Marisin v Siwon & 27 others; Kichapa (Intended Interested Party) (Environment & Land Case 69 of 2005) [2022] KEELC 3075 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3075 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 69 OF 2005

MC OUNDO, J

MAY 26, 2022

BETWEEN

KIPNGENY MARISIN ..... PLAINTIFF

AND

CHRISTOPHER SIWON & 27 OTHERS ..... DEFENDANT

AND

ROSE CHESANG KICHAPA ..... INTENDED INTERESTED PARTY

RULING

1. Before me for determination are two applications, the first one filed by the intended interested party herein dated the June 2, 2020 and brought pursuant to the provisions of order 22 rule 22, order 45 rule 1, 2, order 1 rule 10, order 51 rule 1 of the *Civil Procedure Rules* and sections 3 and 3A of the *Civil Procedure Act* and all enabling provisions of the law where the intended the interested party seeks for stay of execution of a judgment delivered on 20th June 2018 and amended on July 26, 2018, and all consequential orders.

2. The said application was supported by the grounds thereto and the supporting affidavit of Rose Chesang Kichapa, the applicant herein, dated the June 2, 2018 as well as their written submissions.

3. The intended interested party seeks to stay of execution of a judgment delivered on June 20, 2018 and amended on July 26, 2018 for reasons that although she was not a party to the suit and neither was her parcel of land being Transmara/Olosakwana "B'/1299, as per annexure RCK 1, a subject matter in the concluded suit, yet her title was among the parcels of land included in the amended judgment that were cancelled. That she had therefore been condemned unheard despite there having been no Summons to Enter Appearance served upon her. That she had only became aware of the suit after receiving a letter from the Land Registrar requiring her to surrender her title deed for cancellation. That since this was a discovery of new and important information touching on the suit herein, that in the best interest of

justice, the order made on 26th July 2018 ought be set aside and/or reviewed as she risked being evicted from her property. It was her contention was that there would be no prejudice suffered by the Plaintiff were the application allowed.

4. The interested party relied on the decided case in *Ali Bin Khamis vs Salim Bin Khami Kirobe & others* [1956] 1EA 195 as cited with approval in *James Kanyitta Nderitu & Another vs Maros Philotas Ghikas & another* [2016] eKLR to submit that where an order was made without service upon a person who is affected by it, procedural cock-ups would not deter the court ex-debito justitiae from setting aside such order.

5. That the cancellation of her title deed greatly affected her proprietary right to own property as was enshrined under article 41 of *the Constitution* and further went against the provisions of section 26(1) of the *Land Registration Act*. That the evidence in the plaintiff's pleading did not touch on her parcel of land which was a first registration.

6. Her submissions further were that the amendment of the judgment had introduced new matters that had not been part of the suit and which had changed the Plaintiff's cause of action. This was an error on the face of the record and which this court ought to rectify by reviewing and/or setting aside the order made on July 26, 2018. That she was the absolute and indefeasible proprietor of the parcel of land known as Transmara/Olosakwana "B'/1299 unless it could be proved that she had acquired the said parcel of land by fraud or through a corrupt scheme as provided for under sections 25 and 26 of the *Land Registration Act*.

7. That since her title was revoked by the order made on the July 26, 2018, without giving her an opportunity to be heard and/or defend the suit, or participate in the proceedings which resulted into the revocation of her title deed, that it was only fair and just that she be joined as a party to the suit so as to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. That the right to be heard was a valued right and it would offend all notions of justice if her right were to be prejudiced or affected without her being afforded an opportunity to be heard. The interested party sought that the application be allowed with costs.

8. The said application was opposed by the plaintiff through his replying affidavit sworn on June 15, 2020, Grounds of Opposition of an equal date and his submissions to which he submitted that the intended interested party bought parcel of land No Transmara/Olosakwana "B'/1299 in or about the year 2010 from the 18th Defendant with the full knowledge of the pending suit, wherein she failed to apply to be joined in furtherance of the fraud by the said Defendant.

9. That the interested party's parcel of land No Transmara/Olosakwana "B'/1299 was one of the titles that had been illegally curved out of the Plaintiffs land No Transmara/Olosakwana "B'/1117 by the Defendants wherein by a judgment dated 20th June 2018 and amended on July 20, 2018, the said resultant titles had been declared illegal and ordered to be canceled.

10. That parcel of land No Transmara/Olosakwana "B'/1299, which formed part of the Plaintiffs suit land had been illegally acquired by one Joseah Chepkwony Defendant No 18, who was in occupation and possession of the same as at the year 2005 when the suit was filed. The said Defendant jointly with the other Defendants had filed their joint defences wherein they had participated in the proceedings. Subsequently and during the pendency of the suit, the said 18th Defendant had sold parcel No Transmara/Olosakwana "B'/1299 to the interested party who was then registered as its proprietor on May 7, 2010.

11. That the honorable judge did not make an error when she amended her judgment adversely for the ease of execution of the Decree and the argument by the interested party that she ought to have been

served would not have changed the position of the judgment since her land was part of the Plaintiffs land that had been illegally acquired by the Defendants.

