



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 417 OF 2013

JAMES MWANGI GERALD.....PLAINTIFF

VERSUS

ANTONY WARUI.....1ST DEFENDANT

JACINTA WAIRIMU.....2ND DEFENDANT

FRANCIA NJOKI.....3RD DEFENDANT

JOYCE WATIRI MUCHIRI.....4TH DEFENDANT

EVA NJERI MUCHIRI (Suing as the Administrator

of the Estate of JOSEPH KARIUKIMUCHIRI (DEC)....5TH DEFENDANT

RULING

By a Notice of Motion dated 25th February 2014 brought under *Order 45(1) of the Civil Procedure Rules 2010*, the Interested party herein sought the following orders:-

- (1) That the Honourable Court be pleased to review and set aside the order issued on 13th October 2011.***
- (2) That the Honourable Court be pleased to order cancellation of entry number 15 in the register of L.R KIINE/SAGANA/356.***
- (3) That the cost of this application be provided for.***

GROUND IN SUPPORT OF THE APPLICATION

- a) That the Applicant was not afforded an opportunity to be heard before the order issued on 13th October 2011 was made contrary to the rules of natural justice.
- b) That the orders made on 13th October, 2011 adversely affected the proprietary interest of the applicant in L.R KIINE/SAGANA/3966-3972 without affording him an opportunity to be heard.
- c) That the applicant is a bona fide purchaser for value without notice of the aforesaid parcels of land.
- d) That there is sufficient reasons to warrant a review of the said court order.

APPLICANT'S SUMMARY OF FACTS

The said application is supported by an affidavit sworn by the Interested party/applicant on the even date where he deposed as follows:

- 1) That I am the Applicant herein and therefore competent to swear this affidavit.
- 2) That I am a bona fide purchaser for value without notice of the parcel; of land comprised in LR KIINE/SAGANA/3966, 3967, 3968, 3969, 3970, 3971 and 3972.

- a) That on 3rd March 2011 I entered into an agreement for purchase of L.R KIINE/SAGANA/3967, 3968 and 3969 each of which measures 0.04 Hectares from Muriuki Samsom Muriithi. The agreed total purchase price was Kshs 3,000,000/= and I paid Kshs 1000,000/= on that date (annexed hereto is a copy of acknowledgement receipt marked “SW-1”).
- b) That on 28th March 2011, I paid the balance of Ksh. 2,000,000/= (Annexed hereto is a copy of acknowledgement/receipt marked “SW-2”)
- c) That on 14th June 2011, I entered into an agreement for purchase of L.R KIINE/SAGANA/3966 which measures 0.04 hectares from Muriuki Samson Muriithi at a consideration of Kshs, 1000,000/=. That on the said date, I paid Ksh. 120,000/= (Annexed hereto is a copy of sale agreement marked “SW 3”)
- d) That on 1st July, 2011, I paid the balance of the purchase price amounting to Kshs 980,000/= to Muriuki Samson Muriithi in respect of the purchase of KIINE/SAGANA/3966. (Annexed hereto is a copy of the same marked “SW-4”).
- e) That on 5th August 2011, I entered into an agreement of purchase price of L.R KIINE/SAGANA/3970 and 3971 each measuring 0.04 hectares from Muriuki Samson Muriithi at a consideration of kshs 2000,000/=. That on that date, I paid Kshs 200,000/=. (Annexed hereto is a copy of the sale agreement marked “SW-5”)
- f) That on 25th August, 2011, I paid the balance of Kshs 1800,000/= in respect of L.R KIINE/SAGANA/3970 and 3971 to the vendor. (Annexed hereto is a copy of acknowledgement/receipt marked “SW 6”).
- g) That on 13th September 2011, I entered into an agreement for purchase of the L.R KIINE/SAGANA/3972 measuring 0.04 hectares from Muriuki Samson Muriithi at a consideration of Kshs 1000,000/= that on that date I paid Kshs 100,000/=. (Annexed hereto is a copy of the sale agreement marked “SW 7”).
- h) That on 19th September 2011, I paid the balance of Kshs 900,000/= to the vendor (annexed hereto is a copy of the acknowledgement/receipt marked “SW-8”).
- i) That all the aforesaid agreements and acknowledgements were prepared by a firm of advocates of the High Court of Kenya P.M Muchira & Co. advocates, of P.O. Box 174, KERUGOYA.
- j) That at the time I purchased all the aforesaid parcels of land, they were all registered under the names of Muriuki Samson Muriithi, the vendor, and they were free from all encumbrances.
- k) That then vendor only acquired the requisite Land Control Board consent and duly transferred the same to me. (Annexed hereto are copies of the title deeds in respect of L.R KIINE/SAGANA/3966, 3967, 3968, 3969, 3970, 3971 and 3972 collectively marked as “SW 9”).
- l) That at the time I purchased the aforesaid parcels of land, the vendor, Muriuki Samson Muriithi, had exclusive vacant possession of the same.
- m) That the vendor duly gave me exclusive vacant possession of the land upon purchase of the same.
- n) That there is no way I would have known that there was a pending case in court over the parcels of land that I purchased.
- o) That I was never served with any notice of this suit prior to being with the application dated 30th September 2013.
- 3) THAT I purchased the aforesaid parcels of land with a view to putting up a shopping mall thereon. That I duly had architectural drawings made and approved by the relevant authorities (annexed hereto is a copy of the same marked SW 10”).
- 4) THAT I also entered into a labour contract with a contractor on 21st September 2013 for kshs 15,000,000/= (annexed hereto is a copy of the same marked “SW 11”).
- 5) THAT I duly commenced my development of the said parcels of land and I have expended a lot of money (annexed hereto are copies of photographs of the buildings being put up marked “SW 12”).
- 6) THAT I became aware of the suit herein when I was served with the application dated 30th September, 2013 (annexed hereto is a copy of the same marked “SW 13”).
- 7) THAT it is through the said application that I noted from Entry 15 of the annexed Green Card of L.R KIINE/SAGANA/3921-3923 was cancelled allegedly pursuant to an order issued on 13th October, 2011. (Annexed hereto is a copy of the Green card marked “SW -14”).
- 8) THAT my aforesaid parcels of land are sub-divisions of L.R KIINE/SAGANA/3921 as is evident from the copies of the Title Deeds.

9) THAT I was not notified or heard before the order made on 13th October, 2011. That was contrary to the rules of natural justice. That indeed I still have my original title deeds.

10) THAT in the interest of justice that application herein be allowed.

11) THAT what is herein above deponed is true to the best of my knowledge, information and belief.

2ND & 3RD DEFENDANTS/RESPONDENTS SUMMARY OF FACTS

The 2nd Respondent filed a replying affidavit on her behalf and stated as follows;

1) THAT I am the 2nd respondent herein hence competent to swear this affidavit, and I am duly authorized to do the same by the 3rd Respondent.

2) THAT I have read and understood the application dated 25/2/2014, and the affidavit in support of the same, sworn by Simon Wachira the interested party and having understood the same, I do wish to state as follows;

3) THAT I reiterate all the contents of my application dated 30/9/2013 and the affidavit in support of the same sworn on 30/9/2013.

4) THAT I am a stranger to all the averments in paragraph (a) to (k) of the affidavit in support of the application dated 25/2/2014.

5) THAT the facts of the case are as stated in my affidavit in support of my application dated 30/9/2013, which I annex herein for ease of reference (annexed herein and marked "JWR 1").

6) THAT when the 4th and 5th defendants application dated 26/7/2010 came up for hearing, counsel for the plaintiff actually informed the court that after a consent was entered into her client had transferred this land to one Nicodemus Muriuki, who had proceeded to sub-divide the same, and transferred the resultant parcels to some other parties.

7) That the Honourable Court ordered the plaintiff to serve all the persons who had been registered as proprietors of the resultant parcels with a notice to appear in court so that their interests could be addressed and safeguarded but none of the proprietors appeared.

8) That instead of the registered owners appearing in court as ordered, the above mentioned Nicodemus Muriuki filed an application dated 7/12/2011, where he sought to be enjoined as a party to the suit and further sought a review of the orders made on 23/9/2011 as he had bought the plaintiff portion, sub-divided the same and sold the resultant parcels to 3rd parties. (annexed is the application marked "JWR 11").

9) That the said application is still to the best of my knowledge, still pending in court.

10) That is therefore obvious that the mischief surrounding this matter is caused by the said Nicodemus Muriuki, who apparently, if the applicant is being honest, failed to disclose to him that all the title deeds to the lands in issue had been cancelled.

11) That the said Nicodemus Muriuki, in this application dated 7/12/2011, admitted that his land parcel No. KIINE/SAGANA/3921, which he later subdivided and sold, was partitioned from land parcel No. KIINE/SAGANA/3110 which had been decreed to the 4th and 5th applicants.

12) That paragraphs 10 of this affidavit dated 13/5/2014, is therefore totally untrue and is solely calculated to further perpetrate this mischief in this matter.

13) That for the fair determination of all the issues surrounding this matter, and specifically so that the orders decreeing land parcel number KIINE/SAGANA/3110 are enforced, it is only fair that our application be allowed.

14) That what is stated herein is true to the best of my knowledge and belief.

4TH & 5TH DEFENDANTS SUMMARY OF FACT

The 4th and 5th Respondents through the firm of Lawrence M. Mbaabu & Associates filed a Notice of Preliminary Objection in opposition to the said application raising the following issue:

"1' The interested party is a stranger to these proceedings as he has never been enjoined as a party herein and he has therefore no locus whatsoever to file any pleadings in the suit."

PLAINTIFF/RESPONDENT'S SUMMARY OF FACTS

The Plaintiff/Respondent filed a replying affidavit sworn on 27th November 2020 and deposed as follows:

- 1) That I am a male adult of sound mind, the plaintiff herein hence competent to swear this affidavit.
- 2) That the 1st Interested party application dated 25/2/2014 has been read to me by my advocate on record and have understood the same and wish to respond as hereunder.
- 3) That the interested party's application is premature, incompetent and the orders sought are not capable of being granted for the following reasons:
 - a) That the interested party allegedly purchased the property now in question from party and/or vendor who had no title to pass to him and hence he cannot deem to be a bonafide purchaser without notice.
 - b) That pursuant to this Honourable Court judgment delivered on 14/2/2019 in case No. ELC 73/2012 - Nicodemus Muriuki Vs Jacinta Wairimu and others, the Court held that I had no right to allegedly sell the property to Nicodemus now the vendor to the interested party.
- 4) That I am the 1st registered proprietor of the foresaid parcel of land L.R KIINE/SAGANA/356 and sometime in 1993, the said property was fraudulently registered in the names of the advocate one Eliud Rugaita and one Warui Gitari of which subsequently subdivided and sold to third party without my knowledge, information and/or consent/(annexed is a copy of the green card marked "JMG 1")
- 5) That I have in the suit challenged the procedure and fraudulent manner in which the defendants transferred my parcel of land into their names and subsequent sub-division thereof (annexed is a copy of complaint letter marked "JMG 2")
- 6) That the interested party application to specifically the prayer seeking cancellation of entry No. 15 in register of L.R KIINE /SAGANA/356, can only read to mischief as the plaintiff in this instant suit challenging the authenticity of the subsequent titles.
- 7) That the instant interested party application would render the plaintiff's suit and claim nugatory since they have been in illegal occupancy of the suit land despite the existence of the land dispute tussle in court since 2000 to date.
- 8) That it is in the interest of justice that this matter be fixed for full hearing of determination be in devoid of interlocutory application that are intended to delay and cause confusion in the matter.
- 9) That what is deponed to herein is true to the best of my knowledge, information and belief.

APPLICANT/1ST INTERESTED PARTY'S SUBMISSIONS

The Applicant/1st interested party through the firm of Magee Law LLP submitted that he is the registered absolute proprietor of L.R KIINE/SAGANA/3966, 3967, 3968, 3969 3970, 3971 and 3972. He further stated that he started putting up a shopping mall on aforesaid parcels of land and was surprised when he was served with an application dated 30th September 2013 in which one 2nd and 3rd defendants sought for his joinder in the suit as an interested party and an order of injunction. He strenuously opposed the application for injunction and the court eventually dismissed the application for injunction and allowed him to finalize his development and that project now described a Magunas mall at Sagana is fully operational on his parcel of land. Upon perusal of the court file, his counsel discovered that a Court order dated 13th October 2011 was registered against L.R KIINE/SAGANA/356 as Entry Number 15. He further submitted that the said order cancelled Entries Numbers 10,11,12,13 and 14 of L.R KIINE/SAGANA/356. The effect of that was that all the subdivisions of L.R KIINE/SAGANA/356 including the parcels of land that he owns were cancelled. He referred to *Order 45(1) of the Civil Procedure Rules* which he submitted provides that any person who considers himself aggrieved may apply for review and that the same does not state any party aggrieved may apply for review. He submitted that having been aggrieved by an order made by the court without affording him an opportunity to be heard, the applicant has the locus standi to apply for review of the order and that he need not apply to be a party to the suit first. The applicant reiterated his affidavit in support of the application and submitted that he lawfully purchased the suit properties. He did due diligence by conducting a search where he found that the vendor was the registered owner and had exclusive possession of the same. He stated that the vendor lawfully acquired the requisite Land Control Board consent and transferred the said parcels of land to him. He was also given quiet possession of the suit properties. There after he acquired the requisite consent from relevant government agencies to develop the parcels of land and has fully developed them. He argued that it is not in dispute that he was not afforded an opportunity to be heard before the impugned order that cancelled the title deeds was made which is a blatant violation of his right to hearing contrary to the rules of natural justice as provided under Article 50(1) of the Constitution, Section 24 and 80 of the Land Registration Act No. 3 of 2012.

1ST DEFENDANT'S WRITTEN SUBMISSIONS

The 1st Defendant through the firm of Kimwere Josephat & Co. advocates submitted that the applicant has not met the ingredients for review as set out under *Order 45 CPR*. First, he submitted that the applicant was not part of the impugned order sought to be reviewed. As such, the applicant has no locus standi as he was not a party to the proceedings giving rise to the impugned order. The 1st defendant also submitted that the application was brought with inordinate delay and not within the time allowed for application for Judicial Review.

THE 4TH & 5TH DEFENDANTS SUBMISSIONS

The 4th & 5th Defendants through the firm of Lawrence M. Mbaabu & Associates submitted on the following seven 7 issues.

1) Whether the Applicant's application meets the threshold for review under Order 45 CPR, 2010

On this issue, the 4th & 5th Defendants submitted that the Applicant has failed to demonstrate that he has since discovered new evidence to point out any error on the face of the record to warrant the exercise of this Honourable Court's discretion in his favour. In any event, he submitted that the order the applicant is seeking to review is regular and that the same is based on the law. He cited the following authorities:

1. *Michael Muriuki Ngibuini Vs East African Building Society Limited (2015) e K.L.R.*
2. *Nasibwa Wakenya Moses Vs University of Nairobi & Another (2019) e K.L.R.*

2) Whether there are sufficient reasons to warrant grant of a review order

The 4th & 5th Defendants submitted that the facts in this case and the case law demonstrates that the court order that is sought to be reviewed is regular and that the same is based on the law. They also argued that the applicant has failed to demonstrate that he has since discovered new evidence or to point out any error on the face of the record to warrant the exercise of this Honourable Court's discretion in his favour. He cited the following authorities.

1. *Muyodi Vs Industrial and Commercial Development Corporation & Another (2006) I EA 243.*
2. *Tabitha Njeri Kinuthia Vs said Swaleh Said & another (2019) e K.L.R.*

3) Whether the applicant's application dated 25th February 2014 was filed without inordinate delay.

The 4th & 5th Defendants submitted that the Applicant has not offered any explanation for the inordinate delay in filing the instant application. They cite the following cases;

1. *Stephen Gathu Kimani Vs Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) e K.L.R.*

4) Whether the Honourable Court should set aside the Court order issued on 13.10.2011

The 4th & 5th Defendants submitted that an order cancelling Entry Number 15 in the register of title Number KIINE/SAGANA/356 will have the effect of nullifying and extinguishing title Number KIINE/SAGANA/3110 that was reinstated by this Court order issued on 13.10.2011 by Hon J.K. Serگون in exercise of his discretionary powers to vary the consent order of 30.09.2008.

The 4th & 5th Defendants also submitted that if the application is allowed, it will be in contravention of their right to property guaranteed under *Article 40 of the Constitution of Kenya 2010* and any other written law. He cited the following cases:

- 1) *Getway Investment Limited Vs Tajmall Limited and 3 others (2006) e K.L.R.*

5) Whether the Applicant is entitled to the prayers herein.

The 4th & 5th defendants submitted that the instant proceedings before this Honourable Court are sub-judice as the applicant herein instituted Kerugoya ELC Constitutional Petition No. 23 of 2014 after filing the application for review dated 25/2/2014. They argued that in the two applications, the matter in issue directly and substantially relates the matter in issue directly and substantially relates to the applicant's alleged right of ownership over title Number KIINE/SAGANA/3966-3972. The two suits are between the same parties and over the same subject matter. They further submitted that there are no orders staying the proceedings in Kerugoya ELC Constitutional Application No. 23 of 2014. They argued that the applicant herein is clearly forum shopping and abusing the legal process. They cited the following authorities:

- 1) *Niazsons (K) Ltd Vs China Road & Bridge Corporation Kenya (2001) KLR 12.*
- 2) *All Ismail Baraki & Another Vs Chairman, Garissa County Service Board & 4 Others C.A. 236 of 2013 cited with approval in the case of J.S. Muiru & 2 Others Vs Tigoni Treasures Limited & 3 Others (2015) e KLR.*

6) Who should bear the costs of the instant application?

The 4th and 5th Defendants submitted that they are entitled to the costs of this application for being subjected to unnecessary litigation by the applicant.

LEGAL ANALYSIS AND DETERMINATION

I have considered the application dated 25.02.2014, the supporting affidavit and the annexures thereto. I have also considered the responses to the said application and the rival submissions. The applicant in this application is seeking to review and set aside the order issued on 13th October 2011. The applicant is also seeking an order for cancellation of Entry No. 15 in the register of L.R KIINE/SAGANA/356. The basis of the order being complained relates to consent order filed by parties in this case. The first consent order was recorded on 30th September 2008 while the second consent order was recorded on 24th July 2009. By a motion dated 26th July 2010, two applicants namely Joyce Watiri

Muchiri and Eva Njeri Muchiri who were the administrators of the Estate of one Joseph Kariuki Muchiri (deceased) moved the Court seeking the following orders:

- 1) That this application be certified urgent and service thereof be dispensed within the first instance.
- 2) That the plaintiff, 1st, 2nd and 3rd defendants herein be restrained by themselves, their servants and or agents from selling, charging, subdividing, resurveying, constructing, leasing, or otherwise dealing in any manner with property known as ALL THAT PARCEL OF LAND known as KIINE/SAGANA/356 (of which KIINE/SAGANA/3110 has now been amalgamated and merged with) pending the hearing and determination of the application.
- 3) That the plaintiff, 1st, 2nd and 3rd defendants herein be restrained by themselves, their servants and or agents from entering into, selling, charging, subdividing, resurveying, constructing, leasing, and also interfering with the 4th and 5th defendants quiet enjoyment, use and possession of the area that comprised of ALL THAT PARCEL OF LAND known as and/or identifiable as KIINE/SAGANA/3110 (which has now been amalgamated with KIINE/SAGANA/356), and all the developments thereon pending the hearing and determination of this suit.
- 4) That this Honourable Court be pleased to SET ASIDE the following orders, that is to say;
 - a) A decree given under the hand and seal of this Honourable Court on 30th September 2008;
 - b) An order given under the hand and seal of this Honourable Court on 24th July 2009 and issued by this Honourable Court on 24th August, 2009;
 - c) And all consequential orders.

