



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 13 OF 2015

MICHAEL OTIENO WAGUDE.....PLAINTIFF

VERSUS

MORRIS OLWAL.....DEFENDANT

RULING

The applicant prays for orders that there be a stay of execution of the Judgment and Decree of this Honourable Court dated 18th October 2017 pending the hearing and determination of this application inter-partes and that this Honourable Court be pleased to enjoin the Interested Parties/Applicants in this suit as Defendants and that the Judgment and Decree of this Honourable Court dated 18th October 2017 and all other subsequent proceedings and consequential orders be set aside. Moreover, that leave be granted to the Plaintiff/Respondent to Amend and file an Amended Plaintiff incorporating the Interested Parties/Applicants within 14 days from the date of granting this Order with corresponding leave to the Defendant/Respondent. The costs of this application be provided for.

The application is based on grounds that the Judgment in this suit was delivered on 18th October 2017 wherein this Honourable Court ordered the Defendant/Respondent to give vacant possession of the land parcel Kisumu/Dago/566 in 90 days and in default he be forcefully evicted.

The said Judgment was based on Plaintiff filed by the Plaintiff/Respondent claiming that the suit parcel of land belongs to him having inherited the same from his deceased father one Marikus Wagude hence he is entitled to exclusive use and occupation.

At the time of filing this suit, the Plaintiff/Respondent concealed the fact that the suit parcel of land is his ancestral home occupied by the Interested Parties/Applicants who were not made parties in this suit hence unable to file their respective responses.

The Interested Parties/Applicants became aware of existence of this suit on 26th February 2020 when they were forcefully evicted from the suit premises without being issued with any notice and/or eviction order.

The Plaintiff/Respondent is currently in the process of destroying structures mature trees and crops therein.

The Plaintiff/Respondent's action has adversely affected the Interested Parties/Applicants as the suit property is their only known home.

The present suit was only intended to stifle the rights and interests of the Interested Parties/Applicants as the Plaintiff/Respondent had full knowledge of the fact that they were in possession of their respective portions in the suit parcel of land.

In the supporting affidavit of Milka Outa, who has the authority of the interested parties to swear the affidavit, she states that they have been evicted from the suit land. They were not aware of the case or eviction orders. Moreover, that they are beneficiaries of the suit land as it is their ancestral land, having been registered in the names of the Plaintiff's father one Marikus Wagude Otieno as a custodian as he was the senior member alive. That Marikus Wagude Olwal passed away in 1982 before the suit parcel of land was sub-divided to all members of the family. Sometime in 2012, the Plaintiff/Respondent and his brother John Wasonga secretly filed Succession Cause No. 415 of 2011 with respect to the estate of their deceased father Marikus Wagude Olwal. That when they got wind of the unfolding events, they successfully challenged the Grant before it was confirmed. That it has now come to their knowledge that sometime in 2014 the Plaintiff/Respondent filed another Succession Cause No. 760 of 2014 with respect of his deceased's father's estate and obtained a Grant of Letters of Administration which he used to obtain eviction orders in this suit. That had they had been made parties in this suit, they could have filed their respective responses laying claim on the suit parcel of land. That failure by the Plaintiff/Respondent to include them in this suit shows that his intention was to deprive them their rights and interests in the suit parcel of land. That the Plaintiff/Respondent's action has adversely affected them because the suit property is their only known home having resided therein throughout their lifetime. The Plaintiff/Respondent is currently in the process of destroying structures, mature trees and crops therein which will leave them completely homeless an act that cannot be compensated. That it is therefore necessary to grant the orders sought so that the legal issues arising in this suit can be determined on merit by this Honourable Court. That it is just and equitable that the orders sought herein are granted by this Honourable Court.

The Plaintiff/Respondent filed grounds of opposition stating that the application is bad in law, incurably defective and an abuse of the court process. The orders sought for are an affront to the overriding objectives of the court. The Application is filed simply to defeat the ends of justice as the Applicants have not come to court with clean hands in light of the ELC 245 OF 2017 [Micheal Otieno Wagude – VRS- Morris Olwal & The District Land Registrar Kisumu].

In the replying affidavit Micheal Otieno Wagude states that the applicants/Interested Parties herein have all along been aware that the Plot No. KISUMU/DAGO/566 did belong to Marikus Wagude his father who was the sole owner and if at all he was holding the same in trust of the entire family such evidence should surface and or be produced and that the defendant all along had his parcel of land to wit parcel No. KISUMU/DAGO/625 duly registered into his names when he was still a minor which he later sold to the interested parties and that if at all the interested parties are claiming beneficial interest their claim should be directed to the said parcel KISUMU/DAGO/625.

That all the interested parties are family, agents, servants and or employees of the defendant and that the first interested party is the first born son of the defendant all their claim should be directed to land parcel no. KISUMU/DAGO/625 which the defendant sold before taking over the suit parcel. That attempts by the defendant to institute another case was not successful on the same subject. That the interested parties all along been aware that there was a dispute on the suit parcel took no attempt to legal claim the same. Further the defendant attempt to challenge the succession is objection was duly dismissed.

The respondent swears that the supporting affidavit to the interested party's application is untrue that the interested parties/applicants were unaware of this suit immediately after eviction duly done on the 29th June 2018 they move court through an application dated 5th July 2017 which was filed in court on the 6th July 2018 where the said deponent Milka Outa sworn affidavit in support to the said application seeking for stay of execution. That it is criminal offence to lie under oath and the said affidavit of Milka Outa should be expunged from record for misleading the honorable court the deponent been dishonest and have come to this court of equity with unclean hands. That the interested parties'/applicants application has therefore been brought in bad faith, intent in interfere with the plaintiff from exercising its legally conferred rights which was successfully having been done.

I have considered the application which revolves on joinder of parties after judgment and execution, Joinder of parties is governed by Order 1 of the Civil Procedure Rules 2010. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise.

The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings.

But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit.

In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief.

The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. In this case the cause of action is incompatible with the cause of action in the concluded case as the concluded case was premised on trespass by the plaintiff who neither entered appearance nor filed a defence.

The court should be careful when joinder of parties is sought where judgment has been entered and execution of the decree has been completed. The principle law is that a party can be added to a suit even after judgment has been made but before the costs have been taxed. Moreover, the court should be careful to avoid a situation where a party who has lost a case intends to re-litigate through the relatives.

In this case, the intended first interested party is alleged by the plaintiff to be the son to the defendant an allegation that is not disputed by the alleged 1st interested party. The interested parties have concealed their identity to the extent that this court cannot discern their proprietary rights in the parcel of land and therefore unable to exercise its discretion as required by law. The court requires open and honest litigants to enable it exercise its discretion to their favor.

Milka Outa the deponent of the supporting affidavit does not disclose her relationship with the plaintiff and or the defendant and does not demonstrate that she has a claim based on ancestral rights. It is not clear whether she is a purchaser or a relative to either the plaintiff or the defendant. It is important that at this stage the applicants should demonstrate that they have triable issues to enable the court to set aside the judgment that was regularly entered, which they have not.

I do find the application without merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16th DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE