



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL SUIT NO. 116 OF 2014.

BELIS EVAYO OLAKAPLAINTIFF/RESPONDENT.

VERSUS

HOSKIN INDIMULI OLAKADEFENDANT/RESPONDENT.

AND

LAWRENCE OJIAMBO MUGENI.....INTERESTED PARTY/APPLICANT

R U L I N G

1. **LAWRENCE OJIAMBO MOGENI**, hereinafter referred to as the Interested Party, filed the Notice of motion dated 3rd April, 2014 seeking for among other orders a temporary injunction to restrain Belis Evayo Olaka, hereinafter referred to as the Plaintiff, from dealing with land parcel Busia/Township/125. He also prays for the consent order dated 22nd October, 2013 and all consequential orders including that dated 6th November, 2013 to be set aside. The Applicant set out two main grounds on the application. The application is supported by the affidavit of the Applicant and that of Hoskin Indimuli Olaka, the Defendant herein, both sworn on 3rd April, 2013. The main contention by the Interested Party and Defendant in their respective affidavits was that the signature attributed to the Defendant on the consent dated 22nd October, 2013 was not made by the Defendant. They further contend that the ownership of parcel Busia/Township/125 had been settled in favour of the Interested Party in Kisumu H.C.C.C. No. 151 of 2009 on 16th October, 2009.

2. The Plaintiff opposed the application and filed a replying affidavit sworn on 14th April, 2014. He depones that the Interested Party was not a party in this suit and therefore his application cannot be sustained. The Plaintiff further deponed that the orders of 16th October, 2009 in Kisumu H.C.C.C. NO. 151 of 2009 conferring proprietorship of the suit property to Interested Party was stayed on 26th October, 2009. He further added that the Interested Party was not a party to the consent of 22nd October, 2013 and cannot therefore move the court to set it aside.

3. The Defendant filed an affidavit sworn on 30th September, 2014 in opposition to the application. He confirmed that this suit was settled through the consent between him and the Plaintiff. He annexed copies of two letters dated 4th November, 2010 and 7th January, 2010 from the Chief Land Registrar and Commissioner of Lands respectively confirming that the suit land, Busia Municipality parcel 125, had been allocated to John Kayeli Olaka and not Lawrence Ojiambo Mugeni (Interested Party). The Defendant filed an affidavit headed replying affidavit sworn on 19th January, 2015 more or less reiterating the contents of the earlier affidavit sworn on 30th September,

2014. He depones that the consent of 22nd October, 2013 was entered by him freely. He also disowned the supporting affidavit said to have been sworn by him on the 7th April, 2014 and filed by the Interested Party in support of this application.

4. The counsel for the parties consented to proceed with the application through written submissions. The Interested Party's counsel filed the written submission dated 16th March, 2015. The counsel for the Defendant filed theirs dated also 16th March, 2015 on the 18th March, 2015. The counsel for the Plaintiff adopted the written submissions filed for the Defendant.

5. The court has considered the submissions filed by counsel, the contents of the affidavits filed herein, grounds on the application and the pleadings generally and come to the following determinations.

