



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 103 OF 2012 (O.S)

JOHN MUANGE KITHIOKOI.....PLAINTIFF

VERSUS

ERNST HJALMAR FRIDOLF ANDREBERG..... 1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

ESQUIRE INVESTMENT LIMITED.....PROPOSED INTERESTED PARTY

RULING

1. The brief background in this matter is that the plaintiff, John Muange Kithiokoi on 28th February 2012 filed an originating summons against the respondent, Arnst Hjalmar Fridolf Andreberg enjoining the commissioner of lands as an interested party where he sought to be declared as having acquired title over **LR No. 3734/28** by virtue of having been in adverse possession for a period of over 12 years. The respondent and the interested party did not enter any appearance and did not file any response to the originating summons. The matter proceeded for hearing ex parte and the court on 12th March 2013 delivered judgment in favour of the plaintiff declaring that the plaintiff had become entitled to be registered as owner and proprietor of **LR No. 3734/28** by virtue of adverse possession.

2. Esquire Investments Limited the proposed interested party/applicant having become aware of the judgment on 12th September 2014 filed an originating summons vide **Environment and Land Court Case No. 1215 of 2014 wherein** it interalia sought to be declared as the duly registered owner and proprietor of LR No. 3734/28 Muthagari Road, Lavington, Nairobi and further sought an order that the judgment dated 12th March 2013 in **HC ELC No. 103 of 2012 (OS) John Muange Kithioko –vs- Ernst Hjalmar Fridolf Andreberg & Commissioner of Lands** was obtained by misrepresentation and failure to disclose all material facts and as such was invalid, illegal and of no effect. Esquire Investments Limited filed yet another application in the present suit ELC No. 103 of 2012 dated 11th November 2014 where interalia it sought to be enjoined as an interested party in the suit and for an order that the originating summons filed on 12th September 2014 in **HC ELC no. 1215 of 2014 (OS)** be consolidated in the instant suit and necessary directions on the consolidation and disposal of the two suits be given.

3. The plaintiff/applicant John Muange Kithiokoi, on his part applied for and obtained orders for the deputy registrar to execute all necessary documents to enable the registrar of titles to give effect to the decree emanating from the judgment of the court delivered on the 12th March 2013.

4. On 12th August 2014 the plaintiff filed the Notice of Motion dated 7th May 2014 seeking to have the registrar of titles, one W. M Muigai punished for being in contempt of court for disobeying the order of the court requiring the registrar of titles to register the plaintiff as the proprietor of **LR No. 3734/28**. On 27th November 2014 the court directed that both application in **ELC No. 103 of 2012**, one by the proposed interested party and the other by the plaintiff/deed holder for contempt be heard together with the application by the plaintiff (proposed interested party in ELC No. 103 of 2012) in ELC No. 1215 of 2014 (OS). The court directed the applications to be mentioned on 3rd February 2015 for further directions on their disposal.

5. The proposed interested party on 19th January 2015 filed a fresh application in HC ELC No. 103 of 2012 (OS) and on 3rd February 2015 when the matter came for mention as scheduled the proposed interested party notified the court that they wished to withdraw their previous applications and to instead proceed with the application filed on 19th January 2015. The proposed interested party's application filed in HC ELC No. 1215 of 2014 (OS) on 12th September 2014 and the application filed in HC ELC no. 103 of 2012 (OS) on 11th November 2014 were duly marked as withdrawn. Thus the application the subject of this ruling is the proposed interested party's application dated 19th January 2015 as amended on 10th February 2015 pursuant to the leave granted to amend the application on 3rd February 2015.

6. By the amended Notice of Motion dated 10th February 2015 expressed to be brought under sections 1A, 1B, 3A of the **Civil Procedure Act**, Order 10 (11), 51 (1), 1(3) (a) Rules of the **Civil Procedure Rules** the applicant prays for orders:

1. That the judgment dated 12th March, 2013 in High Court ELC No. 103 of 2012 (OS) John Muange Kithiokkoi –vs- Ernst Hjalmar Fridolf Andreberg & Commissioner of lands be set aside as it was obtained by misrepresentation and failure to disclose all material facts by the defendant pending the hearing and determination of this application.

2. That Esquire Investment Limited is the duly registered proprietor of parcel number LR No. 3734/28 Muthangari Road, Lavington, Nairobi.

3. That costs of this application be provided for.

4. That in the interest of justice, the applicant herein be granted leave to be enjoined as an interested party and be served with all the pleadings filed by the respective parties in these proceedings.

7. The application is supported on the grounds that appear on the face of the application and on the facts set out in the affidavit sworn in support of the application by one Ramji D. Varsani on 12th February 2015. The applicant sets out the following grounds in support of the application:-

a. That at the time of filing the originating summons in 2012 Ernst Hajalmar Fridolf Andreberg given as the defendant was not the registered proprietor of the suit property.

b. That an official search from the lands office would have revealed that the applicant herein was registered on the 31st August 2000 as the proprietor of the suit property.

c. The said suit was commenced by way of originating summons by the respondent herein purportedly making claim under section 38 of the Limitation of Actions Act without including or notifying the applicant, who is the registered owner of the parcel of land.

d. That by a caveat emptor published in the standard newspaper on 10th October 2009 and in the Daily Nation Newspaper on 12th October 2009, the applicant notified the public of the contents of the public notice.

e. That despite the construction of a perimeter wall and a caveat on the premises, the respondent has continued to occupy the property.

8. In the supporting affidavit sworn by Ramji D. Varsani in support of the application, the applicant reiterated the grounds set out on the face of the application and maintained that the judgment dated 12th March 2013 was irregular, invalid and illegal and was unenforceable as it was obtained by misrepresentation and failure to disclose material facts as itemized under paragraph 5 of the affidavit. The applicant states as the registered owner of the suit property he ought to have been enjoined as a party to the suit as the plaintiff sought orders that the title of the suit property of which the applicant was registered owner had been extinguished.

9. The plaintiff, John Muange Kithiokoi, swore a replying affidavit in opposition to the proposed interested party's application on 24th February. The plaintiff by the response contends that the judgment and decree given in this matter remain in place and cannot be challenged except by way of appeal or review. The plaintiff avers that the court became *functus officio* upon determining the suit and rendering the judgment and cannot properly hear and determine the applicant's application. The plaintiff further avers that the applicant's application to be enjoined as an interested party is misplaced since the suit has been heard and judgment given. The plaintiff argues that the application is incompetent and misconceived as the law does not allow a party as interested party after delivery of the final judgment and decree.

10. The applicant and the plaintiff decree holder canvassed the application by the applicant dated 19th January 2015 and amended on 10th February 2015 by way of written submissions. The applicant's submissions dated 11th May 2015 were filed on 12th May 2015. The decree holders written submissions dated 26th April 2015 were filed on 13th May 2015. I have reviewed the application together with the affidavit in support and in opposition and the parties written submissions and the issues that stand out for determination are:-

i. Whether the applicant has made out a case to have the judgment entered in favour of the plaintiff set aside.

ii. Whether the applicant ought to be enjoined as a party in the suit.

11. The originating summons filed by the plaintiff was brought under section 38 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules 2010. The originating summons was predicated on the fact that Ernst Hjalmar Fridolf Andreberg was the registered proprietor of land parcel 3734/28 Nairobi and consequently the summons were directed to him. The court in rendering judgment in favour of the plaintiff equally presumed Ernst Hjalmar Fridolf Andreberg was the registered owner when it directed thus:-

“Consequently, the registrar of titles is directed to cancel the registration of Ernst Hjalmar Fridolf Andreberg as owner and instead to substitute John Muange Kithioko as the registered owner”.

12. Section 38 of **Limitation of Actions Act**, Cap 22 Laws of Kenya contemplates an action brought thereunder to be against the Registered owner at the time the suit is filed. Section 38 (1) provides thus:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of land (emphasizes mine).”

Order 37 Rule 7 of the **Civil Procedure Rules** reinforces the view that the action ought to be against the person then registered as owner by requiring that a certified extract of title of the land in question be

annexed to the summons so that it is evident who the registered owner is:

Order 37 Rule 7 provides:-

1. An application under Section 38 of the Limitation of Actions Act shall be by Originating Summons.

2. The summons shall be supported by an affidavit to which a certified extract of the titles to the land in question has been annexed.

3 The court shall direct on whom and in what manner the summons shall be served.

13. The applicant has stated that it is the registered owner and it has been so registered since 31st August 2000. A copy of the extract of the title annexed to the affidavit of Ramji D. Varsani sworn in support of the application dated 11th November 2014 shows that the suit property has changed hands severally since Ernst Hjalmar Fridolf Andreberg was registered as owner on 18th March 1954. The property changed hands in 1960, 1964 and was transferred to Kenya Breweries Ltd on 8th October 1973 and then to Hella Investments Limited on 13th September 1996 before being transferred to Esquire Investments Ltd, the proposed Interested party herein on 31st August 2000.

14. The plaintiff did not annex an extract of title at the time of filing the originating summons. If he had it would have been evident that the 1st defendant was not the registered owner of the suit property and consequently no orders could be issued against him as sought. Equally it would have been evident that the applicant was then the registered owner of the suit property and that it would have been imperative for them to be made a party in the suit. In my view the proper defendant in the suit ought to have been the applicant since they were the registered owners of the property that the plaintiff was claiming to be in adverse possession.

15. The plaintiff does not deny the applicant is the registered owner of the suit property but rather appears to challenge the applicant's acquisition of the property and still argues that the applicant has no valid title since by the time the applicant purportedly purchased the same the plaintiff had acquired the title to the property by adverse possession. These are issues that require to be proved by evidence at the trial. The fact of the matter is that the applicant who ought to have been made a party to the suit by the plaintiff was not and a judgment which was prejudicial to them was made without the proposed interested party who holds title to the property being given a hearing. The judgment in my view cannot stand in as far as it affects the interests of a party who was not a party to the suit.

16. Both parties have submitted at length as to whether or not the applicant can be enjoined as a party after judgment had been entered. I have no doubt in my mind that the applicant as the registered owner of the suit property ought to have been enjoined as a principal party to the proceedings. Indeed the 1st defendant Ernst Hjalmar Fridolf Andreberg against whom judgment was entered was not a proper defendant in this suit. He had absolutely no interest in the suit property having transferred the same way back in 1960. The proper defendant ought to have been the applicant herein. The judgment entered in favour of the plaintiff herein was of no consequence as the party against whom the plaintiff proved his claim had ceased to have any interest in the suit property and the judgment could not be implemented against him.

17. Under Order 1 Rule 10 (2) the court can order the deletion of any party improperly joined as plaintiff or defendant and in place thereof the appropriate parties to be added. Order 1 Rule 10 (2) provides:-

(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.

Although the application by the applicant is to be enjoined in the suit as an interested party, my view is that the applicant is a key and central party in the suit. In exercise of my discretion and in the interest of justice, I would in terms of Order 1 Rule 10(2) direct that the name of the 1st defendant who was improperly joined as a defendant be struck out and in place thereof the applicant, Esquire Investments Limited be added as defendant.

18. In the result I find the application by the applicant amended on 10th February 2015 to have merit and make the following orders:-

1. That the judgment dated 12th March 2013 and all consequential orders in HC ELC No. 103 of 2012 (OS) John Muange Kithioki –vs- Ernst Hjalmar Fridolf Andreberg & Commissioner of Lands be and is hereby set aside.

2. That the name of Ernst Hjalmar Fridolf Andreberg as defendant be and is hereby struck out and the name of Esquire Investments Limited be and is hereby added as defendant in the suit.

3. The plaintiff to have leave of 21 days from the date of this ruling to amend and serve his pleadings on the defendants who will reply to the same within 15 days of being served.

4. The costs of the application shall be in the cause.

Ruling dated and signed at Kisii this 15th day of February 2016.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 17th day of March 2016.

S. OKONG'O

JUDGE

In the presence of:

Mr. Osundwa for the plaintiff

N/A for the defendants

Kajuju Court Assistant

S. OKONG'O

JUDGE