



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CAUSE NO. 460 OF 2017

CHARLES STEVEN MBINDYO..... PLAINTIFF

=VERSUS=

JUSTUS WAINAINA NJUGUNA.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

BONIFACE MBAI MUNYAO,

DAVID MAKOVU MULI &

MICHAEL MUTISO MUNYAO (Suing on their own behalf and on behalf of the members of

**Stony Athi Members Association).....INTERESTED
PARTIES/APPLICANTS**

RULING

1. In the Application dated 13th July, 2021, the Interested Parties have sought for the following orders:

a) That this Honourable Court be pleased to enjoin the Applicants herein as Interested Parties to this suit.

b) That this Honourable Court be pleased to review, vary and/or set aside the Judgment delivered on 15th May 2020 by this Honourable Court and the resultant Decree issued on 8th June 2020 and all other further and/or consequential Orders arising therefrom and make an order to the effect that the Plaintiff is entitled to L.R. No. 9917/9 and L.R. No. 9917/8 belongs to the Interested Parties/Applicants.

c) That this Honourable Court do issue any such other and/or further orders as it may deem fit and in the interests of justice.

d) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Interested Party who has deponed that he is a member of Stony Athi Members Association, an organization registered in the Republic of Kenya pursuant to the provisions of The Societies Rules of 1968 with a Certificate Registration and that he is aware that sometime in the year 1988, the Plaintiff/Respondent purchased all that parcel of land known as **L.R No. 9917/4** measuring approximately 4224.0 Ha (herein after **“the suit property”**) and situate in Machakos County from the Agricultural Development Corporation (ADC) and was issued with a certificate of title.

3. However, it was deponed, on or around the year 1990 and 1991, the Agricultural Development Corporation (ADC) reclaimed 1558 .60 Ha of the suit property from the Plaintiff and issued him with a credit note of Kshs. 2,951370.00 in respect thereof and that consequently, on or about 20th July 1995, the suit property was surveyed and subdivided into L.R No. 9917/8 and L.R No. 9917/9 pursuant to the said reclamation by Agricultural Development Corporation (ADC). According to the 1st Interested Party, thereafter, a surrender document in respect of L.R No. 9917/8 was prepared by the Commissioner of Lands to facilitate the surrender of the land back to ADC.

4. The 1st Interested Party submitted that following the conclusion of the survey exercise and the subdivision of the suit property into L.R

No. 9917/8 and L.R No. 9917/9, the Plaintiff was allocated all that parcel of land known as L.R No. 9917/9 measuring 2233.31 Ha.

5. It is the Interested Parties case that on 23rd August 2013 before the suit herein was filed, they registered their interest in acquiring all that parcel of land known as L.R No. 9917/8 measuring 1558.60 Ha with the National Land Commission in view of the fact that the same had reverted back to Agricultural Development Corporation (ADC) by way of a surrender.

6. It was deponed by the 1st Interested Party that in exercise of the powers conferred by **Article 67 (3)** of the **Constitution of Kenya** and **Section 5(2)** of the **National Land Commission Act**, the Commission upon receipt of the Applicants' request invoked its mandate to review the grant of all that parcel of land known as L.R No. 9917/8 in order to establish whether the same was available for allocation to the Applicants.

7. According to the 1st Interested Party, in accordance with Section 14 of the National Land Commission, the Commission summoned all interested parties namely; the Plaintiff, Machakos County Government, the African Inland Church and the Applicants herein for public hearings held on 6th, 18th and 20th April 2017 and 18th May 2017 as regards all that parcel of land known as L.R No. 9917/8 and that none of the parties so invited attended the hearings save for the Applicants and the CEC member of Machakos County Government.

8. It was deponed that the Commission having heard both the Applicants and the CEC member of Machakos County Government made its decision on 1st August 2017; that by virtue of the decision aforesaid, the Applicants were allocated all that parcel of land known as L.R No. 9917/8 by way of a Letter of Allotment dated 22nd November 2017 for valuable consideration of Kshs.2,050,294 and that the Commission's decision aforesaid has never been challenged whatsoever and is therefore in full force and effect.

