



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 38 of 2010

DIOCESE OF KISII REGISTERED TRUSTEES.....1ST PLAINTIFF

COUNTY COUNCIL OF NYAMIRA.....2ND PLAINTIFF

VERSUS

PETER ATAMBO MUGOYA.....1ST DEFENDANT

JACKSON NYAKUNDI MASANKWA.....2ND DEFENDANT

MAURICE NYACHWAYA.....3RD DEFENDANT

RULING

1. The 1st plaintiff brought this suit against the defendants on 15th February, 2010 through the firm of Masore Nyangau & Co. Advocates. The 1st Plaintiff claimed that, at all material times the 1st Plaintiff was the registered proprietor of all that parcel of land known as L.R.No. Central Kitutu/Mwamanwa/1594(hereinafter referred to only as “**the suit property**”)which was allocated to the 1st Plaintiff by the 2nd Plaintiff. The 1st Plaintiff claimed that, in the month of November, 2009 when the 1st Plaintiff’s servants and agents went to the suit property to fence the same, the defendants mobilized the public to resist the 1st Plaintiff’s development of the suit property. The 1st Plaintiff claimed that although the defendants were arrested and charged in court, the defendants had not stopped interfering with the 1st Plaintiff’s use of the said parcel of land. It was the 1st Plaintiff’s case that unless restrained by an order from this court, the defendants would continue disrupting the 1st Plaintiff’s development activities on the suit property. The 1st Plaintiff prayed for an order of injunction to restrain the defendants from trespassing onto or interfering with the 1st Plaintiff’s occupation of and/or development on the suit property. The 1st Plaintiff also sought an order for general damages for trespass. The defendants entered appearance and filed a statement of defence and counter-claim through the firm of J.O. Soire & Co. Advocates. In their counter-claim, the defendants added the 2nd Plaintiff herein as the 2nd defendant in the counter-claim pursuant to the provisions of Order 8 rule 7 of the old Civil Procedure Rules. The defendants took out summons to enter appearance and served the same upon the 2nd Plaintiff. In their defence, the defendants denied the 1st Plaintiff’s claim against them and contended that the 1st Plaintiff had obtained title to the suit property irregularly. In their counter-claim, the defendants who claim to be officials of **Kiangoso Sub-location Environmental Committee** claim that the suit property was part of a forest and water catchment area which was held by the 2nd Plaintiff in trust for the residents Nyamira.

The defendants claimed that the allotment of the suit property by the 2nd Plaintiff to the Plaintiff was unlawful for want of consent from the Minister for Local Government, the Commissioner of Lands, the Land Control Board and the National Environment Management Authority. The defendants contended that the title to the suit property held by the 1st Plaintiff is invalid, irregular and unlawful. The defendants sought in their counter-claim a declaration that the transaction between the 1st and 2nd Plaintiffs that led to the 1st Plaintiff being issued with a title to the suit property was irregular, invalid and unlawful. The defendants also sought an order for the cancellation of the title to the suit property. The 2nd Plaintiff entered appearance to the Defendants' summons to enter appearance on 27th April, 2010 through the firm of Asati & Company Advocates. Without deciding the issue, in my view, the defendant's counter-claim was properly brought in this suit as it concerned the same subject matter. For reasons that I could not understand from the record, the 1st Plaintiff was not comfortable with the defendants' counter-claim being accommodated in this suit. On 31st March, 2010, the 1st Plaintiff moved the court by way of chamber summons application for inter alia an order that the defendant's counter-claim be pursued in an independent and separate suit. On 6th May, 2010, the 1st Plaintiff's application aforesaid came up for hearing before **M.A.Makhandia J.** From the record of that day, Mr. Nyangau appeared for the 1st Plaintiff, Mr. Soire appeared for the defendants while Mr. Letangule held brief for Mrs. Asati for the 2nd Plaintiff herein. On that day, Mr. Nyangau sought leave of the court to amend the Plaintiff and add County Council of Nyamira, the 2nd Plaintiff herein as 2nd Plaintiff. This request was to me very strange indeed. Mr. Nyangau was acting for the 1st Plaintiff and the 2nd Plaintiff herein that he wanted to join in the suit as 2nd Plaintiff had already been joined in the suit by the defendants as the 2nd defendant in their counter-claim and the 2nd defendant had already engaged an advocate and entered appearance. I wonder how the County Council of Nyamira, the 2nd Plaintiff herein would have been added into the Plaintiff drafted by the firm of Masore Nyangau & Company, Advocates who were acting for the 1st Plaintiff as the 2nd Plaintiff while they were being represented by the law firm of Asati & Company, Advocates. When the court asked Mr. Soire for the defendants and Mr. Letangule who was holding brief for Mrs. Asati for the 2nd Plaintiff whether they had any objection to Mr. Nyangau's application, both informed the court that they had no objection. In the circumstances, an order was given by consent allowing the 1st Plaintiff to amend its plaintiff to add the 2nd Plaintiff herein as a party to the suit within 7 days. The defendants were also granted leave to file an amended defence and counter-claim within 15 days from the date of service of the amended plaintiff upon them. Nothing was said about the 2nd Plaintiff herein who by that time was the 2nd defendant in the counter-claim. Following the said order, the firm of Masore Nyangau & Co. Advocates proceeded to amend their Plaintiff by adding the County Council of Nyamira as 2nd Plaintiff. The defendants also amended their statement of defence and counter-claim by which amendment, they removed the County Council of Nyamira as a 2nd defendant in the counter-claim but retained the counter-claim against them as 1st and 2nd Plaintiffs

