



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. CASE NO. 38 OF 2015 (O.S.)**

**(FORMERLY KERUGOYA HC ELC NO. 803 OF 2013 O.S.)**

**IN THE MATTER OF LAND PARCEL NO. MBETI/GACHURIRI/167**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT**

**MKELI MUNYIA KIOKO.....PLAINTIFF**

**VERSUS**

**ANTHONY NDII.....1<sup>ST</sup> DEFENDANT**

**MURIITHI NJOMO NJUKI & NAHASHON NJUKI**

***NJOMO (being sued as the legal representatives of)***

**NJOMO NJUKI.....2<sup>ND</sup> DEFENDANT**

**NATHAN MUREITHI MAGANJO.....3<sup>RD</sup> DEFENDANT**

**AND**

**JOHN NDII NYAGA.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

**A. Introduction**

1. By a notice of motion dated 4<sup>th</sup> December 2019 expressed to be brought under **Order 1 Rules 10 & 14, Order 10 Rule 11, Order 21 Rule 6, Order 37 and Order 45 Rules 1 & 5 of the Civil Procedure Rules 2010** (the *Rules*), **Section 1A, 1B, 3A & 100 of the Civil Procedure Act (Cap. 21), Articles 40 & 159 of the Constitution of Kenya 2010 and all other enabling provisions of the law**, the Intended Interested Party (the Applicant) sought the following orders:

*a. Spent*

*b. That this honourable court be pleased to grant leave that the Intended Interested Party/Applicant be and is hereby enjoined in this suit.*

*c. Spent*

*d. That this honourable court be pleased to set aside the judgement and orders issued by this honourable court on 24<sup>th</sup> October 2019.*

*e. That this honourable court be pleased to set aside its decree issued on 28<sup>th</sup> October 2019.*

f. That this honourable court be pleased to order that this matter does start afresh.

g. That pending the hearing and determination of this suit, this honourable court be pleased to grant the Interested Party/Applicant an order of mandatory injunction restraining the Plaintiff/1<sup>st</sup> Respondent, her agents, assigns or anybody else whatsoever acting on her behalf or behest, from interfering with the Interested Party's access, usage and quiet occupation of land parcel number Mbeti/Gachuriri/166 and from alienating, disposing off, selling, trespassing on, or in any other way adversely dealing with land parcel no. Mbeti/Gachuriri/166.

h. That this honourable court be pleased to make or grant any other such and further orders, directions and reliefs as it may deem just, prudent, fit and expedient to grant.

i. That costs of this application be in the cause.

## **B. The Applicant's case**

2. The said application was based upon some twenty (20) grounds set out in the body of the notice of motion and supported by the Applicant's own affidavit sworn on 4<sup>th</sup> December 2019 together with the 6 annexures thereto. The gist of the application was that the originating summons for adverse possession was heard and decided in the absence of the Applicant who claimed to have his own claim for adverse possession with respect to one of the suit properties namely, *Title No. Mbeti/Gachuriri/ 166* ("parcel 166"). The said parcel was awarded to the Plaintiff upon a full hearing vide the judgement and decree sought to be set aside. The Applicant's contention was that he was not aware of this suit prior to its conclusion hence he did not participate in it at all.

3. The Applicant's contention was that he had been in open and exclusive possession of parcel 166 since 1993 and that he had developed it by planting miraa trees (khat) and other plants. However, a surveyor's report annexed to the application indicated that the area under cultivation was about 1.8 ha as opposed to the 3.2 ha comprised in the suit property. The Applicant, therefore, sought to have the judgement set aside and the suit re-opened to enable him prove his claim for adverse possession.

## **C. The Plaintiff's response**

4. The Plaintiff filed grounds of opposition dated 11<sup>th</sup> December 2019 in opposition to the said application. It was contended that the court had become *funtus officio* upon delivery of the judgement hence it had no jurisdiction to re-open and hear the matter; that the court could not sit an appeal over its judgement; and that **Order 1 Rule 10 of the Rules** only applied to joinder of a party before judgement. The Plaintiff also contended that the Applicant had failed to establish a legitimate basis for setting aside the judgement hence the application was frivolous, vexatious and otherwise an abuse of the court process.

