



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NUMBER 73 OF 2008

JUSTUS NYAMU & 2 OTHERS.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

ALFRED SAMBUT KIBOI.....INTERESTED PARTY

(Being an application by Mohamed Ali Mohamud to be enjoined in the matter as an interested party.)

RULING

Background

Mohamed Ali Mohamud filed the instant application dated 23rd March, 2017 seeking to be enjoined in the proceedings as the 2nd Interested Party. His interest in the proceedings is that he is the current registered proprietor of all that parcel of land known as LR. No. 36/Vol.VII/32 having acquired the same in 2014 from Wadajir (K) Limited. He is aggrieved by the fact that one Kehar Singh filed a Notice of Motion application dated 15th November, 2016 seeking, inter alia, to nullify all subsequent transfer of the subject property which includes the transfer to the applicant herein. In this regard, he contends that the Interested Party already on record one Alfred Sabut Kimboi ought to have enjoined him in the proceedings as he was aware that he was the registered owner of the land. His further case is that any orders given in the revision application will impact on his proprietary right to the property. It is therefore, in the interest of justice that he be enjoined in the proceedings so that he can ventilate his interest in the property.

The application is supported by the affidavit of the applicant sworn on 23rd March, 2017. Amongst the documents annexed to the affidavit is a sale agreement on the land between himself and Wadajir (K) Limited, Indenture dated 24th November, 2014 and Certificate of Postal Search indicating that as at 17th January, 2017, the applicant was the registered owner of the property.

Both the Interested Party already on record together with the Republic did not oppose the application. The applicant in the main application opposed the application vide a Replying Affidavit sworn by Kulwant Sihra as a lawfully appointed Attorney of the said Applicant pursuant to a Power Attorney donated to him. The affidavit was sworn on 18th May, 2017. The gist of the affidavit is that the said applicant was not a party to the criminal proceedings being **Cr. Case No. 5083 of 1991** which subsequently gave rise to **Cr. Rev. Application No. 73 of 2008**, the subject in this application. The deponent contends that the applicant was neither a complainant nor an accused person and he therefore has no *locus standi* to be

enjoined in these proceedings. Furthermore, the revision proceedings are not adjudicating over the proprietary rights of the parties over the subject property LR. No. 36/Vol. VII/32. The proprietorship of the property, it is contended, is subject of **Environment and Land Court case No. 154 of 2016 – Mehar Singh S/O Harry Singh vs Naomi Njeri Mungai and Alfred Sabut Kimboi** pending at Milimani High Court. As such, the applicant can canvass his interest in that suite. The Interested Party further deposes that this court has no jurisdiction to deal with a matter touching on the interest in the land and that enjoining the applicant will just but delay the disposal of the main application.

Submissions

Given that the State and the Interested Party on record were not opposing the application the submissions were made for the intended Interested Party by learned counsel, Mr. Mude and by Mr. Kibet for the Applicant in the main application who opposed the application. The application was canvassed before me on 7th June, 2017 by way of oral submissions. In addition Mr. Mude relied on a bundle of authorities filed on 5th June, 2017. The court will refer to the cited case law where need be.

According to Mr. Mude the test before the court is the determination of whether the applicant has demonstrated his interest in the matter to warrant his joinder. It was his case that the law was settled on the threshold that a party ought to demonstrate to warrant his joinder in a case. This was that they had a stake in the case. He relied on **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others [2015 eKLR]** to buttress this submission. He also cited the case of **Timothy Isaac Bryant & another v. Inspector General of Police & 3 others [2013] eKLR** which held that another factor the court needed to consider was the interest of justice. Further, the interest the party has in a case and how that interest would be affected if the party is not enjoined in the case is another consideration as was set out in the case of **Meme v. Republic [2004] 1 EA 124.**

Counsel submitted that what was at stake was that the intended Interested Party was the registered owner of the suit property and given that the main application sought the cancellation of the title it would be manifestly unlawful if the application proceeded without his participation. He was of the view that a refusal to enjoin him would prejudice him as the orders sought had far reaching effects including the invalidation of the title. In this regard, the opposition to this application was tantamount to violating the intended Interested Party's right to property.

In addition, counsel submitted that in determining whether a party should be enjoined in a matter, the court must exercise its inherent jurisdiction for the sake of doing justice. This consideration, according to Mr. Mude, tilted in favour of the Applicant. He argued that the circumstances of this case, *ab initio*, demanded that the Applicant in the original application enjoined the instant applicant as a party in the main application. He relied on **Taylor & another v. Lawrence & another [2002] 2 All ER 353** to buttress this point. Counsel urged that the application be allowed.

Learned counsel, Mr. Kibet relied on the Replying Affidavit sworn by Kulwant Sihra, the lawful attorney on behalf of the said Applicant, on 18th May, 2017. He submitted that the intended Interested Party lacked any interest that required to be protected in this matter. He submitted that the matter at hand was a criminal revision application which was inherently dealing with issues that had already been litigated. He submitted that the court would be considering fresh evidence on issues that did not exist at the time of the trial should the instant applicant be enjoined in the matter. Furthermore, the main order sought in the main application stems from the nullification of the proceedings in a previous matter. It thus meant that any transaction that took place after 2009 when the latter matter was decided was a nullity and the court cannot litigate on them again. It was also the counsel's view that this court could not deal with issues relating to disputed ownership of land as that squarely was within the jurisdiction of the Environment and Land Court. In any case, the Applicant had filed before that court Case No. 154 of 2016 where the Applicant should ventilate his interest. He submitted that if this court litigated on the Applicant's case, there was a likelihood of the danger of two courts arriving at different decisions.

On the cited case law, counsel submitted that that of **Skov Estate Limited & 5 Others v Agricultural Development Corporation, ELC No. 251 of 2012** addressed the need for joinder of a party based on

interest in a matter. The interest herein being proprietorship to land meant that it was an issue that could only be adjudicated by the ELC Court. On the other hand, **Timothy Isaac Bryant(supra)** addressed the joinder of a complainant which is not the case in the instant case. It was the counsel's submission that the application lacked merit and ought to be dismissed.

In reply, Mude submitted that the main application was only disguised as an invocation of Section 364 of the Criminal Procedure Code but which in actual sense was not the case. He cited that the application sought a revision order granted in a revision application, a procedure that cannot withstand the test of the law. He submitted that the case before the Environment & Land Court was dismissed and was awaiting reinstatement whose outcome was not predictable. He pleaded with the court to allow the application.

Determination

*The Applicant seeks to be enjoined in the matter on ground of his proprietary interest in L. R. No. 36/VII/32. He filed various documents that indicate that he is the current registered proprietor of the property in question having acquired it from Wadajir (K) Limited. His case is therefore that he is an interested party in the main revision application which revolves around the said land L.R. No. 36/VII/32. The Supreme Court set out the definition of an interested party in **Trusted Society of Human Rights Alliance v. Mumo Matemu (2015) Eklr (Sup. Ct. Pet. 12 of 2013 thus;***

“...an interested party is 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.”

*It must be noted that such applications are rare when a court is exercising its criminal jurisdiction especially in revision proceedings as was observed in **Timothy Isaac Bryant & 3 others v. Inspector General of Police & 3 others[2013] eKLR**, that:*

“...I must emphasize that allowing an interested party to participate in proceedings as the ones before me is the exception rather than the general rule. The duty lies with the court to determine, depending on the circumstances of the case whether or not the party should be enjoined...”

*The Applicant provided the court with a myriad of precedents which he relied on. This court is thankful for the precedents which proved quite helpful in arriving at an objective decision. However, the cases in question are distinguishable from the matter in question since they either were filed as public interest matters as in **Trusted Society(supra)** and **Meme v. Republic (Supra)** or by the complainant as in **Timothy Isaac Bryant(supra)** or related to joinder of parties under civil jurisdiction as in **Skov Estate Limited & 5 others v. Agricultural Development Corporation & another[2015] eKLR**, **Re I. G. Farbenindustrie A.G. Agreement[1943] 2 All ER 525** and **Pizza Harvest Ltd. v. Felix Midigo[2013] eKLR**.*

The Applicant submitted that the Respondent (Applicant in the main application) was aware that he was the registered proprietor of the property and should have enjoined him suo moto. He pointed at the failure to enjoin him as a veiled attempt to get orders without his knowledge. He emphasized that if he was not enjoined as a party, his interest to protect his right to own property would be prejudiced. As a party, he is of the view that he will enable the court to sufficiently and completely adjudicate upon and settle all questions arising.

*In determining this application, I will be cognizant of the fact that joinder of parties is the exception rather than the rule. In so holding, I borrow the words from **R v. Kigera (2006)1 KLR(E&L) 132** that;*

“The rules of natural justice are inherent in all proceedings be they judicial or administrative, unless of course, there is express provision to bar a court from hearing any interested party

...

No person should be made to feel that his interests have not been safeguarded or at least not been borne in mind by the court when arriving at a decision which affects him.”

Therefore, the test is whether if the application is not allowed, the court will lock out the Applicant in adjudicating his interest in the matter. That is to say that he will be prejudiced by virtue of not being in a position to canvass his proprietary right in the aforesaid property No. L. R. No. 36/VII/323. It is gainsaid that his proprietorship of the said piece of property flows from the title initially held by the Interested Party, Alfred Sambut Kiboi. Thus, both parties' interests are similar. To be more specific, the Applicant's interest directly devolved from that of the Interested Party. In black and white, the two parties are victims of purchasing land from persons who bought the land from the original owner. That being said, it is my view that to allow the Applicant to be enjoined in the matter would be to include a party whose interest in the matter is already being pursued. In ***Skov Estate Limited (supra)*** the court, in dismissing an application for joinder of parties held that:

“Litigation invariably affects many people.... It does have ramifications for others as well and one may very well argue that these others have an interest in this litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the question involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another.”

Although the cited case was adjudicated in a civil matter, it is persuasive with regard to the test that a party seeking to be enjoined in a matter must show the interest in the matter that must be more than “being merely affected”. I must qualify this statement whilst applying it in a criminal matter that in addition to showing an interest in a matter, a party must set out reasons why he/she thinks that that interest may be infringed, violated or impugned by failure to enjoin him/her.

In the instant case, the Applicant contends that his inclusion in the matter is necessary to ensure that his proprietary rights are protected. Having earlier found that his proprietary right devolves from that of the Interested Party, it stands to reason that he is well represented in the main application. It follows that the orders that may issue affecting the Interested Party will flow through to the instant applicant. However, I consider the fact that the Interested Party is not too keen to take part in the proceedings as attested by an application by his lawyer, Aminga, Opiyo, Masese & Company Advocates who intended to pull out from representing him. The same was dated 23rd November, 2016 but by a ruling of this court dated 14th December, 2016 it was dismissed. But one question remains tricky; will the Interested Party powerfully pursue the stake with the zeal it deserves? I am skeptical on this issue given the indication that the representative of the party had wished to pull out from the entire proceedings. Therefore, keeping away the applicant may be extremely prejudicial to him. Whether, he and the Interested Party already on record will walk through the journey side by side stand to be tested by time. If that happens, well and good. If it proves shaky and difficult, their roles may provide complementary evidence to the court. I thus conclude that it is only justiciable to allow the Applicant canvass his legal right independently. I accordingly allow the application with no orders of costs. It is so ordered.

Dated and Delivered at Nairobi This 2nd August, 2017

G. W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Cohan h/b for Anan for proposed interested party (Applicant).

2. *Mr.Kibet h/b for Litor for the Applicant in the main application.*
3. *Mr. Opiyo h/b for Sumba the Interested Party in the main application.*
4. *Miss Sigei for the State/Respondent (DPP).*