



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO. 614 OF 2006 (OS)

JAMES MASILA MUTUA.....APPLICANT

VERSUS

JOHN MUTIO MUTUA.....1ST RESPONDENT

FLORENCE NDINDA MUTUA.....2ND RESPONDENT

RULING

1. This application is brought by a Notice of Motion dated 23rd December, 2011 and taken out under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 3 and 15 of the Civil Procedure Rules, and all other enabling provisions of the law. In it the Applicant makes two principal prayers – that he be admitted as an interested party in this matter and that the orders of Aluoch J made on 16th November 2006 be vacated.
2. Upon being served, the Respondent filed a Replying Affidavit on 18th September, 2012 opposing the application. The main grounds of opposition are that the Notice of Motion is founded upon falsehoods, incorrect statements and misrepresentation of material facts, that the application has been made too late in the day as the orders issued by Aluoch J were made on the 17th November, 2006, that both Respondents have never been administrators of the estate of the late Titus Mutua Kilomo, that the Applicant herein entered into a Sale Agreement with the Respondents with full knowledge that the Letters of Administration had not been confirmed, neither had all the beneficiaries granted their consent to the sale nor had the Court granted leave for the sale and hence the purported Sale Agreement had no legal basis therefore, and taking of possession of any part of the estate of Titus Mutua Kilomo(deceased) is an illegality and cannot be sanctioned by any order, that the said alleged Interested Parties cannot claim not to have been served with any court papers leading to the issuance of the said order by Aluoch J as they were neither party to the suit nor beneficiaries in the Succession matter in the estate of the deceased and that the interested parties can recover their losses from John Mutio Mutua and Florence Ndinda Mutua and indeed the two had through their Advocates on record agreed to refund the interested parties their monies before the Gacheche J.
3. The parties filed their written submissions on 6th and 8th May 2013 respectively. The Applicant submits that he entered into an agreement with the Respondents on 9th June, 2004 to purchase a property known as LR. No.12251/31(Original No. 12251/6/16) Nairobi for the sum of Kshs. 4,

000, 000.00; that in accordance with the terms of the said agreement, he paid a deposit of Kenya Shillings 400,000 to the Respondents' lawyers, Messrs. Muniafu Ondari & Co. Advocates.

Further, that on 21st December, 2004, the Applicant was authorized in writing to take possession of the property under purchase awaiting issuance of the title from the Lands Office. The Applicant submits the title document was then issued dated 8th February, 2005 and a copy sent to his lawyers. Further, the Applicant did subsequently discover sometimes in 2011 that an Order had been issued by Aluoch J, which had wide and dramatic consequences; that neither the Applicant nor the more than five (5) parties who had purchased and developed the properties sub-divided out of LR No. 12251/6 Langata were served with the said Originating Summons in spite of the fact that they were directly affected by the Orders sought. The Applicant has developed the property it has purchased and it is now worth at least Kshs. 25, 000,000.00 and that it would be a massive miscarriage of justice for the Orders to remain on record. Further, that the Applicant has a constitutional right to be heard in respect of the said application which was allowed without the Court having heard his side of the story.

4. On his part, the Plaintiff submitted that the 1st and the 2nd Respondents purported to enter into contractual agreements with the interested parties herein for the purchase of purported sub-plots excised from the whole LR. No. 12251/6 Langata, which transactions on the face value could not be enforceable as they contravened the mandatory provisions of Section 82(b) (ii) of the Law of Succession Act. He also submitted that the purported sale of LR No.12251/6 by the two administrators was done on the premise that all the beneficiaries had consented to such sale which is incorrect. He submitted that the principle that 'you can only pass title to that which you own' is more apt in the circumstances. He further submitted that HCCC No. 614 of 2006 (OS) involved the beneficiaries of the deceased and the interested party had no colour of right to purport to be served with Orders when they were strangers to the court, and that nothing prevented them from being enjoined to the suit as interested parties had they opted to, as their advocates were very much abreast with the suits through various correspondences with the Advocates for the Respondents. It was further their submission that the interested party herein cannot move the Court as an innocent purchaser for value as he together with all of the other interested parties were fully aware that the letters of administration issued were not yet confirmed, neither had all the beneficiaries granted their consent to the sale nor had the court granted leave for the sale.
5. It was further their submission that the Purchaser's advocates let down their clients by failing to act diligently in the transaction. They did not cause to have the property valued to discern its true value and confirm whether the vendors herein had the legal capacity to transact and dispose of the estate of the deceased. The Applicant's advocates ought to have exercised due diligence while engaging in the transaction, their failure to exercise such due diligence should not lead to the suffering of the beneficiaries of the deceased who were innocent bystanders in the whole affair. It was their contention that the Applicant is better suited to seek relief from the vendors rather than a misguided legal assault on the beneficiaries of the estate who are innocent bystanders.
6. It is submitted further that on 11th May 2010 all the interested parties entered into a consent that was adopted by the court consolidating all suits filed that touched on the property LR 12251/6 Langata. By the said consent he parties agreed to be bound by all orders that were in existence at the time of consolidation of the suits, and as the applicant failed to enter into reservations on the same he remains bound by the orders made. It was their contention that the effect of the instant application is to seek to lift the veil of the consent order of consolidation dated 11th May 2010 and attack orders made in HCCC No.614 of 2006, without first applying for a review or setting aside of the said order by this court or moving the Court of Appeal on appeal to vacate the consent order. They further contend that the application is an afterthought and a mere smokescreen designed to frustrate the beneficiaries of the deceased from rightfully inheriting their father's estate, and that the application is an abuse of the court process.
7. I have carefully considered the application, the affidavits on record as well as the written submissions by rival parties. I have asked myself whether the Applicant herein has met the legal threshold for enjoining a party as an interested party in a suit. Order 1 Rule 10(2) of the Civil

Procedure Rules, 2010 provides thus:

*“The court may at any stage of the proceedings... and on such terms as may appear to the court to be just, order ...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 adjudicate upon and settle all questions involved in the suit, be added.**”*

8. Under this provision a person other than the plaintiff or defendant, may be added as a party to the suit provided that his presence before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The Applicant herein has submitted that by way of an Agreement for Sale dated 9th June 2004, he entered into an agreement with the Respondents to purchase the property known as LR. No. 12251/31 (Original No.12251/6/16) Nairobi for the sum of Kshs. 4, 000, 000.00. This fact has been acknowledged by the protestor herein albeit he contends that the Applicant herein is not an innocent purchaser for value. The Protester contends that all the interested parties, including the Applicant herein, were aware that the letters of administration issued in respect of the estate of the deceased had not yet been confirmed neither had all the beneficiaries granted their consent to the sale nor had the court granted leave for sale.
9. Clearly, there are questions that should be settled, and one of such questions in my view would be whether or not the Applicant herein was an innocent purchaser as has been argued by the protestor herein. It is my considered view that the Applicant’s presence before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.
10. On the second prayer, which is that the order of Aluoch J of 16th November 2006 be vacated, I agree with the argument of the protestor that the Applicant ought to have filed an appeal asking the Appellate court to quash the orders made by Aluoch J, alternative he should have sought a review. Even if this court had the jurisdiction to handle the application as framed, I note that the said order was made in November 2006, the Applicant chose to file his application on 23rd December 2011, five years after the said Order had been made and no reasonable explanation has been offered as to the delay. This court has no jurisdiction to entertain a matter that should be before the Court of Appeal.
11. In the end I will allow the application in terms of Prayer 1 of the application dated 32nd December 2011. Prayer 2 of the said application is however dismissed. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST DAY OF March, 2014.

W. MUSYOKA

JUDGE