



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 26 OF 2015**

**ZABLON KIMINDU MUTONYI.....PLAINTIFF**

**VERSUS**

**JOSEPH MUCHIRI KIBURI.....1<sup>ST</sup> DEFENDANT**

**JEREMIAH MUCIRI MALIAH.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is in respect to the following two applications:-

1. The defendants' application dated 21st January 2016 seeking to have the plaintiff's suit dismissed/struck off with costs.
2. The plaintiff's application dated 10th February 2016 seeking orders that a temporary injunction be issued restraining the defendants by themselves, their agents, invitees, workmen and/or servants from alienating, selling and/or interfering with land parcels No. KABARE/KIRITINE/2621 and KABARE/KIRITINE/2622 pending the hearing of this application. The plaintiffs also seek an order to cancel the transfer transaction of land parcels No. KABARE/KIRITINE/2621 to Njoka Ngethi and KABARE/KIRITINE/2622 to Stephen Mbogo Muthoni from the defendants.

With the consent of counsel, it was directed that both applications be canvassed by way of written submissions. Those submissions have now been filed by the firm of **MOSI & COMPANY** Advocates for the plaintiff and **MAINA KAGIO & COMPANY** Advocates for the defendants.

I have considered the two applications, the rival affidavits and the submissions by counsel.

With respect to the defendant's Notice of Motion dated 21st January 2016, it is clear from the pleadings annexed herein that the parties are litigating in **KERUGOYA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 300 of 2013**. The subject of that litigation is the same land parcel No. KABARE/KIRITINE/1985. That suit is pending and I have called for it for my perusal and can see part of the orders therein include a certificate of sale declaring the plaintiff to have been the highest bidder in respect of the land parcel No. KABARE/KIRITINE/1985 after paying a sum of Ksh. 750,000. The certificate was issued by the Subordinate Court in **CHIEF MAGISTRATE'S COURT CIVIL CASE No. 300 of 2013** on 21st August 2014. It is not clear why the plaintiff is seeking the same orders in this Court vide his plaint filed herein on 16th March 2015. Counsel for the defendants has therefore urged me to have this suit dismissed and/or struck off since whatever the plaintiff seeks can be canvassed in **KERUGOYA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 300 of 2013**. Striking off a pleading is a draconian order to be applied cautiously and only in the clearest of cases. I am not satisfied

that I should take that route in this case. Having said so, however, and in view of the pendency of **KERUGOYA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 300 of 2013**, the case is caught up in the provisions of **Section 6 of the Civil Procedure Act** which provides as follows:-

***“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”***

The marginal note to the above provision reads:-

***“Stay of Suit”***

In the circumstances, the proper order to make would be to stay this suit rather than striking it out or dismissing it as sought by the defendants.

And with regard to the plaintiff's Notice of Motion dated 10th February 2016, it seeks the following substantive orders:-

***1. Spent.***

***2. That the Honourable Court be pleased to issue a temporary injunction restraining the respondents/defendants herein, either by themselves, their agents, invitees, workmen and/or servants from alienating, selling and/or interfering with the parcels No. KABARE/KIRITINE/2621 and KABARE/KIRITINE/2622 in any manner whatsoever, pending hearing and determination of this application.***

***3. That the Honourable Court be pleased to cancel the transfer transaction of land parcels No. KABARE/KIRITINE/2621 to NJOKA NGETHI and KABARE/KIRITINE/2622 to STEPHEN MBOGO MUTHONI from the defendants.***

***4. The costs of the application be provided for.***

In view of my findings above that this suit is caught up by the provisions of **Section 6 of the Civil Procedure Act**, it follows that this Court cannot even proceed to consider that application on its merits. However, even if that application was to be considered on its own merits, it would be dismissed for the following reasons:-

That application seeks restraining orders in respect to land parcels No. KABARE/KIRITINE/2621 and 2622. It is clear from the annexures herein that those two parcels of land are now registered in the names of **NJOKA NGETHI** and **STEPHEN MBOGO MUTHONI** and although the two are named in the application as the 1st and 2nd interested parties respectively, they are in fact not parties in this case as no application to make them parties in this suit has been filed, prosecuted and granted. The two are therefore strangers to this suit and an order prejudicial to their interest cannot be made without involving them. The application itself is of course badly drafted as it does not seek injunctive orders pending the hearing of the main suit.

Secondly, the application seeks final orders in that the plaintiff asks that the transfer of land parcels No. KABARE/KIRITINE/2621 to **NJOKA NGETHI** and KABARE/KIRITINE/2622 be cancelled. Such an order cannot be granted on an interlocutory application. It can only be granted after hearing evidence from the parties. Therefore, even if the plaintiff's application was to be considered on its own merit, it would only be for dismissal.

Ultimately however and for the reasons stated above, this suit is stayed and the parties advised to pursue their respective claims in **KERUGOYA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 300 of**

**2013.**

Each party to meet their own costs of the two applications.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> NOVEMBER, 2016**

Ruling dated, delivered and signed in open Court this 11<sup>th</sup> day of November 2016

Plaintiff present in person

Mr. Macharia for Mr. Kagio for the Defendants present

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> NOVEMBER, 2016**