6. DETERMINATIONS:

- a. That the court should determine first whether the Interested Party is a party in this suit. Secondly, whether the ownership of the suit land had been settled by consent dated 16th October, 2009 in Kisumu H.C.C.C. No. 151 of 2009 and if so, whether the Defendant had capacity to enter into the consent of 22nd October, 2013 with the Plaintiff in this case. Finally, whether the Interested Party was supposed to be involved in the consent of 22nd October, 2013.
- b. That by an order of this court dated 23rd June, 2010, Kisumu H.CCC. No. 151 of 2009 was among the suits consolidated with this case. That order has not been vacated and or set aside. The court has perused the original court record of the Kisumu H.CCC. No. 151 of 2009 which is annexed to this file and the parties are Lawrence Ojimabo Mugeni as the Plaintiff and Hoskin Indimuli Olaka as the Defendant. Lawrence Ojiambo Mugeni is the Interested Party/Applicant and Hoskin is the Defendant/2nd Respondent in the current application. The subject matter of Kisumu H.CCC. No. 151 of 2009 is Busia Municipality 7983/125 which is the one of the subject matters in the current suit Busia ELC. No. 116 of 2014 (Formerly Busia H.CCC. No. 15 of 2009). (***See the plaint dated 18th May, 2009 with Belisi Ovayo Olaka and Hoskin Indimuli Olaka as Plaintiff and Defendant respectively.***) The Interested Party had filed the Notice of Motion dated 3rd December, 2009 seeking to vacate the orders of 26th November, 2009 among other prayers. The order of 26th November, 2009 was injunctive orders against the Defendant over the suit land and had been issued pursuant to the application dated 23rd November, 2009. The court's ruling dated 22nd June, 2010 clearly shows that the Interested Party participated in the hearing of the Plaintiff's application dated 22nd February, 2010. The foregoing shows clearly that the Interested Party is a party to this case by dint of at least the court order of 23rd June, 2010 consolidating the Kisumu case in which he is the Plaintiff with this case. The Interested party has capacity to bring the application subject matter of this ruling.
- c. That having found as in (b) above and considering that the Interested Party had a claim over the same suit land subject matter of the consent between the Plaintiff and Defendant dated 22nd October, 2013, the two parties to the consent had an obligation to obtain his concurrence before filing the consent in court. The said consent order was filed in court without full disclosure and is incapable of being taken as a full settlement of the ownership of the suit property in Kisumu H.CCC. No. 151 of 2009 and this case.
- d. That the Defendant and the Interested party had entered a consent dated 16th October, 2009 in Kisumu H.CCC. No. 151 of 2009 awarding or the suit land to the Interested Party. It is therefore surprising that the same Defendant entered into a consent dated 22nd October, 2013 in this case giving the same land to the Plaintiff without first vacating the consent of 16th October, 2009 and obtaining the concurrence of the Interested Party. The order of 26th October, 2009 in Kisumu H.CCC. No. 151 of 2009 had only stayed the consent order of 16th October, 2009. The consent order of 16th October, 2009 has not been set aside or vacated and remains on record.
- e. That the affidavit said to have been sworn on 7th April, 2014, but actually sworn on 3rd April,

2014, by the Defendant and filed by the Interested Party in support of his application having been disputed by the Defendant, is hereby expunged from the court record for the following reasons;

- i. The jurat is on a separate page.
- ii. The Interested Party did not rebut the Defendant contention that he did not make the said affidavit and further that the signature on it was not his.
- f. That the parties in the consolidated cases have been filing a multiplicity of applications instead of taking steps to set down the suits for hearing. This only contributes to delaying the finalization of the cases and the court takes this early opportunity to express its displeasure to the parties and their counsel. The court advises that parties and counsel take immediate steps to set down the suits for hearing of the main cases and in the meantime the inhibition order issued on the suit land title on 9th April, 2014 will remain in force till further orders.
- g. That though the Interested Party prays for the order of 6th November, 2013 to be set aside, the copy of the order was not annexed to the application. The court has also perused the court record and does not contain any order dated 6th November, 2013. The court cannot issue an order to set aside a non-existent order.

7. That having found as above, the court find that the Interested Party's application dated 3rd April, 2014 has merit and is party allowed as follows;

- a. That the consent order between the Plaintiff and Defendant dated 22nd October, 2013 and adopted by the court on 24th October, 2013 be and is hereby set aside.
- b. That the parties shall take steps to set down the main suits for hearing within the next 60 days.
- c. That the inhibition order against the suit property issued on 9th April, 2015 to remain in force pending hearing and determination of this suit.
- d. That costs of the application dated 3rd April, 2014 be in the cause.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON18thDAY OF JUNE, 2015.

IN THE PRESENCE OF;

PLAINTIFF/RESPONDENT.....ABSENT

DEFENDANT/RESPONDENT.....ABSENT

INTERESTED PARTY/APPLICANT.....ABSENT

**COUNSEL. MR. WERE AND MR. JUMBA FOR PLAINTIFF AND DEFENDANT
RESPECTIVELY**

JUDGE