9. It is the Applicants' case that they fully and effectually discharged their obligations under the said Letter of Allotment issued by the Commission on behalf of the Government of Kenya therefore becoming *bonafide* allottees for value and that in view of the fact that the right legal procedure was followed in allocating all that parcel of land known as L.R No. 9917/8 to the Applicants who fully and effectually discharged their obligations under the said Letter of Allotment, the Applicants are the *bonafide* owners of the same and are desirous of defending their rights and interests as regards the said property.

10. The 1st Interested Party deponed that the Plaintiff instituted this suit on 21st November 2017 and by a Judgement delivered on 15th May 2020 after *ex-parte* hearing, the Honourable Court held that the Plaintiff is the bonafide and registered owner of the suit property which included the Applicants' parcel of land aforesaid and that the Applicants became aware of this suit and the aforesaid Judgement a few days to the filing of this Application while enquiring on the progress of their Title processing in respect of all that parcel of land known as L. R No. 9917/8.

11. It is the deposition of the 1st Interested Party that the Plaintiff's failure to enjoin the Applicants in this suit yet he was and is fully aware that the Applicants are actually the owners and have proprietary interests in all that parcel of land known as L. R No. 9917/8 arising from the survey and subsequent subdivision of the suit property and that any Orders issued would affect them is a clear manifestation of concealment and/or suppression of material facts and a calculated move of fraud with the sole intention of dispossessing the Applicants their parcel of land known as L.R No. 9917/8.

12. The 1st Interested Party finally deponed that it is manifestly clear that the Plaintiff obtained Judgement in respect of the said suit property in a fraudulent manner and the same is therefore irregular, unlawful and illegal and that the Applicants are justifiably apprehensive that unless this Application is certified urgent and heard immediately by this Honourable Court and the Orders sought herein granted, the Applicants will suffer a great miscarriage of justice, substantial damage and irreparable loss as they stand to lose all that parcel of land known as L. R No. 9917/8 which rightfully belongs to them should the Plaintiff transfer the suit property to innocent third parties and/or choose to execute the Judgement aforesaid in any manner he may choose to.

13. The Plaintiff filed a Replying Affidavit in which he deponed that the Plaintiff had previously filed Judicial Review Application No. 396 of 2016, Nairobi – Republic v. National Land Commission which is currently ELC JR No. 30 of 2020, Machakos, wherein on 22nd September 2016, the court granted the Plaintiff leave to apply for Orders of certiorari and prohibition to quash and prohibit NLC's decision dated 9th August 2016 to conduct a title review of the suit property and that status quo of the suit property should be maintained.

14. According to the Plaintiff, the court directed that the leave granted should operate as a stay of hearing of the review of the grant of the suit property until the substantive motion is heard and determined; that the NLC purported to interfere and allocate the suit property to the Interested Parties contrary to the said Court Orders and that the Plaintiff filed an Application for Contempt dated 22nd January 2018, in 396 of 2016 (30 of 2020) which led to the Chairperson of NLC being summoned to Court to show cause why he should not be arrested for contempt.

15. It is the Plaintiff's case that the NLC filed a Replying Affidavit dated 20th April 2018 in 396 of 2016 (30 of 2020) wherein NLC denied the Plaintiff's allegations that it had allocated the suit property and/or issued Letters of Allotment and in particular to the Interested Parties herein and that the current Application is an abuse of the court process.

16. The Plaintiff deponed that the Surrender document annexed on the 1st Interested Party's Affidavit has not been executed; that the Plaintiff remains the registered proprietor of the Suit Property, L.R. No. 9917/4 and is a stranger to the parcels of land L.R. Nos 9917/8 and 9917/9 which the Applicants allege to have been hived from the suit properties and that the Plaintiffs have not provided any evidence of title to prove the alleged sub-division.

17. It was deponed that sometime in 2015, the Plaintiff discovered that the 1st Defendant was attempting to subdivide the suit property without his knowledge using fake documents and that a representative from Agricultural Development Corporation recorded a statement

dated 17th November 2015, confirming that L.R. No. 9917/4 was sold to the Plaintiff and that it remains in the Plaintiff's name because the Surrender was never executed and the attempted sub-divisions would be illegal.

