



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 158 OF 2014

BARUTHI BUNDI.....PLAINTIFF

-VERSUS-

DOMITILA OBALA OUMA.....1ST DEFENDANT

ALADIN INVESTMENTS LIMITED.....2ND DEFENDANT

THE LAND REGISTRAR KWALE.....3RD DEFENDANT

RULING

(Application by 1st defendant seeking orders to reopen the hearing of the suit which was marked as closed and for leave to issue a third party notice; rules regarding third party notice requiring that notice be issued within 14 days of close of pleadings; application filed more than two years from the last pleading and after the hearing of the case has concluded; leave to issue third party notice declined; on reopening of the case, application premised on the basis that the Land Registrar produced documents which had earlier not been discovered and were not in the knowledge of the applicant when she testified; strictly such application ought to have been made before the hearing of the case was closed, but court, in its discretion, so that no prejudice can be caused to the parties, allowing the application; hearing reopened and all parties given the liberty of adducing additional evidence to address the evidence given by the Land Registrar)

1. The application before me is the one dated 26 April 2021 filed by the 1st defendant. She seeks the following orders: -

a) Spent (certification of urgency).

b) Spent (stay of proceedings pending hearing of the application).

c) That this honorable court be pleased to review, vary and/or set aside the orders of the court issued on 10 February 2020 and 12 April 2021 which directed all parties to file written submissions for purposes of obtaining a judgment date.

d) That the 1st defendant herein be granted leave to issue third party notice against Hussein Abdalla Mugereza out of time and that the said notice be served upon the said intended third party within a period of 7 days only.

e) That the third party notice herein filed and attached hereto be deemed duly filed on record.

f) That the plaintiff's 1st and 2nd defendants' case be reopened only for purposes of taking evidence of the third party's evidence in respect to the 3rd defendant's evidence and documents produced in court on 10 February 2021.

g) That the costs of this application be provided for.

2. To put matters into context, this case was instituted on 30 November 2011. In the plaint, the plaintiff pleaded to be the rightful owner of the land parcel Kwale/Funzi Island/12 having purchased it in May 1993 from the previous proprietor, one Hussein Abdalla Mugereza through one Mohamed Shikeli Kassim, who held a power of attorney donated by the said Mr. Mugereza. He pleaded that he resided on the suit property until the year 1997 when he had to leave owing to tribal clashes. He pleaded that his title was fraudulently transferred to the 1st defendant on 25 February 1997, and that subsequently on 16 January 1998, the title was again transferred to the 2nd defendant. In the suit, he sought orders inter alia for cancellation of the titles of the 1st and 2nd defendants and for a declaration that he is the rightful owner of the suit land.

3. The 1st defendant/applicant filed defence on 14 November 2012 vide which she pleaded that she purchased the suit land directly from Mr. Mgereza in the year 1997. She pleaded that she subsequently transferred her interest to the 2nd defendant. She averred that she had no knowledge of the same plot belonging to the plaintiff. The position of the 2nd defendant is that it properly purchased the suit land from the 2nd defendant in 1997 and a transfer was effected in its favour in January 1998.

4. The matter first came up for hearing on 14 February 2019 before my predecessor, Omollo J. On that day, Mr. Mwandeje, learned State Counsel on behalf of the 3rd defendant, the Land Registrar, Kwale, sought leave to file appearance and defence but was not averse to the matter proceeding. There was no objection from either counsel for the plaintiff, the 1st defendant. The court directed the Attorney General to file and serve the documents of the 3rd defendant within 14 days. The matter proceeded with the plaintiff testifying. The case was then adjourned to allow the plaintiff call the Land Registrar as his witness with the matter being fixed for further hearing on 1 March 2019.

5. In the meantime, on 15 February 2019, the defence of the 3rd defendant was filed. In the defence, it was denied that the plaintiff is the bona fide proprietor of the suit land. When the case came up for further hearing on 1 March 2019, the plaintiff was absent and the court marked the plaintiff's case as closed. The applicant (as 1st defendant) then proceeded to testify. She also called Mr. Mgereza (the original proprietor of the suit land) as her witness and a Mr. Mchambi Juma. She then closed her case. It is pertinent to state that the evidence of Mr. Mgereza is that he sold the suit land directly to the applicant. The case was then adjourned to 11 July 2019 for the hearing of the case of the 2nd defendant. On the said date, the 2nd defendant's witness testified and the 2nd defendant closed its case. The case was then adjourned to take the evidence of the 3rd defendant. It was at this time that Omollo J was transferred and I took up the matter. I gave directions for the matter to proceed from where it had reached and it did come up for hearing of the 3rd defendant's case on 10 February 2021 when the Land Registrar, Kwale, one Dick James Safari, testified. His evidence mainly touched on the record of the land parcel file maintained in the land registry at Kwale. The record consisted of various documents evidencing the transactions recorded. One involved a transfer from the plaintiff to the applicant and indeed the evidence of Mr. Safari was that the title of the applicant was as a result of a transfer from the plaintiff and not Mr. Mgereza. The documents in the parcel file were produced by consent of all counsel. After Mr. Safari had testified, I marked the hearing of the matter as closed, and directed parties to file their final submissions before I could give a date for judgment. It is then that this application was filed.

