



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 157 OF 2017

ENOS ANGOYA LWUGI.....PLAINTIFF/RESPONDENT

VERSUS

NICHOLAS MWALE LUMEZANI.....1ST DEFENDANT/RESPONDENT

ISAAC WEPUKHULU FUCHAKA.....2ND DEFENDANT/RESPONDENT

AND

ISAAC SIMIYU.....1ST PROPOSED INTERESTED PARTY/APPLICANT

PATRICK W. NYONGESA.....2ND PROPOSED INTERESTED PARTY/APPLICANT

PATRICK MASIKA.....3RD PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. The application dated 3/12/2019 and filed in court on 5/12/2019 has been brought by the proposed interested parties who seek the following orders:-

(1) ...spent

(2) That pending the hearing and determination of this application, and further orders of this court, the applicants be granted a temporary stay of the judgment issued on 24/9/2018 together with orders issued pursuant thereto pending the hearing and determination of this application interpartes and subsequently pending hearing and determination of this suit.

(3) That the proposed interested parties herein be granted leave to enjoin in this suit and participate in the proceedings by tendering evidence.

(4) That this court be pleased to set aside, review and/or vary its judgment delivered on 24/9/2018 and all consequential orders thereof pending hearing and determination of this application.

(5) That upon prayer 3 being granted, the proposed interested parties be allowed to participate in the proceedings by tendering evidence in support of its case herein.

(6) That any other relief this court may deem fit and just to grant in the circumstances of this application.

(7) That costs of this application be provided for.

2. The application is brought under Order 45 Rule 1, 2, Order 51 Rule 1, Order 10 Rule 11 and order 22 Rule 75 of the Civil Procedure Rules 2010, Section 1A, 1B, 3, 3A, 63(e) & 80 of the Civil Procedure Act.

3. The application is supported by the affidavit of the 1st interested party on his own behalf and on behalf of the other applicants dated 3/12/2019. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The grounds the applicants relies on are as follows: that judgment was entered in this suit on 24/8/2018 in favour of the plaintiff against the defendants ordering the eviction of the interested parties, who have occupied the suit land since 2014, that the applicants may be evicted

unless stay orders are issued yet the property is developed with the applicants' structures standing thereon and they therefore have a stake in it; that the applicants will have been condemned unheard yet they had bought the subject land from one **Isaac Wepukhulu Fuchaka**. Annexed to the supporting affidavit which amplified these grounds are four copies of sale agreements dated **13/6/2016, 11/7/2016, 10/4/2014** and **10/4/2015**.

5. The suit herein was heard *ex-parte* and judgment issued on **24/9/2018**. The defendants herein were not parties to the suit. It is clear that the judgment that arose in this suit issued orders against the two defendants. That judgment ordered that the sale agreement dated **20/3/2016** between the plaintiff and the 1st defendant be revoked and that the 1st and 2nd defendants be evicted from the suit land. The applicants herein were not parties yet they appear to have obtained the parcels of land they occupy from the 2nd defendant. It is clear that the applicants may be affected in some way by this judgment since they occupy the suit land. I have also considered the defence of 1st defendant dated **15/11/2017** in the matter. It states that there was a verbal communication that the plaintiffs would sign the transfer forms before the 1st defendant but the plaintiff failed to abide by his word.

6. In response to the application the plaintiff sworn a replying affidavit dated **11/12/2019**. His response is that the applicants are strangers and he never dealt with them; that the instant application is *res judicata*; that the applicants have no cause against the plaintiff and that the applicants failed to exercise diligence while purchasing land from the 2nd defendant. He maintains that only the 1st defendant can apply to set aside the judgment herein and the applicants have no capacity to do so. He also avers that the applicants are guilty of a long delay in bringing this application.

7. The applicants filed their submissions on **24/12/2019**.

8. The issues that arise for determination are whether the interested parties should be enjoined in the suit and whether the judgment of this court dated **24/9/2018** and all consequential order should be set aside in favour of the proposed interested parties being allowed to participate in these proceedings by tendering evidence.

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

“10.(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.”

10. The interested parties were certainly not part of the suit. The response of the plaintiff dismisses them as strangers. The plaintiff does not indicate whether he agrees to the allegation that they are in occupation on the suit land. They maintain that they purchased the land from the 2nd defendant who purchased it from the 1st defendant. The agreement vide which the interested parties purchased the land was nullified in the judgment when the two defendants failed to defend the suit.

11. On an application by the 2nd defendant this court pronounced itself while dismissing the application, stating that the 2nd defendant knew of the existence of this suit. However this cannot be said of the applicants herein. There is nothing in the record to show that they were aware of this litigation.

12. Recently this court dismissed an application for joinder in **Kitale Land Case No. 64 of 2011 - Boaz Kipchumba Kaino -vs- G.H. Tanna & Sons Ltd and Abdu Mukwana, Fredrick Sambula, Wanjala Wesela and Robert Makona** on the ground that the applicants had not included any prayer for setting aside judgment was included therein and the application was merely speculative in nature. However, in the instant application that prayer has been included and it is therefore safe to consider the question of joinder.

13. In **Elisha Kare Busienei And Others -vs- Japheth Kipyego Chepkwony and Others Kitale Land Case No. 131 of 2013** the court set aside judgment to allow for the hearing of parties who established that they had been living on the suit land for many years, having purchased it from some of the defendants and I find this case to be no different. In that case this court relied on the decisions in **Carol Silcock -vs- Kassim Sharrif Mohamed [2013] eKLR** and **J M K -vs- M W M & Another [2015] eKLR**.

14. The applicants having demonstrated that they live on the land in question it is incumbent upon this court to hear their side of the story. **Article 50 (1)** of the **Constitution of Kenya 2010** stipulates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. That Article guarantees all citizens a fair hearing. I would not consider it proper if the applicants were evicted before the court has investigated how they came to be on the suit land. For that reason I find that they deserve to be enjoined into the suit as the defendants.

15. In the case of **Wachira Karani v Bildad Wachira [2016] eKLR** the High Court observed as follows:

“Section 3A of the Civil Procedure Act[21] provides that ‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

“The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person

affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside.”

16. This court is of the view that the only way in which the applicants side of the story can be received by the court is by way of evidence which cannot be possible while the judgment emanating from the plaintiff’s plaint stands in the way.

17. That judgment has to be set aside to pave the way for a hearing.

18. In the final analysis I find that the application dated **3/12/2019** has merits. The same is granted in terms of **prayers No. (3), (4) and (5)**. For clarity the orders issued are as follows:

(a) The proposed interested parties are enjoined as the 3rd, 4th and 5th defendants respectively in this suit.

(b) The judgment of this court delivered on 24/9/2019 and all consequential orders are hereby set aside.

(c) The interested parties are granted leave to participate in the proceedings.

(d) The plaintiff shall amend his plaint in view of the contents of his replying affidavit dated 11/12/2019 and serve the same upon all parties within 14 days of this order in default of which this suit shall stand automatically dismissed.

(e) The defendants shall respond to the amendment plaint by filing and serving their defence, list of witnesses witness statements, lists of documents and bundles of documents, within 15 days of service thereon.

(f) This suit shall be mentioned on 18/3/2020 for directions as to hearing.

It is so ordered.

Dated, signed and delivered at Kitale on this 12th day of February, 2020.

MWANGI NJOROGE

JUDGE

12/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for the plaintiff

Applicants 1 and 3 in person

Applicant No. 2 absent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

12/2/2020