5. The Plaintiff also filed a replying affidavit sworn on 13<sup>th</sup> January 2020 in opposition to the said application. The Plaintiff denied that the Applicant was in occupation of parcel 166 and stated that he was the owner of an adjacent parcel of land No. 2167 which was a sub-division of parcel 127. His verbatim response in paragraphs 7-11 was as follows:

*"7. THAT the Applicant herein is not in occupation of land parcel No. Mbeti/Gachuriri/166 as alleged and is only using and occupying the parcel of land adjacent to it, which is land parcel No. Mbeti/Gachuriri/2167.*

*8. THAT land parcel No. Mbeti/Gachuriri/166 is adjacent to land parcel No. Mbeti/Gachuriri/127 which was sub-divided into land parcels Nos. Mbeti/Gachuriri/2166 and 2167 wherein the Applicant/Intended Interested Party is in use of land parcel No. Mbeti/Gachuriri/2167.*

*9. THAT the Applicant/Intended Interested Party is the legal and registered owner of land parcel No. Mbeti/Gachuriri/2167 and is in occupation of the said parcel of land.*

*10. THAT it is not true that the Applicant/Intended Interested Party entered the parcel of land in the year 1993 and has been in occupation since because I have been in occupation of the suit land together with my family since the 1950s.*

*11. THAT it is also not true that the Applicant was not aware of these proceedings because this matter attracted a lot of attention and was well within the knowledge of the residents in the region."*

6. It is noteworthy that the Applicant did not file any further or supplementary affidavit in response to those matters at all despite having an opportunity to do so.

## **D. Summary of submissions of the parties**

7. When the application was listed for hearing on 29<sup>th</sup> January 2020, it was canvassed orally by the advocates for the parties. The Applicant's advocate, Mr. Guantai, prosecuted it on the basis of the grounds set out in the notice of motion and the contents of the supporting affidavit and urged the court to allow the application to enable the Applicant canvass his claim for adverse possession. The Plaintiff's advocate, Ms. Materi, had already filed her written submissions which she relied upon. She pointed out that none of the Defendants at the trial even mentioned the Applicant as cultivating or occupying any portion of the suit properties. She submitted that a person could not be joined in a suit after judgement and relied upon the case of **Ashraf Bayusuf V Jubilee Party of Kenya & 2 Others [2017] eKLR** in support of that submission. On the other hand, Mr. Andande for the Defendants had no opposition to the application.

## **E. The question for determination**

8. The court has considered the notice of motion dated 4<sup>th</sup> December 2019, the grounds of opposition and replying affidavit in opposition thereto as well as the submissions of the parties. The court is of the opinion that following three (3) questions arise for determination:

- a) *Whether the Applicant has made out a case for joinder as an Interested Party.*
- b) *Whether the Applicant has made out a case for setting aside the judgement and for a fresh hearing of the suit.*
- c) *Whether the Applicant has made out a case for the grant of an injunction.*
- d) *Who shall bear the costs of the application.*

## **F. Analysis and determinations**

9. The court has considered the entire material on record on the 1<sup>st</sup> issue. Although the Plaintiff submitted that the Applicant could not be joined in the suit because it is already concluded, the court does not agree with that proposition. The question of whether or not an applicant can be joined in a suit after judgement depends on the particular facts and circumstances of each case and the justification for joinder. For instance, in the case of **Ashraf Bayusuf V Jubilee Party of Kenya & 2 Others** (*supra*) the court declined to join the applicant as an Interested Party because it would not have served any useful purpose since the matter in dispute had been determined by both the Political Parties Disputes Tribunal and the High Court on appeal. However, in the case of **Gichuki Gathaara Kimiti Vs Ndirangu Njogu & Another Nyeri HCCC No. 28 of 2004** the High Court allowed the applicant to be joined upon being satisfied that the parties to the suit had conspired to obtain judgement in order to defeat the applicant's interest in the suit property.

10. The court is, therefore, of the opinion that the Applicant may still be joined in the suit if a legitimate justification is established. The material on record indicates that the Applicant intends to ventilate his perceived claim of adverse possession with respect to parcel 166 or a portion thereof. The procedure for instituting and prosecuting such a claim is set out in **Order 37 Rule 7 of the Rules**. It requires an applicant to file an originating summons for prosecution of such claim. The intended procedure of instituting the claim as an Interested Party through a notice of motion is unknown to law. It would be a waste of judicial time and other resources to allow a claim to be instituted in such an incompetent manner. The court is thus not satisfied that the Applicant has made out a case for his joinder as an Interested Party in this suit.

11. The 2<sup>nd</sup> issue is whether the Applicant has made out a case for setting aside the judgement and for fresh hearing of the suit. The court has considered the material and submissions on record on this issue. The Applicant claims to have been in occupation of parcel 166 since 1993, a period of about 26 years prior to the filing of the instant application. The court is far from persuaded that the Applicant has made out a case for setting aside for the following reasons. First, the Applicant did not controvert the Plaintiff's averments in paragraphs 7-9 of the replying affidavit that he was occupying and cultivating an adjacent parcel of land parcel 2167 which was a sub-division of parcel 127. The Plaintiff availed copies of the relevant sub-division records and demonstrated that the Applicant was indeed the registered proprietor of parcel 2167.

12. The second reason is that if, indeed, the Applicant had been in exclusive possession for over 26 years why did he not bother to lodge his own claim for adverse possession for over 14 years after the maturity of his claim? And how would a setting aside assist him in instituting his claim for adverse possession? The inescapable conclusion to be reached on the facts of the case is that the Applicant is an indolent litigant who should not be allowed to re-open a concluded suit.

13. The third reason why the court does not believe that the Applicant has a legitimate case is that none of the Defendants who vehemently defended the Plaintiff's originating summons for adverse possession ever mentioned in their affidavits, statements and oral evidence that the Applicant occupied any portion of parcel 166. If, indeed, another party other than the Plaintiff would have been in possession, the Defendants would not have hesitated to point out that the Plaintiff had lost possession to such third party.

14. The court shall not accord much probative value to the survey report annexed to the Applicant's supporting affidavit. The report was prepared in the absence of the Plaintiff and the Defendants and it indicates that all the relevant information was provided by the Applicant. It was the Applicant who showed the surveyor his chosen boundaries. He is the one who provided the topographical sheets which the surveyor used. The court has noted that the acreage purportedly under cultivation was inserted by hand without being countersigned. The report itself was neither signed nor dated and the qualifications of the surveyor were not cited. It is, therefore, impossible to hold any particular surveyor accountable for the report.

15. The 3<sup>rd</sup> issue is whether the Applicant has made out a case for an injunction pending the hearing and determination of the suit *de novo*. The court has already found that the Applicant cannot be joined in the instant suit. The court has also declined to set aside the judgement and have the suit heard *de novo*. In the circumstances, an order of injunction would be superfluous and would not serve any useful purpose. Accordingly, the 3<sup>rd</sup> issue is answered in the negative.

16. The 4<sup>th</sup> issue is on costs of the application. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of a suit or action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason to deprive the successful party of the costs of the application. Accordingly, the Plaintiff shall be awarded costs of the application. The Defendants are not entitled to costs since they did not oppose the application.

**G. Conclusion and disposal orders**

17. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 4<sup>th</sup> December 2019. Accordingly, the same is hereby dismissed in its entirety with costs to the Plaintiff.

18. It is so decided.

**RULING DATED and SIGNED in Chambers at EMBU this 30<sup>TH</sup> DAY of APRIL 2020** in the absence of the parties owing to the prevailing Covid-19 situation. The ruling was transmitted to M/s Kiautha Arithi & Co. Advocates for the Plaintiff, M/s Victor Andande & Co. Advocates for the Defendants and M/s Guantai & Associates Advocates for the Applicant through the email addresses which they provided.

**Y.M. ANGIMA**

**JUDGE**

**30.04.2020**