



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT KISII
CASE NO. 1219 OF 2016
(FORMERLY HCC NO. 425 OF 1994)

NYOKAYE ONCHWARI.....PLAINTIFF

VERSUS

DAVID NDEGE ONCHWARI.....1ST DEFENDANT

JOHN MORIASI.....2ND DEFENDANT

R U L I N G

1. This matter has had a long history before the court. The plaintiff filed the suit vide a plaint dated 20th July 1994 seeking inter alia a declaration that $\frac{1}{2}$ of land parcel **LR No. Nyamaiya/3054** belongs to him and that the defendant should transfer the said $\frac{1}{2}$ portion to him. The matter in dispute was by consent of the parties on 13th October 1994 referred to arbitration by the District Officer, Nyamira who was to be assisted by 4 elders. The arbitration award was filed in court and the Hon. Justice Tom Mbaluto (as he then was) on 29th August 1995 entered judgment in terms of the award. A decree was extracted and issued on 15th March 1996 in the following terms:-

a. **That the judgment be and is hereby entered in terms of the award i.e the defendant is hereby ordered that $\frac{1}{2}$ acre or thereabouts of land parcel Nyamaiya/3054 belongs to the plaintiff and that the defendant is hereby ordered to transfer the said measurement or thereabouts from land parcel No. Nyamaiya/3054 and to vacate the said measurement of the land forthwith.**

b. **That a permanent injunction do and is hereby issued against the defendant his agents and/or servants from interfering with the plaintiff's parcel of land measurement of $\frac{1}{2}$ an acre or thereabouts.**

2. The court record shows that **LR No. West Mugirango/Nyamaiya/3054** was subdivided before the decree issued by the court was implemented and among the subdivisions was **LR No. West Mugirango/Nyamaiya/3132**. The plaintiff vide a chamber summons application dated 6th November 1997 applied to have the said land parcel **LR No. West Mugirango/Nyamaiya/3132** transferred to him by the defendant apparently in execution of the decree. The court (Hon. Justice Mbaluto) granted the plaintiff's prayer on 11th December 1997. Before this order was implemented land parcel **West Mugirango/Nyamaiya/3132** was subdivided to create **LR Nos. West Mugirango/Nyamaiya/3563** and

3564. Land parcel **LR No. West Mugirango/Nyamaiya/3563** measuring 0.207Ha was transferred to the plaintiff Nyokaye Onchwari on 4th November 2003.

3. I have set out the foregoing background in regard to this matter to contextualize the plaintiff/applicant's application dated 24th June 2015 which is the subject of this ruling. The application is expressed to be brought under Orders 1 Rule 3, 40 Rules 1, 2 and 5 of the Civil Procedure rules and Section 1A and 3A of the Civil Procedure Act. By the application the plaintiff/applicant inter alia seeks the following orders:-

1. That the honourable court be pleased to enjoin the 2nd defendant/ respondent in this matter.

2. That the 1st and 2nd defendants by themselves, their agents and/or servants or any other person claiming through their names be restrained by way of an interim injunction order of this court from constructing, trespassing, alienating, selling and/or in any other way interfering with the land parcel No. West Mugirango/Nyamaiya/ 3563 and No. West Mugirango/Nyamaiya/3564 pending the hearing and determination of this matter.

3. That the honourable court be pleased to order the subdivision of West Mugirango/Nyamaiya/3132 into two title deeds West Mugirango/Nyamaiya/3563 and No. West Mugirango/Nyamaiya/ 3564 be revoked and reverted back to the original number West Mugirango/Nyamaiya/ 3132 and be registered in the name of the plaintiff.

4. That the OCS Nyamira Police Station be ordered to enforce the compliance of the court orders.

4. The application is supported on the grounds set out on the body of the application and on the affidavit sworn in support by the plaintiff. The plaintiff states that he is the registered owner of land parcel **LR No. West Mugirango/Nyamaiya/3563** and that he has, his matrimonial home on land parcel **No. West Mugirango/Nyamaiya/3564**. He further states that the 1st defendant sold half of **LR No. West Mugirango/Nyamaiya/3054** which resulted in the subdivision of the land into two portions one of which was **LR No. West Mugirango/Nyamaiya/3132**. The plaintiff further states that although he had moved the court and land parcel **LR No. West Mugirango/Nyamaiya/3132** was given to him the 1st defendant unlawfully and illegally got **LR No. West Mugirango/Nyamaiya/3132** subdivided to create land parcels **West Mugirango/Nyamaiya/3563** and **3564**. The plaintiff avers that the 1st defendant has sold land parcel **West Mugirango/ Nyamaiya/3564** to the 2nd defendant who has commenced construction thereon and hence unless restrained will occasion the plaintiff irreparable damage.

