEGAL REPRESENTATIVE OF KAMAU NDEGWA)

VERSUS

SABINA WAITHIRA KAMAU.....DEFENDANT/RESPONDENT

STANLEY GITARI KANYUIRO.....INTERESTED PARTY

RULING

This is in respect to the plaintiff's Notice of Motion dated 30th July 2015 but filed herein on 3rd December 2015 seeking the following substantive orders:-

- 1. That this Honourable Court be pleased to order the amendment of the plaint herein by deleting title No. LOC 2/GACHARAGE/790 and by substituting in the place thereof titles No. LOC 2/GACHARAGE/3818, LOC 2/GACHARAGE/3819 and LOC 2 GACHARAGE/3820.***
- 2. That this Honourable Court be pleased to order the name of STANLEY GITARI KANYUIRO to be added as a party/defendant in the suit.***
- 3. That this Honourable Court be pleased to order that the status quo on the three (3) titles be maintained until this suit is heard and determined.***
- 4. That the plaintiff/applicant may file and serve a further amended plaint with the name of the proposed defendant.***
- 5. That such further orders be granted as this Honourable Court sees fit and just.***

The application which is brought under the provisions of **Order 40 Rule 1, Order 1 Rule 3 and 10 (2) and Order 51 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** and all enabling provisions of the law is premised on the grounds set out therein and supported by the affidavit of the plaintiff **WILSON NDEGWA KAMAU** suing as the legal representative of the Estate of **KAMAU NDEGWA**.

Briefly, the plaintiff's case is that although he had filed this case against the defendant **SABINA WAITHIRA KAMAU** for fraudulently obtaining the title to land parcel No. LOC 2/GACHARAGE/790, the defendant has since sub-divided the said land into three (3) portions being LOC 2/GACHARAGE/3818, 3819 and 3820. That parcels No. LOC 2/GACHARAGE/3818 and 3819 are registered in the defendant's names but parcel No. LOC 2/GACHARAGE/3820 is registered in the names

of the interested party **STANLEY GITARI KANYUIRO** who is not a member of the plaintiff's family. It is therefore imperative that the said interested party be enjoined in these proceedings so that the Court may adjudicate on and settle all the questions involved. It is also important to have status quo of the three titles preserved.

The interested party has filed a replying affidavit in opposition to the said application in which he has pleaded, inter alia, that this suit was filed on 31st December 2013 and he purchased parcel No. LOC 2/GACHARAGE 3820 on 15th May 2012 as per the sale agreement annexed. That he therefore bought his land well before this suit was filed and for valuable consideration following the right procedures. That his interest is protected by law as he is a bona fide purchaser for value and this application is defective, incompetent and an abuse of the Court process.

However, in a supplementary affidavit, the plaintiff depones that at the time he was filing this suit on 31st December 2012, he was not aware that the defendant had already entered in to an agreement with the interested party. That he had lodged a caution against the suit land and was under the impression all along that it was in place until he conducted another search in July 2015 only to realize that the said caution had been removed without his knowledge. That immediately upon discovery of this, he filed this application but was unable to file it as the Court file was missing and the Deputy Registrar was informed in writing. That unless the status quo is maintained by way of a temporary injunction, the suit will be rendered nugatory.

Submissions have been filed both by the firm of **R.M. KIMANI Advocate** for the plaintiff and **KIRUBI MWANGI Advocate** for the interested party.

I have considered the plaintiff's Notice of Motion dated 30th July 2015, the rival affidavits and annexures thereto as well as the submissions by counsel.

The plaintiff basically seeks three remedies:-

- 1. Amendment of plaint by substituting the land parcel No. LOC 2/GACHARAGE/790 with No. LOC 2/GACHARAGE/3818, 3819 and 3820.***
- 2. Enjoining of STANLEY GITARI KANYUIRO as a defendant.***
- 3. Order of status quo or injunction to preserve the suit property.***

Order 1 Rule 3 of the Civil Procedure Rules provides as follows:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”

Order 1 Rule 10 (2) of the Civil Procedure Rules on the other hand provides as follows:-

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

In **EASTERN BAKERY VS CASTELLINO 1958 E.A 461**, the Court held as follows:-

“Amendments to pleadings sought before the hearing should be freely allowed if they are made without injustice to the other side, and there is no prejudice if the other side can be compensated

by costs. But there is no power to enable one distinct cause of action to be substituted for another”

Further, the Court of Appeal in the case of CENTRAL KENYA LTD VS TRUST BANK LTD 2000 2 E.A 365 said:-

“A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there has been no undue delay, (2) no new inconsistent cause of action was introduced, (3) no vested interest or accrued legal right was affected and (4) the amendment could be allowed without injustice to the other side”

It is clear therefore that in principle, amendments to pleadings will be allowed if no injustice is caused to the other party and where the presence of a party is important in order for the Court to adjudicate on all the matters before it, then such party should be enjoined in the proceedings.

