



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 687 OF 2014

JAMES GATHITHO MUTAHI.....PLAINTIFF

-VERSUS-

DUNCAN NDERITU NDEGWA.....1ST DEFENDANT

KEREMARA HOLDINGS LIMITED.....2ND DEFENDANT

ELUAI LOKALE.....INTENDED 3RD DEFENDANT

RULING

A. INTRODUCTION

1. The material on record indicates that by an originating summons dated 24th November, 2014 filed pursuant to **Section 38 of the Limitations Act (Cap. 22) and Order 37 rule 7 of the Civil Procedure 2010 (the Rules)** the Plaintiff sought determination of 4 questions relating to the suit property. In a nutshell, the originating summons was essentially seeking adverse possession of 8.0 acres out of the 2nd Defendant's L.R No. 6381/20/1 (*the suit property*). The said summons was supported by an affidavit sworn by the Plaintiff on 5th December, 2014.

2. It would appear that upon the Defendants failing to enter

appearance and file an answer to the originating summons the Plaintiff obtained interlocutory judgment against them. It would further appear that the said interlocutory judgment was set aside on 23rd September, 2015 by consent of all the concerned parties. The parties further consented to take directions to the effect that the originating summons shall be treated as the plaint whereas the Defendants' replying affidavit was to be treated as the defence and documents annexed thereto to be deemed as exhibits at the trial. The suit was to be canvassed through *viva voce* evidence and the parties were granted 30 days to file any further documents and witness statements if they so wished.

3. When the suit was next listed for mention on 3rd February, 2016 to confirm compliance the parties were duly represented by advocates and they confirmed that they shall not file any further or additional documents or statements. The suit was consequently fixed for hearing on 10th May, 2016. The record shows that the suit did not proceed on that date but was stood over to 18th October, 2016 when the Plaintiff gave evidence and closed his case. The suit was thereupon stood over to 15th May, 2017 for defence hearing.

4. It would appear that the defence hearing did not take off on that day. When the suit eventually came up for further hearing on 30th May, 2018 it became apparent that the Defendants had changed the defence strategy. They had filed witness statements without leave of court. The same were expunged from the record since they had been filed long after the Plaintiff had closed his case and without leave of court. It would appear that the suit thereafter remained dormant for several months until the instant application was filed.

B. THE DEFENDANTS' APPLICATION

5. By a notice of motion dated 6th November, 2018 based upon **Order 1, rule 10, Order 11 Rule 7(4)(b), Order 40 rules 1, 2 and 3, Order 45 rule 1 and Order 51 rule 1** of the **Rules, Sections 3 and 3A of the Civil Procedure Act (Cap. 21), and Section 3 of the Judicature Act (Cap. 8)**, the Defendants sought the following orders:

(a) Spent.

(b) Spent.

(c) That this honourable court be pleased to enjoin Eluai Lokale as the 3rd Defendant herein.

(d) That the Plaintiff be restrained either by himself, his servants or agents, from interfering with the intended 3rd Defendant's enjoyment of LR No. 6381/31 until further orders of this honourable court.

(e) That the Plaintiff be restrained either by himself, his servants or agents, from interfering with the intended 3rd Defendant's enjoyment of LR No. 6381/31 pending the hearing and determination of this suit.

(f) That this honourable court be pleased to review its directions on the hearing given on 23rd September, 2015, 18th October, 2016 and 30th May, 2018 respectively.

(g) That the Defendants do have leave to separate from each other the components of defence and witness statement as contained in the 1st Defendant's replying affidavit sworn on 21st April, 2018.

(h) That the defence and counter claim herein be deemed to have been filed and served on the Plaintiff pursuant to the directions given by this honourable court on 23rd September, 2015.

(i) That the 1st Defendant be granted leave to file a supplementary affidavit/statement to update this Honourable court on the status of the suit property.

(j) That the Defendants be allowed to file additional statements to the replying affidavit sworn by the 1st Defendant on 21st

April, 2015.

(k) That the Plaintiff be at liberty to give further evidence in chief under **Section 146 of the Evidence Act**.

(l) That the Plaintiff be at liberty to call additional witnesses.

(m) That the costs of this application be provided for.

6. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavits by Duncan Nderitu Ndegwa and Eluai Lokale sworn on 6th November, 2018 and the exhibits thereto. The 1st and 2nd Defendants contended that there was need for them to file additional witness statements in furtherance of their right to a fair hearing under **Article 50 of the Constitution of Kenya**; that the directions taken at the trial of the suit had inhibited them from effectively defending the suit; that the Defendant's replying affidavit sworn on 21st April, 2015 did not fully set out their case; that the Defendants wanted to amplify the facts stated in the replying affidavit since the Plaintiff had referred to it in his evidence; that the intended 3rd Defendant was in occupation of part of the land claimed by the Plaintiff; and that that Plaintiff shall not suffer any prejudice if the application was allowed.

C. THE PLAINTIFF'S RESPONSE

7. The Plaintiff filed a replying affidavit sworn on 4th February, 2019 in opposition to the said application. It was contended that the application was an abuse of the court process which was intended to circumvent previous court orders in the suit. It was contended that the Plaintiff's case was heard in the presence of the 1st and 2nd Defendants' advocates without any objection. The Plaintiff further stated that he had no claim against the intended 3rd Defendant hence he did not intend to sue him and therefore he should not be forced to sue him. It was also contended that the instant application by the intended 3rd Defendant was a scheme to front a rescue plan for the 1st and 2nd Defendants whilst the suit was pending defence hearing. The court was consequently urged to dismiss the application with costs.

D. THE DEFENDANTS' REJOINDER

8. The Defendants and the intended 3rd Defendant filed a further affidavit sworn by Duncan Nderitu Ndegwa on 12th February, 2019 in response to the Plaintiff's replying affidavit. The Defendants essentially reiterated the contents of their previous affidavits and

disputed the contents of the Plaintiff's replying affidavit sworn on 4th February, 2019. The deponent stated that he was in the process of transferring L.R No. 6381/31 to the intended 3rd Defendant and that the Plaintiff had wrongfully interfered with the said property. It was further contended that the claim for trespass to land could only be introduced upon amendment of pleadings. The court was, once again, urged to allow the application.

E. DIRECTIONS ON SUBMISSIONS

9. It would appear from the material on record that said application was argued orally before Hon. Justice Waithaka on 18th February, 2019. The record shows that the Defendants' advocates prosecuted the said application on the basis of the grounds set out in the application and the contents of the Defendants' supporting affidavits and further affidavit. The Plaintiff's advocate also opposed the application on the basis of

the contents of the replying affidavit and urged the court to dismiss it.

F. THE ISSUES FOR DETERMINATION

10. The court has perused the Defendants' notice of motion dated 6th November, 2018, the Plaintiff's replying affidavit in opposition thereto, the Defendants' further affidavit and the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Defendants have made out a case for review of the orders made on 23rd September, 2015, 18th October, 2016 and 30th May, 2018.*

(b) *Whether the Defendants are entitled to the various consequential orders sought upon review.*

(c) *Whether the intended 3rd Defendant has made out a case for his joinder as a 3rd Defendant in the suit.*

(d) *Whether the intended 3rd Defendant is entitled to the injunction and other consequential orders sought.*

(e) *Who shall bear costs of the application.*

G. ANALYSIS AND DETERMINATION

(a) Whether the Defendants have made out a case for review of the orders made on 23rd September, 2015, 18th October, 2016 and 30th May, 2018

11. The court has considered the material and submissions on record on this issue. The material on record shows that on 23rd September, 2015 by consent of the parties the interlocutory judgment against the Defendants was set aside and directions on the hearing of the originating summons were given again by consent of the parties. By a further consent of the parties on 18th October, 2016 they admitted the Plaintiff's affidavits and annexures as exhibits in the suit whereupon the Plaintiff testified and closed his case.

12. The record further shows that on 30th May, 2018 the court struck out the Defendants' witness statements which had been filed on 29th May, 2018. The said statements were struck out because they had been filed without leave of court and after the Plaintiff had closed his case.

13. The Defendants' application was based, *inter alia*, upon **Order 45 rule 1 of the Rules** which stipulates as follows:

“Any person considering himself aggrieved –

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

14. The said principles for the grant of an application for review were reiterated in the case of **Origo & Another v Mungala [2005] eKLR** whereby the Court of Appeal held that:

“From the foregoing, it is clear that an applicant has to show that there is discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the Applicant must make the application without unreasonable delay...”

15. It is evident from the record that the orders made on 23rd September, 2015 and 18th October, 2016 were made by consent of the concerned parties who were duly represented by advocates at the material time. It has been held that orders made with the consent of the parties are not to be lightly interfered with except upon grounds which may justify the setting aside of a contract. In the case of **Hiran v Kassam (1952) 19 EACA 131** it is held *inter alia*, that;

“The mode of paying the debt, then, is part of the consent. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Order (7th Edn)*; vol 1, p. 124, as follows:

“prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

16. The said authority was applied in the latter case of **Brooke Bond Liebig Ltd v Mallya [1975] EA 266** where Law Ag P stated at page 269 that;

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

17. That legal position was followed in subsequent cases such as **Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485, Waside v Wamboko [1988] KLR 429**, and the case of **SMN v**

ZMS & 3 Others [2017] eKLR.

18. The court finds absolutely no reason or justification to interfere with, vary, or set aside the consents recorded by the parties’ advocates on 23rd September, 2015 and 18th October, 2016. It was not alleged that the consents were obtained by fraud, coercion, undue influence, or on account of any of the factors which may vitiate a contract in law. It is also strange that it took the Defendants between 3 and 4 years to apply for review of the consent orders and long after the Plaintiff had testified and closed his case. There was no plausible explanation rendered for the delay. As was held in the case of **Origo and Another (supra)** an application for review must be filed without unreasonable delay. The record shows that even after the Defendants changed advocates in June, 2018 they did not file the instant application until November, 2018. That additional delay was not explained.

19. The court has also considered the prayer for review of the orders made on 30th May, 2018 striking out the Defendant’s witness statements. The court gave solid reasons for the action. The Defendants had previously informed the court that they would not file any statements or additional documents. On the basis of that confirmation, the suit was set down for hearing whereupon the Plaintiff testified and closed his case. The Defendants were not at liberty to sneak in new witness statements after the closure of the Plaintiff’s case and without leave of court. The court finds no ground for review of the striking out order within the realm of **Order 45 rule 1** of the **Rules**. The Defendants have, again, not explained the delay in seeking review of the order for more than 5 months. Accordingly, the court is not inclined to grant a review.

(b) Whether the Defendants are entitled to be various consequential orders upon review

20. The court is of the opinion that this issue is now moot. The consequential orders were all dependent upon the prayer for review being successful. Since the court is not inclined to grant the review sought it, would follow that the Defendants are not entitled to the consequential orders sought.

(c) Whether the intended 3rd Defendant has made out a case for joinder as a 3rd Defendant in the suit

21. The court has considered the material and submissions on record on this issue. The material on record shows that the Plaintiff’s suit is a claim for adverse possession of 8 acres out of the suit property against the registered owner. The material on record shows that the intended 3rd Defendant is not the registered proprietor of the suit property. The material on record further shows the Defendants intend to transfer the suit property or part thereof to the intended 3rd Defendant but no transfer appears to have taken place thus far. The court has further noted that whereas the Plaintiff’s claim is against L.R No. 6381/20/1, the intended 3rd Defendant claims that the Plaintiff has trespassed into L.R No. 6381/31 which he claims to have bought from the Defendants in 2010.

22. The intended 3rd Defendant based his application upon **Order 1 rule 10(2)** of the **Rules** which stipulates as follows:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

23. It must be remembered that although the court has a wide discretion to add new parties to proceedings, such discretion must be exercised judicially and upon reason. The Plaintiff’s claim is for adverse possession against the registered proprietor. A claim for adverse possession is in the nature of a prescriptive right which runs with the land irrespective of change of ownership once the right has crystallized. The Plaintiff has sworn that he has no claim against the intended 3rd Defendant and that he has no intention to sue him. The court is of the opinion that a Plaintiff ought not to be forced to sue a Defendant against his will especially where he has no claim against him. In **Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR** the Court of Appeal held as follows on the issue:

“...O’Hare and Hill’s Civil Litigation, 7th Edition (1996) at page 101 opines that one cannot be added as a plaintiff unless one

gives one’s consent in writing. In contrast, anyone can be joined as a defendant even against his wishes. However, no person can be a defendant unless the plaintiff claims some relief, even if only a declaration, against him. The general rule of practice is that the plaintiff is “dominus litis”. This means that he is entitled to choose the defendants against whom he wishes to pursue his claim for the reliefs he seeks, and that he cannot be compelled to proceed against persons whom he has no desire to use ...”

24. It is also not clear why the intended Defendant did not apply to be joined in the suit earlier and before the Plaintiff’s case was heard. The material on record indicates that the intended 3rd Defendant was aware as far back as 2013 that the Plaintiff was claiming some land which he claimed to have been allocated by the 1st Defendant. In fact, in his witness statement filed on 29th May, 2018 he claimed that the Plaintiff had built a certain structure on his land and that he reported the matter to the Defendants’ office. It is also pertinent that even by the time he filed a witness statement on 29th May, 2018 he had not filed any application for joinder in the proceedings. He was content to be a witness for the Defendants. He did not render any explanation why he took another 5 months to file the instant application for joinder. The court is of the opinion that the application for joinder was merely an afterthought and part of the Defendants’ strategy to delay and frustrate the expeditious conclusion of the suit. Accordingly, the court is not inclined to grant the prayer for joinder of the intended 3rd Defendant in the suit.

(d) Whether the intended 3rd Defendant is entitled to the injunction and other consequential orders sought

25. It is obvious that this issue was dependent upon the joinder of the intended 3rd Defendant as party to the suit. Since the court is not inclined to grant the prayer for joinder, it would follow that that the intended 3rd Defendant is not entitled to an injunction and the other consequential orders sought.

(e) Who shall bear costs of the application

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Plaintiff shall be awarded costs of the application to be borne by the Defendants and the intended 3rd Defendant jointly and severally.

H. CONCLUSION AND DISPOSAL

27. The upshot of the foregoing is that the court finds no merit in the instant application by the Defendants and the intended 3rd Defendant. Accordingly, the notice of motion dated 6th November, 2018 and filed on 7th November, 2018 is hereby dismissed in its entirety with costs to the Plaintiff. The costs shall be borne by the Defendants and the intended 3rd Defendant jointly and severally.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 14TH DAY OF JULY 2021.

In the presence of:

Ms Nduta Kamau holding brief for Dr. Kamau Kuria for the Defendants

No appearance for the Plaintiff

Court assistant – Wario

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Y. M. ANGIMA

ELC JUDGE