12. That the interested party's application sought to reopen the case and set aside the award judgment yet her claim was on parcel land No. Transmara/Olosakwana "B'/1299 which was inseparable from all the Defendants declared illegal titles and any order made would affect all other titles held by the Defendants. That there had been no appeal preferred by the Defendants against the impugned judgment. That the Decree had been issued and the suit was at an execution stage which made the court fuctus officio.

13. That the interested party slept on her rights if at all she had any. The said application was defective, bad in law and lacked merit, the judgment having been executed by cancellation of titles and further that the same was res-judicata. That the grounds relied on by the intended interested party ought to have been canvassed on Appeal. That even if the orders for amendment dated the July 26, 2018 were set aside, the judgment dated June 20, 2018 would still stand unaffected as there is no prayer for setting aside of the same. The Plaintiff sought for the application be dismissed with costs.

Determination.

14. Indeed it is not disputed that the Plaintiff in this matter filed suit against 28 defendants vide his plaint dated the 8th June 2005 seeking a declaration that the purported registration of 1st -27th Defendants as owners of land parcel No. Transmara/Olosokwan/1117 was illegal and wrongful and should therefore be cancelled. The 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 22nd, 24th, and 26th Defendants had filed their joint statements of defence dated 18th July 2005 denying the allegations while, contending that they are entitled to possession and occupation of the 40 acres of land comprised in No. Transmara/Olosokwan/1117 and therefore the Plaintiff had no cause of action to warrant the cancellation of titles issued to them. The matter was set for hearing wherein evidence was adduced by the parties herein. Vide a judgment delivered on the 20th June 2018, the court entered judgment for the Plaintiff declaring the purported registration of Defendants No. 1 to 27 as owners of land parcel no. Trnsmara/Olosakwana/1117 illegal and wrongful. The Court then directed that a copy of the judgment be served on the Land Registrar under whose jurisdiction the suit land fell to effect the necessary changes and restore the register of land parcel No. Transmara/Olosakwan/1117 in the name of the Plaintiff. On the 26th July 2018, the court, pursuant to the provisions of section 99 of the *Civil Procedure Act*, made an amendment to its judgment clarifying the titles to be canceled as Transmara/Olosakwan/1170, 1171, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1152, 1153, 1154, 1299, 1349, 1163, 1180, 1181 and 1182. It is thus worth noting that from the interested party's annexure marked as RCK, she had been registered as the proprietor of Transmara/Olosakwan/1299 measuring 1.08 hectares on the 7th May 2010.

15. I have also considered Map sheet No. 43 of Transmara/Olosokwana B which was tendered as Pf exh 6 during the trial. The same indicated the parcel numbers that had been hived off from parcel No. 1117 and Transmara/Olosakwan/1299 had been amongst the said properties. Although the interested party has deponed that she had not been joined as a party to the proceedings which culminated into the cancellation of her title, yet it is clear that she had obtained the same during the pendency of the suit.

16. The issues that crystalize for determination are twofold. The first is whether the interested party should be joined to these proceedings and the second is whether there should be stay of execution of the judgment delivered on June 20, 2018 and amended on July 26, 2018.

17. The substitution and addition of parties to a suit is governed by order 1 rule 10 (2)of the *Civil Procedure Rules* which provides as follows;

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and 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 to adjudicate upon and settle all questions involved in the suit, be added."

18. The above provision states that parties may be joined to proceedings at any stage, however the Supreme Court in *Communications Commission of Kenya and 4 Others vs Royal Media Services Limited & 7 others* [2014] eKLR held as follows;

'An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

ii. Joinder to provide protection of the rights of a party who would otherwise the adversely affected in law;

iii. Joinder to prevent a likely course of proliferated litigation.'

19. The court went on to state:

> 'The Applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The Applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal...
>
> We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.'

20. In this case, the interested party contends that it is necessary to include her in these proceedings as execution would be against her property. The interested party's contention was that she was condemned unheard and that the Plaintiff will not suffer any prejudice if the application is allowed. The Plaintiff on the other hand submits that the cause of action was between the Plaintiff and the 28 Defendants who illegally hived of 40 acres of land comprised in his land No. Transmara/Olosakwana "B'/1117, the interested parties land No. Transmara/Olosakwana "B'/1299 being one of them and therefore the same was inseparable from all the Defendants' declared illegal titles.

21. The Court has noted from the record that this matter was filed on the 8th June 2005 wherein the Defendants entered their Memorandum of Appearance and joint defence on the 4th and 20th July 2005 respectively. Subsequently the matter had been set down for hearing on the 26th September 2007 (there are no prior proceedings on record). That notwithstanding, Transmara/Olosakwana "B'/1299 was transferred and registered to the interested party on the on 7th May 2010 during pendency of the suit.

22. In *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR, the Court of Appeal addressed the issue of lis pendens as follows;

> " Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.
>
> Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-
>
> 'It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.'

23. It is clear from the above holding that the act of alienating the property and having it registered in the interested party's name during the pendency of the litigation process, ran afoul of the doctrine of lis pendens and was therefore tantamount to contempt of court.

24. The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail.

25. In *Bernadatte Wangare Muriu -vs- National Social Security Fund Board of Trustee & 2 Others* [2012] eKLR, the court cited with approval the case of *Bellamy -vs- Sabine* IDEJ 566 as cited in the case of *Fredrick Joses Kinyua & Another -vs- G.N. Baird* Nairobi HCCC No. 4819 of 1989 as consolidated with George Neil Baird & another -vs- Fredrick Joses Kinyua & aother where the judge stated:-

> " The doctrine of lis pendens intends to prevent not only the Defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the Defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party ..."

26. The doctrine binds not only parties to the litigation, but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings irrespective of whether they had notice of the litigation or not.

27. Indeed in the case of *Abdalla Omar Nabhan -vs- The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another,* Malindi HCCC No. 63 of 2013 the court held that where a party disposes of a property to a third party in the absence of an injunctive order, the final judgment or order that the court issues would be as though such a sale or transfer never took place and the judgment shall be binding on the third party.

28. The impugned judgment was to the effect that the registration of Defendants No. 1 to 27 as owners of land parcel No. Trnsmara/Olosakwana/1117 was illegal and wrongful and therefore the need to make the necessary changes and restore the register of land parcel no. Transmara/Olosakwan/1117 in the name of the Plaintiff. In light of the said judgment and keeping in mind that parcel No. Trnsmara/Olosakwana 'B'/1299 was one of the parcels of land that were found to have been acquired illegally and wrongfully, I find that the interested party has not demonstrated the relevance of adding her to the

proceedings. In my view, this application is merely an ingenious approach by the intended interested party to delay execution proceedings commenced against her by the Plaintiff. Informed as such I need not go into the second I need not go into the second of the matters for determination. The Application dated the June 2, 2020 is herein dismissed with costs.

The second Application.

29. The second application dated the October 28, 2021 was filed by the 1st, 3rd to 8th, 10th to 19th and 26th defendants, and brought under the provisions of order 10 rule 11, and order 51 rule 1 of the *Civil Procedure Rules*, section 1A, 3A, 63 (e) & 95 of the *Civil Procedure Act*, articles 50 and 159 of *the Constitution* of Kenya, and all other enabling provisions of the law where the Applicants herein had sought for orders that the firm of Geoffrey Kipngetich and Company Advocates come on record for them. The Defendants/ Applicants in this application further sought for orders to set aside and/or review the orders issued on 26th July 2018 and all other consequential orders thereto. The said application was supported by the grounds thereto, the supporting affidavit of Alice Chepngeno Kitur the 1st defendant/applicant herein dated the October 28, 2021 and written submissions. The application was unopposed as the Plaintiff did not file any response. This notwithstanding, I have to interrogate the Applicant's application as is expected of me as not all unopposed applications ought to be allowed automatically.

30. The Applicants' in this application, being the 1st, 3rd to 8th, 10th to 19th and 26th defendants contend that the impugned amendment of the judgment resulted into an ex-parte order of 26th July 2018 ordering the cancellation of titles to the land parcels No. Transmara/Olosakwan/1152, 1153, 1117,(sic) 1172, (sic) 1170, 1173, 1179, 1181, 1178, 1176, 1182, 1299 and 1349 be cancelled. That there had been no notice to either the Defendants or their Counsel and further that these parcels of land had not formed part of the subject to the suit.

31. I find the main issue for determination being;

    i. Whether the firm of M/S Geoffrey Kipngetich and Company Advocates are properly on record.

    ii. Whether there should be stay of proceedings

    iii. Whether the Applicant has established grounds for review.

32. Order 9 rule 9 of the *Civil Procedure Rules,* 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

> When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be"

33. Clearly the provisions of order 9 rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was

well articulated in the case of *S. K. Tarwadi vs Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

> "...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

34. In the case of *Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi* [2012] eKLR the Court held as follows:

> "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."
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> The court went further to quote with approval the holding by Hon. Sitati Judge, in Monica Moraa –vs- Kenindia Assurance Co. Ltd. [2010] eKLR where the court held as follows:
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> ".....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the Applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached....."

35. In the present case Judgment had been rendered on the 20th June 2018 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 were applicable herein.

36. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case, was that Counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the Notice of Change of Advocates before filing the application to set aside the orders of the Court. Instead the Defendants' Counsel, without leave of the Court, filed their Certificate of Urgency dated the 28th October 2021, more than two years after the judgment had been rendered, wherein he purported to come on record, and sought for orders therein stated above which clearly offended the express provisions of order 9 rule 9 of the Civil Procedure Rules.

37. It must be remembered that the provisions of order 9 rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change Counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his Counsel must notify the Court and other parties.

38. Although the Defendants have a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 9 above is mandatory and thus cannot be termed as a mere technicality.

39. Having found that these procedure was not followed by M/S Geoffrey Kipngetich and Company advocates, the said firm is not properly on record, and has no legal standing to move the court on behalf of the defendants/Applicants. Consequently, and in the absence of such leave of court as provided by the law, the application by notice of motion under certificate of urgency dated the October 28, 2021 and filed by the firm of M/S Geoffrey Kipngetich and Company Advocates is hereby struck out with costs at a lower scale since the same was undefended.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 26TH DAY OF MAY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE