



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 143 OF 2014

ELISHEBA NASIPWONDI WEPUKHULU.....PLAINTIFF

VERSUS

BENARD WASILWA WEPUKHULU.....DEFENDANT

AND

ANNAH NAMAЕ MASIBO.....APPLICANT

AND

MARGARET ONYANCHI MALOBA.....1ST INTERESTED PARTY

BRAMWEL GEDION S. WASILWA 2ND INTERESTED PARTY

EDMOND KHAM SIN WASILWA3RD INTERESTED PARTY

RULING

By an Originating Summons filed herein on 8th August 2014, **ELISHEBA NASIPWONDI KHAREMWA** (the plaintiff herein) sought orders that she be registered as proprietor of the land parcel **NO BOKOLI/BOKOLI/692** by way of adverse possession in place of the then registered proprietor **BERNARD WASILWA** (the defendant herein).

The Originating Summons was opposed but on 10th May 2016, the suit was compromised in the following terms by consent: -

- a. Plaintiff to get 4 acres out of parcel NO BOKOLI/BOKOLI/692.**
- b. Plaintiff to meet costs of survey registration and stamp duty and defendant to allow access to be done within 90 days.**
- c. Parties to sign all relevant documents and attend Land Control Board for sub – division and transfer.**
- d. Each party to meet their own costs.**

I now have before me for determination, the Notice of Motion files by **ANNAH NAMAЕ MASIBO** (the Applicant herein) and dated 20th April 2020 in which she seeks the following: -

- 1. Spent**
- 2. Spent**
- 3. That ANNAH NAMAЕ MASIBO be made a party in this suit.**
- 4. That an order do issue restraining the plaintiff, defendant and the interested parties by themselves, their servants workers agents and/or otherwise howsoever from evicting ANNAH NAMAЕ MASIBO (the Applicant) from land parcel numbers**

BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622 (originally BOKOLI/BOKOLI/692) from entering therein and/or interfering in any manner with the Applicant's use of the suit parcels pending inter – parties hearing of this application and hearing and determination of this suit.

5. That there be a stay of execution of the order issued on 9th May 2016 pending inter – parte hearing and pending hearing and determination of this application.

6. That the consent order issued on 9th May 2016 be reviewed, varied and/or set aside.

7. That BUNGOMA ELC CASE NO 152 OF 2016 (OS) be consolidated with this suit.

8. That an order to issue inhibiting the registration of any dealing on land parcels numbers BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622 (originally BOKOLI/BOKOLI/692) pending the hearing and determination of this application and suit.

9. Costs.

The application is premised on **Sections 3, 3A, 63(e), 80 and 89 of the Civil Procedure Act, Orders 9 Rule 9, 22 Rule 22, 45 Rules 1, 2, 3 and 451 Rule 1 of the Civil Procedure Rules. Section 68 of the Land Registration Act and Article 50 of the Constitution** as well as all other enabling provisions of and powers of the law. It is based on the grounds set out therein and supported by the Applicant's affidavit also dated 20th April 2020.

The gravamen of the application is that on 5th December 2016, the Applicant had filed an Originating Summons in **BUNGOMA ELC CASE NO 152 OF 2016** against the defendant seeking orders in adverse possession with regard to the land parcel **NO BOKOLI/BOKOLI/692**. That the defendant was served with summons to enter appearance on 6th December 2016 and entered appearance on 10th March 2017 and filed a replying affidavit on 10th January 2018. That it was upon the perusal of the replying affidavit that the Applicant discovered that the plaintiff had in fact sued the defendant in this suit and a consent Judgment had been recorded on 9th May 2016. That the said consent Judgment does not reflect the correct position on the ground as the Applicant is the one occupying the entire land parcel **NO BOKOLI/BOKOLI/692** as revealed in the Originating Summons filed in **BUNGOMA ELC CASE NO 152 OF 2016**. That upon perusal of the Certificate of Search for parcel **NO BOKOLI/BOKOLI/692**, the Applicant discovered that it had been closed on sub – division giving rise to parcels **NO BOKOLI/BOKOLI/692** as per the annexed Certificates of Search. The plaintiff, defendant and the interested parties who have never occupied the land parcel **NO BOKOLI/BOKOLI/692** have now threatened to evict her and deliberately failed to inform the Court that her suit **BUNGOMA ELC CASE NO 152 OF 2016** was pending. She is therefore likely to suffer irreparably if the orders sought herein are not granted.

The application is opposed and the defendant and interested parties filed replying affidavits. I could not trace in the record any replying affidavit by the plaintiff. I must at this stage express my fears that until the E – filing system which we have had to embrace following the **COVID – 19** pandemic is firmly rooted in our processes, both the litigants their counsel and Judicial Officers will experience many challenges in the transmission and filing of documents. It took quite a lot of judicial time tracing some of the pleadings in this file. I had the same experience in the case of **FRANCIS WEKESA .V. JOSEPH NATO BUNGOMA ELC CASE NO 29 OF 2015** where some of the documents transmitted by counsel were illegible. However, with **COVID – 19** still here with us, we all just have to improve our act.

In his replying affidavit dated 14th May 2020, the defendant described the application as a non – starter, bad in law and a waste of this Court's time and which ought to be dismissed with costs. He averred that this suit was concluded on 10th May 2016 by consent of the parties and the process of survey and subdivision of the land parcel **NO BOKOLI/BOKOLI/692** is complete and title deeds have been issued to the respective proprietors. That the Applicant has never been in occupation of the land parcel **NO BOKOLI/BOKOLI/692** as claimed. That there has been inordinate delay in filing this application which has not been explained by the Applicant. That the consent herein was entered into without any fraudulent intent and cannot be set aside unless by another consent by the parties. That the Applicant has no legal or equitable rights over the land in dispute and the Court is in fact functus officio and there must be an end to litigation. This application should therefore be dismissed with costs.

In her replying affidavit dated 21st May 2020, **MARGARET ONYANCHI MALOBA** the 1st Interested Party deponed, inter alia, that she is the registered proprietor of the land parcels **NO BOKOLI/BOKOLI/3622 and 3296** having purchased them for valuable consideration and is in possession an occupation thereof. That at the time of purchase, she was not aware of any proceedings nor were there any inhibitions or encumbrances thereon. That this case having been concluded, there is no pending suit on which the orders sought can be granted. That the consent Judgment can only be set aside on grounds for rescinding a contract. That when the Applicant filed **BUNGOMA ELC CASE NO 152 OF 2016** she must have known about this suit yet it took her 2 years to file this application. That this suit cannot be consolidated with a finalized suit and it would be a travesty of justice to do so. The application should therefore be dismissed as it is an afterthought.

BRAMWEL GEDION WASILWA the 2nd Interested Party also swore a replying affidavit dated 21st May 2020 in which he described this application as misconceived and an abuse of the Court process. That following the Judgment and decree in this case in which the Applicant was not a party, the land parcel **NO BOKOLI/BOKOLI/692** was subdivided by the defendant who was his father and he was given the parcel **NO BOKOLI/BOKOLI/3298** which he is now in possession of. That the Applicant neither stays nor works on land parcel **NO BOKOLI/BOKOLI/3298** and no injunction can be issued. That it would be a travesty of justice for him to be restrained and stay of execution can only issue before the Judgment and decree are executed. That this suit cannot be consolidated with **BUNGOMA ELC CASE NO 152 OF 2016** nor can orders of joinder be made. The application should therefore be dismissed with costs.

On his part, **EDMOND KHAMSIN WASILWA** the 3rd Interested Party similarly described the application as an afterthought, misconceived and an abuse of the process of the Court. He deponed that the Judgment and decree in this case has been executed after which

land parcel **NO BOKOLI/BOKOLI/692** was sub – divided and parcel **NO BOKOLI/BOKOLI/3299** was transferred to him and he obtained title on 7th September 2019. That the Applicant does not stay or work on land parcel **NO BOKOLI/BOKOLI/3299** and so she cannot obtain injunctive orders. That there was no appeal from the said Judgment and this suit cannot be consolidated with **BUNGOMA ELC CASE NO 152 OF 2016** which is pending and since neither the Applicant nor himself are parties in this suit, no orders of inhibition can issue over title **NO BOKOLI/BOKOLI/3299**. This application should therefore be dismissed with costs.

The Applicant filed a supplementary affidavits dated 4th June 2020 in response to the replying affidavits by the interested parties. She denied that her application is an afterthought, misconceived or bad in law adding that infact no survey has been carried out on the ground and that she is the one in occupation of the land in dispute for the last 5 ½ decades and the interested parties have never taken possession. That the interested parties’ interests in the land in dispute are subject to her rights and she has placed cautions thereon. That the consent leading to the sub – division of land parcel **NO BOKOLI/BOKOLI/692** was obtained by fraud. That there is need to consolidate this suit with **BUNGOMA ELC CASE NO 152 OF 2016** otherwise she will be condemned un – heard contrary to the Constitution and the rules of Natural Justice.

The application was canvassed by way of written submissions which have been filed both by **MR BW’ONCHIRI ADVOCATE** for the Applicant and **MR MAKALI ADVOCATE** for the Interested Parties.