2. On 17th September, 2010, the 2nd Plaintiff herein through the firm of Asati & Company Advocates filed an application by way of chamber summons under **Order 1 Rules 10, 13 and 22** of the **Civil Procedure Rules** and **Sections 1A and 3A** of the **Civil Procedure Act, Cap.21 Laws of Kenya**, for an order that the name of the 2nd Plaintiff be struck out from the amended Plaintiff. The application was brought on the grounds that the 2nd Plaintiff was joined as 2nd Plaintiff in this suit improperly and that the presence of the 2nd Plaintiff is not necessary for the determination of the real issues in controversy in this suit. The other grounds are that, the 2nd Plaintiff has no claim against the defendants and as such, they stand to suffer loss and prejudice by their presence in this suit as 2nd Plaintiff. The 2nd Plaintiff's application was opposed by the 1st Plaintiff and the defendants. In their grounds of opposition dated 12th May, 2011 and filed in Court on 24th May, 2011, the 1st Plaintiff opposed the application on the grounds that the joinder of the 2nd Plaintiff in this suit was consented to by the advocate for the 2nd Plaintiff and as such unless the other parties consent, the 2nd Plaintiff cannot be removed from the suit. The other grounds on which the 2nd Plaintiff's application is opposed is that, the suit property was allocated to the 1st Plaintiff and as such the 2nd Plaintiff is a necessary party to the suit whose presence would enable the

court to completely and effectually determine the dispute between the parties. The 1st Plaintiff also contended that the application has been brought after unreasonable delay. The defendants opposed the application on the same grounds as the 1st Plaintiff. In their grounds of opposition dated 6th June, 2011, they contended amongst others that, the 2nd Plaintiff has not given good grounds for setting aside the consent order that added the County Council of Nyamira as a 2nd Plaintiff in this suit. The defendants contended further that striking out the 2nd Plaintiff as a party to the suit would be very prejudicial to the defendants who were the ones who had brought the 2nd Plaintiff to this suit initially, as a defendant to their counter-claim before it was made a Plaintiff by consent.

