



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

CASE NO. 112 OF 2016

MARY WANJIKU NGUNJU.....PLAINTIFF/ APPLICANT

-VERSUS-

JAMES GICHIMO KIMANI...DEFENDANT/ RESPONDENT

RULING

1. The plaintiff/applicant (hereinafter referred to as the applicant) filed a Notice of Motion dated **27th May, 2016** seeking an injunction to restrain the defendant/respondent (hereinafter referred to as the respondent) from depositing building materials and from constructing any building or structures on Title Number **Nyeri/Mweiga/360** (hereafter referred to as the suit property) pending the hearing and determination of the suit.
2. The application is premised on the grounds on its face and supported by the applicant's affidavit sworn on **27th May, 2016**. She depones that the respondent has begun construction on the suit property; that she had sold the suit property to the respondent, but was unable to complete the sale; that she offered to refund the purchase price to the respondent but he declined to accept it and she now believes that the respondent intends to put up a permanent structure so that she may compensate him.
3. The application is opposed by the respondent vide his replying affidavit sworn on **7th June, 2016**. He avers that he has already sold the suit property to F. Gachanga Njeri, who has since deposited building materials; that he has no interest in the suit property as it now belongs to someone else.
4. By way of rejoinder, the applicant filed a further affidavit sworn on **14th June, 2016**. She avers that the agreement regarding purchase of the suit property was between her and the respondent, thus she is not involved in any dealings between the respondent and the third party.
5. In a supplementary affidavit sworn on **6th October, 2016**, the respondent deponed that the applicant wishes to sell the land to a third party at a higher value than what was earlier agreed, hence her breach of the sale agreement. He states that he is amenable to compensation based on the current market value of the property.
6. The application was heard on **11th October, 2016**, with **Mr Kiminda** appearing for the applicant and the respondent representing himself.
7. Mr Kiminda reiterated the contents of the applicant's pleadings, namely that the sale agreement between the parties fell through after the applicant and her family members were unable to agree on the

modalities of subdividing the land. She offered to refund the respondent the purchase price plus a further 20% but he declined this offer.

8. In response, the respondent submitted that this matter occurred over 3 years ago; that he took possession and started cultivating the land after paying the purchase price; that he later sold the suit property to Njeri and he is in no position to stop the deposit of building materials on the suit property. He prays that the issue be resolved quickly by the court, since the suit property is now owned by 31 people, all beneficiaries of the applicant's father's estate.

9. I have considered the pleadings of the parties herein. Neither party is a registered proprietor of the suit property. The applicant obtained confirmation of grant issued in Succession Cause No 489 of 2008; and went ahead to sell her portion of the suit property to the respondent but owing to disagreements between her and her family members, she rescinded the contract; She offered to refund the respondent the money he had paid to her plus 20% interest due to her default (as per clause 7 of the agreement dated 2nd June, 2011 totalling to Kshs 192,000) but the respondent rejected this offer and through a letter by his advocates dated 28th April, 2016 demanded Kshs 600,000 being the current market value of the land and the developments thereon. (This is the amount paid to him by F. Gachaga Njeri who had purchased for the suit property vide a sale agreement dated 6th May, 2013).

10. An application for injunctive orders is governed by the following principles set out in **Giella v Cassman Brown and Co. Ltd & Another** [1973] E.A. 358:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

11. So has the applicant shown a prima facie case with a probability of success against the respondent? I think not. I say this because, from the affidavits filed, it is clear that there is a person by the name of F. Gachanga Njeri who has since purchased the suit property and she is not a party in this suit. It has also emerged that she is the one undertaking the ongoing construction on the suit property.

12. It is a well settled principle of law that a court cannot grant orders in vain which cannot be complied with as held by the Court of Appeal in the case of **Eric V. J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others** Civil Application No. 20 of 1994 (12/94 UR) as follows;

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

13. I associate myself with the holding in the aforesaid case by the court of appeal and find that if the orders sought in the instant motion are granted, they will be of no effect as the person constructing is not a party to the suit. To cure this defect, I invoke **Order 1 Rule 10 (2)** of the **Civil Procedure Rules 2010** and order that F. Gachanga Njeri be added as a party in this suit as her presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

14. I am guided by the case of **Technomatic Limited T/A Promopack Company v Kenya Wine Agencies Limited & another** [2014] eKLR where **Havelock J** stated:

“Order 1 Rule 10 (2) states ‘the Court may at any stage of the proceedings either upon or

without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added’.

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”

16. In addition to enjoining the new party I order that status quo to be maintained pending the hearing and determination of the suit. Costs of the application shall be in the cause.

Dated, signed and delivered at Nyeri this 8th day of November, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

Ms Mwangi h/b for Mr. Kiminda for the applicant

James Gichimo Kimani – respondent

Court assistant - Lydia