



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 2 OF 2004

NATHAN NGUMABO KATA.....PLAINTIFF/RESPONDENT

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

SAMUEL KANOGO RITHO.....2ND DEFENDANT/RESPONDENT

SOPHIA ABDILLAHI CHACHA.....INTERESTED PARTY/APPLICANT

RULING

This ruling is in respect of a Notice of Motion dated 2nd December 2020 by the Interested Party/applicant seeking the following orders: -

- 1. Spent.**
- 2. Spent.**
- 3. Pending the hearing and determination of the Notice of Motion the Plaintiff/Respondent by himself, servants or agents be restrained by way of a court order from selling, transferring, charging or in any other way whatsoever from dealing with the suit land L.R. No. Chembe/Kibabamshe/414.**
- 4. The Honourable Court be pleased to review and set aside the judgment delivered on the 20th day of September 2019 and all the consequential orders and or decree be vacated.**
- 5. The Interested Party be enjoined in the proceedings and canvass her and the suit be heard afresh so that the Interested party be allowed to agitate its position.**
- 6. Costs be provided for.**

Counsel agreed to canvass the application vide written submissions which were duly filed.

INTERESTED PARTY'S SUBMISSIONS

The Applicant relies on the grounds on the face of the application and the Supporting Affidavit of Sophia Abdillahi Chacha where she deponed that suit land L.R. No. Chembe/Kibabamshe/414 was initially allocated to one Karisa Dhuri through Settlement Fund Trustee, who subsequently sold the same to a company Moor Park Limited.

On 9th June 2000, the suit land was subdivided into two portions being L.R. No. Chembe/Kibabamshe/708 and Chembe/Kibabamshe/709.

The Applicant further deponed that subsequently she purchased Chembe/Kibabamshe/708 and a title issued in her favour on 19th June 2020. According to the Applicant, this court was not informed of those facts before arriving at the decision delivered on 20th September 2019.

Counsel for the Applicant submitted that the Applicant being the proprietor of the suit land, and failure to participate in the proceedings was a violation of her constitutional rights guaranteed under Article 40, 48 and 20 of the Constitution of Kenya, 2010.

Counsel also submitted that the Plaintiff has attempted and unsuccessful tried to sell the property which has resulted in proceedings in **CMCC ELC NO. 12 of 2020 (Franco Esposito –VS- Jonathan Ngumbao Kata**

Further that in the lower court, the firm of Richard Otara represents the Plaintiff Franco Esposito who has sued Jonathan Ngumbao Kata (Defendant in the case) and in the present case Jonathan Ngumbao Kata is represented by the said firm of Richard Otara where he is the Plaintiff hence the representation is irregular as there is conflict of interest

Mr. Kibunja also submitted that the Notice of Appointment of Advocates filed by Khaminwa & Khaminwa Advocates and dated 30th September 2021 in the lower court is meant to conceal the fact that Richard Otara & Co. Advocates had filed Grounds of Opposition on behalf of Franco Esposito on 24th August 2021. Counsel urged the court to allow the application as prayed.

PLAINTIFF//RESPONDENT'S SUBMISSIONS

In response to the Application, the Plaintiff/Respondent filed a Replying Affidavit on 19th March 2021 where he deponed that office of the Chief Land Registrar was served with the impugned Judgment on 30th September 2019. And on 15th June 2020, the Kilifi Land Registrar sought verification of the decree from the Registrar to this court; which was in turn given vide the Deputy Registrar's letter dated 16th June 2020. Subsequently, a title for the suit land was issued in the Plaintiff's name on 17th August 2020.

The Plaintiff further deponed that the suit land was initially registered to the 2nd Defendant/Respondent on 30th May 1978, title which was at some point revoked reverting the same to the government. This decision was later on revoked causing the title to revert to the 2nd Defendant as per the exhibited ruling and order dated 25th November 1993 in **Miscellaneous Cause Number 185 of 1987**.

Respondent deponed that said Karisa Dhuri was at all times aware of this suit for reasons that the firm of Kilonzo & Aziz Advocates who filed a Replying Affidavit in this matter on 28th August 2015, was the same firm that did the transfer from Karisa Dhuri to Moor Park Limited. That firm filed an application to join the owners of the subdivided plots to the suit, application which was abandoned midway.

Counsel relied on section 7 of the Civil Procedure Act and submitted that the present application was res judicata as there was **Nairobi HCC No. 2387 of 1987 and HCC Misc. No. 185 of 1987**.

It was the Plaintiff's submission that the firm of Kibunja & Associates was not properly on record for failure to file a Notice of Appointment as provided for under Order III Rule 1 of the Civil Procedure Rules. Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination are as follows; -

- 1. Whether the Applicants are entitled to an order of joinder in the suit after judgment?**
- 2. Whether the Applicants are entitled to the review and setting aside of Judgment and the reopening of the suit for the purpose of hearing of their evidence in the matter?**
- 3. Orders to be granted**

The Applicant has stated that she was not aware of the suit herein and that she was not heard before the Judgment was delivered. It is trite principle that the court has unfettered discretion to review and set aside judgments on such conditions as it may deem just.

The court in **Elisha Kare Busienei & 3 Others vs Japheth Kipyego Chepkwony & 2 Others [2020] eKLR** explained that an application for joinder in which the Applicant seeks setting aside of a Judgment is legally competent.

Similarly, in **J M K -vs- M W M & Another [2015] eKLR** the Court of Appeal set aside an order of the Employment and Labour Relations Court made on an application filed after Judgment seeking to join the Applicant as a party in the matter. The court in that case considered two factors: - that the Applicant's reputation was at stake in that the Employment and Labour Relations Court had found the Applicant guilty of sexual harassment without granting the Applicant an opportunity to be heard; and that the application had alongside the order of joinder sought the setting aside of the Judgment.

The same court in **J M K -vs- M W M & Another [supra]** observed as follows regarding joinder of parties after delivery of Judgment: -

“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 motu, to order the name of a person who ought to have been joined or whose presence before the 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 this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state 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.”

Article 50 of the Constitution of Kenya, 2010 guarantees the right to be heard, therefore, the duty of this court in the instant application is to establish whether the Applicant should have been heard, and if she was accorded such an opportunity to be heard. The issue is whether she has a legal stake in the suit which must be considered.

It was not in dispute that the suit land was at some point sub-divided into two portions- Chembe/Kibabamshe/708 and 709. The Applicant exhibited a copy of a title of Plot 708 registered in her name on 19th June 2020 approximately 1 year after the impugned Judgment was delivered.

She also exhibited a Sale Agreement dated 30th October 2018 and a certificate of official search dated 13th October 2015 confirming the said Moor Park Limited as the proprietor of Chembe/Kibabamshe/708. This shows that the Applicant has a legal stake as earlier stated and the same should not be ignored by shutting her out.

The Applicant has also demonstrated that the orders emanating from the impugned Judgment would greatly affect her interest in the suit land. Indeed, the Applicant was never served with any notice regarding this suit.

The issues of representation raised by Mr. Kibunja shall be dealt with at the hearing of the main suit when Counsel can have an opportunity to respond to the issues raised.

Joinder of the Interested Party in this case means that the Judgment has to be set aside to allow her to participate in the fresh hearing of this suit. The Court has discretion to grant an order of review and setting aside the Judgment.

I have considered the application, the submission by Counsel and find that the application has merit and is hereby allowed as prayed. The Interested Party to file any pleadings if need be within the next 14 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF MARCH, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.