3. When the 2nd Plaintiff's application came up for hearing before me on 29th January, 2013, Mrs. Asati who appeared for the 2nd Plaintiff in her submission reiterated the contents of the affidavit of **Joseph Otieno Okech** which was filed in support of the application and the grounds set out in the body of the application the contents of which I have already mentioned herein above. Mrs. Asati submitted that the 2nd Plaintiff was surprised that it had been joined in this suit as they had not given any instructions to the advocate for the 1st Plaintiff to have then joined in the suit. Counsel contended that the 2nd Plaintiff was not a party to the consent order made on 6th May, 2010 and as such was not bound by the same. In any event, counsel submitted that, grounds for setting aside a consent order were apparent on the face of the consent namely, the fact that the advocate for the 1st Plaintiff who sought the joinder of the 2nd Plaintiff had no instruction from the 2nd Plaintiff to do so and that the action of the said advocate bordered on fraud. Counsel submitted that the 2nd Plaintiff's position in the suit originated by the 1st Plaintiff is ambiguous and embarrassing. Counsel submitted that, the 2nd Plaintiff not only have no claim against the defendants but have no way also of pleading in the suit as the 2nd Plaintiff was joined in the suit brought by the 1st Plaintiff through its advocate Masore Nyangau who had no instructions to act for the 2nd Plaintiff. There is no way therefore in which the 2nd Plaintiff's advocates, M/s Asati & Company Advocates can participate in the suit as they don't own the pleadings on which the 2nd Plaintiff was joined as a party to this suit. Mr. Soire advocate for the defendants in his response to the submission by the advocate for the 2nd Plaintiff submitted that it would be unfair to strike out the name of the 2nd Plaintiff from this suit. According to counsel, it is the defendants who had brought the 2nd Plaintiff into this suit as a defendant to the counter-claim and when the 1st Plaintiff's advocate suggested on 6th May, 2010 that the 2nd defendant be removed from being a defendant in the counter-claim and made a 2nd Plaintiff, the defendants honestly believed that the 1st Plaintiff's advocate had instructions from the 2nd Plaintiff to join them in the suit as co-plaintiff. Counsel submitted that the presence of the 2nd Plaintiff in the suit is necessary and if the 2nd Plaintiff is not comfortable in being a Plaintiff, the position should revert to that prior to the amendment of the Plaintiff. In other words, the 2nd Plaintiff would be struck out as 2nd Plaintiff in the Plaintiff but will revert to its earlier position of being a 2nd defendant in the defendant's counter-claim.

4. I have considered the 2nd Plaintiff's application together with the affidavit in support thereof. I have also considered the submission of the 2nd Plaintiff's advocate. Equally, I have considered the grounds of opposition filed by the 1st Plaintiff and the defendants and the submission by the advocate for the defendants. The view I take on the matter is as follows. The 2nd Plaintiff was joined in this suit as 2nd Plaintiff on 6th May, 2010. Prior to that, the 2nd Plaintiff was a 2nd defendant in the counter-claim that the defendants had filed against the 1st Plaintiff herein and the 2nd Plaintiff. As I had stated earlier in this ruling, the 2nd defendant had been joined in the counter-claim by the defendants on the ground that the suit property was allocated by the 2nd Plaintiff to the 1st Plaintiff illegally. The defendants therefore sought to have the transaction between the Plaintiffs declared illegal and the 1st Plaintiff's title cancelled. To that extent, the 2nd defendant for all intents and purposes was a necessary party to the suit. When an order was made to join the 2nd Plaintiff in the suit as a Plaintiff instead of being a defendant in the counter-claim, the defendants also amended their defence and counter-claim by which amendment, the usual heading which is normally added in a defence and counter-claim when a party wants to add a

