



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Makala & 17 others v Kipteng; Kiplagat (Proposed Interested Party) (Civil Suit 210 of 1993) [2022] KEHC 11126 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 210 OF 1993
EKO OGOLA, J
MAY 24, 2022**

BETWEEN

KACHERO OLE MAKALA & 17 OTHERS PLAINTIFF

AND

GEORGE KIPTENG DEFENDANT

AND

DAVID KIPLAGAT PROPOSED INTERESTED PARTY

RULING

1. The application before this court is a notice of motion application dated March 25, 2021 by the proposed interested party seeking the following orders;
 - a) Spent
 - b) Spent
 - c) Hon David Kiplagat be enjoined as an interested party in this suit.
 - d) Eviction order made on February 23, 2021 be set aside or reviewed.
 - e) There be a stay on the eviction order made on February 23, 2021 pending the hearing and determination of this application inter-partes.
 - f) This matter be consolidated with Eldoret ELC No 115A of 2020.
 - g) Costs of this application be in the cause
2. The application is based on the grounds contained therein and the affidavit in support of the same.



3. It is the applicant's case that the proposed interested party is the lawful proprietor of land parcel No Soy/Kapsang Block 8 (Nyalibei) 190 which is comprised within the suit land. None of the parties herein reside on the suit land, and that the parties entered into a consent on January 18, 2021 with the view of frustrating status quo orders in ELC Case No 115A of 2020 where they are also parties.
4. It is averred that the proposed interested party bought the suit land in 2014 and developed it. It is imperative that the order be set aside as it arises from a fraudulent consent to subvert justice in ELC Case No 115A of 2020. Further, the defendant is deceased and could not have been in a position to enter into the consent dated January 18, 2021 or even instruct counsel.
5. The application was opposed vide a replying affidavit and grounds of opposition. There was a replying affidavit sworn on April 12, 2021 by David Lei Soit and another one sworn on June 7, 2021 by William Lesame Kiteng. The grounds of opposition were filed on the same date.
6. It is the respondent's case that the applicant has moved to court 28 years after the matter was instituted. The matter was concluded a long time ago and what is ongoing is execution of the decree for the sub division of the parcel in 2 portions of 606 acres and 303 acres as a result of the outcome of the matter having been before the tribunal. They cited the case of *Doone farms v Richard Soi and 4 others* [2017] eKLR and *Marigat Group Branch and 3 others v Wesley Chepkoimet & 19 others* in support of their submissions.
7. The respondents aver that the applicant has not demonstrated whom he is claiming the land from and it is only fair that the application be dismissed as he cannot be blindly enjoined.
8. The respondents state that the genesis of the eviction order that the applicant wants to be set aside is an application dated December 14, 2021 which was adopted as an order of this court on February 23, 2021. Nothing has been demonstrated by the applicant with regard to the allegations of fraud. The respondent cited the case of *M&E Consulting Engineers v Lake Basin Development & another* on the grounds of setting aside a consent.
9. Further, the respondents aver that the matter cannot be consolidated with ELC 115A of 2020 as there was a judgment and decree already issued in the present suit. The respondent cited the case of *Stumberg and another v Port Geitr* (1970) EA 233 and *Law Society of Kenya v The Centre of Human Rights and Democracy* Petition No 14 of 2013 on the issue of consolidation.
10. The respondent maintained that the applicant is not entitled to the orders sought.

Issues For Determination

11. Upon considering the pleadings and submissions of all the parties I have identified the following issues for determination;
 - a) Whether the applicant should be enjoined as an interested party.
 - b) Whether the order made on February 23, 2021 should be set aside.
 - c) Whether this matter should be consolidated with Eldoret ELC No 115A of 2020



Whether The Applicant Should Be Enjoined With An Interested Party

12. An interested party was defined in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR as;

”...one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

13. In the case of *Meme v Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

14. The applicant claims he has a stake in the property but has only provided the alleged title of his portion. There is no sale agreement that proves that he purchased the land and if so from whom. His only claim to the suit is based on the title which he has not proved is part of the suit land that was subject of the consent.

15. The applicant allegedly purchased the land in 2014 but has not explained the delay in seeking to be an interested party. Further, the matter has tentatively been concluded.

I find that the applicant has not met the threshold to be enjoined as an interested party.

Whether The Order Made On February 23, 2021 Should Be Set Aside

16. The order made on February 23, 2021 was as a result of a consent entered into on January 18, 2021 by the parties in the suit. The defendant’s estate was represented by administrators who proved the same vide an annexure MLK1 in the replying affidavit. The same was granted on March 28, 2016 for the purpose of filing the suit. This decisively deals with the issue of validity of the consent since the estate was duly represented.

17. The grounds for setting aside a consent was set out in *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1982] KLR 485, where Harris, J correctly held, *inter alia*, that -

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

In this matter the applicant has not proved that the consent meets the above threshold for setting aside a consent.



Whether This Matter Be Should Be Consolidated With Eldoret ELC No 115A Of 2020

18. The principles to consider in consolidation of suits were amply set out in the case of Mombasa HCCC No 992 of 1994 *Nyati Security Guards and Services v Municipal Council of Mombasa* wherein the factors were enumerated as follows; -

“the situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -

- (a) Some common question of law or fact arises in both or all of them; or
- (b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
- (c) For some other reason it is desirable to make an order for consolidating them.”

19. In determining whether the suit should be consolidated the court must also consider the purpose of consolidation. In Petition No 14 of 2013 *Law Society of Kenya v Center for Human Rights and Democracy and 12 others* [2014] eKLR, Supreme Court observed follows: -

“the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

20. The applicant has not shown that there has been common questions of law and fact that arise in both suits. Further, the rights being claimed in both suits have not been shown to arise from the same transaction. It is evident the present matter was concluded by virtue of the consent order aforesaid and consequently there is no reason to consolidate the same.

21. The upshot is that the application before the court lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH MAY 2022.

EK OGOLA

JUDGE

