



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO. 12 'A' OF 2014 (OS)**

**MODE OF TRACK.....FAST TRACK**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 OF LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL NO. EAST BUKUSU/NORTH SANG'ALO/967**

**BETWEEN**

**CHARLES MUNGA KIPSANG.....APPLICANT**

**VERSUS**

**PATRICK TELEWA NABISWA.....1<sup>ST</sup> DEFENDANT**

**AND**

**SAUL WEKESA NYONGESA.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

**CHARLES MUNGA KIPSANG** (the Applicant herein) has moved this Court by way of an Originating Summons dated 14<sup>th</sup> January 2014 and filed herein on 20<sup>th</sup> January 2014 seeking the main prayer that he be registered as the proprietor of  $\frac{3}{4}$  an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/ 967** (the suit land) in place of the registered proprietor **PATRICK TELEWA NABISWA** (the Respondent herein) through adverse possession. The claim is also founded on a sale agreement between the parties dated 14<sup>th</sup> March 1980.

The claim is contested and by a replying affidavit dated 25<sup>th</sup> March 2014, the Respondent has denied that there was any such agreement of sale or that the Applicant is in occupation of a portion of the suit land measuring  $\frac{3}{4}$  acre.

It is not in dispute that during the pendency of this suit, the Respondent has sub – divided the suit land into three portions two of which **EAST BUKUSU/ NORTH SANG'ALO/6573** and **6574** he has transferred to **SAUL WEKESA NYONGESA** (the proposed Co – Respondent herein). The Respondent does not deny this fact and has infact confirmed the same through his further statement dated 21<sup>st</sup> November 2016 in which he adds that he has retained the third portion being **EAST BUKUSU/NORTH SANG'ALO/6572** in his names.

Arising out of the said transfer of parcels number **EAST BUKUSU/ NORTH SANG'ALO/6573** and **6574** to **SAUL WEKESA NYONGESA**, the Applicant has moved this Court by his Notice of Motion dated 12<sup>th</sup> June 2019 and premised on the provisions of **Sections 3 and 3A of the Civil Procedure Act, Sections 68 and 69 of the Land Registration Act and Rule 10 of the Civil Procedure Rules** seeking the following orders:-

**1. Spent**

**2. That an order to issue inhibiting the Respondents from transferring sub – dividing and registration of any dealing with the land parcels number EAST BUKUSU/NORTH SANG'ANLO/6572, 6573 and 6574 (originally 967) pending the hearing and determination of this suit.**

**3. That the name of SAUL WEKESA NYONGESA be enjoined in this case as a Co – Respondent and summons be amended accordingly.**

**4. Costs.**

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit dated 12<sup>th</sup> June 2019.

The gravamen of the application is that during the pendency of this suit, the Respondent has sub – divided the suit land into three (3) portions namely **EAST BUKUSU/NORTH SANG'ALO/6572** (which is registered in his names) and **EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** (which he has transferred to the proposed Co – Respondent). That there is a need to enjoin the proposed Co – Respondent and amend the Originating Summons to enable this Court determine the issues in dispute and also issue an order inhibiting the Respondents or their agents from further sub – dividing or transferring the resultant titles pending the hearing and determination of this suit. That no prejudice will be caused to the Respondents if the orders sought are granted.

The application is opposed and by his replying affidavit dated 14<sup>th</sup> October 2019, the Respondent, while acknowledging that he has sub – divided the suit land as stated by the Applicant, he nonetheless avers, inter alia, that the Applicant has no registered or un – registered interest over the suit land and this application is made in bad faith, malice and mischief with the aim of preventing him from transacting with his title. That the Applicant is not even in occupation of the suit land which is held by the Respondent in trust for other beneficiaries and therefore there is no reason to warrant the grant of the orders sought. That this application should be dismissed with costs.

With the consent of counsel for both parties, it was agreed that the application be determined on the basis of the parties' respective affidavits.

I have considered the application and the rival affidavits.

I shall first consider the prayer seeking to enjoin the Co – Respondent in this case.

It is not denied by the Respondent that he has, pending the determination of this suit, sub – divided the suit land into three (3) parcels, two (2) of which (parcels **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574**) he has transferred to the proposed Co – Respondent while he has retained the third portion being **EAST BUKUSU/NORTH SANG'ALO/6572**. The Applicant seeks therefore that the proposed Co – Respondent be enjoined herein.

**Order 1 Rule 10(2) of the Civil Procedure Rules** provides as follows: -

***“The Court may at any stage of the proceedings, either upon or without 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.”*** Emphasis mine.

