



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 28 OF 2004

GICHUKI GATHAARA KIMITI PLAINTIFF/RESPONDENT

VERSUS

NDIRANGU NJOGU DEFENDANT/RESPONDENT

AND

PETERSON MWANGI INTERESTED PARTY/APPLICANT

R U L I N G

Peterson Mwangi Kariuki (hereinafter referred to as the Applicant) has moved this court under section 3A of the Civil Procedure Act, section 128 of the Registered Land Act and Order L rule 1 of the Civil Procedure Rules seeking Orders inter alia:

- *That he be made a party in this suit*
- *That the consent order entered into between the Plaintiff and the Defendant on 23rd April 2004 be set aside and the dispute be determined on its merits among the three parties.*
- *That the court be pleased to issue an inhibition against titles to land parcel Muhito/Gaturia/1493 and Muhito/Gatura/1494 pending the hearing of the application.*

The applicant has annexed a supporting affidavit deponing that he obtained judgment in Nyeri CMCC No. 474 of 2000 against the Defendant/Respondent in this suit for Kshs.221,795/= which judgment he sought to execute against the Respondent/Defendant's land Muhito/Gatura/1477 (subdivided into 1489, 1490, 1492, 1493 and 1494). That the Respondent/Plaintiff objected to the execution. In a ruling delivered on 25th July 2002 the court upheld his objection in respect of plots 1489, 1490 and 1492 but overruled the objection in respect of plots Nos. 1493 & 1494 and allowed execution to proceed in respect of these two parcels. The applicant appealed against this ruling but his appeal was dismissed in Nyeri H.C.CA. No. 129 of 2002 the judge upholding the ruling of the trial magistrate delivered on 25th July 2002 in Nyeri CMCC No. 474 of 2000.

Thereafter without the knowledge of the applicant the Respondent/Plaintiff made an application in Nyeri CMCC No. 474 of 2000 for review of the orders of 25th July 2002 consequent to which an order was made exparte on 26th January 2004 reviewing the orders and lifting the caution and inhibition registered against plots Nos. 1493 & 1494.

Relying on this ex parte order the Respondent/Plaintiff had the two properties registered in his name. This suit was then filed by the Respondent/Plaintiff seeking declaratory orders against the Respondent/Defendant and a consent was recorded on 23rd April 2004.

When these matters came to his knowledge the applicant successfully applied in the lower court for review of the orders made on 26th January 2004, his efforts to have the registration of the Respondent/Plaintiff cancelled were however frustrated in view of the consent order granted by this court in this case on 23rd April 2004 whereby Judgment was recorded in favour of the Plaintiff as against the Defendant and it was agreed that the two plots Nos. 1493 & 1494 belong to the Respondent/Plaintiff and that the land Registrar should rectify the register to indicate the plaintiff as the owner of the two parcels.

The applicant maintains that this consent order is a clear violation of the order made in Nyeri CMCC 474 of 2000 and confirmed in H.C.C.A. No. 129 of 2002 wherein it was ruled that the two parcels belonged to the Respondent/Defendant and not the Respondent/Plaintiff and that the applicant had the right attach them and to proceed with execution against the said parcels.

The applicant maintains that he is a party aggrieved by the consent order and therefore urges the court to have him enjoined as an interested party to enable him protect his right.

He also urges the court to set aside the consent order so as to enable the court properly determined the issues after hearing all the parties.

Ms Mwai who appeared for the applicant relied on the following authorities:

- *Kenya Bankers Association v/s Minister for Finance & Another [2002] 1 KLR 45.*
- *Galot & 5 others v/s Kenya National Capital Corporation [2002] 1 KLR 798.*

The Respondent/Plaintiff objected to this application contending that the application was misconceived as the Civil Procedure Act and Rules did not provide for an interested party. He swore a replying affidavit in which he deponed that he bought all the parcels of land from the Respondent/Defendant and he objected to the proclamation on the properties. He maintained that the applicant's appeal was dismissed by the High Court and that he applied for and obtained declaratory orders.

He claimed that the applicant was abusing the court process to illegally attach his property. He urged the court to dismiss the application as the joinder of the Applicant would amount to an abuse of the court process. At the hearing of this application, the Plaintiff/ Respondent who was in person did not however attend court.

The Respondent/Defendant also filed a replying affidavit in which he contended that the application was frivolous and an abuse of the court process. He reiterated what the Respondent/Plaintiff had deponed and added that when he was sued by the Respondent/ plaintiff for declaratory orders he instructed his advocate to enter into a consent judgment which was done. He maintained that the applicant had turned execution proceedings into an illegal claim for land. Mr. Kingori who appeared for the Defendant/Respondent submitted that all the plots had already been sold and a joinder would therefore amount to an abuse of the court process.

It is evident that the matters deponed to by the Applicant with regard to the proceedings in Nyeri CMCC 474 of 2000 an Nyeri H.C.C.A. No. 129 of 2002 have not been substantially disputed. It is clear that the applicant had an interest in plots Nos. 1493 & 1494 by virtue of the execution proceedings which he had initiated in Nyeri CMCC No. 474 of 2000. Although the applicant was unsuccessful in his appeal in H.C.C.A. 129 of 2002, the High court confirmed his right to execution in respect of the two plots. It is evident that the applicant was aggrieved by the consent order entered into by the Respondent/Plaintiff and Respondent/Defendant on 23rd April 2004 as it deprived the Applicant the right to execute against these two properties without the applicant being heard. It was submitted by the Respondents that the application to have the applicant joined as an interested party is misconceived as same is not provided under the civil

Procedure Rules.

The answer to this is found in Order I rule 9 & 10 of the Civil Procedure Rules which gives the court the discretion to substitute or add parties to proceedings at any stage provided their presence is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. This provision does not restrict the court to adding only a co-plaintiff or Co Defendant or a 3rd party only as maintained by the Respondents. I therefore overrule their objection in this regard and grant leave to the applicant to be joined as an interested party to this suit as his presence is necessary to enable the court to effectually adjudicate upon all the issues.

It being evident that the consent order entered into by the Respondents on 23rd April 2004 was made in clear violation of the applicant's rights to execution over plot Nos. 1493 & 1494 given in CMCC 474 of 2000 and confirmed in H.C.C.A. 129 of 2002, the order was entered into fraudulently to defeat the applicant's rights. I do therefore set aside the consent order and order that the dispute be determined on merit after hearing all the parties.

The prayer in respect of the inhibition is already spent as same was sought pending the hearing of this application. The upshot of the above is that I allow the application and make the following orders:

(1) That the applicant shall be joined as an interested party in this suit.

(2) That the consent order entered into between the Respondent/Plaintiff and Respondent/Defendant on 23 rd April 200 4 be and is hereby set aside and the dispute shall be determined after hearing all the parties.

(3) The applicant shall have costs of this application as against the Respondent/Plaintiff and Respondent/Defendant.

Dated, signed and delivered this 10 th day o f February 2005.

H. M. OKWENGU

JUDGE