



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT**

**CASE NO. 75 OF 2014**

**BONVENTURE ODEYO OBUYU (Suing as the Legal Representative of the**

**estate of ELIAS MALOMBE OBUYU).....1<sup>ST</sup> DECREE HOLDER/APPLICANT**

**PATRICK OBUYU.....2<sup>ND</sup> DECREE HOLDER/APPLICANT**

**= VERSUS =**

**BERNARD MULEMBO NAMWAMBA....JUDGMENT DEBTOR/RESPONDENT**

**AND**

**EXECUTIVE OFFICER,**

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT,**

**COUNTY GOVERNMENT OF BUSIA.....INTERESTED PARTY/RESPONDENT**

**R U L I N G**

1. The Application for determination is the Notice of Motion dated 18<sup>th</sup> December 2017 and filed on 3<sup>rd</sup> January 2018. It was brought under orders 1 rule 10(2) and 11 and 51 Rule 1 of the Civil Procedure Rules, and sections 1A, 1B, 34 (erroneously typed as 3A) presumably of the Civil Procedure Act and all enabling provisions of the law. The Applicants - **BONVENTURE ODEYO OBUYU** - and - **PATRICK OBUYU** - are decree holders in the suit herein. The Respondents are - **BERNARD MULEMBO NAMWAMBA** -who is the judgment debtor in the suit and the **EXECUTIVE OFFICER, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT, COUNTY GOVERNMENT OF BUSIA**, the intended Interested Party.

2. The Applicants having been successful in the main suit herein have brought this Application after hitting a snag in the implementation of their resultant decree issued on 8<sup>th</sup> September 2015. They seek the following orders:

(i) That the Honourable Court be pleased to grant leave to enjoin the County Government of Busia as an Interested Party/ Respondent herein pursuant to the statutory notice issued to it on 30<sup>th</sup> October 2017.

(ii) That upon granting of prayer (1) herein above, this Honourable Court be pleased to direct the Executive Officer, Ministry of Lands or Department of Lands in the County Government of Busia to implement fully this Honourable Court's decree dated 27<sup>th</sup> day of August, 2015 and issued on the 8<sup>th</sup> day of September 2015

(iii) That costs of the Application be provided.

3. There is a similar Application in the court file dated 20<sup>th</sup> December 2016 that seems to have been abandoned. The Application is opposed vide the Judgment Debtor's grounds of opposition dated and filed on 12<sup>th</sup> February 2018 as well as the intended Interested Party's grounds of opposition dated and filed on 14<sup>th</sup> June 2018. The Applicant filed a supplementary affidavit on 3<sup>rd</sup> May 2018 in response to the grounds of opposition. Parties then elected to proceed by way of written submissions. The Applicants' submissions were filed on 3<sup>rd</sup> July 2018 and the Judgment Debtor's were filed on 6<sup>th</sup> July 2018. Counsel for the Intended Interested Party did not file submissions but associated himself with the Judgment Debtor's submissions.

4. Following a judgment by Hon. Justice S. N Kibunja held in their favour on 27<sup>th</sup> August 2015, the Applicants obtained a decree issued on 8<sup>th</sup> September 2015. They sought to enforce *inter alia* the orders on the face of the decree stipulated as follows:

**“...THAT the Plaintiff’s case against the Defendant under the Plaint dated 29<sup>th</sup> March 2012 is granted in the following terms:**

- **A declaration is hereby issued that the suit Plot No. 20 Port Victoria is still part of the Estate of Elias Malomba Obuyu alias Malomba Oyier who died on 4<sup>th</sup> March 1983.**
- **The transfer of the said Plot to the name of the Defendant, Bernard Mulembo Namwamba that occurred in the year 2008 was unprocedural and done without due process and is hereby revoked.... ”**

5. The Application is based on the grounds that Plot No. 20 Port Victoria Market in Bunyala West location of Bunyala sub county (hereinafter the “suit property”) is registered in the name of the intended interested party who has custody of its title documents. The judgment debtor is registered as a lessee or allottee of the intended interested party to which it pays land rent and rates over the suit property. The Applicants further state the intended interested party was served with the decree which required them to register the suit property in the name of its original owner, the late Malomba Oyier and to delete the names of the judgment debtor with respect to the said plot. The intended Interested Party declined to do so because the decree was not addressed to it for implementation and they would not facilitate its execution unless they were required to by way of a court order which position led to the current Application.

6. The Respondents on the other hand opposed the Application on the grounds that the Court is functus officio, the intended Interested Party was not a party to the proceedings herein and was therefore not heard, the Applicants were employing unknown procedures in litigation and that the application is defective, a non-starter, an afterthought and an abuse of Court process.

7. In their Supplementary Affidavit, the Applicants were of the view that the Application being brought under section 34 of the Civil Procedure Act can be treated as a suit in its own right and questions of representation of parties who were initially not party to the suit can be determined in that capacity. They contended further that the Application is primarily between themselves and the intended Interested Party having been successful in their case against the Judgment Debtor. He is therefore a busy body and the crux of the matter is implementation of the decree which is solely within the mandate of the intended Interested Party.