It is clear from the above that the Court has powers, either by application or even suo motto, to order that any person be added as a party to proceedings so that all questions involved can be adjudicated upon and settled. In **SARKAR'S CODE OF CIVIL PROCEDURE (11<sup>TH</sup> EDITION VOL 1 PAGE 887)**, it is stated that: -

***“The Section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a compete adjudication should be made parties.”***

In **CENTRAL KENYA LTD .V. TRUST BANK & OTHERS C.A CIVIL APPEAL NO 222 OF 1988** the Court of Appeal affirmed the above position and added that: -

***“ ..... all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs.”***

The fact that the Respondent has already sub – divided the suit land and sold some of the resultant sub – divisions to the proposed Co – Respondent is not in dispute. It is infact affirmed by the Respondent. The Applicant's Originating Summons, and which he now seeks to amend by enjoining the proposed Co – Respondent, is that he has acquired by way of adverse possession  $\frac{3}{4}$  acre out of the suit land. Since the Co – Respondent is now a proprietor of some of the resultant sub – divisions of the suit land, it is only proper that he be enjoined in these proceedings so that all the issues involved herein can be ***“effectually and completely”*** be adjudicated upon and determined by this Court. Indeed it is in the interest of the proposed Co – Respondent that he be enjoined in this suit because should the Applicant succeed in his Originating Summons, the resultant Judgment may affect the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** which are now registered in his name and he may end up being condemned un – heard. Therefore, far from suffering any prejudice, the proposed Co – Respondent will have an opportunity to defend this suit. And I have not heard the Respondent allege any prejudice that will be caused to him if the prayer for amendment and enjoining of the proposed Co – Respondent is made.

That prayer is well merited. It is allowed.

The Applicant also seeks an order inhibiting the Respondents from transferring sub – dividing and registering any dealing with the land

parcels **NO EAST BUKUSU/NORTH SANG'ALO/6572, 6573 and 6574** pending the hearing and determination of this suit. Such an order is provided for under **Section 68(1) of the Land Registration Act** as follows: -

***“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or change.”***

An order of inhibition, just like a prohibitory injunction, restricts the registered owner of property that is in dispute from having any transactions registered thereon until the dispute is determined or until further orders of the Court. Before making such an order, the Court must be satisfied that the land in dispute is at risk of being disposed or alienated to the detriment of the Applicant which would render the suit an academic exercise. It therefore becomes necessary to issue such an order. In the circumstances of this case, the Applicant has already demonstrated that portions of the suit land have been transferred to the proposed Co – Respondent while this suit was pending. But the Applicant is also to blame for what transpired because, having filed this suit on 20<sup>th</sup> January 2014, he went to sleep until 4<sup>th</sup> May 2015 and it was during that period when he was in slumber – land that the Respondent sub – divided and transferred portions of the suit land to the Co – Respondent. Hopefully he has now been jolted into action and will pursue his claim more aggressively.

Having said so, I am satisfied that the prayer for any order of inhibition is necessary in the circumstances of this case so that the land parcels **NO EAST BUKUSU/NORTH SANG'ALO 6572, 6573 and 6574** are not further transferred during the pendency of this suit.

The up – shot of the above is that the Notice of Motion dated 12<sup>th</sup> June 2019 is allowed in the following terms: -

- 1. SAUL WEKESA NYONGESA be and is hereby enjoined in this suit as the 2<sup>nd</sup> Respondent. The amended Originating Summons be filed and served upon him within 14 days of this ruling.**
- 2. The 2<sup>nd</sup> Respondent shall have 14 days from the date of service upon him of the amended Originating Summons to file and serve his response thereto.**
- 3. An order of inhibition is issued restraining the Respondents herein, their servants or agents from transferring, sub – dividing or in any way registering any dealings with the land parcels NO EAST BUKUSU/ NORTH SANG'ALO/6572, 6573 and 6574 (Originally EAST BUKUSU/NORTH SANG'ALO/967) pending the hearing and final determination of this suit.**
- 4. Costs shall be in the cause.**

**Boaz N. Olao.**

**J U D G E**

**30<sup>th</sup> January 2020.**

**Ruling dated, delivered and signed in Open Court this 30<sup>th</sup> day of January 2020 at Bungoma.**

Mr Bw'onchiri for plaintiff present

Mr Wasilwa for Mr Wekesa for the defendant present

Joy/Okwaro – Court Assistants

**Boaz N. Olao.**

**J U D G E**

**30<sup>th</sup> January 2020.**