person who is not already a party to the suit as a defendant to the counter-claim (under Order 7 rule 8 of the Civil Procedure Rules) was deleted. The defendant's counter-claim therefore was reduced to a normal counter-claim by defendants against Plaintiffs. If the 2nd Plaintiff is struck off the suit, the result would be that the defendants would have to start the whole process again of seeking the leave of the court to amend their defence and counter-claim so as to put the 2nd Plaintiff in its position prior to the amendment complained of. I am therefore in agreement with the submission by the advocate for the defendants that the orders sought if granted would be prejudicial to the defendants. The court order aforesaid by which the 2nd Plaintiff was joined in this suit as 2nd Plaintiff was given by consent of all the parties. I am not in agreement with the submission by the 2nd Plaintiff's advocate that the said order came as a surprise to the 2nd Plaintiff and that the 2nd Plaintiff was not a party to and is not bound by the said consent order. As I had already mentioned, the 2nd Plaintiff was represented by an advocate known as Letangule who held Mrs. Asati's brief before **Justice M.A.Makhandia** when the consent was recorded. Letangule consented to the order joining the 2nd Plaintiff into the suit as 2nd Plaintiff. The 2nd Plaintiff is therefore bound by the consent order and as such must give valid grounds before the said consent order can be set aside which essentially is the order sought by the 2nd defendant herein. The law on setting aside consent orders or decrees is now well settled. Since consent is an agreement between parties, it can only be set aside on the same grounds on which a contract may be set aside. These include, mistake, fraud and misrepresentation. In my view, the 2nd Plaintiff's application should have sought a review of the order of 6th May, 2010 on any of these grounds and not the striking out of its name from the suit under **Order 1 Rules 10, 13, and 22** of the **Civil Procedure Rules**. The 2nd Plaintiff having been brought into the suit as a Plaintiff by consent, the provisions of order 1 cited above would not apply. Under **Article 159(2) (d)** of the **Constitution of Kenya, 2010** and **Sections 1A and 1B** of the **Civil Procedure Act, Cap.21 Laws of Kenya**, I will treat the 2nd Plaintiff's application as if it is seeking a review of the order made on 6th May, 2010. As I have already stated, a consent order may be set aside or varied on account of mistake, fraud or misrepresentation. I am satisfied that the consent order made on 6th May, 2010 was made by mistake and can be set aside or varied on account of that mistake or on account of error apparent on the face of record. As submitted by the advocate for the 2nd Plaintiff, the firm of Masore Nyangau & Company, Advocate was not instructed by the 2nd Plaintiff to act for it. In the circumstances, the said firm of advocates could not join the 2nd Plaintiff as a co-Plaintiff in this suit in which they were acting only for the 1st Plaintiff and were aware that the 2nd Plaintiff was being represented by the firm of Asati & Company Advocates. The other mistake arises from the effect of the amendment which resulted in two Plaintiffs in one Plaintiff being represented by two different law firms. This has made it impossible for the 2nd Plaintiff's advocates to participate in the proceedings as they do not own and are not parties to the amended Plaintiff that was filed by the firm of Masore Nyangau & Co. Advocates. For the reasons given above, I am satisfied that this is an appropriate case, in which this court should exercise its discretion to review its orders made on 6th May, 2010. I hereby make the following orders;

i. the order made on 6th May, 2010 is hereby varied by setting aside the leave that was granted to the 1st Plaintiff to amend the Plaintiff to incorporate County Council of Nyamira as a party to this suit and the leave granted to the defendants to amend their defence and counter-claim;

ii. Consequent to the above, the amended Plaintiff dated 11th May, 2010 and filed in court on 12th May, 2010, the amended written statement of defence and counter-claim dated 27th May, 2010 and filed in court on the same day and the 1st Plaintiff's Reply to Defence and Defence to Counter-claim dated 7th June, 2010 and filed in court on 9th June, 2010 are hereby struck out and expunged from the court record;

iii. this suit shall proceed on the basis of the pleadings filed by the parties prior to 6th May, 2010. The parties are however at liberty in the usual manner to amend the said pleadings with leave of the court;

iv. the 1st Plaintiff is at liberty to pursue his application dated 29th March, 2010. In the event that

the Plaintiff decides to pursue the said application, the time within which he should file his reply to defence and defence to counter-claim would be extended by 14 days from the date on which a decision is made on the said application, otherwise, the 1st Plaintiff is hereby granted leave to file a fresh, his reply to defence and defence to counter-claim within 21 days from the date hereof ;

v. the 2nd Plaintiff/Applicant herein is also granted leave to file its defence to the defendants counter-claim within 21 days from the date hereof.

vi. as there is no clear winner in the application before the court, the costs shall be in the cause;

vii. in view of the far reaching consequences of the orders that I have made, the parties are at liberty to apply.

Dated, signed and delivered at KISII this 15th day of March, 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:-

No appearance for the 1st plaintiff

Miss Sagwa for the 2nd Plaintiff

Mr. Soire for the defendants
Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**

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