



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 13B OF 2017

PHILLIP KIBUBA NZIOKA.....PETITIONER/RESPONDENT

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT

(State Department of Housing and Urban Development).....2ND RESPONDENT

THE COUNTY COMMISSIONER MACHAKOS COUNTY.....3RD RESPONDENT

AND

REUBEN KAVITHI KYUNGU (*Suing as the Administrator of the Estate of*

DANIEL KYUNGU MUASYA.....INTENDED RESPONDENT/APPLICANT

RULING

1. The Notice of Motion dated 28th June, 2019 was brought under Section 3A and 63(e) of the Civil Procedure Act, Order 1 Rule 10 and Order 12 Rule 7 of the Civil Procedure Rules and Article 50 of the Constitution of Kenya by the Intended Respondent/Applicant seeking for the following orders:

a) Spent.

b) That an order do issue setting aside the Judgment dated 29th March, 2019, Order dated 4th April, 2019, Decree and any other subsequent orders issued herein.

c) That the proceedings in this matter be set aside.

d) That the Intended Respondent/Applicant herein be enjoined as a Respondent.

e) That the Intended Respondent/Applicant be granted leave to file his response to this Petition out of time.

f) That costs of this Application be provided for.

2. The Application is supported by the Affidavit of Reuben Kavithi Kyungu who has deponed that he is an administrator of the Estate of Daniel Kyungu Muasya; that Daniel Kyungu Muasya died on 20th April, 2001 and that prior to his death, he was the registered owner of land known as Machakos Block 1/127 (*formerly L.R. No. 909/258*).

3. The Intended Interested Party deponed that the Petitioner had sued the deceased in High Court of Kenya at Nairobi Civil Case No. 687 of 1975 seeking that he should be declared the owner of land known as Machakos Block 1/127 and that by a decree issued on 22nd October,

2009, the said suit was dismissed under the then Order 16 rule 6 of the Civil Procedure Rules.

4. The Intended Interested Party deponed that neither him nor the deceased were aware of any other suit in which the Petitioner herein had sued the deceased; that after the death of the deceased, he filed Machakos High Court Succession Cause No. 183 of 2002 in which Letters of Administration Intestate were issued on 10th February, 2003 and that on 3rd December, 2004, he was issued with a Certificate of Confirmation of Grant in which land known as Machakos Block 1/127 (*formerly L.R. No. 909/258*) is to be shared jointly between Bonifas Kyungu Muasya, Soul Muthoka Kyungu, Philip Nzuki Kyungu and himself.

5. The deponent lamented that the Petitioner filed a Petition in this court while aware of the said Grant and chose not to enjoin him as a Respondent and that the failure to enjoin him in this suit was malicious, done in bad faith and aimed at defrauding the Estate of Daniel Kyungu Muasya of land known as Machakos Block 1/127 (*formerly L.R. No. 909/258*).

6. The Intended Interested Party finally deponed that if the orders sought are not granted, then the Estate of the deceased will stand condemned unheard contrary to Article 50 of the Constitution.

7. In the Supplementary Affidavit sworn on 12th November, 2019, the Intended Interested Party deponed that he was not aware that the suit property was disposed in 1976 by his father to Monika Koki; that the signatures contained in the consent order dated 7th February, 1977 as well as the surrender agreement dated 19th March, 1976 were forgeries and that he did not witness the signing of any Agreement where his father surrendered land to third parties.

8. The Petitioner/Respondent opposed the Application vide a Replying Affidavit sworn on 24th October, 2019 in which he deponed that he filed the Petition on 18th August, 2017 as a personal representative of Monika Koki Nzioka seeking the renewal of the Lease of L.R. No. Machakos Block 1/127 (*formerly L.R. No. 909/258*).

9. The Petitioner deponed that on 29th March, 2009, the court heard the Petition and delivered its Judgment extending the Lease and that the current Application is a fraud because the Applicant was aware that the suit property was disposed by the deceased to Monika Koki before his death on 20th April, 2001.

10. According to the Petitioner, vide a consent order dated 7th February, 1977 in High Court Civil Case No. 2380 of 1976 between Monica Koki and the deceased as well as himself, Judgment was entered against the deceased for a sum of Kshs 20,000 with a rider that on default of payment, the suit property should be transferred to Monica Koki and that when the decretal amount was not paid, the suit property was transferred and registered in favour of Monica Koki on 19th March, 1976.

11. The Petitioner deponed that the suit property was not part of the Estate of the deceased since the same was disposed of in 1976 before he died; that the Applicant cannot be enjoined in finalised proceedings and that the court is *functus officio*. The Petitioner deponed that the dismissal of Civil Suit No. 687 of 1975 had nothing to do with the concluded proceedings and that there was no reason why the Applicant should have been enjoined in the Petition.

12. The Application was canvassed vide written submissions. The Applicant's counsel submitted that the Petitioner/Respondent herein knew the history of the suit land but deliberately chose not to enjoin the Intended Respondent/Applicant so as to defeat his interests in the land; and that the suit land herein belongs to the Intended Respondent/Applicant's father.

13. Learned counsel submitted that the Petitioner/Respondent herein failed to disclose that there is in existence at the Environment and Land Court at Machakos ELC Case Number 217 of 2010 wherein the Intended Respondent/Applicant herein has sued the Petitioner over the suit land.

14. Counsel submitted that the Intended Respondent/Applicant's father was not aware of this Petition; that his late father never signed the consent annexed on the Replying Affidavit and that the signature was a forgery. Counsel relied on the provisions of Order 1, Rule 10 of the Civil Procedure Rules 2010 which provides as follows:

“10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”

15. It was counsel's argument that the Intended Respondent/Applicant herein has shown his interests in the suit property and that the orders that are sought to be set aside were obtained irregularly.

16. The Respondents' counsel submitted that the deceased disposed of the suit property to Monika Koki before he died; that the sale was evidenced by a consent order dated 7th February 1977 which was adopted as a court order in HCCC No. 2380 of 1976 between the deceased and Monika Koki and that a Deed of Transfer was executed by him and registered on the 19th March, 1976.

17. It was submitted that the Judgment sought to be set aside extended the Lease of the suit property for 99 years; that the Respondents filed the Petition for the purposes of extending the expired Lease, and that Judgment was entered in favour of the Petitioner.

18. The law governing joinder of parties is Order 1 Rule (10) (2) of the Civil Procedure Rules that empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence

before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

19. Considering that these proceedings were commenced by way of a Petition, the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013 (the Mutunga Rules)*) come into play.

20. Rule 5 (d) of “*the Mutunga Rules*” provide that 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 just, order that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

21. The Black’s Law Dictionary, 9th Edition defines a “*Necessary Party*” as being:

“A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”

22. In Sarkar’s Code of Civil Procedure (11th Edition Reprint, 2011.Vol. 1, page 887), the authors stated as follows:

“The Section (on joinder) should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

23. The record shows that the Petitioner sued the Respondents vide a Petition dated 16th August, 2017. In the Petition, the Petitioner averred he is the personal representative of the Estate of the late Monica Koki; that the deceased is the registered proprietor of parcel of land known as Machakos Block 1/127 (*the suit property*) and that he has made several attempts to have the Lease in respect to the suit property extended without success. In the Petition, the Petitioner prayed for an order compelling the Respondents to renew the Lease for a further period of 99 years in his name.

24. In the Petition, the Petitioner explained how the late Monica acquired the suit property after filing Nairobi HCCC No. 2380 of 1976. The Petitioner filed alongside the Petition the consent order that was obtained in HCCC No. 2380 of 1976 which led to the registration of the suit property in favour of the late Monica Koki.

