



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

MILIMANI ELC CASE NO 424 OF 2009

CIBIYA FARM HOLDING..... PLAINTIFF

VERSUS

THE SCHOOL BOARD OF OUR

LADY OF PEACE KIELTY

TRUST PRIMARY SCHOOL..... 1ST DEFENDANT

CITY COUNCIL OF NAIROBI..... 2ND DEFENDANT

RULING

1. On 23rd September, 2016, at the Environment and Land Court at Milimani, Nairobi, the plaintiff filed an application by way of Notice of Motion which indicated it was brought to court under Sections 1A, B, 3a and 99 of the Civil Procedure Act, Cap. 21 Laws of Kenya, Order 21 Rule 3(3), Order 50 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The application is dated 22nd September, 2016
2. The application seeks the following orders:
 1. The matter be certified urgent and heard ex-parte in the first instance.
 2. That the judgment of the Honourable Mr. Justice Njoroge delivered herein on 21st March, 2016 (“the said judgment”) be amended so as to rectify a plot number error apparent in the said judgment.
 3. That the said judgment/decree be amended to read that an order of injunction is hereby granted restraining the 1st and 2nd defendants by themselves, agents, workmen or anybody to act (sic) under their instructions from using entering into, occupying, alienating, destroying or removing any item or in any manner interfering with the plaintiff’s quiet enjoyment of Plot Number L.R 11377/4 and not 11377/2 Karen Nairobi as contained in the said judgment/decree or dealing in any way or transferring title of the property known as L.R. 11377/4 and not 11377/2 Karen Nairobi as contained in the judgment/decree to any other party or any person apart from the plaintiff herein, or using the same in any manner whatsoever or evicting the plaintiff from the suit land or interfering with the plaintiff’s access to or egress from the suit land.
 4. That further, the said judgment/decree be amended to read that a declaratory order be and is hereby

granted that the plaintiff is a bonafide purchaser of property known as L.R. 11377/4 Karen, Nairobi and not L.R. 11377/2 as contained in the judgment/decree.

5. That the said judgment/decree be amended to read that an order be and is hereby granted directing the 2nd defendant to transfer and sign all necessary documents to effect registration of land parcel Number L.R. 11377/4 Karen Nairobi and not L.R. 11377/2 as contained in the judgment/decree, into the plaintiff's name failure to which the Court's Registrar to effect the same.

6. That in the circumstances, the true and rightful land parcel Number is L.R. 11377/4 and not L.R. 11377/2 as contained in the judgment/decree.

7. That such further orders and/or directions be given to the intent that the L.R.. in question be rectified to L.R. 11377/4.

8. That costs of this application be provided for.

3. The application has the following grounds:

1. That in a judgment delivered by this honourable court on 21st March, 2016 by the honourable Mr. Justice Njoroge ("the said judgment") an order of injunction was hereby granted restraining 1st and 2nd defendants by themselves, agents, workmen or anybody purporting to act under their instructions from using, entering into, occupying alienating, destroying or removing any item or in any manner interfering with the plaintiff's quiet enjoyment of plot number L.R. 11377/2 instead of 11377/4 Karen Nairobi or dealing in any way or transferring title of the property known as L.R. 11377/2 instead of 11377/4 Karen Nairobi to any other party or any person apart from the plaintiff herein, or using the same in any manner whatsoever or evicting the plaintiff from the suit land or interfering with the plaintiff's access to or agress from the suit land.

2. That further an order was granted directing the 2nd defendant to transfer and sign all necessary document to effect registration of land parcel number L.R 11377/2 Karen Nairobi instead of L.R. 11377/4 into the plaintiff's name failure to which the court's registrar to effect the same.

3. That a declaratory order was granted that the plaintiff is a bonafide purchaser of property known as L.R. 11377/2 Karen, Nairobi instead of L.R. 11377/4.

4. The right and correct L.R. Number in question therefore is 11377/4.

5. That however, the learned judge in his said judgment used the LR. Number 11377/2 instead of 11377/4.

6. That pursuant to the aforesaid erroneous L.R. Number, the orders in the said judgment/decree cannot be effected.

7. That the aforesaid error of (sic) in the judgment/decree need to be corrected for the judgment/decree to be effected so as not to occasion grave and substantial prejudice to any party.

