



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 353 OF 2009

JOHN MUCHEMI NDUNG’U.....)

PETER NGULU KIMULI.....)

KORI KAMUYU AS CHAIRMAN, VICE CHAIRMAN & SECRETARY OF MAILI SABA
MWENGENYE SELF HELP GROUP.....
PLAINTIFFS

VERSUS

UPSANA KENT (SUED AS THE ADMINISTRATOR OF THE ESTATE OF RANBIR S/O
KEHARCHAND KENT.....)DEFENDANT

RULING

On 18th November, 2010 this court delivered a judgment bestowing LR. NO. 11531/9 upon the plaintiffs by way of adverse possession. Subsequently, at the instance of the plaintiffs, on 29th June, 2011 the court gave an order to the Chief Land Registrar to register the transfer of the said property in favour of the plaintiffs pursuant to the decree given on 18th November, 2010. The Deputy Registrar of this court was mandated to sign the transfers and execute any other documents and instruments to give effect to the said decree.

The proceedings leading to the said judgment and the subsequent order were conducted ex-parte. There is now before me an application by way of Notice of Motion under Orders 40 Rules 1, 2(1), 45, 22, Rule 25 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the intended interested party be joined as the party in this suit, the Chief Land Registrar and the Registrar of Titles Nairobi be restrained from implementing the orders delivered by this court on 18th November, 2010 and issued on 3rd December, 2010 pending the hearing and final determination of this application. That this honourable court do review and set aside the ruling and orders delivered on 18th November, 2010 pending the hearing and determination of this application; that applicants also pray for a temporary injunction to restrain the plaintiffs by themselves servants, agents or otherwise from entering, tress passing, harassing, intimating, threatening or otherwise whatsoever interfering with the interested party’s quiet enjoyment, possession and occupation of parcel LR NO/15131/9.

The grounds advanced by the applicant appear on the face of the application and include inter alia the following,

- a. The intended interest party is the registered owner of the suit property.

- b. The suit proceeded to hearing on 18th February 2010 and 27th May, 2010 in the absence and without knowledge of the intended interested party yet it had an interest in the suit as the registered owner.
- c. The plaintiffs acquired a copy of the title and without ascertaining the registered ownership proceeded to sue and claim advance possession against the previous owner. Had the plaintiffs informed the intended interested party of the hearing the said interested party would have applied to be enjoined herein and defend its interest as registered owner.
- d. The intended interested party was and has always been in possession of the suit property and holder of the valid certificate of title. Had the plaintiffs disclosed this to the court the orders made over the said property would not have been made.
- e. The intended interested party shall suffer immense and irreparable loss that may not be compensated by an award of damages if the plaintiffs are not restrained from entering, occupying and remaining on the suit property.

The application is further supported by an affidavit sworn by one Peter Mburu Kamau the secretary of the intended interested party. The plaintiffs oppose this application and there is a replying affidavit sworn by one Peter Ngulu Kimuli said to be the Chairman of the plaintiff group. The defendant on the other hand supports the application by the intended interested party. The plaintiffs opposed the application.

Following directions given, the parties herein filed written submissions upon which the court has been called upon to make a ruling. Learned counsel for the parties have cited several authorities in support of their respective positions. I have read the said authorities and in the event I do not refer to or cite any of those authorities, this should not be construed to be wanting in substance. However, I must observe that some of the material presented belongs to the province of a trial where witnesses are called and cross-examined. Having said so, I revisit my earlier observation that the originating summons and the orders that followed were determined in the absence of the defendant and interested party.

As at the time of hearing the originating summons, the court was persuaded that service had been effected upon the defendant. It is now submitted on behalf of the defendant that no such service was effected. To advance that argument the defendant has annexed two affidavits sworn by one Eric O. Osingo, a court process server on whose affidavit the court relied to confirm service of the Originating Summons. The first affidavit was sworn on 30th September, 2009. That related to service of Originating Summons dated 9th July, 2009. The second affidavit was sworn on 9th May, 2011 relating to an ex-parte Notice of Motion dated 16th March, 2011.

The defendant has pointed out that the signatures on the two affidavits are so markedly different that, it is not possible they are of the same person. On that basis, service of the court process cannot be true. On the other hand, the interested party insists the title is in its name. No adverse orders could have been issued without being heard. There is then another twist in this matter, there is a letter dated 5th June, 2013 on record addressed to the court by one Ambassador Franklin Esipira on behalf of the Permanent Secretary, Ministry of Gender, Children and Social Development. To this letter there has been annexed two other letters from the same Ministry showing different officials of the Management Committee of the plaintiff.

The record before me shows that this has been an issue as captured in the proceedings of 29th November, 2012 and 17th December, 2012. Now that this letter of 5th June, 2013 is on record, this court is unable to resolve the issue in this application. The foregoing notwithstanding, the real issue is whether or not the interested party supported by the defendant can secure the orders sought in the Notice of Motion.

Order 45 Rule 1 of the Civil Procedure Rules provides that

“any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could

not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record ,or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

A party making such an application need not have been involved in the previous proceedings leading to such a judgment or order. This is clearly the case as the words used in this rule refer to **“any person”**. It was incumbent upon the intended interested party herein and the defendant to persuade the court that the requirements of this rule have been met. Both the intended interested party and the defendant have annexed affidavits sworn by the Eric O. Osiro the process server at the centre of service in this matter. Those affidavits bear two markedly different signatures which the parties submit do not belong to the said signatory. In answer to that submission, the plaintiff said the intended interested party and the defendant were at liberty to call the said process server but have not.

From the submissions my understanding is that, this information was not available to the parties that have challenged service of court process and therefore falls under the discovery of new and important matter which was not within their knowledge.

I know that this court was persuaded that service had been properly effected upon the defendant, in granting the orders sought on 18th November, 2010 and the subsequent order of 29th June, 2011. I must admit however that, as at the time of addressing the application on 29th June, 2011 I was not seized of the affidavit sworn by the said process server. I had no reason then, to interrogate the disparities of the signatures now in dispute.

Having now looked at the two signatures, I have reason to entertain the doubts that have been raised by the intended interested party and the defendant. Further to the foregoing, the Commissioner of Lands is said to have communicated in writing vide a letter dated 28th July, 2012 to the firm of Mbichire & Co Advocates to the effect that there is something untoward about the title in respect of the subject matter in that, it is currently registered in the name of the intended interested party and not the plaintiffs. As this is an issue yet to be interrogated, I say no more.

Without delving any deeper into the several matters raised herein, I am persuaded that this is a matter in which the courts intervention is appropriate. It is also important to note that the subject matter herein is land, and where serious issues are raised such as the ones in this application, parties should be given an opportunity to litigate their positions to final conclusion. That calls for the preservation of the subject matter. Having said so, I find that the orders sought in the application are meritorious. Ms Unity 45 Housing Co-operative Society Limited are hereby jointed as interested parties in this suit.

The Judgment of this court dated 18th November, 2010, and all orders flowing thereunder are hereby set aside. There shall be orders in terms of prayers 3 and 6 of the Notice of Motion dated 25th June, 2012. I am averse to involving the police in civil process and in the event any of these orders require compliance the court bailiff should ensure this takes place and may only seek assistance from the police, if need be. The costs of this application shall be in the cause.

Orders accordingly.

Dated and Delivered at Nairobi this 25th Day of July 2013

A. MBOGHOLI MSAGHA

JUDGE