6. The application is supported by the affidavit of Cynthia Ombat, learned counsel for the 1st defendant/applicant. She has deposed that throughout the trial, the 3rd defendant (the Land Registrar, Kwale) did not express any intention of relying on any documents and did not file any. She deposed that, however, when the Land Registrar testified on 10 February 2021, he produced several documents which had not been filed in court nor served upon all parties for scrutiny prior to the hearing date. She deposed that his evidence raised new issues and new facts, which were not within the applicant's knowledge when she was giving her evidence, and introduced transactions between the applicant and the plaintiff, of which the applicant had no knowledge. She deposed that from the evidence of the Land Registrar there is need to join a 3rd party to the suit (Mr. Mgereza) to disclose and clear material facts.

7. The plaintiff has opposed the application through the replying affidavit of Kioko Maundu, who is also learned counsel appearing for the plaintiff. He has deposed inter alia that this application has been filed two and a half months after the close of the 3rd defendant's case. He does not think that the reasons given are proper to allow for issue of a Third Party Notice. He deposed that once a case has started, Third Party proceedings cannot be taken.

8. Nothing was filed by the 2nd defendant, and Ms. Janmohamed, learned senior counsel for the 2nd defendant, left it entirely to the court. Mr. Waga, learned counsel holding brief for Mr. Mwandeje, informed court that the 3rd defendant was not opposing the application.

9. Mr. Maundu filed written submissions to oppose the application while Ms. Ombat made oral submissions urging me to allow the application. I have taken these into account.

10. There are two issues raised in the application. First, is the prayer seeking to file and serve a Third Party Notice, and secondly, is the prayer to recall witnesses.

11. Starting with the issue of the Third Party Notice, Third Party Proceedings are covered under Order 1 Rule 15 which provides as follows :-

“15 (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

12. It will be seen from the above that a third party notice is to be issued within 14 days of close of pleadings. The last pleading was the defence filed by the 3rd defendant on 15 February 2019. If the applicant needed to file any third party proceeding, then she needed to do so within 14 days of the said date. This application was filed on 21 April 2021, more than two years to the close of pleadings and after the parties had testified. If indeed the applicant thought that the defence raises an issue that requires the issue of third party proceedings, then she had sufficient time to file one. Given the length of time that has lapsed, I am not persuaded that this is a fit case to grant leave for issuance of a third party notice. I also find it curious that the applicant wishes to issue a third party notice to a person who is her witness and who she has called to assist her in her case. This is an adversarial system and it doesn't augur well that a witness of a party is at the same time being sued by the same party. The above aside, I see no prejudice to the applicant if I reject this prayer for issuance of a third party notice, for whatever she wishes to raise in the third party proceeding can as well be raised in a separate suit. I thus dismiss the prayer for issuance of a third party notice.

13. The second issue is whether I should allow for recall of witnesses. I agree with the applicant that the Land Registrar did not file any documents alongside his pleadings and also did not file a list of documents as is required by the Civil Procedure Rules. However, no objection was raised to the production of documents when he testified. There was certainly opportunity for the applicant, through her counsel, to object to the production of the documents which was not taken up, or alternatively apply, immediately after Mr. Safari had testified and before the hearing was closed, to recall the applicant or any of the witnesses that had testified so that the evidence adduced by Mr. Safari can be canvassed. That should have been the proper thing to do. To wait until parties have filed submissions upon conclusion of the suit, then spring an application of this nature, is in my view completely unprocedural and a practice that ought not to be encouraged.

14. This however is a court of justice. I am ready to go out of my way to ensure there is a level playing field for all parties. If I can avoid it, I wouldn't wish to shut any party out from presenting evidence which is critical to the determination of any case. In the circumstances of the matter before me, it is apparent to me that Mr. Safari did avail some new evidence and documents which the parties may not have had the benefit of canvassing before they proceeded to testify and close their respective cases. There is also the fact that the defence of the 3rd defendant was actually filed after the plaintiff had testified, which strictly speaking ought not to have been allowed, though the parties did consent to the same. I find that there are some special circumstances in this case and so that there is opportunity for the whole evidence to be presented, it is in my opinion, prudent and justiciable, that the case of all parties, not just that of the applicant, be reopened, so that all parties may have an opportunity to comment on the evidence of the Land Registrar which is certainly critical to the determination of this suit.

15. I will therefore allow this application only to the extent of allowing the parties to reopen their respective cases. All parties are at liberty to adduce additional evidence to address the evidence that was availed by the Land Registrar. I will give further directions on how to go about this after delivery of this ruling.

16. The only issue left is costs. I had mentioned earlier that an application such as this is not one to be encouraged for there was a chance to apply to recall witnesses before the close of the hearing. I have only allowed this application completely out of my discretion and the need to ensure that justice is not only done but seen to be done. I am in those circumstances unable to grant costs to the applicant. However, in the event that the plaintiff succeeds in his suit, he will have the costs of this application. For the other parties, I make no orders for or against them in respect of the costs of this application.

17. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA