



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 318 of 2015 (OS)

1. MBARO JOHNSON
2. KASUNGU GONA MASHA
3. SALIM WANJALA KILISWA
4. BAKARI HAMISI KATANA
5. CHARO KARISA JEFWA
6. ATHMAN SALIM
7. KARASU MWARANDU MUMBA
8. KAJUMWA MWAMBOZE
9. KASIMU KHAMISI
10. JOYCE MADZO MPOLE).....PLAINTIFFS/APPLICANTS

(Suing on their behalf and on the behalf of the squatters/residents of Junda Kasarani Ndogo
residing UPON PROPERTY/TITLE NO.771/II/MN NUMBER 430 in the schedule of members of
BAHATI JUNDA SELF HELP GROUP attached to the Originating Summons herein

VERSUS

1. TAVETA TEACHERS INVESTMENT LTD
2. REGISTRAR OF TITLES.....DEFENDANTS/RESPONDENTS

RULING

1. The application for determination is the notice of motion dated 24th August 2020 brought under Order 37 Rule 6, 7 (1), (2)&(3), 14 and 16 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It seeks for orders:

1. That this Honourable Court do order the Chief Registrar of Lands the 2nd Defendant herein to register as joint proprietors for Plot No.LR.NO.771/II/MN the current officials of Bahati Junda Self Help Group namely Mbaru Johnson as Chairman for the time being, Jones Ngala Machanga as Secretary and Charo Jefwa as Treasurer to hold the proprietorship jointly in trust for members currently of Bahati Junda Self Help Group CONSEQUENT UPON decision and decree of this Honourable Court delivered by Honourable Justice Matheka on 29th March 2019.

2. That the costs of this application be provided for.

2. The application is supported by the affidavit of Mbaro Johnson sworn on 30th September, 2019 in which he has deposed that the three named individuals are the current office holders of the association known as Bahati Junda Self Help Group. That the decision of the court granted them possession and ownership of Parcel of Land LR. NO. 771/II/MN and the Registrar of Titles should be ordered to register the names of the three officials as proprietors of the land to hold in trust of the members of the group. They relied on Sections 65 and 66 of the Land Registration Act 2012 and submitted that the land should have a registered owner.

3. The application is opposed by the respondents. The 1st respondent filed a replying affidavit by David Righa Mwakio sworn on 21st October, 2020 while the 2nd respondent filed grounds of opposition dated 23rd February, 2021. The 1st respondent submitted that no orders can be issued against the Chief Land Registrar as he was not a party to the suit and has never been a party. That Bahati Junda Self Help Group has never been a party to the suit and therefore the prayer sought herein is incompetent and an abuse of the court process. The 1st respondent's counsel relied on the case of **Zephir Holdings Limited –v-Mimosa Plantation Limited & Others (2014) eKLR**. The 1st respondent averred that the applicants obtained ex-parte judgment, against Title Number 771/II/MN and not CR. Number 8594 which belongs to Taita Taveta Teachers Investment Ltd.

4. On its part, the 2nd Respondent submitted that the application is defective as the court is functus officio. Counsel for the 2nd respondent relied on the case of **Serve In Love Africa (SILA) Trust –v- Abraham Kiptarus Kiptoo & 2 Others (2019) eKLR; Telkom Kenya Limited –v- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited (2014)eKLR; Raila Odinga & 2 Others –v- Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR**. The 2nd Respondent submitted that the judgment of court dated 29th March 2019 did not order the 2nd respondent to register the PLOT LR. NUMBER 771/II/MN in favour of the person the Applicant have proposed and therefore the applicants cannot purport to move the court to make additional orders which it did not make in the first instance. The 2nd respondent submitted that it is trite law parties are bound by their pleadings. That in the originating summons as well as the judgment delivered by the court, the applicants did not pray for orders of registration to be effected by the 2nd respondent, and that the application is therefore an afterthought and an abuse of the court process. On the argument that the application is functus officio, the 2nd respondent's counsel relied on the **Telkom Kenya Limited Case (supra)** which followed with approval the decision in the Canadian Case of **Chandler –v- Alberta Association of Architects(1989) 2 S.C.R.848**, where in explaining the origins of the rule of functus officio it was held in part that:

“The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court.”

That further, the court highlighted statutory provisions and specifically order 21 Rule 3 which states that “a judgment once signed shall not afterwards be altered or added to save as provided by Section 99 of the Act or on review. The 2nd respondent submitted that the current application has not demonstrated that it fits the exceptions of the functus officio doctrine. In addition, that the application seeks to enforce orders in the title of the pleadings which essentially opens up the door for review of the judgment which may only be done through an application under Order 45 of the Civil Procedure Rules which the applicants have not opted for. The 2nd respondent further submitted that it did not participate in the mainsuit and the Land Registrar was not a party to the suit and cannot be enjoined at the point of enforcing orders. The 2nd respondent submitted that the application is fatally defective and should be dismissed with costs.

5. Having considered the application and the submissions the issue for determination is whether the applicants are entitled to the orders sought. The application seeks an order directed to the 2nd respondent herein to register as joint proprietors of PLOT LR NO.771/II/MN the current officials of Bahati Junda Self Help Group, namely Mbaro Johnson, Jones Ngala Machanga and Charo Jefwa who are said to be the Chairman, Secretary and Treasurer respectively, to hold the proprietorship jointly in trust for the members of the said group. The application is opposed. To understand the present application, it is necessary to give background facts to the dispute between the parties and the context of the judgment and decree that are subject of the intended registration.

6. The applicants, Mbaro Johnson and 9 Others (suing on their own behalf and on behalf of the squatters/residents of Junda Kasarani Ndogo numbering 430 as per the schedule of members of Bahati Junda Self Help Group residing (attached to the originating summons) and residing on property Title No.771/II/MN CR 8594 measuring 47.62 acres or thereabouts filed an originating summons dated 19th November, 2015 and filed in court on 20th November, 2015 against the defendant, Taveta Teachers Investment Limited claiming to be entitled to the said land by way of adverse possession. The defendant denied the claim and filed a replying affidavit sworn by David Righa Mwakio on 28th March 2018. The matter came up for hearing before N.A. Matheka J. on 3rd December, 2018. On 29th March 2019, judgment was entered for the plaintiffs as follows:

“1. That the plaintiffs have acquired title to the disputed land by adverse possession having lived on the suit land for over twelve (12) years openly and without any interference by anyone.

2. That the defendant, by self, agents, servants, family members and other authorized persons and independent contractors be restrained by a permanent injunction from entering the suit property or demolishing the houses, structures or damaging or harvesting the plaintiffs crops therein and or evicting or interfering with the plaintiffs user and occupation of the suit property with their families.

3. Costs to the plaintiffs. ”

7. A decree was issued on 3rd June 2019 in terms of the said judgment. It is this decree which the applicants seek to enforce. In the suit, it is

clear that there was only one defendant namely, Taveta Teachers Investment Limited. However, in the current application, the applicants have introduced the Registrar of Titles as a 2nd respondent. My understanding of the current application is to enable the applicants enforce the decree that was issued in their favour. Section 38 (1) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides as follows:

“(1). Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(4). The proprietor, the applicant and any other person interest may apply to the High Court for determination of any question arising under this Section.”

8. I note that one of the questions posed by the plaintiffs in the Originating Summons was as follows:

“4. Are the plaintiffs entitled to be registered as the owners of the suit property?”

In my considered view, since the plaintiffs succeeded in the suit against the defendant, they were entitled to make the present application to give effect to the decree herein. Although the respondents argue that the judgment was against Title Number 771/II/MN and not CR. Number 8594, this argument is not correct because the subject matter of the suit as captured in the judgment of the court was Title NO.771/II/MN CR 8594 measuring 47.62 acres or thereabouts. That was the suit land and the subject matter in the application herein does not comprise matter which are extraneous to the suit and the decree. It is true that there is a prayer in the application directing the 2nd respondent, who was not a party to the suit, to register the applicants as proposed. However, the law as cited above provides for an application for registration, and the only person who can register land is the 2nd respondent. I am therefore not persuaded that the court is functus officio in this instance. In any event, the application can be said to fit under the exception submitted by counsel for the 2nd respondent in the Telkom Kenya Limited Case (supra) “where there was an error in expressing the manifest intention of the court.” There is no doubt the intention of the court was to have the applicants registered as proprietors of the suit land, the court having found that the appliance had acquired title to the suit land by adverse possession. Having regard to the fact that the applicants have a judgment and decree in their favour, I am of the opinion that the applicants were justified in proceeding to make the application herein. I do not think that there is any other way of enforcing the decree as it stands other than by granting the orders sought herein. For the foregoing reasons I find that the notice of motion dated 24th August 2020 is merited and the same is allowed as prayed. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 20TH DAY OF MAY 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE