



Chege & others v Ebenezer Real Agency & others (Environment & Land Case E233 of 2024) [2024] KEELC 6713 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E233 OF 2024
MD MWANGI, J
SEPTEMBER 24, 2024**

BETWEEN

EASTHER WANGECI CHEGE & OTHERS PLAINTIFF

AND

EBENEZER REAL AGENCY & OTHERS DEFENDANT

RULING

(In respect to the Plaintiff's Notice of Motion dated 10th June, 2024 seeking diverse orders)

Background

1. The Plaintiffs in their Notice of Motion application dated 10th June 2024 in addition to the prayer for a temporary injunction pray for two additional main prayers as follows: -
 - a. That revocation orders be issued against the 1st Defendant's title dated 7th October, 2016 - Nairobi/Block 126/29.
 - b. That a declaration be issued that Tabitha Wanjiku Gatimu (deceased) is the bona fide owner of Title No. Nairobi/Block/126/296 and the 2nd Defendant be compelled to register her name as the owner of the said properties and issue letters of allotment.
2. The Plaintiffs filed their suit vide the plaint dated 10th June, 2024. I find the Plaintiffs' suit as filed perplexing.
3. Whereas there are 9 Plaintiffs, only the 1st and 2nd Plaintiffs are described in the descriptive paragraphs of the plaint (i.e. paragraphs 1 and 2 of the plaint). There is no description or mention of the other Plaintiffs.
4. The verifying affidavit in support of the plaint on the other hand is deposed by the 1st Plaintiff only. He does not state that he deposes the affidavit on behalf of the other Plaintiffs. He simply states that he



- is the 1st Plaintiff hence competent to swear the affidavit. He proceeds to depose that he has read and understood the plaint and accompanying documents and verify the content to be true.
5. In respect to the Defendants, the plaint again only describes the 1st and 2nd Defendants though there are a total of 7 Defendants. There is not the slightest mention of the other 5 Defendants.
 6. The Plaintiffs' claim is for 2 plots allegedly arising from the subdivision of a plot No. 672 (Nairobi Block 126/29) by Ngundu Farmers' Co-operative Society Ltd which was allocated to the late Tabitha Wanjiku Gatimu. They allege that upon the demise of the late Wanjiku Gatimu, the 2 plots passed on to her children. The Administrators of the estate of Tabitha Wanjiku Gatimu with the consent of the grandchildren subsequently sold the parcels of land to John Macharia Njoroge and John Ng'ang'a Kibe. The leases for the above parcels were to be processed through Ngundu Farmers' Co-operative Society.
 7. It is pleaded that the said purchasers decided to subdivide the land into smaller portions and sold the resulting portions to the Plaintiffs under share certificates bearing various names i.e. Ebenezer Real Agency, Ebenezer Landview Company Limited, Jasho Real Estate Agents and Murangathi Property Investment.
 8. The Plaintiffs further plead that in the year 2007, it was discovered that the 1st Defendant had fraudulently, illegally, irregularly, unlawfully, and or unprocedurally without any colour of right processed the lease documents in his own name. The particulars of fraud, illegalities, irregularities and unlawful are pleaded at paragraph 16 of the plaint.
 9. The Plaintiffs in the plaint pray for a declaration that the 1st and 2nd Plaintiffs are the lawful and legal owners of the suit property, an order directing the 2nd Defendant to cancel the fraudulent lease and certificate of lease issued to the 1st Defendant and an order to cancel all entries and rights acquired by the 1st Defendant over the suit property amongst other orders.
 10. The Plaintiffs approached this court by way of a certificate of urgency. On 18th June 2024, the court gave directions on service of the application upon the Defendants/Respondents and set it down for inter partes hearing on 3rd July 2024. It was eventually heard on 31st July, 2024 in the absence of the Defendants/Respondents who had allegedly been served but did not respond to it.

Issues for Determination

11. Having analyzed the Plaintiffs' application and the pleadings filed alongside, the issue for determination is whether the orders sought in the application can issue at the interlocutory stage.

Analysis and Determination

12. The Plaintiffs have not stated on the face of the Notice of Motion under which provisions of the law it has been brought. This is contrary to the provisions of Order 51 rule 10 of the *Civil Procedure Rules* which requires that the Order, rule or other statutory provisions under or by virtue of which any application is made be stated. However, that is a technicality and should not be the only basis for refusal of the application.
13. What is not in doubt is that the application is an interlocutory application. It is certainly not an application for summary judgment.



14. In the English case of *Gilbert – vs- Eden* (1878) 9 ch.D, Cotton L.J, defined interlocutory applications as those applications;

“.....which do not decide the rights of parties, but are made for purposes of keeping things in status quo till the rights (of parties) can be decided or for purpose of obtaining some directions of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for purposes of enabling the court ultimately to decide upon the rights of the parties.”

15. The objective of an interlocutory application is to protect the Plaintiff against injury, by violation of his legal right(s) which he cannot adequately be compensated in form of damages recoverable in the action, if the matters in dispute were resolved in his favour at the trial.

16. The Plaintiffs in this case in their application however, do not seek to keep things in status quo; neither are they seeking directions of the court as to the conduct of their case. What the Plaintiffs seek are for all intents and purposes final orders. They, despite framing their application as an interlocutory one, are inviting the court to make conclusive or definitive findings through this Notice of Motion application.

17. Gicheru J.A (as he then was) in the case of *Rockland Kenya Ltd – vs – Elliot White Miller* (1994) eKLR, held that at the interlocutory stage, it is not the function of the court to attempt ‘to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend on to decide difficult questions of law which call for detailed arguments and mature considerations’. Such matters are to be dealt with at the trial.

18. Ringera J, (as he then was) in *Airland Tours & Travel Ltd – vs – National Industrial Credit Bank, Nairobi* (Milimani HCCC 1234 of 2002), expressed a similar opinion to the effect that in an interlocutory application, the court is not required to make any definitive findings of facts or law.

19. Finally, I must state that the Plaintiffs’ case is premised on allegations of fraud. The law in relation to fraud is clear as pronounced by Tunoi, J (as he then was) in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar* (2000) eKLR. The Judge rightly stated that,

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course, be set out, and then it should be stated, that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

20. Going just a little bit further, the standard of proof for fraud as far as held in the case of *Kinyanjui Kamau – vs- George Kamau* (2015) eKLR, is obviously higher than that required in ordinary civil cases.

21. The Plaintiffs’ application is an attempt to sidestep the due process; the rather lengthy process of proving the alleged fraud. The Plaintiffs’ application must fail. I hereby dismiss it in its entirety. I will however make no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:



Mr. Mwaura for the Plaintiffs/Applicants

N/A by the Defendants

Court Assistant – Yvette.

