



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT BUNGOMA
HCCC NO.87 OF 2005**

ROSE N.
KITAYI**PLAINTIFF**
~VRS~
MERCY NABAYI
KHAEMBA.....RESPONDENT
AND
DR. WILLIAM
OUMA.....APPLICANT

RULING

This is an application dated 18/07/2009 seeking for orders to set aside judgment in this case and all consequential orders. It also seeks for orders to have the Applicant enjoined as one of the Defendants in this case. The Applicant, Dr. William Ouma depones that he is the registered owner of the suit land Bungoma East Bukusu/South Kanduyi/11712 and has constructed a house on the suit property valued at Ksh.4,000,000/=. He contends that the parties in this case executed an illegal consent order regarding his land. The Applicant depones that the said order is likely to deny the Applicant his rights on the property. The Plaintiff's claim is based on a transaction in which the Applicant was involved. It is his contention that filing a separate suit will not solve the common questions of fact and law. Being an innocent purchaser of good value, it is important that the Applicant protects his interest. Mr. Samba for the Applicant argued that the Respondent's allegations that the Applicant obtained his land through fraud, those issues can only be resolved through evidence. There has been previous suits between the parties on the same land. For this reason, the Plaintiff was obliged to join the Applicant as a party.

The Respondent/Defendant opposed the application. In his replying affidavit and through his counsel Mr. Kraido, the Applicant contended that the Applicant's registration of the suit premises was obtained through fraud and that any document used for that purpose was a forgery.

After considering the arguments of both sides, I find that it is not in dispute that the Applicant is the current registered owner of the suit premises E. Bukusu/S. Kanduyi/11712. The Plaintiff claims for orders of specific performance against the Defendant in this case in respect of the same parcel of land. The parties in this case entered into a consent on 30/12/2006 that the Defendant transfers the land to the Plaintiff upon the Plaintiff removing a caution against the title. If this consent order is enforced, it will present challenges to all the parties concerned. Firstly it will be unenforceable in favour of the Plaintiff in this case should the Applicant be the registered owner. The Respondent says he has filed a suit for orders to cancel the Applicant's registration. Until the said registration is cancelled the said consent has no legal

force. However, the Applicant as well as the Plaintiff have legal interests in the suit premises. The Applicant being the registered owner, irrespective of how the title was obtained has a right to be enjoined in the suit and to be heard. So long as the said registration exists, the Applicant ought to have been enjoined as a party to this suit to defend his interests. The allegations of fraud may be proved through evidence by the parties. The same cannot be resolved in interlocutory proceedings.

I find the application meritorious and I allow it as prayed. In effect, the consent judgment of 30/12/2006 between the Plaintiff and Defendant is hereby set aside and the Applicant is hereby enjoined as an interested party. Costs in the cause.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the 30th day of November, 2010 in the presence of Mr. Areba for Samba for the Interested Party.

F. N. MUCHEMI

JUDGE