8. That in view of the said error contained in the said judgment/decree, to date the plaintiff is yet to extract the final decree thereof as the same can only be extracted after due resolution by the learned trial judge to amend the judgment/decree to reflect the actual and right L.R. Number to wit 11377/4.

9. That unless the said judgment is amended as prayed:-

(a) The plaintiff would be unable to obtain his just fruits therefrom.

(b) The entire trial process would be rendered a nullity.

(c) The ends of justice and equity would be defeated and frustrated.

10. That in view of the foregoing, there is good and sufficient cause for amendment of the said judgment as prayed.

11. That this application has been made diligently and without unreasonable delay.

12. That accordingly, in the interests of justice and fairness, the said judgment ought to be reviewed as prayed.

4. The application is supported by the affidavit of **NEWTON OMONDI OSIEMO** sworn on **22nd September, 2016** which states:

"I, NEWTON OMONDI OSIEMO a resident of Kenya and of Post Office Box Number 48298 – 00100, Nairobi within the Republic of Kenya do hereby swear as follows:-

1. That I am an adult of sound mind and a director of the applicant/plaintiff herein duly authorized and well acquainted with the facts of the present application, hence competent to swear this affidavit.

2. That an injunction was granted in our company's favour against the defendants by Hon. Justice Njoroge through his judgment on 21st March, 2016.

3. That however there was an error on the plot number in question that is to say the judgment/decree had L.R. 11377/2 instead of 11377/4.

4. That all the orders given concerning the said plot cannot be effected because the judgment/decree contains a wrong number to wit L.R. 11377/2 instead of 11377/4, hence this application is meant to amend and correct the same.

5. That it is in the interest of justice that the application be granted.

6. That what is deponed to hereinabove is true to the best of my knowledge and belief.

5. The plaintiff filed a supplementary affidavit sworn by **Newton Omondi Osiemo on 19th July, 2017** which states:-

1. That I am one of the Directors of the Decree holder/Applicant herein, duly authorized and well conversant with the facts of this matter and therefore competent to swear this supplementary affidavit.

2. That I swear this supplementary affidavit in furtherance to my application dated 22nd September, 2016 and the supporting affidavit thereto.

3. That upon receipt of the judgment in this matter and in an attempt to serve the decree we learnt from the Registrar of lands that, the parcel of land known as L.R Number 11377/2 is a road reserve which

could not have been sold to us and the right number of the subject suit should have read L.R. Number 11377/4 which they promised to correct in their records.

4. That in pursuance to the same on 30th June, 2017 I wrote a letter to the Chief Lands Registrar in the Ministry of Lands seeking a confirmation as to whether L.R. NO. 11377/2 has been corrected to L.R. NO. 11377/4 in their records in lieu of this new development that only came to our knowledge after the judgment had been delivered (annexed and marked "CH1" is a true copy of the letter).

5. That the Ministry of Lands and Physical Planning in the Department of Lands, vide letter dated 12th July, 2017 wrote to us confirming the registration in the day book number 3079 as LR. NO. 11377/4 and not LR. NO. 11377/2 of the lease document entered between our company and the 2nd defendant herein (annexed and marked "CH2 and CH3" are true copies of the letter and day book number 3079 respectively).

6. That in view of the aforesaid, I aver that the correct lease entered between our company and Nairobi City Council is in respect to L.R. NO. 11377/4 and not LR. NO. 11377/2 and hereby request for correction of the judgment to read L.R. Number 1137/4 instead of L.R. Number 1137/2.

7. That the correction sought herein were matters that were not within my knowledge at the time of trial of this suit and only came to fore at the execution stage and upon learning the same, I instructed my lawyers to make this application for correction which will enable my company enjoy the fruits of its judgment.

8. That I swear this supplementary affidavit in support of the orders sought in my application.

9. That what is deponed herein above is true to the best of my knowledge and believe.

6. The application was fixed to be heard interpartes on 16th October, 2017. Only the plaintiff's advocate, Mr. Morara was present. He told the court that he was relying on the supporting affidavit sworn by Newton Omondi Osiemo on 22nd September, 2016 and his supplementary affidavit sworn on 19th July, 2017. He said that there was a judgment in this suit in respect of L.R. 11377/2 whereas the correct parcel of land was 11377/4. He informed the court that after judgment was delivered, the plaintiff could not execute the decree as it was realized that LR. 11377/2 was a road reserve which could not be sold. He further said that he had annexed correspondence to the supplementary affidavit which shed light on what is the correct position. He asked the court to amend its judgment to reflect the correct position.

7. I have carefully considered the pleadings proffered by the plaintiff. I have also considered the submissions made on its behalf by its advocate.

8. I note that in the original plaint dated 21st August, 2009 and in the amended plaint dated 8th September, 2009, the plaintiff was unequivocal that the suit property was L.R. 11377/2. In view of the fact that a judgment was delivered on 21st day of March, 2016 and to bring out if or if not the court made a mistake by citing the wrong suit land, I find it necessary to reproduce the amended plaint. It avers as follows:

1. The plaintiff is a limited liability company incorporated and registered in Nairobi, Kenya. Its address for the purpose of this suit is care of M/S Aming'a Opiyo, Masese and Co. Advocates, Shankardass House, 3rd Floor, Moi Avenue, Nairobi.

2. The 1st defendant is the school of a primary school (sic) an educational establishment

registered in Kenya and carrying on business in the name and style of Our Lady of Peace Kielty Trust Primary School P. O. Box 24599-00502 Karen, Nairobi. (Their address of service for the purposes of this suit shall be through the plaintiff's advocates' office).

3. The 2nd defendant is the City Council of Nairobi. (Their address of service for the purposes of this shall be through the plaintiff's advocates' office).

4. At all material times relevant to this suit, the plaintiff is the legal owner as tenant in common in fee simple of a piece of land being plot Number L.R. 11377/2 situated at Karen in the City of Nairobi.

5. The plaintiff became the legal owner of the suit property pursuant to a lease agreement for value on 24th April, 2009 between itself and the 2nd defendant the city council of Nairobi the registered proprietor from the President of the Republic of Kenya for a period of Ninety Nine years from the First Day of November One Thousand Nine Hundred and Eight One.

6. The 2nd defendant upon executing the aforementioned lease agreement in favour of the plaintiff' is under a duty to facilitate the transfer of title of the suit property into the name of the plaintiff.

7. The purchase price of the suit property was fully paid by the plaintiff to the 2nd defendant on the understanding that the 2nd defendant was making all efforts possible to obtain title documents to the suit property.

8. The plaintiff has taken the requisite steps to have the suit land registered into its name by having the stamp duty duly paid and is only awaiting the conveyance to be completed and have the title deed's name effected in its favour.

9. Notwithstanding the foregoing and in flagrant breach of the lease agreement the 2nd defendant failed to furnish the title documents to the plaintiff thereby frustrating the completion of the said lease agreement and had instead written a letter dated 28th August, 2008 (sic) to the commissioner of Lands advising that registration of process in favour of the plaintiff be stopped to the detriment of the plaintiff.

PARTICULARS OF BREACH

(a) Failure to procure, obtain the title documents of the property in favour of the plaintiff.

(b) Failing to procure the requisite consent to transfer the suit property into the name of the plaintiff.

(c) Reneging on the Sale Agreement by requesting the Commissioner of Lands to stop processing title in favour of the plaintiff vide letter dated 28th August, 2009.

(d) Allocating the suit property to the 1st defendant without authority and/or consent to the plaintiff.

10. The 1st Defendant without notice to the plaintiff and for unknown reasons has trespassed into the plaintiff's property and is hurriedly digging the place in readiness for construction of permanent buildings to the detriment of the plaintiff's interest in the said suit land rendering this

action necessary.

11. The purported allocation of the suit property to the 1st defendant by the 2nd defendant is null and void in law in lieu of the Sale Agreement in force between the plaintiff and the 2nd defendant who is estopped in law from renegeing on the same, in any manner.

12. The plaintiff further clams general and special damages against the defendants for the interference with the plaintiff's quiet possession and enjoyment of all the plaintiff's benefit in the suit land.

13. The plaintiff prays for a permanent injunction against the defendants restraining the defendants from asserting any claims over the suit land.

14. By reasons of the matters pleaded in the paragraphs hereinabove the plaintiff has suffered and will continue to suffer loss and damage and claims compensation and damages from the defendants.

15. There is no other suit pending and there have been no previous proceedings in any court between the plaintiff and the defendants over the same subject matter.

16. The cause of action arose in Nairobi within the jurisdiction of this honouable court.

9. For the above reasons the plaintiff prayed for judgment against the defendants jointly and severally for:-

(a) An order of injunction restraining the 1st and 2nd defendants by themselves, agents, workmen or anybody purporting to act under their instructions from using, entering into, occupying, constructing, alienating, destroying or removing any item or in any manner interfering with the plaintiff's quiet enjoyment of plot Number 11377/2 Karen, Nairobi or dealing in any way or transferring title of the property known as L.R. 11377/2 Karen, Nairobi to any other party or any person apart from the plaintiff herein, or using the same in any manner whatsoever or evicting the plaintiff form the suit land or interfering with the plaintiff's access to or egress from the suit land until the final determination of this suit.

(b) A declaratory order that the plaintiff is a bonafide purchaser of property known as L.R. 11377/2 Karen, Nairobi.

(c) An order directing the 2nd defendant to transfer and sign all necessary documents to effect registration of land parcel Number L.R. 11377/2 Karen, Nairobi into the plaintiff's name failure to which the court's Registrar to effect the same.

(d) A declaration that the 2nd defendant's letter of 28th August, 2009 has no legal effect and therefore the commissioner of Lands is bound by its contents.

(e) General damages for trespass.

(f) Cost of this suit and interest at court rates.

(g) Any other relief that this honourable court may deem fit and just to grant.

10. I granted prayers for judgment against the defendants jointly and severally in the following terms:-

(a) An order of injunction is granted restraining the 1st and 2nd defendants by themselves, agents, workmen or anybody purporting to act under their instructions from using, entering into, occupying, constructing, alienating, destroying or removing any item or in any manner interfering with the plaintiff's quiet enjoyment of plot Number 11377/2 Karen, Nairobi or dealing in any way or transferring title of the property known as L.R. 11377/2 Karen, Nairobi to any other party or any person apart from the plaintiff herein, or using the same in any manner whatsoever or evicting the plaintiff from the suit land or interfering with the plaintiff's access to or egress from the suit land.

(b) A declaratory order is granted that the plaintiff is a bonafide purchaser of property known as L.R. 11377/2 Karen, Nairobi.

(c) An order is granted directing the 2nd defendant to transfer and sign all necessary documents to effect registration of land parcel Number L.R. 11377/2 Karen, Nairobi into the plaintiff's name failure to which the court's Registrar is to effect the same.

(d) A declaration is issued that the 2nd defendant's letter of 28th August, 2009 has no legal effect and therefore the commissioner of Lands is not bound by its contents.

(e) General damages are awarded to the plaintiff for trespass in the sum of Kshs.1,600,000/= and interest thereon is payable at court rates from the date of delivery of this judgment.

(f) Costs are awarded to the plaintiff and interest at court rates is payable from the date of delivery of this judgment.

11. I find that all through the proceedings the plaintiff and the defendants were dealing with land parcel No. 11377/2, Karen, Nairobi. That was the subject matter. Any changes made after judgment has been delivered can only be minor changes which cannot affect the substratum of the subject matter. The defendants had denied the plaintiff's claim concerning L.R. Number 11377/2. By changing the judgment to refer to L.R. Number 11377/4, this would amount to condemning them unheard. This would be in breach of the rules of natural justice.

12. Section 99 of the Civil Procedure Act allows for amendment of clerical or arithmetical errors and of any accidental slips or omissions. Changing the number of the land in question is beyond the purview of what is allowed by Section 99 of the Civil Procedure Act.

13. I do note that in grounds 5 and 6 of the application, it is stated:

"5. THAT however, the learned Judge in his said judgment used the L.R. Number 11377/2 instead of L.R. Number 1377/4

6. That pursuant to the aforesaid erroneous L.R. Number, the orders in the said judgment/decrece cannot be effected.

14. There can be nothing further from the truth than the two assertions. This court made no mistake in referring to L.R. 11377/2. This was the subject matter in dispute. I reiterate that there was nothing erroneous that merits correction.

15. In the circumstances, I find that this application has no merit. It is hereby dismissed.

16. No costs are awarded as the defendants did not participate in the proceedings concerning this application.

17. It is so ordered.

Delivered in open court at Chuka this **13th day of November, 2017** in the presence of:

CA: Ndegwa

Morara h/b Owino Opiyo for the Plaintiff/Applicant

Respondents absent

P.M. NJOROGE

JUDGE



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