



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND DIVISION**

**ELC. CASE NO. 227 OF 2001**

**PHILIP K. TANUI.....PLAINTIFF/APPLICANT**

**VERSUS**

**RUTH C. CHEPNG'ETICH.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ESTHER M. WAMBUGU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Plaintiff's Notice of Motion dated 28<sup>th</sup> January 2013 in which he seeks an order allowing M/s Cog Consultants Limited to enter upon the parcel of land known as L.R. No. 209/12919 Nairobi (hereinafter referred to as the "suit property") for the purpose of carrying out a current valuation of the property and that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Philip K. Tanui, sworn on 28<sup>th</sup> January 2013 in which he averred that he is registered as a tenant in common with the Defendants over the suit property since 30<sup>th</sup> December 1996 but that the Defendants have excluded him from the occupation and or management of the affairs of the suit property. He further stated that to enable the court to conclusively determine the issues between the parties, a current valuation of the suit property and the buildings erected thereon is required. He also said that though he had instructed M/s Cog Consultants Limited to carry out a valuation exercise on 14<sup>th</sup> August 2012 which required them to gain access to the suit property, the Defendants blocked the exercise by denying them access to the suit property. He further stated that this action prejudices the fair trial and expeditious disposal of this suit and that in the circumstances, the Defendants should be compelled to allow access.

The Application is contested. The 2<sup>nd</sup> Defendant/Respondent filed her Replying Affidavit sworn on 7<sup>th</sup> June 2013 in which she confirmed that she is the owner of the suit property together with the 1<sup>st</sup> Defendant as tenants in common. She disclosed that the suit property has two separate Government Quarters or houses built on it. She further stated that she is a retired civil servant and that she was allocated House No. HG 776 "B" on the suit property while the 1<sup>st</sup> Defendant was allocated House No. HG 776 "A" by virtue of their position as civil servants. She further stated that both she and the 1<sup>st</sup> Defendant made the necessary payments of the purchase price to the Commissioner of Lands. She further stated that due to her busy schedule at work, she and the 1<sup>st</sup> Defendant enlisted the services of the Plaintiff to pursue the processing of the title deed to the suit property in her name and the name of the 1<sup>st</sup> Defendant. She further averred that without her knowledge or approval, the Plaintiff misrepresented that he was a civil servant and that the suit property belonged to himself and the Defendants jointly with the result that the title deed was issued in their three names. She further stated that the suit property was allocated to her by the Government of Kenya under the Civil Servant Housing Programme and was sold to her by virtue of her being a civil servant. She further disclosed that she has lived in the said house continuously since 1986 to date without any interruption and has enjoyed peaceful possession and ownership. She further added that the Plaintiff has never been a civil servant and he did not pay any

consideration for the suit property and therefore has no share in the said property. She further stated that the gist of her case is that the Plaintiff fraudulently, irregularly and illegally obtained title to the suit property to her detriment and has no right to request to conduct a valuation of that which is not his. She further stated that the main issue of contention between the parties to this suit is whether the suit property belongs to the Plaintiff jointly with the Defendants or not and that this issue has to be resolved by this court at a full hearing with the aid of tested oral evidence before the court can determine whether or not a valuation is necessary. She further added that if the Application is allowed, the orders sought will infringe on and violate her right of ownership and quiet possession of the suit property and that of her co-defendant.

The Plaintiff responded with his Supplementary Affidavit sworn on 25<sup>th</sup> June 2013 wherein he averred that his dealings with the Defendants were on the express understanding that they were partners pursuing the allotment and acquisition of the suit property which dealings were eventually crystallized into the Memorandum of Understanding dated 16<sup>th</sup> July 1997 and signed by all parties. He stated that the 2<sup>nd</sup> Defendant signed the Memorandum of Understanding acknowledging his interests in the suit property and yet now seeks to invalidate the same by unproven imputations of fraud. He further added that the Defendants have not raised any issue of fraud or misrepresentation in their Defence to this suit and that the allegations were scurrilous. He further added that after application jointly with the Defendants, they were issued with an allotment letter dated 27<sup>th</sup> October 1995 and that the title deed in the names of all of them was procured in a regular manner. He further added that Government houses could be allocated to any individual as long as they applied for and such application was approved. He further pointed out that the orders sought in this Application are not final in nature but are intended to enable the court to effectively and expeditiously adjudicate upon the issues between the parties.

The issue before me for determination is whether or not to allow the Plaintiff's agent to have access to the suit property for the purpose of conducting a valuation at this stage of the suit. The Defendants argue that a valuation should not be conducted before the issue of ownership has been decided upon by this court after full trial. They contend further that the Plaintiff has already indicated one of his prayers in his Amended Plaint to be allowed to conduct a valuation of the suit property. On his part, the Plaintiff insists on being allowed to conduct the valuation exercise now. He does not disclose to this court the compelling reason behind his request. I am inclined to agree with the Defendants. This suit was filed by the Plaintiff by a Plaint dated 12<sup>th</sup> February 2001 which was replaced with an Amended Plaint filed on 10<sup>th</sup> July 2003. Many years have elapsed since then to now. I don't consider the carrying out of a valuation of the suit property to be a priority more so considering that the Plaintiff has not disclosed to what use he wishes to put the valuation. The Plaintiff should instead give the hearing of this long outstanding suit priority so that a final decision on the ownership of the suit property is rendered.

In the circumstances, I decline to grant the order prayed. I hereby dismiss this Application with costs to the Defendants.

**DELIVERED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2014.**

**MARY M. GITUMBI**

**JUDGE**