The plaintiff’s case, as I understand it, is that when he filed this case on 31st December 2012 seeking the rectification of the register in respect to land parcel No. LOC 2/GACHARAGE/790, it had not been subdivided to give rise to the three parcels No. LOC 2/GACHARAGE/3818, 3819 and 3820 the latter of which is now registered in the names of the interested party. That he only discovered this in July 2015 long after this suit had been filed. And since the interested party is now registered as the proprietor of parcels No. LOC 2/GACHARAGE/3820 while the other two parcels No. LOC 2/GACHARAGE/3818 and 3819 remain in the names of the defendant, it is important to enjoin the interested party as a defendant. The interested party on his part claims that the transfer of parcel No. LOC 2/GACHARAGE/3820 was done before this suit was filed and he is an innocent purchaser for value. It is not in dispute that the land parcels No. LOC 2/GACHARAGE/3818, 3819 and 3820 are sub-divisions of land parcel No. LOC 2/GACHARAGE/790 which the plaintiff claims was fraudulently transferred by the defendant into her names. Of course whether that transfer was fraudulent or not will be a matter for the trial Court. However, since the interested party is now the registered proprietor of a portion of that land, it is in fact in his own interest that he is enjoined in these proceedings so that orders adverse to him are not made in his absence. He claims that he is a bona fide purchaser for value who bought parcels No. LOC 2/GACHARAGE/3820 long before this suit was filed and in compliance with all the legal procedures. The plaintiff has not annexed the proposed amended plaint and so this Court does not know the claim against the interested party if he is enjoined in these proceedings as a defendant. Nonetheless, as the proprietor of a sub-division of the original land parcel No. LOC 2/GACHARAGE/790, it is clear to me that the presence of the interested party in these proceedings is important **“in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit”**

I am of course alive to the fact that this application is being brought in 2015 when this suit was filed in 2012. However, it is clear from the plaintiff’s supplementary affidavit that when he filed this suit in 2012, he had conducted a search which reflected that only the defendant was registered as the proprietor of the land parcel No. LOC 2/GACHARAGE/790. It was not until he conducted another search in July 2015 that he realized that the cautions he had placed on that parcel had been removed and the land been sub-divided to give rise to LOC 2/GACHARAGE/3818, 3819 and 3820. Thereafter, this file went missing and this application could not be filed as is clear from the copy of letter dated 20th August 2015 from the plaintiff’s advocate addressed to the Deputy Registrar of this Court requesting that this file be traced – annexure **WNK 2**. The delay therefore, though long, has been satisfactorily explained.

Further, although this case was filed in 2012, it has not commenced hearing. This may be attributed to the failure to trace it in the registry. This amendment is being sought before the hearing and as was held in the case of EASTERN BAKERY (supra), it **“should be freely allowed”**. I do not see what injustice will be caused to the interested party. He remains the registered proprietor of land parcel No. LOC 2/GACHARAGE/3820 until this Court decides otherwise. Prayers No. 1 and 2 of the plaintiff’s Notice of Motion dated 30th July 2015 are therefore well merited and are allowed.

The plaintiff further seeks an order of status quo on the three parcels of land i.e. LOC

2/GACHARAGE/3818, 3819 and 3820 pending the hearing and determination of this suit. His fear is that the interested party may dispose off the portion that is in his names. It is clear to me that the plaintiff's fear is that the land parcels No. LOC 2/GACHARAGE/3818, 3819 and 3820 may be further disposed off in view of the fact that the original land parcel No. LOC 2/GACHARAGE/790 was subdivided and alienated notwithstanding that he had placed a caution thereon. That fear is not without basis. In my view, however, an order of inhibition under **Section 68 (1) of the Land Registration Act** will best protect his interest in view of what I have stated above.

Ultimately therefore and upon considering all the issues herein, I allow the plaintiff's Notice of Motion dated 30th July 2015 and make the following orders:-

- 1. The plaintiff is granted leave to amend his plaint to reflect land parcels No. LOC 2/GACHARAGE/3818, 3819 and 3820 instead of parcel No. LOC 2/GACHARAGE/790.***
- 2. The plaintiff is granted leave to enjoin STANLEY GITARI KANYUIRO as a defendant in this suit.***
- 3. An order of inhibition is issued prohibiting the registration of any dealings with land parcels No. LOC 2/GACHARAGE/3818, 3819 and 3820 pending the hearing and determination of this suit.***
- 4. The defendant is at liberty to amend her defence, if need be, within 14 days of service of the amended plaint.***
- 5. Costs shall be in the cause.***

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016

Ruling dated, delivered and signed in open Court this 25th day of November 2016

Mr. Ngigi for Mr. Kimani for Applicant present

No appearance by the other party.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016