



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CIVIL CASE NO. 71B OF 2008

SYOMBUA MASILA

SALIM KIPRASHI (suing as the legal representatives of the estate of

IBRAHIM SALIM.....PLAINTIFFS

VERSUS

IGNATIUS CHEGE MWANGI.....DEFENDANT

SAMSOSN MPATIAN RINKA.....INTERESTED PARTY/APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 15th January 2020 the Interested party filed an application seeking the following orders

- a) Spent
- b) That leave be granted to the Interested party to be enjoined to this suit
- c) That there be a stay of execution of the decree and order of the court dated 31st October 2014 herein and/or any other orders of the court pending the hearing and determination of the this application
- d) That the honourable court be pleased to issue a temporary injunction restraining the defendant by himself, his agents and servants from selling, dealing, interfering, alienating or disposing of all that parcel of land registered as Transmara Olochani/237 pending the hearing and determination of this application
- e) That this honourable court do review or set aside the orders of 31st October 2014.
- f) That this honourable court be pleased to grant any other orders and/or relief befitting the circumstances
- g) That the costs of this application be provided for

2. The application is anchored on the grounds stated on the face of the Notice of Motion and the supporting affidavit of Samson Mpatian Rinka sworn on the 19th January 2020. In the said affidavit the applicant deposes that he only learnt of the existence of this suit in December 2019 when he was served with summons in Narok ELC Case no. 56 of 2019 where the judgment in this case was attached as an annexure. He deposes that he wishes to challenge the decision in the instant suit as a basis for proving his case in Narok Court as he is of the view that the judgment was rendered on the basis of false information and he has new and important information which he wishes to bring to the court's attention regarding the defendant's title which is currently under investigation.

3. The application is opposed by the respondent through his supporting affidavit sworn on the 30th January 2020. The Respondent contends that the application is frivolous, vexatious, incompetent and an abuse of the court process. He depones that the applicant has not attached any document to show that he is the registered owner of the suit property and if indeed the applicant was the registered owner of the suit property, he ought to have known about the judgment that was delivered in 2014 in the instant suit. He depones that the applicant is not the

registered owner of land parcel no. Transmara olochani/232 as the said title has been variously sub-divided and given new titles. He states that there is no suit pending in which the applicant can be enjoined and he cannot seek a review in a case in which he did not participate. He states that the applicant is seeking a stay of execution of a decree that was issued six years ago without demonstrating what loss he stands to suffer if the orders sought are not granted.

ISSUES FOR DETERMINATION

4. Having considered the application, affidavits and rival submissions, the following issues arise for determination:

- i) Whether the applicant should be enjoined in this suit
- ii) Whether this honourable court should grant a stay of execution of the decree and order dated 31.10.2014
- (iii) Whether the temporary injunction should be issued to restrain the defendant from interfering with land parcel no. Transmara Olochani/237 pending the hearing and determination of this application.
- iv) Whether this honourable court should review or set aside the orders dated 31.10 2014

ANALYSIS AND DETERMINATION

5. The two main issues are whether the applicant should be enjoined in this suit and tied to this is the question as to whether the decree and orders herein ought to be reviewed. The other 2 issues flow from these two. With regard to the first issue, the law governing joinder of parties is set out in Order 1 Rule 10 of the Civil Procedure Rules, 2010 which provides 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 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”

6. In the instant suit the applicant seeks to be enjoined in the suit six years after judgment was delivered. The suit was filed in 2008 and the applicant claims that he has been in possession of the suit property. If that is the position then it is strange that he was not aware of the plaintiff's suit. The question that the court must grapple with is whether in the circumstances, the presence of the applicant would be necessary as the court has already adjudicated upon the issues in dispute and rendered its decision. Indeed, if the applicant was likely to be affected by the judgment, he ought to have moved the court soon after the judgment was delivered.

7. The applicant has stated that he would like to be enjoined in the suit so as to have the judgment reviewed or set aside on the grounds that there is a report dated 19.10.2019 indicating that the defendant's title is under investigation. The conditions for review are set out in Order 45 (1) of the Civil Procedure Rules 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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

8. It is clear that for a party to warrant an order of review on the ground that he has discovered a new and important matter he must satisfy the court that the said matter or information was not available to him after the exercise of due diligence. Furthermore, it is clear that an application for review must be brought without unreasonable delay.

9. In the instant case, the applicant has alluded to the fact that the defendant's title is under investigation as there is a likelihood that it was obtained fraudulently. It is important to note that the issue of fraud was brought to the court's attention as it was alleged that there were letters by one J.M Mutiso suggesting irregularities in the manner in which the title was issued and in its judgment the court made a finding on the same. There is therefore nothing new that could not have been made available to the court at the time the case was heard. Perhaps the best remedy for the applicant would have been an appeal against the judgment but again the inordinate delay in bringing this application militates against him. At any rate, the applicant has been sued in another matter relating to the subject matter herein in Narok court and nothing stops him from presenting his evidence in that suit to prove that he is entitled to the suit property. In my view, re-opening this suit 12 years after it was filed and 6 years since it was decided would be prejudicial to the parties and it would go against the overriding objective of the Environment and Land Court Act and the Article 159 2(b) Constitution.

10. Having arrived at the above finding, I do not find it necessary to delve into the issue of stay of execution and injunction.

The upshot is that I find no merit in the application and I dismiss it with costs to the respondents.

Dated signed and delivered at Kisii this 21st day of February 2020.

J.M ONYANGO

JUDGE