



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 148 OF 2017

HARUN CHITIAVI WASHIYA.....PLAINTIFF/APPLICANT

VERSUS

PETER MULA WANAMAMBIDEFENDANT/1ST RESPONDENT

SIPHROSE NALIAKA MASITENI..... 2ND RESPONDENT

RULING

The application is dated 18th December 2020 seeking the following orders that;

1. The District Land Registrar, Kakamega to cancel the titles to Land Parcel No. South Kabras/Chemuche/4101 and restore the original parcel number South Kabras/Chemuche/3314 in the name of Peter Mula Wanamambi.
2. Costs be in the cause.

It is based on the affidavit of Haron Chitiavi Washiya and grounds that the 1st respondent is the owner of land parcel No. S. Kabras/Chemuche/3314. The 1st respondent sold to the applicant part of parcel number No. S. Kabras/Chemuche/3314 apportion measuring approximately 0.08 ha. With no apparent reason the 1st respondent declined to sign transfer papers to effect transfer of apportion measuring 0.08 Ha to the applicant as ordered by this honourable court. Despite the court ordering the respondent to effect transfer of the same the respondent declined and instead sold/transferred the same portion to the 2nd respondent. That the cancellation of the new titles and restoration to the original title is necessary for the effectiveness of the decree issued to the applicant.

The 1st respondent submitted that he discovered that judgment in default of defence was entered against him on the 18th September, 2017. That he was never served with summons to enter appearance as purported by the process server in the affidavit of service. (As per the annexure marked PMW1). That the signature indicated on the face of the summons to enter appearance as mine is not mine as exhibited by his signature in his national identity card herewith attached and marked PMW2. That the suit land belongs to a third party who was not party to this suit. The respondents also raised a preliminary objection that the matter is irregularly before this court and an abuse of the court process.

The 2nd respondent submitted that she is the registered owner of the suit land and was not a party to this suit. That the matter is irregularly before this court and an abuse of the court process.

This court has considered the application and the submissions therein. The provisions of **Order 1 Rule 10 (2)** of the Civil Procedure Rules is that;

“ 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.”

In the Court of Appeal in **JMK v MWM & another (2015) eKLR**. Let the Court of Appeal stated that;

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by

either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

Order 1 rule 9 of the Civil Procedure Rules provides as follows:-

“No suit shall be defeated by reason of joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

In the case of **DIG-TEC Images Limited vs Kenya Railways Staff Retirement and Benefits Scheme and 4 Others** (2015) eKLR, the court held as follows;

“The purpose of joining a party to a proceeding is to have a necessary party for the purpose of determining the real matters in question It follows therefore that a party as long as his joinder shall assist in determination of the matter in question, can be joined at any stage of the proceeding.”

It is thus clear from the law and the authorities cited above that the court has a wide discretion in joining new parties to existing proceedings, either before, during and after trial. *Order 1 Rule (10) (2)* of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others, CA NO. 222 OF 1998*, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

The 2nd respondent was registered as the owner of the suit land a few days before the judgement was delivered in this matter and hence the court suo moto enjoins her as the 2nd respondent in this matter and the preliminary objection by the respondents is overruled.

I have peruse the court proceedings and find that the 1st respondent did attend court on the hearing date and gave oral evidence admitting the claim. He cannot now come to court and say he was not aware of the same. Be that as it may I have perused the search certificate and find that the suit land was transferred to a third party who was not a party to this suit one Siphrose Naliaka Masiteni (2nd respondent). The 1st respondent testified in court on the 2nd February 2018 admitting the claim and saying he was ready to give the applicant his land. Judgement was delivered on the 17th May 2018 confirming the same. The defendant fraudulently transferred the land in March 2018 before this judgement was delivered in May 2018. I have perused the green card on record for land parcel No. S. Kabras/Chemuche/3314 and find that the suit parcel was subdivided on the 29th March 2018 long after the litigants had testified and were awaiting judgement. Title was issued to the 2nd respondent on the 5th April 2018. I find the defendant/1st respondent is a deceitful man and was fraudulent and out to subvert the cause of justice. I find that by the time the suit land was transferred it was not available to the third party who is the 2nd respondent. Indeed in a criminal case PMCC no 400 of 2015 Butali the 1st respondent admitted selling the said suit land to the plaintiff and stated that it was still available and he had not refused to transfer. I find that the plaintiff still remains the rightful owner of part of parcel number No. S. Kabras/Chemuche/3314 measuring approximately 0.08 ha which he bought from the 1st respondent and which is admitted. For these reasons I find that this application is merited and I grant the following orders;

1. The District Land Registrar, Kakamega to cancel the titles to Land Parcel No. South Kabras/Chemuche/4101 and restore the original parcel number South Kabras/Chemuche/3314 in the name of Peter Mula Wanamambi.
2. The Deputy Registrar to transfer a portion Land Parcel No. South Kabras/Chemuche/3314 measuring 0.08 ha to the plaintiff/applicant
3. Costs to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021

N.A. MATHEKA

JUDGE