8. I have read the submissions by both parties. The submissions espouse the positions taken by each side in the application and response. Ideally, the proper position is for a Plaintiff to enjoin all parties necessary for determination of his suit and from whom relief will flow in the event he is successful. The application is brought under Section 34 of the Civil Procedure Act (cap 21). That Section provides that any question arising between parties to the suit or their representatives relating to execution, discharge or satisfaction of the decree shall be determined by the court executing the decree. It is further provided that if an issue arises as to whether a person is a representative of a party, the issue shall be determined by the court.

9. Counsel for the Applicant felt that the court can invoke Section 34 to enjoin the intended party. But the opposing side took the position that the court is functus officio and, if anything, the intended Interested Party should have been enjoined much earlier in the suit, if at all.

10. In my view, Section 34 of the Civil Procedure Act (cap 21) is not appropriate. The Section names two categories of persons to whom it applies. These two categories are (a) the parties to the suit and/or (b) their representatives. And in case of representatives, the Section even foresees a situation where there can be a contention as to whether an intended party is a representative or not.

11. It is obvious in this matter that the intended Interested Party is not a party to the suit at all. It is clear too that the same party cannot be treated or deemed, by any stretch of imagination or logic, to be a representative of any party in the suit. A representative in my view would have to be somebody with the requisite succession grant if or where a party to the suit is deceased or a person with a power of attorney if a living party decides to appoint one. A representative can also be a party to the suit appointed through consent by other parties to the suit to represent them for purposes of execution. The intended Interested Party is not any of these. Section 34 therefore cannot apply because the intended Interested Party is not one of the parties envisaged by the Section.

12. It was submitted by the Respondent that the court is functus officio. I disagree with this position. A court of law normally becomes functus officio regarding a final judgement it has written and delivered. And it becomes so because after delivering such judgement, it has pronounced itself with finality. But we are here dealing with execution, which is a post-judgement stage in which the court that delivered a judgement is normally involved. At the execution stage, the court normally has an oversight, facilitative, administrative, and sometimes even judicial, role. The application at hand should be seen in this context.

13. It is now clear that Section 34 of the Civil Procedure Act (cap 21) is not applicable here. It is also clear that the court is not functus officio. A question now arises: Can the intended Interested Party still be enjoined as a party to the suit. To answer this question, one needs to appreciate some of the reasons why parties are enjoined to suit. One also needs to consider the particular reasons(s) why the intended Interested Party is sought to be enjoined in this matter.

14. To my mind, under Order 1 Rule 10(2) of Civil Procedure Rules, 2010, the power to amend or add parties may be exercised at any stage of the proceedings. And the court has power to allow such amendment or addition even at the post-judgement stage. This is so as long as something remains to be done to effectuate the judgment. All the court needs to consider is whether the presence of party is necessary to promote convenient administration of justice and/or whether such inclusion of a party may prejudice the already existing parties to the suit.

15. In this particular matter, judgement was delivered by court and the Respondent was found to have violated the law in transferring the suit land to himself. The Respondent is not shown to have appealed against the judgment. The intended Interested Party has custody of the records of ownership and it is desired that records should be changed to give effect to the judgement.

16. When approached to make the necessary changes, the intended Interested Party is said to have declined on the ground that it was never a party to the suit. Infact, had the intended Interested Party looked at the judgement and agreed to enforce it, the application at hand would not have become necessary.

17. And now in answer to the question whether such party can be added, it is obvious the answer is **YES**. The court is mandated to add a party at any stage of the case including the execution stage. No court of law would wish to see that its orders were issued in vain. It is always the duty of the court to ensure that a litigant gets and enjoys the fruits of his judgement. Enjoining the Interested Party in the suit becomes necessary to ensure that the party is within the eyes or purview of the applicable law. It then becomes easy to take action if the Interested Party becomes recalcitrant or evasive.

18. Courts in our jurisdiction have had occasion to allow joinder of parties in post-judgment stages. In **R V Commissioner of Lands: Misc. Appl. No. 96 of 1998**, the applicants applied to be made parties to the suit after it had already been concluded. They argued, *interalia*, that they had not been made aware of the proceedings. Wambiliangah J (as he then was) allowed the application saying, *interalia*, that the ultimate aim is to do justice.

19. In **MIKE MAINA Vs COMMISSIONER OF LANDS & others: Civil Appeal No. 221/1997**, a man was granted leave by the court of Appeal to challenge a decision of the High Court at the appellate stage even though he was not a party to the dispute at the High Court. Infact, in the suit, the man appeared to be the one appealing yet he was not a party to the dispute.

20. It is clear then that paramount in the consideration whether a party can be enjoined or not in a concluded case is the desire to see that justice is done and/or is not defeated. If the Interested Party in this suit is not joined, it is clear that the Applicant herein will never enjoy the fruits of his judgment. It is clear too that the court will have given a judgment in vain. It is for that reason that the application herein is allowed in terms of prayers 1 and 2. The Applicant however will pay the costs of the application. And this is because the mistake not to enjoin the Interested Party at the beginning was his in the first place.

**Dated, signed and delivered at Busia this 28<sup>th</sup> day of February, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Applicant: Present

2<sup>nd</sup> Applicant: Absent

Judgment Debtor/Respondent: Absent

Interested Party: Absent

Counsel of Applicants: Absent

Counsel of Judgment Debtor/Respondent: Present

Court Assistant: Nelson Odame