I have considered the application, the rival affidavits and annextures as well as the submissions by counsel.

At the beginning of this ruling I gave a brief background to this suit. It is common ground that this suit has already been compromised by a consent Judgment dated 9th May 2016 between the plaintiff and defendant with respect to the land parcel **NO BOKOLI/BOKOLI/692**. It is also not in dispute that neither the Applicant nor the interested parties were parties in this case. There is however pending for determination at this Court **BUNGOMA ELC CASE NO 152 OF 2016** though it is not clear at what stage it has reached.

With regard to the prayer seeking to make the Applicant a party in this suit, **Order 1 Rule 10(2) of the Civil Procedure Rules** provides as follows: -

“This 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 effectively and completely to adjudicate upon and settle all questions involved in the suit, be added.” Emphasis added.

The objective of **Order 1 Rule 10(2) of the Civil Procedure Rules** must therefore be to allow a person, who is not a party, to be enjoined in proceedings in which he has an interest in the subject of the dispute so that he is not condemned un - heard. Secondly, that also enables the Court to benefit from the evidence and pleading of that person in order to **“effectively and completely to adjudicate upon and settle all questions involved in the suit.”** After all, the principle that now govern Courts is to do substantive justice to the parties. Having perused the Originating Summons in **BUNGOMA ELC CASE NO 152 OF 2016**, it cannot be disputed that the Applicant has a justiciable interest in land parcel **NO BOKOLI/BOKOLI /692**. Whether or not that claim is merited will be a matter for the trial Court. However, this suit has already been determined by a consent dated 9th May 2016 and the decree has been executed and part of the suit property transferred to the third parties. There are therefore no pending proceedings in this suit. **Order 1 Rule 10(2) of the Civil Procedure Rules** of course starts by stating that **“the Court may at any stage of the proceedings”** allow the joinder of any person to a suit. The tem Proceedings is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as follows: -

“The regular and orderly progression of a law suit;

Including all acts and events between the time of commencement and the entry of Judgment.” Emphasis added.

The Court of Appeal faced with an application of this nature had the following to say in the case of **JMK .V. MWW & ANOTHER 2015 eKLR**: -

“We would however agree with the respondent that Order 1 Rule 10(2) Contemplates an application for amendment or joinder of parties when proceedings are still pending before the Court. SARKAR’S CODE (supra) quoting s authorities decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.” Emphasis added.

The Court then contrasted that view with the decision of the Court of Appeal of Tanzania in the case of **TANG GAS DISTRIBUTORS LTD .V. SAID & OTHERS [2014 E.A 448]** where that Court took the view that joinder can be done even after Judgment where damages are yet to be assessed and that it is only where there is nothing more to be done that the rule becomes inapplicable. Even if this Court were to apply the position in the **TANG GAS DISTRIBUTORS** case (supra), it is clear from what I have already stated above that not only is there a final Judgment in this suit against which no appeal was filed but further, that the execution process was completed and part of the suit property transferred to third parties. There is therefore nothing pending adjudication in this case to warrant the joinder of the Applicant. That prayer is rejected.

The Applicant also seeks in prayers 4 and 8 the orders that the plaintiff, defendant and interested parties by themselves, their servants, workers, agents and otherwise be restrained from evicting the Applicant from the land **parcels NO BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622** (originally **BOKOLI/BOKOLI/692**) or from entering therein and interfering with her use thereof and also an order inhibiting the registration of any dealings on the said parcels of land. These are essentially prayers for a temporary injunction pending trial governed by the provisions of **Order 40 of the Civil Procedure Rules** even though the Applicant has not invoked it in her application.

That provision provides under Rule 1(a) as follows: -

“Where in any suit it is prove by affidavit or otherwise –

a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienate by any party to the suit, or wrongfully sold in execution of a decree; or. Emphasis added

It is clear that there is no pending suit herein. These can be no basis upon which any temporary injunction can be granted in the absence of a suit. This was considered by **KNELLER J A** in the case of **THEURI .V. LAW SOCIETY OF KENYA 1984 KLR 366** where after examining the position in other jurisdictions, he said that until a suit has been commenced, no injunction can issue. There can be no dispute about that because the purpose of a temporary injunction pending trial is designed to preserve the subject matter of the suit until the dispute between the parties is heard and determined or until further orders of the Court. There is no suit pending herein the same having been compromised through a consent Judgment four (4) years ago. Those prayers are not available to the Applicant. Even if the Court was minded to grant them, and as **MR MAKALI** has rightly submitted, they would amount to orders in vacuo.

Having said so, however, I notice from the Certificates of Searches in respect to land parcels **NO BOKOLI/BOKOLI/3297, 3298, 3299, 3300, 3301 and 3622** that the Applicant has infact already placed cautions thereon. They are therefore secured in favour of the Applicant.

The Applicant similarly seeks the order that this suit be consolidated with **BUNGOMA ELC CASE NO 152 OF 2016**. The consolidation of suits is one of the issues to be considered during the pre – trial conference under **Order 11 of the Civil Procedure Act** with a view to the expeditious disposal of cases. **Order 11 Rule 3(h) of the Civil Procedure Act** states that among the issues to be considered during the pre – trial conference is the: -

“Consolidation of suits”

That obviously means that consolidation can only be done where two or more suits are pending for determination by the Court. The position obtaining here is that this suit is no longer pending. In **LAW SOCIETY OF KENYA .V. CENTER FOR HUMAN RIGHTS & DEMOCRACY & OTHERS 2014 eKLR, THE SUPREME COURT** observed as follows:-

“..... the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.” Emphasis added.

The object of consolidation, it must be remembered, is to avoid a multiplicity of litigation between the same parties over the same subject. The only suit that is pending is **BUNGOMA ELC CASE NO 152 OF 2016**. It cannot be consolidated with a suit that no longer exists. That prayer is similarly un – merited and is rejected.

Prayer **NO 5** seeks the order that there be a stay of execution of the order issued on 9th May 2016 pending the hearing and determination of the application. That prayer is clearly spent but even assuming that it sought the order for stay of execution pending determination of the suit, it would not be available to the Applicant for two reasons. Firstly, there is no suit pending and secondly, the order of 9th May 2016 has already been executed. In his skeletal submissions filed herein, counsel for the Applicant **MR BW’ONCHIRI** has referred this Court to the following decisions: -

1. NAFTALI RUTHI KINYUA .V. PATRICK THUITA GACHURE & ANOTHER 2015 eKLR.

2. DORCAS MUTHONI & OTHERS .V. MICHAEL IRERI NGARI 2016 eKLR.

Those cases do not aid the Applicant at all because they related to suits that were pending determination. This is not such a suit. That prayer is equally dismissed.

Finally, the Applicant seeks the prayer that the consent Judgment dated 9th May 2016 be reviewed, varied and/or set aside. In **BROKE BOND LIEBIG LTD .V. MALLYA 1975 E.A 266, LAW Ag P** said: -

“A Court cannot interfere with a consent Judgment except in such circumstances as would afford ground for varying or rescinding a contract between the parties”

The jurisprudence that runs through decided cases such **HIRANI .V. KASSAM 1952 19 EACA 131**, and **FLORA WASIKE .V. DESTIMO WAMBOKO 1982 – 88 1 KAR 625** among others, is that a consent Judgment or order has contractual effect and can only be set aside on grounds that would justify the setting aside of a contract such as fraud, mistake misrepresentation or where it was obtained contrary to public policy or without sufficient material facts. Setting aside of Judgments is provided for under **Order 10 Rule 11 of the Civil Procedure Rules**. Not having been a party to this suit, it is unlikely that the Applicant can benefit from that provision. In any case, this was not an ex –parte Judgment. It was a consent Judgment and even the parties herein would have to surmount the hurdle set out in **Section 67(2) of the Civil Procedure Act** in case of an appeal.

And with regard to a review of that consent Judgment, the Applicant would still have to establish the grounds set out in **Order 45 Rule 1 of the Civil Procedure Rules** which are discovery of new and important matter or evidence, mistake or error, other sufficient reason and, most

importantly, that she approached the Court **“without unreasonable delay.”** It is clear from the Applicant’s own affidavit that she became aware about the existence of this suit on 10th January 2018 when she was served with the defendant’s replying affidavit in opposition to the Originating Summons in **BUNGOMA ELC CASE O 152 OF 2016**. She adds however that her advocate could not trace this file in the registry hence the delay in filing this application. She has annexed copies of her advocate’s letters in support of that averment. However, the earliest letter appears to be dated 19th September 2018 which is some eight (8) months after she became aware of the existence of this suit. There is no explanation as to why it took her a whole eight (8) months to instruct counsel. Then after she obtained the proceedings in March 2020, it took her another one (1) month to file this application. That is clearly **“unreasonable delay”** which has not been explained.

The up – shot of all the above is that the Applicant’s Notice of Motion dated 20th April 2020 is devoid of merit. It is accordingly dismissed with costs to the defendant and interested parties.

Boaz N. Olao.

J U D G E

29th June 2020.

Ruling dated, delivered and signed at **BUNGOMA** this 29th day of June 2020. To be delivered through electronic mail with notice to the parties in keeping with the guidelines following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

29th June 2020.