



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL CASE NO. 97 OF 2008**

**MARCELLUS LAZIMA CHEGE.....PLAINTIFF**

**VERSUS**

**MARY MUTORO SIRENGO.....1ST DEFENDANT/RESPONDENT**

**JOEL BOB SIRENGO..... 2ND DEFENDANT/RESPONDENT**

**PAUL ANDREW OKWARO.....INTERESTED PARTY**

**THE LAND REGISTRAR TRANS-NZOIA/TURKANA**

**WEST POKOT DISTRICTS.....PROPOSED 3RD RESPONDENT**

**RULING**

1. The interested party herein Paul Andrew Okwaro filed a notice of motion dated 22/10/2013 in which he seeks the following reliefs;

***(a) That leave be granted to the interested party to have the Land Registrar Trans-Nzoia/Turkana/West Pokot Districts enjoined as a party to this suit.***

***(b) That this Honourable court do compel the Land Registrar Trans-Nzoia/Turkana/West Pokot Districts to remove all outstanding cautions, inhibitions and/or restrictions over parcel of Land Known as LR NO. Trans-Nzoia/Sinyerere/301.***

***(c) That this Honourable court do compel the Land Registrar Trans-Nzoia/Turkana/West Pokot Districts to register the transfer dated 12/1/2012 in favour of the transferee/interested party herein.***

***(d) That the costs of this application be provided for.***

2. The history of this application can be traced from a suit filed by Marcellus Lazima Chege against Mary Mutoro Sirengo and Joel Bob Sirengo on 16/7/2004. The first defendant is the registered owner of LR NO. Trans-Nzoia/Sinyerere/301. The plaintiff who had been leasing part of the defendants land later opted to purchase part of the defendants property. An agreement to that effect was entered between the plaintiff and the first defendant. The sale could not however go through prompting the plaintiff to file a suit against the defendants in which he sought a declaration that the defendants were indebted to him in the sum of Kshs.1,783,000/=, an order of specific performance of the sale agreement, general damages for breach of contract and costs of the

suit.

3. The plaintiff's suit was compromised through a consent entered into by the Advocate for the plaintiff and the advocate for the defendants on 24/2/2005. In the said consent, judgement was entered against the first and second defendant jointly and severally for Kshs.1,700,000/=. There was a stay of execution for 90 days. Warrants of execution were to issue if there was no settlement after expiry of 90 days.
4. The plaintiff applied for execution by way of sale of the property registered in the name of the first defendant. The process went on and it culminated in the sale of LR NO. Trans-Nzoia/Sinyerere/301 at a public auction held on 18/2/2010. The property was sold to the interested party/applicant.
5. Before the property was sold the defendants had made a number of attempts to have a stay of execution and review of the judgement as well as an injunction in the court of Appeal in vain. These attempts included an application filed on 12/8/2008 in which the defendants sought to review, vary and/or set aside the consent judgement in favour of the plaintiff. The application for review was heard by Justice Ombija who dismissed the same in a ruling delivered on 2/7/2009. The applicants moved to the court of Appeal and successfully made an application seeking to extend the time for filing notice of appeal and the appeal out of time.
6. The appellants then lodged an appeal against the ruling of Justice Ombija. This appeal was heard and in a judgement delivered on 15/5/2013, the order of Justice Ombija dismissing the application for review was set aside and the application by the appellants date 12/8/2008 was allowed.
7. It is apparent that plaintiff in this suit proceeded with execution process on the basis that there was no stay of execution of the decree. The plaintiff was aware of the Appeal which had been filed against the order of Justice Ombija refusing to review and set aside, the consent judgement. The interested party was too aware that there was an appeal challenging the judgement which resulted in the decree from which he benefited by purchasing the land in a public auction.
8. The interested party even obtained orders from the High Court compelling the Deputy Registrar of the court to sign transfer on behalf of the defendants. There was even an order from the High Court compelling the Land Registrar to remove a Prohibition order issued on 2/8/2005 which was registered at the lands registry on 11/8/2005. The applicant even paid for the transfer and paid stamp duty but the transfer could not be registered prompting him to make the current application. There were also cautions registered against the title. The applicant contends that the Land Registrar who is proposed to be enjoined as third defendant has refused to remove the cautions and to register the transfer.
9. The applicant's application is supported by the plaintiff's replying affidavit sworn on 26/1/2015. The plaintiff contends that the interested party is an innocent purchaser for value and that he was neither a party to the consent nor to the appeal filed. The plaintiff further contends that the right to ownership of the interested party has not been extinguished or nullified by the judgement of the court of Appeal.
10. The application by the interested party is opposed based on replying affidavit of the respondents sworn on 11/12/2014. The respondents basically contend that the applicant's right to the property were extinguished by the judgement of the court of appeal delivered on 15/5/2013. The respondents therefore contend that the filing of the present application is an abuse of the court process.
11. I have gone through the applicant's application and the submissions filed by the parties herein. There is no contention that the property that the applicant bought has not been registered in his name. There is also no contention that there is a judgement of the court of Appeal which allowed the review of the consent judgement which was the basis of the execution which resulted in the

