



REPUBLIC OF KENYA
IN THE LAND & ENVIRONMENT COURT
AT KILGORIS

ELC CASE NUMBER 10 OF 2021

IGNATIUS CHEGE MWANGI.....PLAINTIFF/RESPONDENT

-VERSUS-

ADSON OLE MINIS.....1ST DEFENDANT/RESPONDENT

OLE NANYOKIE LEMAYIAN ONYOKIE.....2ND DEFENDANT/RESPONDENT

SHIROI KIMOKOTHO OLEE NASHA.....3RD DEFENDANT/RESPONDENT

MPOKE MATASI.....4TH DEFENDANT/RESPONDENT

SAMSON MPATIAN RINKA.....5TH DEFENDANT/RESPONDENT

AHMAD SALIM.....6TH DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF NAROK.....7TH DEFENDANT/RESPONDENT

AGNES SYOMBUA MASILA &

FARID SALIM KIPRASH

(Suing as the legal administration of the Estate of

IBRAHIM SALIM KIPRASH (DECEASED)...PROPOSED 8TH DEFENDANT/APPLICANT

OFFICE THE LAND REGISTRAR-KILGORIS.....PROPOSED 9TH DEFENDANT

RULING

The Application before court is the Notice of Motion dated 18th March 2021 brought under Article 62(2) of the Constitution of Kenya, 2010, Rules 5(d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the law.) (hereinafter referred as “the application”) Seeking substantively three prayers which are as follows:-

“1. That pending the hearing and determination of this Application, this Honourable court be pleased to stay any further proceedings herein.

2. That the proposed 8th (Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal Administrators of the Estate of Ibrahim Salim Kiprash) and 9th Defendant (Office of the Land Registrar-Kilgoris) herein be enjoined as parties to the suit herein.

3. That this Honourable Court be pleased to summon the Deputy County Commissioner Transmara West to court to produce a report with respect to the outcome of his investigations pertaining the alleged fraud regarding the title of the parcel of lands registered as Transmara/Ololchani/237 and Transmara/Ololchani/232 and further explain why he confiscated the title deed of the Plaintiff herein.”

The Grounds in support of the Prayers in the application hereinabove are as follows;-

- a) **THAT** the enjoinder is necessary to enable the Court effectively, completely adjudicate, and settle all the questions in dispute involved in the suit.
- b) **THAT** it is in the Interest of Justice sought by the Plaintiff and the Defendants herein that the Application be allowed.
- c) **THAT** the proposed 8th Defendant's name is adversely mentioned by the Plaintiff and the Defendants herein thus it is important that she is enjoined to the suit at hand.
- d) **THAT** as per the filed pleadings before court, both the Plaintiff and the Defendants are in agreement that indeed the Plaintiff's title herein was confiscated on fraud allegations which were investigated by the office of the Deputy County Commissioner-Transmara West.
- e) **THAT** the evidence and or report by the Office of the Deputy County Commissioner Kilgoris which has capacity to investigate fraud allegations will assist Court in reaching a just and fair decision.

The Application has been supported by the affidavit of one **AGNES SYOMBUA MASILA** sworn on the 17th March 2021 with no annexures thereof.

The Application filed by the Advocates of the Intended 8th Defendant namely Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal administrators of the Estate of Ibrahim Salim Kiprash has been served on the Plaintiff/Respondent as well as the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendant.

The Plaintiff/Respondent in response swore a Replying Affidavit on the 7th of April 2021 and filed the same in Court on the 8th of April 2021.

Upon service, the Intended 8th Defendant namely Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal administrators of the Estate of Ibrahim Salim Kiprash filled a Supplementary Affidavit sworn on the 14th June 2021 and filed the same in Court on the 15th of June 2021.

The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendant upon service of the present application informed the Court that their clients had no interest in the present application and therefore did not file any pleadings on the same.

The Plaintiff/Respondent filed their Submissions on 11th August 2021 and the Intended 8th Defendant filed their substantive submissions on 2nd July 2021.

ISSUED FOR DETERMINATION.

Having perused the pleadings set out above in their totality, the Court has identified four main issues for determination;-

- a) Whether or not there are adequate grounds to issue a stay of proceedings Order pending hearing and determination of this Application.
- b) Whether or not the Intended 8th Defendant namely Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal administrators of the Estate of Ibrahim Salim Kiprash should be joined in this suit as a necessary party.
- c) Whether or not the Intended 9th Defendant namely Office of the Land Registrar-Kilgoris should be joined in this suit as a necessary party.
- d) Whether or not this Honourable Court should summon the Deputy County Commissioner Transmara West to produce a report with respect to the outcome of his investigations pertaining to the alleged fraud regarding the title of the parcel of lands registered as Transmara /Ololchani/237 and Transmara/Ololchani/232 and further explain why he confiscated the title deed of the Plaintiff herein.

ISSUE NUMBER A

On the issue of Whether or not there are adequate grounds to issue a stay of proceedings Order pending hearing and determination of this Application, the Honourable Court's decision is that this prayer was not granted at the first instance and therefore has been overtaken by events and/or spent.

ISSUE NUMBER B

On the issue of whether or not the Intended 8th Defendant namely Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal administrators of the Estate of Ibrahim Salim Kiprash should be joined in this suit as a necessary party, the Honourable Court's finding is as

follows:-

The Plaintiff herein filed a Plaint on the 5th December 2019 against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants.

The Plaintiff's Cause of Action in the Plaint filed on the 5th December 2019 was that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants trespassed onto his property known as TRANS-MARA/OLOLCHANI/237 registered in his name and demolished various structures that the Plaintiff had erected therein to the Plaintiff's detriment.

The Plaintiff's Claim in the Plaint dated 5th December 2019 was therefore an Order of Permanent Injunction to issue against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants either by themselves, agents, servants, employees and/or anybody claiming under them from in anyway interfering with, damaging, wasting, alienating, trespassing and/or doing any other activity whatsoever on the parcel of land known as TRANS-MARA/OLOLCHANI/237.

In addition to the above, the Plaintiff sought an Order of eviction against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants from the suit property known as TRANS-MARA/OLOLCHANI/237.

The Plaintiff in support of the Cause of Action crystallized in the Plaint dated 5th December 2019 attached a certified Copy of the Title Deed of the suit property known as TRANS-MARA/OLOLCHANI/237 as well as a Judgment pronounced regarding the suit property by Honourable S.Okongo J in the proceedings known as KISII ELC CIVIL CASE NUMBER 71 B OF 2008 between the Intended 8th Defendant namely Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal administrators of the Estate of Ibrahim Salim Kiprash and the Plaintiff/Respondent in this Application.

This Honourable Court in considering the present Application has gone through the Judgment of Honourable S.Okongo J in the proceedings known as KISII ELC CIVIL CASE NUMBER 71 B OF 2008 between the Intended 8th Defendant namely Agnes Syombua Masila & Farid Salim Kiprash Suing as the legal administrators of the Estate of Ibrahim Salim Kiprash and the Plaintiff/Respondent and this Honourable Court hereby makes a finding that the dispute between the Intended 8th Defendant/Applicant and the Plaintiff/Respondent over the properties known as TRANS-MARA/OLOLCHANI/237 belonging to the Plaintiff and TRANS-MARA/OLOLCHANI/232 belonging to the Intended 8th Defendant/Applicant were fully adjudicated and settled accordingly.

The Intended 8th Defendant/Applicant's main ground that their names have been adversely mentioned by the Plaintiff and the Defendants in these proceedings is not a sufficient ground to warrant an enjoinder in this suit as a Defendant.

The Provisions of the Law that deal with the discretionary powers to joinder in any proceedings are provided by Order 1 Rule 10(2).

The Provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules provide as follows:-

“ 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 a 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 the order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.”

In the Case of (*Deported Asians Property Custodian Board-Vs- Jaffer Brothers Limited (1999) 1EA 55*), the Court had the following to say on applications of Joinder:-

“For a person to be joined on the ground that his/her presence in the suit is necessary for effectual and complete settlement of all the questions in the suit one of two things has to be shown. Either it has to be shown that the Orders , which the Plaintiff seeks in the suit, would legally affect the interests of that person, and it is desirable , for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit.

Alternatively, a person qualifies , (on an application of a Defendant) to be joined as a Co-Defendant , where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

The Provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and the principles set out in the Case of Deported Asians Property Custodian Board –Vs-Jaffer Brothers Limited have one common requirement.

The Common requirement is that there must be a question of fact or law that requires be to adjudicated or determined at the substantive hearing between the already existing parties and the party applying to be enjoined in the suit or alternatively the outcome of the hearing will affect the party applying to be enjoined in the suit.

In this particular Application by the Intended 8th Defendant/Applicant, this Honourable Court fails to find any question of fact or law that the Applicant has placed before this Honourable Court which would assist at the hearing of this matter or affect and/or bind the Intended 8th Defendant/Applicant after the hearing of the substantive suit.

Consequently, Prayer Number C of the Notice of Motion dated 18th March 2021 is hereby dismissed with costs to the Plaintiff/Respondent.

ISSUE NUMBER C.

On Prayer Number C of the Notice of Motion dated 18th March 2021, this Honourable Court is of the view that having declined to enjoin the Intended 8th Defendant/Applicant to these proceedings, then Prayer Number D also fails as the Office of the Land Registrar-Kilgoris never made any Application for joinder or filed any Affidavit in support of the Intended 8th Defendant's/Applicant's application dated 18th March 2021.

The Honourable Court having dismissed the Intended 8th Defendant's/Applicant's Application for joinder and their being no Affidavit in Support of the Notice of Motion dated 18th March 2021 by the Attorney General on behalf of the Land Registrar-Kilgoris , this Honourable Court dismisses Prayer Number C with no orders as to costs.

ISSUE NUMBER D.

On prayer Number D in the Application dated 18th March 2021, this Honourable Court is of the view as earlier stated that the dispute between the Intended 8th Defendant/Applicant and the Plaintiff/Respondent over the properties known as TRANS-MARA/OLOLCHANI/237 belonging to the Plaintiff and TRANS-MARA/OLOLCHANI/232 belonging to the Intended 8th Defendant/Applicant were fully adjudicated and settled accordingly by the Judgment of Honourable S.Okongo J in the proceedings known as KISII ELC CIVIL CASE NUMBER 71 B OF 2008.

This prayer in the view of this Honourable Court is an effort to re-open a dispute which has been adjudicated upon and the same cannot succeed in this Court.

Prayer Number D of the Notice of Motion dated 18th March 2021 is similarly hereby dismissed with costs to the Plaintiff/Respondent.

DELIVERED AT KILGORIS ENVIRONMENT & LAND COURT ON THIS 21ST DAY OF SEPTEMBER 2021.

HON.EMMANUEL.M.WASHE

JUDGE

In the presence of:-

Mureithi holding brief for Mrs Rotich for the 1st, 2nd, 3rd, 4th, 6th and 7th Defendant

Also appearing for the intended 8th Defendant/Applicant

Plaintiff in court in person.