25. The Petition was not defended by the Respondents. In its Judgment dated 29th March, 2019, this court allowed the Petition in the following terms:

a. An order be and is hereby issued compelling the Ministry of Transport, Infrastructure, Housing and Urban Development and the County Commissioner Machakos (State Department of Housing and Urban Development and the County Commissioner) to discharge the charge registered on 28th February, 1974 against the Deceased’s Interests over Machakos Block 1/127 (formerly L.R. No. 909/258).

b. An order of mandamus be and is hereby issued directed at the Chief Land Registrar directing and commanding him to vacate the 1st charge and renew the deceased’s Estate’s Lease over Machakos Block 1/127 (formerly L.R. No. 909/258) for a further term of 99 years.

26. The Applicant has argued that the Estate of the late Daniel Kyungu Muasya should have been enjoined in the Petition considering that Nairobi HCCC No. 687 of 1975, which the Petitioner is relying on, was dismissed by the court. The Applicant annexed the copy of the Decree in Nairobi HCCC No. 687 of 1975 which shows that the suit between the Petitioner and the late Daniel Kyungu Muasya was dismissed by the court on 18th July, 2001 under the then Order XVI Rule 6 of the Civil Procedure Rules.

27. The Applicant also annexed on his Affidavit a copy of the Certificate of Confirmation of Grant which shows L.R. No. 909/258 (*now registered as Machakos Block 1/127*) was part of the Estate of the late Daniel Muasya as at 3rd December, 2004.

28. The Petitioner has argued that the Applicant cannot be enjoined in this Petition because the matter has been concluded. It is not true that where a matter has been concluded, a new party cannot be enjoined. The Court of Appeal of Tanzania, in *Tanga Gas Distributors Ltd vs. Said & Others (2014) E.A 448*, while considering the equivalent of our Order 1 Rule 10(2) of the Civil Procedure Rules, considered the issue of joinder of a party in proceedings that have been finalised.

29. In the said case, the court stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been fully disposed off and there is nothing more to be done that the rule becomes inapplicable and that a party can be added even at the appellate stage. This position was adopted by the Court of Appeal in *J M K vs. M W M (2015) eKLR*.

30. In the case of *Standard Chartered Financial Services Limited & 2 Others vs. Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 Others (2016) eKLR*, it was observed that the court has jurisdiction to reopen and rehear a concluded matter where the interests of justice demand.

31. In the case of *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR*, it was noted that the Supreme Court of India underlined the importance of the right to be heard in *Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 664, at 711* as

follows:

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

32. In *Patel vs. E. A. Cargo Handling Services Ltd (1974) E. A. 75*, the court observed that for effective administration of justice, the courts are enjoined to investigate all disputes and decide them on merit. Moreover, in the case of *Sebei District Administration vs. Gasyali (1968) EA 300*, it was held that denying a party the opportunity to be heard shall be the last resort of court.

33. The Applicant herein has sought to set aside the Judgment of this court because he wants to be heard. The Applicant has annexed a Certificate of Confirmation showing that the suit property is one of the properties forming the Estate of the late David Kyungu Musya.

34. Contrary to what the Petitioner asserted in the Petition, the Applicant has averred that the late David Kyungu did not transfer the suit property to the Petitioner. It is the Applicant’s case that the purported consent that the Petitioner entered into with the deceased was a forgery and that Nairobi HCCC No. 2380 of 1976 was dismissed.

35. The assertions by the Applicant need to be investigated at trial. Indeed, considering that the suit property forms part of the Estate of the deceased, the question of ownership of the suit property has to be addressed by the court after hearing all the parties. Consequently, it is my finding that the Applicant is a necessary party in these proceedings for the purpose of ascertaining the issue of ownership of the suit property.

36. For those reasons, I allow the Application dated 28th June, 2019 as follows:

- a) The proceedings and the Judgment of this court dated 29th March, 2019 be and is hereby set aside.*
- b) The Intended Respondent/Applicant be and is hereby joined in this proceedings as a party.*
- c) The Intended Respondent/Applicant to file his Replying Affidavit within twenty one (21) days.*
- d) Each party to meet his own costs.*

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE