



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENTA

AT HOMA BAY

ELC CASE OS NO. 33 OF 2021

(FORMERLY MIGORI ELC 35 OF 2018)

IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF THE TITLE BY ADVERSE POSSESSION OF A PORTION OF LAND PARCEL NO. KABUOCH/K/KARITA/755

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

AGABATUS OGALO OKOTHPLAINTIFF/RESPONDENT

AND

LAWRENCE MORTY OPIYO OKELOO.....DEFENDANT

AND

COLLINS OMONDI ACHILLES.....1ST INTENDED INTERESTED PARTY/APPLICANT

JOSEPH OPIYO2ND INTENDED INTERESTED PARTY/APPLICANT

DISTRICT REGISTRAR OF LAND-HOMABAY.....3RD INTENDED INTERESTED PARTY

RULING

1. By a Notice of Motion dated 5th October 2020 and filed in court on 8th October 2020 under section 73 (1) of the Land Act No. 3 of 2012 (The application herein), the 1st and 2nd intended interested parties (The applicants herein) through M/S Ogwe and Associates Advocates, are seeking the orders infra:

a. Moot

b. THAT the Honourable Court be pleased to enjoin COLLINS OMONDI ACHILLES, JOSEPH OPIYO and THE DOSTRICT REGISTRAR OF LAND HOM BAY as interested parties herein.

c. THAT this Honourable Court be pleased to ORDER removal of restriction in Land Parcel No. KABUOCH/KONYANGO/KOBONYO/KARITA/755 lodged by AGABATUS OGALO OKOTH the plaintiff.

d. THAT this Honourable Court do issue Notice to show cause upon AGABATUS OGALO OKOTH why Caution cannot be removed.

e. Costs of this application be borne by the Respondent.

2. The grounds set out as numbers 6, 7, 8 and 9 on the face of the application alongside the 1st applicant’s supporting affidavit of even date with the annexed copies of an agreement, mutation forms and a certificate of official search marked as “COA 1, 2 and 3” respectively, anchor

the application. In a nutshell, the applicants complain, inter alia, that in February 2020, the respondent irregularly caused the 3rd intended interested party to lodge a caution over the suit land, KABUOCH/KONYANGO/KOBONYO/KARITA/755 on the basis that this suit was pending. That the suit has not been prosecuted yet the restriction is subsisting to-date. That the 1st and 2nd applicants who are a purchaser for value and a son of the defendant respectively cannot obtain their respective title and inheritance in respect of the suit land unless the restriction is removed. Thus, it precipitated the instant application.

3. By a 19-paragraphed replying affidavit sworn filed herein on 12th April 2021, the plaintiff (Respondent), through the firm of Veronica Migai and Company Advocates, opposed the application and sought its dismissal with costs for being misconceived, bad in law and an abuse of the process of this Honourable court. Annexed to the application, are copies of the green card and sale agreements dated 23rd February 2006, 4th November 2007, 9th October 2011 and 21st November 2017 in regard to sale of land reference number Kabuoch/K/Karita/512.

4. The respondent deposed, inter alia, that he bought a portion of the suit land and paid full purchase price thereof to the defendant. That he facilitated the defendant to carry out succession, sub divide the suit land and transfer the portion to him. That the defendant has failed to transfer the portion to him. That he is desirous of prosecuting this suit. That the 3rd intended interested party did not need a court order to lodge the caution but may need a court order to remove the same.

5. The 3rd intended interested party was duly served as disclosed in the affidavit of service filed herein on 8th February 2021

6. On 25th May 2021, this court ordered and directed that the application be canvassed by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**

7. Accordingly, on 6th of October, 2021, learned counsel for the applicants filed submissions dated 4th October 2021 where reference was made to the orders sought in the application, the grounds thereon, the response to the application and the powers of the Registrar under **section 78 (2) of the Land Registration Act, 2016 (2012)**. Counsel cited the case of **Nyagah Nderi vs James Nyaga Kinyua 2012 eKLR** on the purpose meant to be served by the restriction. Counsel submitted that the applicants have given good reasons for the removal of the restriction and that the application be allowed with costs.

8. On the other hand, learned counsel for the respondent filed submissions dated 29th June 2021 on even date. Counsel reiterated the response to the application and urged the court to disallow the application. Counsel submitted that the applicants have caused further delay of the suit by filing of this application.

9. I have thoroughly studied the application, the replying affidavit and the rival submissions in their entirety. In that regard, is there merit in the application?

10. The applicants have urged this court enjoin them as interested parties in the instant suit. According to the **Black's Law Dictionary 10th Edition at page 647**, the term "Enjoin" means;

"To legally prohibit or restrain by injunction."

11. Similarly, the Concise Oxford English Dictionary 12th Edition defines the following terms:

- a. "Enjoin"-uniting of the parties or claim in a single lawsuit, and
- b. "Joinder"-to prohibit someone from performing an action by issuing an injunction.

12. Besides, from the spirit of the application, the rival submissions and the aforesaid definitions, I think the applicants meant "joinder" and not "enjoin" the parties in this suit. On that score, the application is properly before the court as no party is bound to be prejudiced thereby.

13. It is trite law that it is the duty of the court to ensure that the respondent is made aware of the matter before court by way of service of the requisite papers. The respondent may appear or decline to appear in the case: See **Ogada-vs-Mollin (2009) KLR 620**.

14. The respondent was duly served herein. He has participated in the application.

15. I bear in mind **section 73 of the Land Act, 2016 (2012)** under which the application is commenced. I further note **Order 1 Rule 9 of the Civil Procedure Rules, 2010** on mis-joinder and non-joinder of parties as well as **section 78 (2), Nyagah Nderi case** (both supra).

16. Articles 48 and 50 (1) of the Constitution of Kenya, 2010 provide for access to justice and fair hearing respectively. The term "Trial" is defined in the **Concise Oxford English Dictionary at page 1539** (supra) and the definition is noted accordingly. Undoubtedly, every person including the applicants have unlimited right to fair trial under Article 25 (C) of the same Constitution.

17. This court is guided by the Overriding Objective under sections 1A, 1B, 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya as read with sections 3 and 19(2) of the Environment and Land Act, 2015 (2011). Furthermore, the court has special and inherent powers under sections 3 and 3A of the Civil Procedure Act (supra) to allow or disallow the application. The bottom line is to attain the best ends of justice.

18. It is noteworthy that orders 3 and 4 sought in the application are intertwined in nature. Upon grant of order No. 2 sought therein, the 3rd interested parties would be brought on board to shed light herein on the restriction in the best ends of justice.

19. It is also important to note that on 22nd November 2021, the Deputy Registrar of this court issued notice to the parties regarding the instant ruling pursuant to this court's orders and direction given on 8th December 2021.

20. Wherefore, I find the application dated 5th of October 2021 and filed herein on 8th of October 2020, partially merited. I proceed to determine the same thus;

a. Prayer No. 2 therein for joinder (and not enjoin) of the applicants/interested parties, is hereby allowed.

b. Prayers 3 and 4 therein regarding the removal of the restriction and notice to issue to the respondent/plaintiff respectively, are hereby disallowed.

c. Costs of the application be in the cause.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 8TH DAY OF OCTOBER ,2021

G M A ONGONDO

JUDGE

Parties - Absent

Okello - Court Assistant