ALTERNATIVELY

- d) The aforesaid orders be amended in such manner and fashion that do not affect the applicants interest in the property known as KIINE/SAGANA/3110.
- 5) That in view of the orders made herein above, property known as Land Reference Number KIINE/SAGANA/3110 be reinstated forthwith and a new title be issued to the applicants in the name of JOSPEH KARIUKI MUCHIRI and all the survey boundaries and beacons related to the said property be reinstated accordingly.
- 6) That these orders be served upon the District Land Registrar, Kirinyaga District and the District Surveyor, Kirinyaga District for compliance purposes.

After hearing the applications inter-partes, this Court sitting in the nature and character of the High Court rendered itself on the said application on 23rd September 2011 and issued the following orders:

1. That this Court be and hereby pleased to set aside the following orders that is to say;
2. That the aforesaid orders be and are hereby amended in such manner and fashion that they do not affect the applicant's interest in the property known as KIINE/SAGANA/3110.
3. THAT in view of the orders made herein above, property known as Land Reference Number KIINE/SAGANA/3110 be and is hereby reinstated forthwith and a new title be re-issued to the applicants in the names of JOSEPH KARIUKI MUCHIRI and all the survey boundaries and beacons relate to the said property be reinstated accordingly.
4. That these orders be served upon the District Land Registrar, Kirinyaga District and the District Surveyor, Kirinyaga District for compliance purposes.
5. That the costs of this application be provided for.

These orders are the subject of the present application. According to the applicant/1st interested party, the above orders were issued without affording him an opportunity to be heard. Upon perusal of the sale agreement in respect of the suit properties being L.R KIINE/SAGANA/3966-3972, the applicant entered into agreement for the purchase of the properties with one Muriuki Samsom Muriithi (vendor) between 3rd May 2011 and 13th September 2011. The title deeds in respect of the suit properties were also issued to the applicant between 6th April 2011 and 29th September 2011. It follows therefore that when this court sitting in Nyeri issued orders on 15th September 2011 cancelling Entry No. 15 in the register of LR KIINE/SAGANA/356 which hereby affected all resultant subdivisions which include the applicant's suit properties LR KIINE/SAGANA/3966, 3967, 3968, 3969, 3970, 3971 and 3972. It is clear that by the time this court issued the said orders on 30th September 2011, the applicant herein was not afforded an opportunity to defend his properties which is a flagrant violation of his Constitutional right to own property under **Article 40 of the Constitution of Kenya 2010**. The said **Article 40** provides as follows:

Protection of right to property.

“40(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property;

a) Of any description; and

b) In any part of Kenya”.

Article 50 of the Constitution, 2010 also affords a party a right to be heard before being condemned. The same provides as follows;

“50 (1) Every person has the right to have a dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.....”.

The order by this Court issued on 30th September 2011 offended the applicants right to natural justice and the *audi alleram partem* rule which dictates that no person should be condemned unheard.

I also note that when this Court issued the impugned order, the applicant was the registered proprietor of the suit properties L.R NO. KIINE/SAGANA/3966, 3967, 3968, 3969, 3970, 3971 and 3972 respectively. The law protects the title of a registered owner under **Section 26 of the Land Registration Act No. 3 of the Laws of Kenya** which provides as follows;

“26(1) The certificate of title issued by the Registrar, upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

The law is so protective of a certificate of title issued by the Registrar pursuant to a transfer or transmission and it gives only two ways in which the title issued can be cancelled. The manner in which the title issued to the applicant was cancelled on 30th September, 2011 is therefore unprocedural and the order is in my view liable to be reviewed and/or set aside which I hereby do. Suffice to state that the applicant need not make a formal application to be enjoined as a party before seeking the orders. In any event, the orders issued on 30th September 2011 cancelling his titles deeds did not require that he be enjoined as a party first before issuing the orders. In any case, this Court has powers to make an order enjoining a party to suit suo moto.

The upshot of my finding is that the Notice of Motion dated 25/02/2014 is merited and the same is allowed as prayed. Costs shall be in the cause. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of

- 1) Mr. Mbaabu for 4th and 5th Defendants
- 2) Mr. Asimwe holding brief for Magee for 1st Interested party
- 3) Ms Wangechi Munene holding brief for Ms Buti
- 4) Kabuta – Court clerk.