



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 163 OF 2016

VIOLET LUCY SIKUKU 1ST PLAINTIFF

PATRICK OBARA2ND PLAINTIFF

RAPHAEL SIKUKU WAMBUKHA3RD PLAINTIFF

VERSUS

MARTIN SIKUKU WAMBUKHA1ST DEFENDANT

YUSUFU ALI AKINA2ND DEFENDANT

AND

KNIGHT VUTAGWA ADELI

EDWIN AMALIAGI ESSENZI

MIRIAM TUNYA IBRAHIMPROPOSED INTERESTED PARTIES

BENEDICTINE SISTERS OF OUR LADY OF GRANCE AND COMPASSION

R U L I N G

VIOLET LUCY SHIKUKU, PATRICK OBARA and RAPHAEL SHIKUKU WAMBUKHA (the 1st, 2nd and 3rd plaintiffs respectively) first moved to this Court vide their “*home made*” plaint filed herein on 19th December 2016 claiming against **MARTIN SIKUKU WAMBUKHA** and **YUSUFU ALI AKINA** (the 1st and 2nd defendants respectively) various remedies with regard to the land parcel **NO WEST BUKUSU/SOUTH MATEKA/4926** and the resultant sub – divisions being parcels **NO WEST BUKUSU/SOUTH MATEKA/5169 – 5189**. Various allegations of fraud were pleaded against the defendants in the manner in which they acquired the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/4926** and sub – divided it.

The defendants resisted the claims against them. After hearing the parties, this Court delivered it’s Judgment on 15th July 2021 dismissing the plaintiffs’ suit but ordering that being family, each of the parties would meet their own costs.

I now have before me a Notice of Motion dated 23rd July 2021 and filed on 28th July 2021 drawn and filed by the defendants but which cites the following as Interested Parties: -

- 1. KNIGHT VUTAGWA ADELI**
- 2. EDWIN AMALIAGI ESSENZI**
- 3. MIRIAM TUNYA IBRAHIM**
- 4. BENEDICT SISTERS OF OUR LADY OF GRACE AND COMPASSION.**

The application is signed by the plaintiffs but is not premised on any provision of the law. It seeks the following orders: -

(a) Spent

(b) That the Honourable Court be pleased to set aside the Judgment and order issued on 15th July 2021 to allow the Applicants to join the Interested Parties as Respondents.

(c) That the Honourable Court be pleased to allow the inhibitory order issued on 20th November 2017 remain in force and the same allow for a fresh hearing and determination of this case.

(d) That costs be in the cause.

The application is premised on the grounds set out therein and is supported by the affidavit of **VIOLET LUCY SIKUKU** the 1st plaintiff herein. I must confess that I have found it difficult to understand what exactly the plaintiffs seek by their application. But from what I can discern from their not very cogent pleadings is that they seek to join the above named Interested Parties in this suit for reasons that the said Interested Parties purchased part of the land in dispute from the defendants. Annexed to the supporting affidavit are the following documents: -

1. Defendants' further list of documents.

2. Certificate of Official Search for the land parcel NO WEST BUKUSU/SOUTH MATEKA/5171 in the names of **EDWIN AMALIAGI ESSENZI** and **KNIGHT VUTANGWA ADELI**.

3. Certificate of Official Search for the land parcel NO WEST BUKUSU/SOUTH MATEKA/5169 in the name of **KNIGHT VUTAGWA ADELI**.

4. Certificate of Official Search for the land parcel NO WEST BUKUSU/SOUTH MATEKA/5174 in the name of **THE BENEDICTINE SISTERS OF OUR LADY OF GRACE AND COMPASSION**.

5. An order issued by this Court on 20th March 2017 prohibiting any dealings with the land parcels NO WEST BUKUSU/SOUTH MATEKA/4922 and 4926.

The application is opposed and by a replying affidavit jointly signed by the defendants and dated 9th August 2021, they describe the application as defective, frivolous, vexatious, bad in law, academic, an abuse of the process of the Court and a waste of time. That the Honourable Court is functus officio and cannot sit on appeal by entertaining this application which has been overtaken by events. That the plaintiffs are not clear on what they want and their application is a sham meant to delay the defendants' enjoyment of the fruits of their Judgment.

The application has been canvassed by way of written submissions. These have been filed by the plaintiffs in person and by the firm of **SIKUTA & ASSOCIATES** for the defendants.

I have considered the application, the rival affidavits and the submissions.

The starting point must surely be the joint affidavit dated 9th August 2021 and signed by **MARTIN SIKUKU WAMBUKHA** and **YUSUF ALI AKINA** the defendants herein. **Order 19 Rule 5** of the **Civil Procedure Rules** provides that: -

5: *“Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”*

Since an affidavit is evidence, and in view of the provision of **Order 19 Rule 5** of the **Civil Procedure Rules**, it must be obvious that it can only be sworn by one person. At least that was the position that **OMOLO J A** took in the case of **FRANCIS KARIU GAKUMBI & EDWARD MWANGI NGURE .V. PILISKA NJOKI MAINA 2008 eKLR** when he said the following with regard to an affidavit that had been sworn by two persons: -

“I do not know that two different people can swear one oath at the same time. An affidavit is sworn evidence and that being so, each party ought to swear a separate affidavit even if the facts on which they are swearing the affidavits are the same. The practice of the (sic) people swearing and signing one affidavit must stop and if the motion had been opposed on the ground that it was not supported by a competent affidavit, I might well have struck it out on that basis.”

When the matter went before an en – larged Bench, **BOSIRE, GITHINJI** and **ALUOCH JJ. A** after considering the practice under both the Indian Code of Civil Procedure and the English practice stated as follows with regard to the remarks by **OMOLO JA**: -

“He however fell into error when he expressed the view that he doubted whether two people can swear one oath at the same time. He expressed himself too widely on that aspect because as we have shown above, certain common law jurisdictions freely allow two or more people to swear on affidavit at the same time.”

The parties did not address me on that issue. I therefore need not say much more on it now. Another opportunity will surely present itself in another forum. What I can say for now is that as will soon become clear, that affidavit sworn by the two defendants is not of much significance in this ruling.

The plaintiffs' Notice of Motion dated 23rd July 2021 is clearly flawed and is for dismissal for several reasons. To begin with, the proposed interested parties whom the plaintiffs seek to join in these proceedings are not even aware about this application. The plaintiffs aver that the proposed Interested Parties are the proprietors of some of the resultant parcels created following the sub – division of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926**. They ought to have been impleaded as defendants in the original suit. They were not even served with this application because it affects them as proprietors of part of the land in dispute. In paragraphs iv and v of the application, the plaintiffs have pleaded as follows: -

IV “That this case was filed and served to the Respondents by Applicants who were clients to the Interested Parties and they totally refused to enjoin them as Interested Parties that rendered this case nugatory.”

V “That the law is very clear that the parties registered to the land in dispute as a proprietor should be given a chance to be heard to allow for justice to be made to all parties involved in the case.”

It is of course true that all parties involved in a case or whose presence is necessary for the Court to effectively determine all the issues involved should be joined in a case. But that is what the plaintiffs ought to have done when they filed this suit. They were also at liberty to amend their plaint to include them as defendants. It is not the business of the Court, as an arbiter, to guide parties in litigation on how to conduct their cases.

With regard to the prayer to set aside this Court's Judgment delivered on 15th July 2021, it is clear from the record that it was not an ex parte Judgment. This was a final Judgment arrived at after hearing all the parties herein. There are no provisions in the Civil Procedure Rules for the setting aside of a final Judgment. This was the view taken by the Court of Appeal in the case of **KENYA POWER & LIGHTING COMPANY LTD .V. BENZENE HOLDINGS LTD 1/a WYCO PAINTS C.A CIVIL APPEAL No 132 of 2014 [2016 eKLR]** where the Judges expressed themselves as follows: -

“Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rules dealing with the setting aside of default Judgments, the Civil Procedure Rules does not have a provision for the setting aside of the final Judgment. A party aggrieved by a final Judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42.” Emphasis added.

Clearly therefore, the remedy for setting aside this Court's Judgment dated 14th July 2021 is not available to the plaintiffs. Their recourse is an appeal or review. That prayer is hereby dismissed.

Finally, the plaintiffs also seek the order that the inhibitory orders issued on 20th November 2017 do **“remain in force and the same allow for a fresh hearing and determination of this case.”**

On 20th November 2017, this Court issued an order directing the Land Registrar Bungoma to put an inhibition on all parcels of land resulting from the sub – division of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926 “until further orders of the Court.”** The case has now been heard and a final Judgment issued. An application by the plaintiffs to set aside that Judgment has been dismissed. The plaintiffs' claims have been dismissed. This Court has rendered itself on the dispute involving the suit land. **Section 70(d)** of the **Land Registration Act** allows the Court to cancel an inhibition: -

70(d) “by a consequent orders of the Court”

The order of inhibition placed on the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** was to last **“until further orders of the Court.”** As the suit is now concluded, this is the right time to lift the orders of inhibition.

The up – shot of the above is that having considered the plaintiffs' Notice of Motion dated 23rd July 2021, I make the following orders: -

- 1. The application is dismissed.**
- 2. The orders of inhibition placed upon the land parcels NO WEST BUKUSU/SOUTH MATEKA/4922 and 4926 are hereby lifted.**
- 3. As the parties are family, each shall meet their own costs.**

Boaz N. Olao.

J U D G E

4th November 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 4th day of November 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines with notice to the parties.

Boaz N. Olao.

J U D G E

4th November 2021.

Explanatory notes: -

This ruling was due for delivery on 14th October 2021. However, I was indisposed and away in Nairobi for treatment until 27th October 2021. The delay is regretted but was inevitable in the circumstances.

Boaz N. Olao.

J U D G E

4th November 2021.