



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 156 OF 2010

JAMES OWUOR AMOLO

(Suing as the legal representative of

JACTONE AMOLO OYARE, deceased)PLAINTIFF

VERSUS

PETER ADONGO OKONGO DEFENDANT

RULING

1. The Plaintiff, James Owuor Amolo is the legal representative of the estate of Jacktone Amolo Oyare (hereinafter referred to as “the deceased”) while the defendant, Peter Adongo Okongo is the legal representative of the estate of Pius Okongo Odera (hereinafter referred to as “Odera”). The deceased brought this suit against the plaintiff on 9th June, 2010 seeking an order that the register for LR No. Kanyamkago/Kajulu/488(hereinafter referred to as “the suit property”) be rectified by the cancellation of the name of the defendant and the replacement thereof with the name of the plaintiff as the registered owner thereof. In his plaint, the deceased had contended that he purchased the suit property from Odera in the year 1970 and had occupied the same with his family for over 39 years. The deceased stated that when he carried out a search on the title of the suit property on 22nd September, 2009, he found out that the suit property was registered in the name of the defendant.
2. The deceased averred that the defendant thereafter started putting up structures on the suit property and cultivating the same thereby interfering with the deceased’s normal activities on the suit property. Together with the plaint, the deceased filed an application by way of Chamber Summons dated 3rd June, 2010 in which he sought a temporary injunction to restrain the defendant from in any way interfering with, wasting, damaging, alienating, constructing on and/or doing any other thing on the suit property pending the hearing and determination of this suit. The deceased’s application came up for hearing before Makhandia J.(as he then was) on 30th June, 2010 when the same was allowed as prayed.
3. While this suit was pending, an order was issued by the Senior Principal Magistrate’s Court at Migori in Migori SPMC Misc. Application No. 37 of 2010(hereinafter referred to as “the Migori Case”) on 27th September, 2011 for the eviction of the deceased from the suit property. The deceased filed another application by way of Notice of Motion dated 3rd October 2011 for a stay of execution of the said order which application was heard and allowed conditionally by R.Lagat-Korir J, on 5th October 2012. By the time this ruling was delivered, the deceased had passed away on 5th March, 2012 and as such could not comply with the conditions that had been imposed by the court.

4. On 11th April, 2013, the plaintiff herein applied to be substituted in this suit as plaintiff in place of the deceased and for the review of the orders that were made by R. Lagat-Korir J. on 5th October, 2012 aforesaid so that he can comply with the conditions that were given therein. The plaintiff was granted leave to be joined in the suit in place of the deceased on 6th June, 2013 while the orders that were granted by R. Lagat-Korir J. on 5th October, 2012 were reviewed by this court on 16th May, 2014. This court ordered a stay of the orders that were given in the Migori case for the eviction of the deceased from the suit property on condition that the plaintiff would execute a bond in the sum of Ksh.100,000/= as security for costs within 60 days from the date of the order and that the parties would comply with Order 11 and thereafter set down this suit for hearing within 120 days failure to which the stay would lapse automatically.
5. From my perusal of the court record, I have noted that the plaintiff has not complied with the said orders that were given herein on 16th May, 2014 with the result that a stay of the order for the eviction of the deceased from the suit property that was given in the Migori case has lapsed. The plaintiff has now filed a yet another application by way of Notice of Motion dated 24th February 2015 under Order 1 rule 3 of the Civil Procedure Rules and Section 63(e) and 100 of the Civil Procedure Act seeking the following orders;-

1. **Spent**

2. **That court be pleased to enjoin John Angino Oduke and Mary Awach in this suit as the 2nd and 3rd defendants respectively.**
3. **That after granting prayer (2) above the court be pleased to order the plaintiff to amend his plaint to enjoin John Angino and Mary Awach as 2nd and 3rd defendant in the suit herein.**
4. **That the attached copy of the draft plaint be allowed (sic) as properly filed and served upon payment of the requisite court fees.**
5. **That costs of this application be provided for.**

6. This application was supported by the affidavit of the plaintiff sworn on 24th February, 2015. In his affidavit, the plaintiff stated that despite the fact that this court made an order on 30th June 2010 for the parties to maintain the status quo pending the hearing and determination of this suit, the defendant has proceeded to transfer the suit property to John Angino Oduke and Mary Awach, the proposed, 2nd and 3rd defendants. The plaintiff has contended that this move is calculated to defeat the claim herein. The plaintiff annexed to his affidavit a copy of a certificate of official search on the register for the suit property dated 11th December, 2014 which shows that the suit property was registered in the names of the proposed 2nd and 3rd defendants on 13th June, 2012.
7. The plaintiff has contended that in the circumstances, it is necessary that the said John Angino Oduke and Mary Awach be joined in this suit as co-defendants otherwise this court may end up issuing orders in vain against the present defendant who has already disposed of the suit property. The plaintiff has contended that if the orders sought are not granted he is likely to suffer irreparable loss and damage.
8. The plaintiff's application was opposed by the defendant through a relying affidavit sworn on 26th May 2015. In his affidavit, the defendant stated that the plaintiff's application is an abuse of the court process of the court because he (the defendant) acquired the suit property lawfully after following the due process and as such was entitled to dispose of the same to the proposed 2nd and 3rd defendants. The defendant termed the plaintiff's application as frivolous and vexatious on the ground that the plaintiff had failed to comply with the conditions that were imposed by the court herein on the 16th May 2014 upon which the plaintiff had been granted a stay of execution of the eviction orders that were issued in the Migori case.
9. The defendant has contended further that the proposed 2nd and 3rd defendants are the lawful proprietors of the suit property having acquired the same from the defendant. The defendant has contended that he acquired the suit property after the deceased was found to have obtained the title to the suit property fraudulently by a criminal court at Migori. The defendant has contended that the joinder of the proposed 2nd and 3rd defendants in this suit would be a waste of judicial time.

