



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT

ELC NO 338 OF 2014

MUINAMI

JOHN NJOROGE

NUTHU

JAMES MBURU

**JANET KARUNGARI KAMOTHO & 72
 OTHERS.....PLAINTIFFS/RESPONDENTS**

VERSUS

**KENYA AFRICAN NATIONAL UNION.....1ST
 DEFENDANT/RESPONDENT**

**NAIROBI COUNTY GOVERNMENT2ND
 DEFENDANT/RESPONDENT**

**PATRICK NDERITU.....3RD
 DEFENDANT/RESPONDENT**

**LANDMERK INTERNATIONAL PROPERTIES LIMITED....PROPOSED 4TH
 DEFENDANT/APPLICANT**

RULING

The application for consideration is the Notice of Motion dated **5th November 2014**, brought under **Order 1 Rules 3,45, Rule 1 Order 51 Rule 1** of the **Civil Procedure Rules, Section 80 & 3A of the Civil Procedure Act** seeking for orders

1. *That pending the hearing and determination of this application, the court be pleased to stay the execution or enforcement of the orders contained in the ruling dated and delivered on 30th October 2014.*
2. *That the court be pleased to set aside and or vary its ruling and orders dated and delivered on 31st October 2014, restraining the 3rd defendant from trespassing, developing, erecting structures and or any manner dealing with plot LR No. 29082,Kasarani pending the hearing and*

determination of this suit

3. *That the court be pleased to set aside or vary its ruling and orders dated and delivered on 31st October 2014, restraining the 1st defendant from alienating, disposing off, selling, transferring, mortgaging and or in any manner dealing with plot LR No 29082, Kasarani pending the hearing and determination of the suit or further orders of this suit.*
4. *That the honourable court be pleased to order that the applicant be joined in this suit as the fourth Defendant.*

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Anna Njeri Gitanyu** a Director of the proposed 4th Defendant. She averred that the court issued restraining orders against the 3rd defendant which were issued through material non disclosure of vital information in that the land had already been sold to Landmerk International Properties Limited and the said Landmark International Properties is in possession of the suit property. That **KANU** the 1st Defendant had already executed a transfer in favor of Landmerk International Properties Limited where the 3rd defendant was one of the Directors of the purchaser company. That **KANU** had filed two other cases being Nairobi **ELC No 329 of 2012** and **ELC No 15 of 2014** and in both cases obtained favourable injunctions in relation to this same subject matter which would have necessitated to disclosure of the names of all the plaintiffs. That the plaintiffs are using the said orders in an attempt to unlawfully evict Landmerk International Properties Limited from the suit land despite the fact that no orders have been issued against the applicant yet the applicant is the purchaser of the suit property as attested by the a true copy of the sale agreement and that they have paid the full purchase price. That despite paying the full purchase price, and depositing building materials to the suit property, the injunction poses a risk to the building materials as they are at risk of being stolen and or vandalized which actions shall occasion irreparable damage to the applicant. That the 3rd defendant being a Co-director of the applicant company forwarded all the documents showing ownership of the suit property, but his advocate did not produce them in the affidavit he filed leading to the issuance of the orders of **31st October 2014** which are now in vain and untenable as the 3rd defendant is not in a position to ensure compliance with the said order.

The 1st defendant through its Secretary General **Nick Kiptoo Korir Arap Salat** deposed a Replying Affidavit. He supported the proposed applicant's application. He confirmed that the 1st defendant sold the suit property to the proposed 4th defendant and surrendered possession of the property. That the transfer instruments had long been executed in favour of the applicant therefore the orders issued on **31st October 2014**, are futile as they cannot be enforced against the 1st defendant who bears no connection with the suit property by the time the orders were made in terms of ownership. He further averred that the plaintiff had not shown any ownership documents whether by allotment or title deed neither did they claim to have purchased the property from anybody. He stated that the ruling dated **31st October 2014**, should be set aside as they affect a proprietor in possession who was never made a party to the proceedings.

The plaintiff's opposed the application. **John Njoroge Muinami**, swore a Replying Affidavit stating that it was not deliberate that the plaintiffs failed to enjoin the applicant as a party to this suit since they were not aware of it. That the 1st and 3rd Defendant having participated in the proceeding, cannot purport to introduce new evidence after the fact through the applicant as these documents were all along in their custody and they conveniently withheld them so as not to let the plaintiffs know the value and nature of the transaction in the dispute. He further submitted that the court only made a ruling and orders for ***maintaining the status quo*** pending the hearing and determination of the suit and is misleading for the applicant to indicate that the orders relate to its eviction and or that of the 3rd Defendant. Further that the ruling only prohibit interference of the suit property. That the issue of legality or otherwise of the sale transaction and the real ownership of the suit premises are issues for determination during the hearing of the main suit. That if the Plaintiff's would suffer irreparable harm if the orders sought are granted as the applicant has indicated it is in possession of the suit premises and has commenced developments yet ownership of the property has not been determined by the court. That the applicant can always seeks a refund of the purchase price from the 1st Defendant if it is determined that it illegally sold the suit

premises and therefore seeks the court to only grant the applicant leave to be enjoined as a party to the main suit.

Parties filed their written submissions which the court has taken consideration when making its finding.

I have considered the affidavits, the written submissions and the authorities cited by the parties herein. The issue for this court's determination is whether the proposed 4th defendant has made out a case to deserve the reliefs sought in its application. The reliefs sought are:-

1. ***That the intended 4th defendant be enjoined to this suit.***
2. ***That the ruling dated 31st October 2014 and subsequent orders of this court be set aside***

The issue for the court to determine is whether the Applicant has demonstrated that it has any interest to be enjoined to these proceedings as a 4th defendant at this stage. **It is a fundamental consideration that before a person can be joined as party, it must be established that the party has high interest in the case. In addition, it must be clearly demonstrated that the orders sought in the main suit would directly and legally affect the party seeking to be added.**

These considerations have been amplified by the Supreme Court of Uganda in the case of the Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] I.E.A 55, where the court held that,

“...for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person.”

In the instant case, the applicant has alleged that it purchased the suit property from the 1st defendant and paid the full purchase price for the said property and was in the process of commencing construction on the suit property. It therefore feels aggrieved that it has not been enjoined to the suit property yet it is in possession and further an order of the court has barred it from undertaking any activity on the suit property. The Court has noted that the parties herein have no objection to the applicant's application to be enjoined as a party to this suit.

In the premises and in the interest of fairness and Justice, the court will grant leave to the proposed 4th defendant to be enjoined in the proceedings and to participate in the hearing of the plaintiffs Claim. In that regard the now enjoined 4th defendant has leave of **14 days** from the date of this ruling to file any response, to the Plaint dated **20th March 2014**, and any other pleadings that may need a response from the 4th defendant.

The applicant wants this court to set aside the ruling delivered on 31st October 2014 and all the consequential orders. This must be exercised judiciously by the court.

In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** the Court of Appeal held that:-

“In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.”

The orders issued by the court in the said ruling are orders of injunction against the 3rd

defendant from trespassing, developing, erecting structures and or any manner dealing with plot **LR No. 29082**,Kasarani pending the hearing and determination of this suit and the 1st defendant from alienating, disposing off, selling, transferring, mortgaging and or in any manner dealing with plot **LR No 29082**, Kasarani pending the hearing and determination of the suit or further orders of this suit. The 4th defendant has laid claim of the suit property and has by affidavit evidence demonstrated how it purchased the suit property from the 1st defendant .It has even indicated to the court that it is in possession of the suit property and in the process of developing it having deposited building materials at the suit property. On the other hand the plaintiffs have also laid claim on the suit property and have disputed the sale of the suit property to the 3rd and now 4th defendants claiming that the property was illegally sold by the 1st defendant without disclosing the transaction to the plaintiffs. The determination of the legal owner is the proper subject of trial by this court and the only way to establish the factual owner of the subject matter, the court will have to make a finding on the tested evidence after the parties have been cross examined on their statements and documents.

Since the 4th defendant has shown the court through its affidavit that it was in the process of constructing the suit property, I find that it is only fair to preserve the suit property pending the hearing and determination of the suit property pending the hearing and determination of this suit. It is not disputed that the 3rd Defendant is a Co-director of the 4th defendant and an injunction has been issued against him. I find it in order that the orders earlier issued by this court on **31st October 2014** were meant to safeguard the interest of all the parties in this suit. I therefore decline to grant orders **2, 3 and 4** of the Notice of Motion dated **5th November 2014** .The application only succeeds in terms of **prayer 5**.

Consequently, the Court dismisses the 4th Defendant/Applicant's prayers **No.2 ,3, and 4** of the Notice of Motion dated **5th November,2014**. However, the Court allows prayer No.5 of the said Notice of Motion.

Costs shall be in the cause.

It is so ordered.

Dated,Signed,Delivered this 20th day of May 2015

L. GACHERU

JUDGE

In the Presence of:-

Mr Njagi for the Plaintiff/Respondent

Mr Njoroge for the Applicant

Mr Manara for 3rd Respondent

Hilda :Court Clerk

Court:

Ruling read in open Court in the presence of the above counsels.

L.GACHERU

JUDGE

