

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 190 OF 2014

LEONARD WAFULA SHIKUKU.....PLAINTIFF

VERSUS

MARK JUMA WAFULA.....DEFENDANT

DAVID BUNDU BUSOLO.....INTERESTED PARTY/APPLICANT

RULING

[1] The applicant in this case has brought this application under order 45 rule 1 of the Civil Procedure Rules and Sections 1A 1B 3A and 80 of the Civil Procedure Act. He prays for orders he be joined in the suit as an interested party and there be a stay of execution of the exparte Judgment and the decree herein pending the hearing of this application inter partes. He also wants the Court to review, vary and set aside the Judgment delivered on 27/7/2016 and all consequential orders therein and that the interested party be granted leave to file his defence together with supporting documents.

[2] The applicant's application is grounded on the fact that he purchased land parcel number Kimilili/Kibingei/4815 from the defendant herein on 30/4/2013 and was registered proprietor thereof on 1/10/2013. That that land is a result of subdivision of Kimilili/Kibingei/4425. He avers among other reasons that he was not served with the pleadings on this case. That he stands to suffer irreparably if the Judgment herein is executed. He argues that the subdivision of Kimilili/Kibingei/4425 introduced new proprietors to the suit land who essentially should have been enjoined in this suit before the suit was heard.

[3] The applicant annexed on his affidavit a memorandum of land sale agreement dated 30/4/2013 a copy of the Title deed number Kimilili/Kibingei/4815 dated 1st October 2013 when this application came for hearing on 28/11/2016 a consent order was entered into by the parties that written submissions be filed and exchanged within seven days for the applicant and that the respondent do reply within seven days of service by the applicant.

The applicant filed his submission on 7/12/2016. The respondent has not filed his submission. He however had filed a replying Affidavit in which he stated that the applicant's application is misconceived bad in law malafides and does not lie and should be dismissed with costs. He argued that the defendant herein had been served.

[4] Having perused the application of the applicant, I note that he is one of the beneficiaries of the titles cancelled by this Court. He had title then. He ought to have been served so that he could make his representations about his title. Indeed all other title holders arising out of the subdivision ought to have been served as well. I think a miscarriage of justice was occasioned on the part of the applicant.

Consequently, I set aside the Judgment entered herein and all its consequential orders. I do order that the applicant herein be made a party to this suit and all persons who are title holders pursuant to subdivisions of the suit land shall be served with the plaint herein. The suit shall be fixed for hearing on merits. The suit parcel and the subsequent subdivisions of the same shall be inhibited by the land Registrar and all dealings with the same shall be prohibited until further orders of this Court. The costs of this application shall be the suit.

It is so ordered.

Judgment read in open court in the presence of Madam Mumalasi.

DATED and **DELIVERED** at **BUNGOMA** this **30th** day of **March**, 2017.

S.N. MUKUNYA

JUDGE