18. According to the Plaintiff, before the filing of the suit herein, he was not aware of the Interested Parties as being allottees of L.R. No. 9917/8 because the suit was filed on 21st November 2017 and the impugned letter of allotment is dated 22nd November 2017 and that upon discovery of the said letter of allotment in January 2018, the Plaintiff appropriately filed contempt proceedings against the NLC in 396 of 2016 (30 of 2020).

19. The Plaintiff deponed that he obtained the Judgment herein lawfully, legally and regularly by giving a full disclosure of material facts pertaining to the 1st Defendant's fraudulent actions and from whom he sought redress against; that the Judgment and Decree issued herein are not adverse to the Interested Parties who were not necessary to be heard on the issues in dispute in this suit and that the issues raised by the Interested Parties regarding the impugned Letter of Allotment in their Application are pending hearing and determination in 30 of 2020 (396 of 2016) and 166 of 2018.

20. It was deponed by the Plaintiff that the suit herein has been heard and determined to its conclusion therefore there being no pending proceedings, the Interested Parties' prayer to be joined in this matter is misplaced, defective and untenable in law.

21. The Application proceeded by way of written submissions. In their submissions, the Interested Parties' advocate submitted that based on the provisions of the law, this Court possess adequate jurisdiction, pursuant to the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45(1)** of the **Civil Procedure Rules**, to recall its order if it is obtained by concealment of material facts and/or fraud practiced upon the court.

22. Counsel submitted that the power of the court to review its orders emanates from the nature of the Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect litigants from the indignity of unfairly obtained orders and to punish unseemly behaviour.

23. It was submitted that the Judgment delivered on 15th May 2020 was based on false and misleading evidence given with the intention of deceiving the court and that as such, the Judgment is void for want of legality in so far as the concealed evidence is concerned. Counsel relied on the case of *Meek vs Fleming [1961] QB 366*, (page 11-30, see page 24) where **Pearce LJ** at page 379 held that:-

“Where a party deliberately misleads the Court in a material, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment as unfairly procured.”

24. It was submitted that at the time of delivering the Judgment, the Court was constrained by the absence and/or unavailability of the evidence that the Applicants now brings to Court and which was not readily available to the Court at the time the matter was heard and determined.

25. The Plaintiff's counsel submitted that it is not in dispute that when the Interested Parties applied to be made parties in these proceedings on 13th July 2021, there were no pending proceedings in this suit to which they could have been made a party, the Judgment having been delivered on 15th May 2020 and Decree issued on 8th June 2020.

26. Counsel relied on the case of *Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another [2014] eKLR* where the Court held that:-

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.”

27. Counsel for the Defendant also relied on the case of *Tang Gas Distributors Ltd vs Said & Others [2014] EA 448* which quoted with approval the case of *JMK vs MWM* as follows:

“In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

28. It was submitted that this Court having delivered its Judgment and Decree, and the proceedings herein having been concluded, the Court lacks jurisdiction to join the Interested Parties and re-hear this suit since it is *functus officio* and that by joining the Applicants, the court would be erroneously introducing secondary litigation and raise new issues that were not in the original pleadings before the Court.

29. According to Plaintiff, the Interested Parties' Application raises a new cause of action and issues that were not before this Honourable Court; that it is irregular for the Applicants to move this Court which lacks jurisdiction to hear the Application and that the Applicants should have filed a new suit pertaining to their own cause of action (which they have in JR Misc. 166 of 2018) rather than trying to side-litigate.

30. It was submitted that the suit property was subject of criminal investigations due to the illegal sub-division of it by the 1st Defendant and that the NLC's attempt to review the suit property's title was halted in case number 396 of 2016 (30 of 2020) vide the orders of Aburili J. pending hearing and determination of that matter.

31. It was submitted by the Plaintiff's counsel that the Surrender document which the Interested Parties claim to have resulted in L.R. No. 9917/8 and 9917/9 was never executed; that the Plaintiff remains the registered proprietor of the suit property, L.R. No. 9917/4 and that the Interested Parties have also not provided any evidence of title and/or deed plans to prove the alleged sub-division.

32. According to the Plaintiff's advocate, the letter of allotment does not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated in the letter of allotment; that the Plaintiff's certificate of title issued by the Registrar, is to be taken by all Courts as prima facie evidence that the Plaintiff is the absolute and indefeasible owner of the suit property and that the said title cannot be subject to challenge by the Interested Parties' letter of allotment.

33. It was submitted that the Application has not been presented to this Court timely and is vitiated by undue delay having been tendered about 1 year 2 months after the delivery of the Judgment; that the Interested Parties have always been aware of this suit having been involved in the criminal investigations against the 1st Defendant by recording statements and that they attended irregular meetings at the NLC and also filed a JR Misc. App. No. 166 of 2018.

34. Counsel submitted that the issues raised by the Interested Parties are novel and distinct from what was before this Court and raise a new cause of action concerning a different property and that this Court cannot entertain such an action because it would be secondary and side-litigation contrary to the rules of procedure.

Analysis and Finding

35. This suit was commenced by way of a Plaint dated 20th November, 2017 as against the three Defendants. In the Plaint, the Plaintiff averred that he is the registered proprietor of land known as LR No. 9917/4 measuring 4,224 Hacters; that he purchased the said land from ADC in 1989; that he has constructed his rural home on the land and that the 1st Defendant had fraudulently attempted to sub-divide the suit property into LR Nos 9917/5-13.

36. The Plaintiff averred in the Plaint that he had learnt that the suit property was being allocated to third parties while he was holding the original title document. In the prayers, the Plaintiff sought for a declaration that he is the bona fide and registered owner of LR No. 9917/4 and a permanent injunction restraining the 1st Defendant from selling or subdividing the suit property.

37. The Defendant having not entered appearance, the matter proceeded *ex parte*. This court delivered its Judgment on 15th May, 2020 in which it allowed the Plaintiff's claim as prayed. In the current Application, the Interested Parties are seeking to be enjoined in the suit for the review and setting aside of the said Judgment.

38. **Order 1 Rule 10(2)** of the **Civil Procedure Rules** empowers the court, at any stage of the proceedings, upon an 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.

39. In *Sarkar's Code of Civil Procedure (11th Edition Reprint, 2011. Vol. 1, page 887)*, the authors stated as follows:

“The Section (on joinder) 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.”

40. The Court of Appeal of Tanzania, in *Tanga Gas Distributors Ltd vs Said & Others (2014) E.A 448*, while considering the equivalent of our **Order 1 Rule 10(2)** of the **Civil Procedure Rules** stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been fully disposed of and there is nothing more to be done that the rule becomes inapplicable and that a party can be added even at the appellate stage. This position was adopted by the Court of Appeal in ***J M K vs M W M (2015) eKLR***.

41. From the above decisions of the Court of Appeal, it is clear that in appropriate cases, the court can enjoin a party in a suit even after Judgment has been made, and especially in a situation where the party seeking to be enjoined ought to have been heard before the decision of the court was rendered, but was not heard due to misjoinder or non-joinder.

42. The Interested Parties' case is that the Plaintiff purchased all that parcel of land known as L.R No. 9917/4 measuring approximately 4224.0 Ha (herein after "suit property") from the Agricultural Development Corporation (ADC) and was issued with a certificate of title and that around the year 1990 and 1991, the Agricultural Development Corporation (ADC) reclaimed 1558.60 Ha of the suit property from the Plaintiff and issued him with a credit note of Kshs. 2,951370.00 in respect thereof.

43. According to the Interested Parties, on or about 20th July 1995, the suit property was surveyed and subdivided into L.R No. 9917/8 and L.R No. 9917/9 pursuant to the said reclamation by Agricultural Development Corporation (ADC) and that a Surrender document in respect of L.R No. 9917/8 was prepared by the Commissioner of Lands to facilitate the surrender of the same back to ADC.

44. The Interested Parties have annexed letters dated 20th February, 1991, 28th February, 1991, 18th November, 1991, 26th May, 2016 and 26th November, 2018. The said letters are correspondences in relation of the purported surrender of LR No. 9917/8 between the Plaintiff, the ADC and the then Commissioner of Lands. The Applicants also produced in evidence what seems to be a Surrender document.

45. The 1st Interested Parties submitted that following the conclusion of the survey exercise and the subdivision of the suit property into L.R No. 9917/8 and L.R No. 9917/9, the Plaintiff was allocated all that parcel of land known as L.R No. 9917/9 measuring 2233.31 Ha.

46. According to the Interested Parties, before the suit herein was filed, they registered their interest in acquiring all that parcel of land known as L.R No. 9917/8 measuring 1558.60 Ha with the National Land Commission in view of the fact that the same had reverted back to Agricultural Development Corporation (ADC) by way of a surrender.

47. It was deponed by the 1st Interested Party that in exercise of the powers conferred by **Article 67 (3) of the Constitution of Kenya and Section 5(2) of the National Land Commission Act**, the Commission upon receipt of the Applicants' request invoked its mandate to review the grant of all that parcel of land known as L.R No. 9917/8 in order to establish whether the same was available for allocation to the Applicants.

48. According to the 1st Interested Party, in accordance with **Section 14 of the National Land Commission Act**, the Commission summoned all interested parties namely; the Plaintiff, Machakos County Government, the African Inland Church and the Applicants herein for public hearings held on 6th, 18th and 20th April 2017 and 18th May 2017 as regards all that parcel of land known as L.R No. 9917/8 and that none of the parties so invited attended the hearings save for the Applicants and the CEC member of Machakos County Government.

49. It was deponed that the Commission having heard both the Applicants and the CEC member of Machakos County Government made its decision on 1st August 2017; that by virtue of the decision aforesaid, the Applicants were allocated all that parcel of land known as L.R No. 9917/8 by way of a letter of allotment dated 22nd November 2017 for valuable consideration of Kshs.2,050,294 and that the Commission's decision aforesaid has never been challenged whatsoever and is therefore in full force and effect.

50. The Applicants have annexed a copy of the letter of allotment dated 22nd November, 2017 that was issued to the Association by the NLC in respect of LR No. 9917/8-Konza. It is the Applicants' case that they fully and effectually discharged their obligations under the said letter of allotment issued by the Commission on behalf of the Government of Kenya therefore becoming *bonafide* allottees for value.

51. The Plaintiff on the other has deponed that the alleged letter of allotment is a forgery and non-existent; that the suit property has never been sub divided as claimed and that in any event, the deliberations of the NLC in respect to the suit property were stayed. According to the Plaintiff, the Interested Parties ought to file a distinct suit and ventilate their issues.

52. As I have stated in the preceding paragraphs, the Plaintiff in this matter did allege in the Plaintiff that the suit property had fraudulently been sub divided, and sought for the orders of the court restraining the Defendant from sub diving the suit property.

53. That being the case, the allegations by the Interested Parties that indeed the suit property was sub divided in the year 1995 after a portion of the land was surrendered ought to be heard on merit. Whether the Plaintiff was compensated for the land that is being claimed by the Interested Parties or not, and whether the Plaintiff indeed surrendered the said portion of land or not can only be addressed by the trial court.

54. Considering that the Judgment of this court declared the Plaintiff the bona fide owner of LR No. 9917/4, and in effect declared the purported sub division of LR No. 9917/4 null and void, the Applicants' case can only be heard after the Judgment of this court has been set aside. Indeed, the Plaintiff has not shown which prejudice he will suffer if the Interested Parties are allowed on board so as to ventilate their case, *vis a vis* the allegation that a portion of the suit property was available for allocation, and was indeed allocated to them.

55. Having come to the conclusion that the inclusion of the Interested Parties will effectually and completely resolve the issue of ownership of LR No. 9917/4, I shall allow the Interested Parties' Application as follows:

a) The Judgment delivered on 15th May 2020 by this Court and the resultant Decree issued on 8th June 2020 and all further and/or consequential orders arising therefrom be and is hereby set aside.

b) The Interested Parties be and are hereby enjoined in this suit as Defendants.

c) The Interested Parties to file their pleading(s) within 14 days of the date of this Ruling.

d) Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Kago for the Plaintiff

No appearance for the Defendants

Ms Nyaga for the interested parties

Court Assistant – John Okumu