sale of the first respondent's land which was bought by the interested party. The issues which emerge for determination are as follows:-

**(a) Can the court compel the Land Registrar to remove all the cautions lodged against the title held by the first respondent?**

**(b) Has the judgement of the court of Appeal delivered on 15/3/2013 extinguished the right to ownership of the property bought by the applicant in a public auction?**

**(c) Whether this application is an abuse of the process of the court.**

12. The interested party/applicant annexed a copy of search dated 29/2/2012. According to this search there are five cautions lodged by various individuals claiming various interests in LR NO TransNzoia/Sinyerere/301. The Land Registration Act of 2012 provides instances when a caution may be removed. This include removal on orders of the court. The various cautioners have not been notified of the current application. It is against the principles of natural justice to condemn a party without hearing him. Before the cautions were registered, the Land Registrar satisfied himself that the same were not frivolous. It will therefore be unfair for the court to order the removal of the cautions without the cautioners knowledge or hearing them. I therefore find that no order can issue compelling the Land Registrar to remove the cautions as the cautioners have no knowledge of the present application.

13. There is a judgement of the court of Appeal delivered on 15/5/2013. This judgement set aside the order of Justice Ombija refusing to allow the application for review and setting aside of the consent judgement entered on 25/2/2005. The judgement allowed the appellants application dated 12/8/2008. The application of 12/8/2008 sought review and setting aside of the consent judgement on the ground that the same was entered by the appellant's advocates without their instructions. The Judges went into great detail to show how the same was unfair given the manner in which it was recorded. The interested party and the plaintiff in this case have submitted that the appeal Judges set aside the consent Judgement because there was no evidence on record to show that a consent judgement had been entered.

13. I have read the judgement of the Court of Appeal. This was not the reason why the Judges allowed the appeal. The Judges observed that there was no record of what transpired on 25/2/2005 but they were alive to the fact that there was a consent recorded on 25/2/2005. It is true that there is no record in the court file on what transpired in court on 25/2/2005. This is because some pages are missing. However this notwithstanding, the fact remains that there was a consent recorded and this was confirmed through correspondence from the plaintiff's advocate.

14. The applicant herein bought LR NO. Trans-Nzoia/Sinyerere/301 pursuant to a decree which resulted from a consent judgement. This property has not been registered in the applicant's name. The consent judgement has since been set aside. The judgement having been set aside, I do not think that there is any basis upon which the applicant can insist on having the land registered in his name. The judgement of the Court of Appeal extinguished his right to ownership of the land. To proceed to grant him the orders he is seeking is like assuming that the judgement the basis on which he bought the property is still valid. The judgement having been set aside, it went down with all consequential orders including orders of attachment and sale.

