



Omboko v Speaker & Chairperson of Busia County Assembly Service Board & 6 others (Petition E005 of 2020) [2022] KEELRC 14695 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 14695 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E005 OF 2020**

CN BAARI, J

JULY 7, 2022

BETWEEN

INNOCENT ENOCE OMBOKO PETITIONER

AND

**SPEAKER & CHAIRPERSON OF BUSIA COUNTY ASSEMBLY SERVICE
BOARD 1ST RESPONDENT**

**CLERK AND SECRETARY BUSIA COUNTY ASSEMBLY SERVICE
BOARD 2ND RESPONDENT**

BUSIA COUNTY SERVICE ASSEMBLY SERVICE BOARD 3RD RESPONDENT

**CHAIRPERSON BUSIA COUNTY ASSEMBLY STAFF ADVISORY
BOARD 4TH RESPONDENT**

BENARD MUBINJA WAMALWA 5TH RESPONDENT

ALLAN WAFULA MABUKA 6TH RESPONDENT

GABRIEL ERAMBO ESONGA 7TH RESPONDENT

RULING

1. Before Court is the Respondents' motion dated 17th November, 2021, brought pursuant to Order 1 Rule 10(2) of the *Civil Procedure Rules* (2010), Section 52 of the Transfer of Property Act (Repealed), Section 162(1) of the *Land Act* (2012), Section 163 of the Registered *Land Act* (Repealed) and Section 12 (3)(viii) of the *Employment and Labour Relations Court Act*. The Applicants seek orders as follows: -

i. Spent

ii. Spent



- iii. That the Honourable Court be pleased to join the following persons as interested Parties to this suit:
 - a. Godfrey Namubatsi Lumanyi as 1st Interested Party
 - b. The County Land Registrar, Busia County as the 2nd Interested Party
 - iv. Spent
 - v. That the Honourable Court be pleased to grant a temporary injunction restraining Godfrey Namubatsi Lumanyi, the intended Interested Party either by himself or through his agents and/or servants from adversely dealing with, selling, mortgaging, charging, transferring or in any other way interfering with the current ownership of the parcel of land known as Bukhayo/Mundika/2842 pending hearing and determination of this suit
 - vi. That the transfer of the suit property being Bukhayo/Mundika/2842 from the Claimant/Petitioner, to Godfrey Namubatsi Lumanyi, the intended Interested Party dated 11th November, 2021 be declared null and void.
 - vii. That the intended 2nd Interested Party, being the County Land Registrar, Busia County be ordered to cancel and/or revoke the transfer of the suit property dated 11th November, 2021 from the Claimant/Petitioner to Godfrey Namubatsi Lumanyi and the title deed for the property revoked.
 - viii. That the costs of the application be in the cause.
2. The application is supported by grounds on the face thereof, and the affidavit of Allan Wafula Mabuka. The crux of the application is that the intended 1st Interested Party be joined to these proceedings for reason that he is the current owner of the suit property.
 3. The Applicants further aver that the intended 1st Interested Party became owner of the suit property by virtue of a transfer effected on 11/11/2021 during the pendency of this matter, and should be joined so as to explain the circumstances under which he gained ownership during pendency of the suit, and for reason that the suit property is subject of the case before court, and may affect his proprietary interests, and as such, he is a proper necessary party who should be joined to this matter.
 4. The Applicants further aver that the County Land Registrar for Busia County, is a proper and necessary party to be brought into this proceeding for reason that he is the officer charged with the duty of transferring property and secondly, that the Applicants have sought orders for cancellation of title for 1st Interested Party, and it is only the County Land Registrar who is vested with powers to do so.
 5. The Applicants state that the law on joinder of parties to suits is clear that to join is a discretionary power of the court, and which discretion is to be exercised based on principles such as whether a party sought to be joined has interest in the suit, that the party is affected by the decision of the court, and whether the dispute will be effectively and fairly determined without the Interested Party. They sought to rely on the holding in Charles Lekerio Vs. Telkom Kenya & to support this position.
 6. The Applicants/Respondents aver that the Claimant as an employee of the 3rd Respondent obtained a mortgage facility from the employer to the tune of 7 million shillings and undertook to offer the title subject of this application as security for the loan.
 7. The Applicants aver that the Claimant admitted receiving the mortgage from his employer, and has indicator that the funds were utilized to purchase the suit property acquired on 24/8/2015.



8. The Applicants further states that the Claimant refused to surrender the title deed to the property to enable employer register a charge over it resulting in the employer instituting disciplinary proceedings in an effort to force him to surrender title for purposes of securitization.
9. The Applicants aver that upon being invited to a disciplinary hearing, the Claimant resigned from their employ on 1/11/2019, just two days before the hearing.
10. The Applicants state that on the day the Claimant applied and obtained consent to transfer is the same day he lodged it at Lands Office for transfer, and that the transfer was similarly effected on the same day, leading them to infer a deliberate action to defeat this application.
11. The Applicants aver that for reason that this matter was pending and the suit property was central to it, the doctrine of *lis pendens* acts as injunction on its own under equity, irrespective of whether or not there's a court order. They further aver that the doctrine binds party's before court even an innocent purchaser for value.
12. The Counsel for the Applicants in his oral submissions told the court that contrary to the Claimant's assertion, they have not alleged the existence of an employment relationship, but contend that theirs is a claim for recovery of money advanced as mortgage to the Claimant, and not to charge the title.
13. It is submitted for the Applicants that equity deems what ought to have been done as done, and the Claimant objecting to this matter because there was no charge created on the suit title that he was to surrender for creation of charge and did not, does not hold.
14. The Counsel further submits that equity will not suffer a wrong without a remedy. Claimant obtain loan and commits a wrong by failure to service and wants the court to declare the employer as having no remedy is untenable. It is further submitted that there was an implied and Constructive Trust created between the Claimant/Petitioner and the Respondents that upon receipt of the mortgage the Petitioner would surrender title for purpose of securitization and that he would pay the loan.
15. It is further submitted for the Applicants that under the *Law of Contract Act*, there is no time bar on issues of trust. Further, Counsel submits that the time bar raised by the Claimant collapses on this ground. Counsel submits that under Section 19 of *Law of Contract Act* "Time limit for recovery of mortgage money is 12 years" and again, it is submitted that under Section 90 of the *Employment Act*, limits employment related cases to three years and that the Claimant resigned in November, 2019 which takes it 2022, when parties are already before court.
16. Counsel further submits that the principle of *res judicata* does not apply to this matter as the previous suits were summarily struck out and that no final hearing took place and the former court did not have Jurisdiction to do so.
17. It is submitted that the assertion by the Claimant of waiver, election and estoppel, that for these principles to operate, there must be evidence to prove waiver, election and estoppel and Respondent have never waived their right to recover the mortgage.
18. It is counsel's further submission that this Court has jurisdiction for reason that the mortgage was issued by an employer to an employee.
19. The Applicants state that on a balance of probability, the court should consider injunctioning the Interested Parties to stop suit property from any further transfer.
20. The Claimant opposed the application vide a replying affidavit and grounds of opposition dated 7th December, 2021 and filed in court on 8th December, 2021. The Claimant further filed a Preliminary



Objection to the Respondents/Applicants' application herein seeking to have the application struck out for reasons to be spelt out herein.

21. The Claimant opposed the application on the basis that it is statute barred by dint of Section 38 of the Land Act, Section 3(3) of the Law of Contract Act, Section 4(1) of the Limitation of actions Act and Section 90 of the Employment Act. The Claimant further contend that the application is non-cognizable by dint of Section 5 of the Civil Procedure Act.
22. The Claimant further argues that the application is res judicata having been the subject of the Respondents' dismissed claim in Busia ELC No. 02 of 2020, and Busia ELC Appeal No. E005 OF 2021.
23. The Claimant argues that the application herein is barred by election, waiver and estoppel and that the back-door draft amendments seek to defeat the accrued defences of election, waiver and estoppel.
24. It is the Claimant's position that the Court lacks jurisdiction to entertain this application for reason that they are not suited as the application herein is fatally defective and are incapable of being granted the property known as Bukhayo/Mundika/2842.
25. The Claimant contend that the Applicants have not met the criteria for grant of injunctive orders. He further states that Applicants claim over parcel Bukhayo/Mundika/2842 is invalid and hopeless for reason that they misled the court into granting them orders when they do not have a formal contract over the property in question, nor is it mentioned in the loan application form, and that the property was completely out of the loan arrangement.
26. The Claimant states that for reason that the property is an alternative prayer in the Respondents/Applicants draft counter claim, it is not possible to inhibit the property, especially having admitted that they have no charge over the property.
27. The Claimant further argues that the suit property is now in the name of a third party who does not have an employment relationship with the Respondents/Applicants.
28. The Claimant states that the doctrine of Lis Pendens does not apply to situations of charges and mortgages, nor does it overthrow rights of a registered owner under statutory proprietary regime in light of Sections 24, 25(1), 26 and 68(2) of the Land Act, 2012.
29. The Claimant states that the Respondents/Applicants are still seeking admission of their draft counter claim.
30. The Claimant/Petitioner filed written submissions on the instant application dated 14th March, 2022. He submits that the application is fatally incompetent for reason that though the Respondents seek injunction pending the hearing of the suit, they have no claim or counter-claim over the suit property, and secondly that they seek final orders of cancellation of title deed at an interlocutory stage. He sought to rely on the holding in Julie Nyawira Mathenge v Kenya Institute of Administration (2013) eKLR to buttress this position.
31. The Claimant submits that the Respondent had not pleaded issues of equity that they sought to rely on in support of their application. He further submits that equity cannot override the express provisions of Section 3(3) of the Law of Contracts act and Section 38 of the Land Act.
32. It is the Claimant's submission that for an equitable mortgage or charge to arise, the law requires that there be a debt, a deposit of title and an intention that the deeds shall be security for the debt. He further submits that there has been no deposit of title for the suit property and nor was there an intention to



use it as security. He placed reliance on the holding in the case of *Kenpaul Sign Bhachu v Equitorial Commerical Bank* (2007) eKLR.

33. The Claimant submits that this court does not have jurisdiction to entertain the instant application for reason that there is no, and there has never been employment relationship between the Applicants and the Registered owner of the suit property. The Claimant further submits that the application is statute barred. The Claimant sought to rely on the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* (2016) eKLR.
34. The Claimant submits that the Respondents/Applicants advanced him an unsecured loan and never asked for the title deed that they now claim to be security for the loan. He submits that the loan subject of this application was disbursed in two instalments, and the Respondent did not insist on submission of security before the last instalment was remitted. The Claimant further submits that there is no agreement between himself and the Respondent over land title Bukhayo/Mundika/2842.
35. The Claimant prays that the Respondents' application is struck out with costs.

Determination

36. I have considered the application, the grounds in support and both the oral and written submissions by the parties. The following issues fall for determination:
 - a) Whether the intended Interested Parties have an interest in the suit to warrant their joinder.
 - b) Whether the application meets the threshold for grant of the orders sought.

Whether the intended Interested Parties have an interest in the suit to warrant their joinder.

37. Order 1 Rule 10 (2) of the *Civil Procedure Rules*, provides as follows in regard to joinder of parties:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

38. Nambuye, J in *Kingori vs. Chege & 3 Others* [2002] 2 KLR 243, set the guiding principles on the question of joinder as follows:

“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the constitution* of the suit without whom no decree at all can be passed. Therefore in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his



presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.”

39. The Respondents’ case is that the 1st and 2nd Intended Interested Parties are necessary parties to these proceedings based on the fact that the 1st Intended Interested Party is in possession of the suit property and the 2nd intended Interested is the County Land Registrar of the County at which the suit property is situate, and who is the only person who can effect orders sought herein, in respect of the suit property in the event those orders are granted by this court.
40. The question for this court then becomes whether the Intended Interested Parties are necessary and proper parties to this suit, and whether the ultimate order or decree cannot be enforced without their presence in the matter.
41. In the Case of *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015] eKLR the court stated as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do, is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”
42. That the 1st Intended Interested Party currently has possession of the suit property, in my view, should make him reasonably affected by the pending litigation, and which makes him a necessary and proper party, and should be joined. On the other hand, the presence of the County Land Registrar is necessary to enable shed light on the issues so as to assist the court arrive at a balanced judgment, and to effectively and completely adjudicate upon and settle all questions involved in the suit.
43. Accordingly, I find merit in the application for joinder.



Whether the application meets the threshold for grant of the orders sought.

44. On the application for injunctive relief, Section 12(3) of the [Employment and Labour Court Act](#), empowers this court to grant injunctive reliefs. It states:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;.”

45. The grant of a temporary injunction is an exercise of the Court’s judicial discretion which must be exercised judiciously. The purpose of a temporary injunction is to maintain the status quo. The conditions for the grant of a temporary injunction are now settled. In the celebrated case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358 for grant of interim orders, the governing principles have been set out as follows:

- i. First, an applicant had to show a prima facie case with a probability of success.
- ii. Secondly, an interlocutory injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
- iii. Thirdly, if the court was in doubt, it would decide an application on the balance of convenience.

46. On the question of whether or not the Applicants/Respondents have a prima facie case, the Claimant/Petitioner submitted that the application is fatally incompetent for reason that the Respondents seeks injunction pending the hearing of the suit, when they have no claim or counter-claim over the suit property.

47. The court at this stage just needs to be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. All that the Respondents/Applicants needed to show was that their cause of action had substance. For a serious triable issue to be established, the substantive suit should, on the face of it, and without recourse to the merits, disclose a cause of action.

48. The court record indicates that the Respondents/Applicants filed an application dated 2nd November, 2021, seeking leave to amend their response to the petition and proceeded to attach a draft amended response to petition, which amendment includes a counter-claim.

The application has not been heard and for this reason the Respondents/Applicants do not have a substantive suit upon which to hinge their application and the orders sought therein.

49. It is therefore not possible for this court at this point to tell whether or not the Respondents/Applicants have a prima facie case when in fact, all they have on record is a draft counter-claim. The Applicants, without a doubt put the cart before the horse.

50. I find and hold that the application for temporary orders of injunction does not satisfy the threshold for grant of such orders.

51. In the last two prayers, the Applicants seek nullification of title to the suit property and cancellation and/or revocation of the title held by the 1st Interested Party. These prayers are final in nature and which can only be determined upon fully hearing the substantive suit and which suit is not yet before court.

52. In whole the court makes orders as follows:



- i. That Godfrey Namubatsi Lumanyi be and is hereby joined to this suit as the 1st Interested Party and The County Land Registrar, Busia County be and is hereby joined as the 2nd Interested Party.
- ii. That the prayers for temporary injunction and nullification and/or cancellation of title is declined.
- iii. The costs of the application shall be costs in the cause.

53. Orders of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. I. O. Omboko Petitioner present in person.

Ms. Okoth h/b for Mr. Juma for the Respondents

Christine Omollo – C/A