5. The intended 2nd defendant in the replying affidavit sworn in response to the plaintiff's application dated 25th May 2016 seeking to cite the defendants for contempt for disobeying a court order granted by this court on 11th November 2015 deponed that he is the registered owner of land parcels **LR Nos. West Mugirango/Nyamaiya/3110, 3080, 2392** and **3070** all of which neighbour the applicant's land parcel **3563**. The intended 2nd defendant furnished copies of abstracts of title ("**JMI**") which attested to the fact. The 2nd intended defendant asserted that he had never been a party to the suit to be said to have disobeyed any order of the court. The 2nd intended defendant at any rate denied that he has undertaken any construction on **LR Nos. West Mugirango/Nyamaiya/3563** and/or **3564**.

6. The applicant and the intended 2nd defendant argued the application by way of written submissions. I have reviewed and considered the submissions filed by the parties and the issues that stand to be determined are firstly, whether there is a basis to have the 2nd interested party enjoined to the instant suit, and secondly, whether there is a basis to grant the order of injunction and revocation of titles in respect of **LR No. West Mugirango/Nyamaiya/3563** and **3564** and to restore the original title **West Mugirango/Nyamaiya/3132**.

7. Order 1 Rule 10 of the Civil Procedure Rules provides for the substitution and/or joinder of parties to a

suit. Order 1 Rule 10 (2) provides as follows:

(2) The court may at any stage of the proceedings, either upon or without the application of either party, order that the name of any party improperly joined, whether as plaintiff for 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.

Joinder of a party to a suit envisages a situation where the proceedings are ongoing and the suit has not been finalized. A party cannot be enjoined to a suit post judgment since the issues in the suit are deemed to have been finally determined, unless of course the judgment is set aside to permit for fresh proceedings in which the enjoined party participates.

8. In the present matter judgment was entered on 29th August 1995. As per the extracted decree issued on 11th March 1996 the plaintiff was entitled to a portion of ½ acre out of land parcel **West Mugirango/Nyamaiya/3054**. The plaintiff has predicated the instant application on the order granted on 11th December 1997 by Mbaluto, J. which inter alia provided:-

“That its hereby ordered that the portion No. West Mugirango/Nyamaiya/ 3132 to be transferred forthwith to the plaintiff/applicant’s name as it is the only portion left apart from what is occupied by the defendant/respondent.”

The application by the plaintiff that gave rise to the order was definitely an attempt to implement the judgment/decree of the court. The court record does not show the 1st defendant was served with that application. What is clear is that the order was granted ex parte. My view is that the order cannot be taken to have been a variation of the judgment which was specific that the plaintiff was entitled to ½ acre or thereabouts. A decree capturing what the judgment entailed was extracted and it was clear that the plaintiff was entitled only to a ½ acre portion of land.

9. The plaintiff agrees that when parcel **3132** was subdivided land parcel **3563** which measures 0.207Ha or 0.51acres was transferred to him. The plaintiff effectively got what he was awarded in the suit. It is worth noting that the plaintiff since 25th February 1998 when he obtained an order from the executive officer to execute the transfer in regard to land parcel **3132** no further action was taken in this file until 19th February 2015 when the plaintiff filed an application seeking to enforce the decree against the defendant but which application the plaintiff did not pursue but instead filed the present application. It is doubtful whether there was a decree that was capable of being executed since the decree that was issued in 1996 had become time barred after the expiry of 12 years from the date of its issue.

10. Having carefully considered the plaintiff’s application dated 24th June 2015, I find no basis to order the interested party to be enjoined as a defendant in the instant suit. There is no pending suit in which he can be enjoined the suit having been finally determined. The plaintiff got what he was awarded in the decree. He was not entitled to anything more than ½ acre or thereabouts and that is what he got when land parcel **West Mugirango/Nyamaiya/3563** was transferred to him. This parcel of land was hived from parcel **3132** which both parties agree formed part of the original parcel **West Mugirango/Nyamaiya/3054**.

11. On the basis of the analysis and findings that I have made hereinabove, it follows there can be no basis for granting the order of injunction sought and/or making an order revoking titles **LR Nos. West Mugirango/ Nyamaiya/3563** and **3564** and/or to restore title of land parcel **West Mugirango/Nyamaiya/3132**. The plaintiff’s application is without any merit and I dismiss the same with costs to the intended 2nd defendant/interested party. The interlocutory order of injunction granted in this matter is vacated and discharged.

12. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 28th day of April, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ayienda for Makori for the plaintiff

Ms. Mireri for Ochoki for the 1st and 2nd defendants

Milcent Court assistant

J. M. MUTUNGI

JUDGE