15. There was an argument by the plaintiff herein that the applicant was an innocent purchaser for value without notice and that he was not party to the consent or the appeal filed herein. The interested party joined this suit after the judgement. He was aware that an appeal against the judgement which resulted in him buying the land had been lodged in the Court of Appeal. He nevertheless went a head to push for registration of the land in his name. There was an attempt to have him made a party to an application seeking stay of sale of the land in issue. This application was declined because had the Judges allowed the joinder of the applicant as a party, that would have amounted to re-opening the application.

16. The application for stay of sale in the Court of Appeal was declined after it turned out that the sale had already taken place. The Judges observed that though an appeal had been filed against Judge Ombija's refusal to review the judgement, the application at hand had been rendered futile in view of the fact that the property had been sold in a public auction. The interested party was given the impetus to move on by the ruling of the Appeal court. When he filed an application seeking orders to compel the Deputy Registrar to sign the transfer on behalf of the reluctant defendants, Justice Koome as she then was observed that though the defendants had preferred an Appeal to the court of Appeal, there was no order for stay. She went a head to allow the interested party's application. It is therefore clear that the interested party was aware of the appeal pending in the Court of Appeal. He cannot therefore argue that he was innocent about the whole issue though he was not a party.
17. I was referred to two decisions by Justice Mutungi and Justice Munyao. In the decision of Justice Mutungi in the *case of Amos Wangera Njoroge & 9 others -Vs- Serah Wamunyu Muriuki & another [2014] EKLK*, the property in issue had been sold in a public auction. The same had been registered in the name of the purchaser. The defendants approached the purchaser with a view to buying it back. There was some agreement reached but the purchaser died before completing the deal. The defendants then brought a suit against his administrators seeking to enforce the deal between them and the purchaser. They lost the case because the agreement was not in writing as required in the Law of contract. The facts of that case are therefore quite different from the present case.
18. In the ruling of *Justice Munyao in Paul K. K. Birech -Vs- Barclays Bank of Kenya & 2 others [2013] EKLK*, the applicant had purchased a property in a public auction. Before the property could be registered in his name, the plaintiff withdrew his case against the first and second defendants. The applicant was the third defendant in the suit. He brought an application seeking orders compelling the first and second defendants to execute a transfer in his favour. The application was dismissed because there was no suit upon which he could base his application as the plaintiff had already withdrawn his suit against the first and the second defendants and the applicant had no counter-claim. This decision does not assist the applicant in this case.
19. The consent judgement having been set aside, it extinguished the applicant's claim to the property which he had bought in a public auction. Had the application and the plaintiff been patient enough to wait for the outcome of the appeal, they would not have found themselves in this situation where a judgement whose fruits they had started enjoying has now been set aside.
20. I now go to the last issue on whether the present application is an abuse of the process of the court. The interested party had filed another application similar to the present one on 19/6/2012. This application was dated 11/6/2012. On 24/10/2012, the parties agreed that the application be disposed of by way of written submissions. The respondents' advocate filed his submissions on 7/11/2012. When the matter came up before Justice Karanja on 7/11/2012, the applicant's advocate indicated to the court that he was yet to file his submissions. The Judge then referred the parties to take a date at the registry. The applicant never filed his submissions as agreed and therefore no ruling was made on his application. The applicant instead waited for eleven (11) months before filing the present application. The earlier application was never withdrawn. The applicant filed the present application well aware that the Court of Appeal had set aside the consent judgement the basis of which he is claiming land bought during a public auction. I find that the filing of this application is an abuse of the court process. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 9th day of March, 2015.

**E. OBAGA**

**JUDGE**

In the presence of M/S Arunga for Mr Otieno for 1st and 2<sup>nd</sup> respondent. Court Clerk –  
Kassachoon.

**E. OBAGA**

**JUDGE**

**9/3/2015**