10. When the application came up for hearing before me on 28th August 2015, the parties agreed to argue the same by way of written submissions which were duly filed by both parties. I have considered the plaintiff's application, the affidavit in support thereof and the submissions by the plaintiff's advocate. I have also considered the affidavit in reply by the defendant and the defendant's written submissions that he filed in person.
11. As I have stated earlier in this ruling, on 16th May 2014, I allowed the plaintiff's application for stay of the decree and orders that had been issued in the Migori case for the eviction of the deceased from the suit property on certain conditions which the plaintiff seems not to have met. The defendant's contention in the present application is that the said orders of stay having lapsed, he was within his right to transfer the suit property to the proposed 2nd and 3rd defendants. As I have mentioned above, on 30th June, 2010, this court (Makhandia J.) issued an order of a temporary injunction restraining the defendant from wasting, damaging, alienating, constructing on and/or doing anything on the suit property pending the hearing and determination of this suit. This order was made on the plaintiff's application for injunction that was filed on 9th June, 2010. That order has not been varied or set aside. The application that was made by the plaintiff seeking a stay of execution of the decree and eviction order that was issued in the Migori case was made subsequent to the injunction application aforesaid and after the said injunction order had been granted.
12. In my view the orders that were made by R. Lagat-Korir J. on 5th October, 2012 and which were reviewed by this court on 16th May, 2014 had no effect on the injunction order that was given by Makhandia J. on 30th June, 2010. The defendant was still bound to respect and obey the said injunction order whether or not the plaintiff had complied with the subsequent orders that were given by R. Lagat-Korir J. and by this court aforesaid. In the circumstances, it is not open for the defendant to argue as he has done herein that the plaintiff having failed to meet the conditions that were imposed herein on 16th May, 2014, he was at liberty to dispose of the suit property. The defendant's other argument that the deceased had acquired the suit property fraudulently is also irrelevant. That is an issue that the court would deal with at the trial. I am of the view that the defendant had no legal justification for transferring the suit property to the proposed 2nd and 3rd defendants while this suit is still pending hearing and determination.
13. The application before me is seeking the joinder of the proposed 2nd and 3rd defendants into this suit. Order 1 rule 10 (2) of the Civil Procedure Rules empowers the court at any stage of the proceedings upon application by either party or suo moto to order the name of a person who ought to have been joined or whose presence before court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on a similar provision, the authors of **Sarkar's Code of Civil Procedure (11th Ed. Reprint 2011 vol. 1. P 887)** stated that:-

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit but all persons necessary for a complete adjudication should be made parties.”

14. Similar sentiments were expressed in Court of Appeal case of **Central Kenya Ltd –vs- Trust Bank & 4 Others, Court of Appeal, Civil Appeal No. 222 of 1998**(unreported) where it was stated as follows regarding the guiding principles in amendment of pleadings and joinder of parties:-

“All amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

The Court of appeal of Tanzania, while considering the provisions of their Code of Civil Procedure which is similar to our Order 1 rule 10 (2) of the Civil Procedure Rules in the case of **Tanga Gas Distributors Ltd –vs- Said & Others [2014] E. A 448** stated that, the power of the court to add a party to proceedings can be exercised at any stage of the proceedings and that a party can be joined

in a suit even after judgment where damages are yet to be assessed and that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable.

15. It is not disputed that John Angino Oduke and Mary Awach, the proposed 2nd and 3rd defendants are now the registered proprietors of the suit property. The suit property was transferred to them by the defendant while this suit in which the ownership of the said property is in issue as between the plaintiff and the defendant is pending and while there is an injunction in force restraining the defendant from selling or transferring the property to a third party. As the current owners of the suit property, the proposed defendants may be affected by the order that the court would make in this suit. The presence of the proposed 2nd and 3rd defendants in the suit is therefore necessary to enable the court to adjudicate the dispute herein fully and finally as between all the parties interested in the same. In my view the joinder of the proposed 2nd and 3rd defendants in this suit is required by the very essence of justice that demands that a party should not be condemned unheard.
16. In conclusion, I find no merit in the grounds that have been put forward by the defendant in opposition to the application herein. I therefore allow the plaintiff's application dated 24th February, 2015 in terms of prayers 2 and 3 thereof. The plaintiff shall amend the plaint to join the new parties to the suit within 14 days from the date hereof. The costs of the application shall be in the case.

Delivered, Dated and Signed at Kisii this 27th day of August, 2015.

S.OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Defendant present in person

Mr. Omwoyo court clerk

S.OKONG'O

JUDGE