



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC CIVIL APPL. NO. 395 OF 2005

**IN THE MATTER OF APPLICATION OF ELIUD WEPHUKULU KHAUKHA FOR ORDERS
OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF LAND DISPUTES ACT NO 18 OF 1990

BETWEEN

ELIUD WEPUKHULU KHAUKHA..... APPLICANT

VERSUS

THE ATTORNEY GENERAL RESPONDENT

AND

ZEBEDAYO M. KOROSIAINTERESTED PARTY

RULING

1. The Applicant moved the court by an application dated 30th July 2013 seeking the following orders;

a). That it pleases the honourable court to order the Land Registrar Bungoma Lands Office to cancel all entries made in the register on the 5th July, 2005 in respect of title No. BOKOLI/CHWELE/1092 and cancel all subsequent titles created thereunder to wit BOKOLI/CHWELE/1924, 1927,1928,2157,2158,2197,2198,2229, 2230, 2652, 2654, 2655, 2657, 2680,2681,2750,2751, 2752 and 2753 respectively.

b). That costs of the said registration of the said entries and this application be borne by the Respondents.

2. The motion is premised on the grounds on the face of it and the supporting affidavit sworn by the Applicant. In ground 2, the Applicant avers that “The Registrar issued a search certificate showing the land had reverted to the original owner but later it turned out twenty new titles were created hence need for the orders”

The Applicant has also annexed a copy of the judgment in Eldoret Misc. Civil Appeal No. 47 of 2009 which ordered for cancellation of the entry of 5th July 2005 in the register.

3. The application is opposed. The Interested party has sworn a replying affidavit in which he depones inter alia that he has not executed any transfer documents to vest titles in the names of third parties. Neither has the Applicant given the names of the people who have received the said titles. He also deponed that the Applicant has sued him and several other people seeking eviction orders in Bungoma HC.Environment & Land case no. 169 of 2013. He has annexed copies of pleadings in that suit to his replying affidavit.

4. Mr. Sichangi advocate for the Applicant submitted that their application is brought pursuant to the judgment of the court of appeal which made a decision that all numbers that originated from L.R. Bokoli/CHWELE/1092 stand canceled. He urged the court to cancel the entries of all the sub-divisions as listed in the application and revert the land back to the original number L.R. Bokoli/Chwele/1092.

5. Mr. Murunga for the Interested Party in opposing the motion submitted that the Applicant did not annex extracts from the lands office to prove that the numbers indeed existed. That the Interested party does not know the third parties he is alleged to have transferred land to and anyone accused must be given an opportunity to be heard. Finally he submitted there is suit commenced by the Applicant where L.R. 1092 is the subject matter therefore this application is incompetent and ought to be dismissed.

6. I have considered the pleadings and the submissions offered by the parties. It is not disputed that the decision of the Court of Appeal in Misc. Civ. Appeal No. 47 of 2009 ordered for cancellation of the entry of 5th July 2005 which was made pursuant to the award of the Chwele Land Disputes Tribunal. This is what the judges said;

“To give meaning to this judgment and to save the parties the headache and expense of another litigation, I direct that the entries made on 5th July 2005 in the register of title No. Bokoli/Chwele/1092 be reversed forthwith and the title do revert to the first Respondent.”

7. In my understanding of this decision of the Court of Appeal, all the Applicant needed to do was to extract this decree and serve it on the District Land Registrar for compliance. The Applicant submits however that the order was served on the Land Registrar and he did cancel the entries but thereafter has issued several new titles. As submitted rightly by the interested party, no extracts have been shown to the court to demonstrate the titles listed in prayer (1) of the application are actually in existence or is a result of sub-division of L.R. 1092. And if these are the titles that were issued after the order was executed, then the Applicant ought to have commenced contempt proceedings against the contemnor, in this case the Land Registrar.

8. The Interested party also submitted that this application is incompetent because of the existence of a suit filed by the Applicant regarding the same subject matter I have looked at the prayers sought in the plaint, the orders include' ***“eviction from parcel No. Bokoli/Chwele/1092.”*** While in the counter-claim, the Defendants seek to declare the Plaintiff's (Applicant) registration of L.R. 1092 as fraudulent and a declaration that the Plaintiff is holding the land in trust for the Defendants.

9. The subject matter in the motion was pursuant to the award of the Chwele Land Disputes Tribunal which was found to have been made without jurisdiction. It cannot be said it relates to the subject matter in the current proceedings which is about eviction, fraud and trust.

10. Although the Applicant did not annex the extracts of the register in respect of L.R. 1092 to prove the numbers sought to be canceled emanated from it. The Applicant said his application was made pursuant to the judgment of the Court of Appeal. To this extent, I agree with him that he is entitled to enjoy the fruits of the judgment of that court. The submissions that 3rd parties who are accused to be registered as owners of titles emanating from subdivision of L.R. 1092 will be condemned unheard cannot hold. This Application is merely to execute the decision of the Court of Appeal and not to open hearing of a fresh suit. Such 3rd parties can apply to be joined in the current suit Bungoma HC Environment and land case no. 169 of 2013 that is challenging the applicant's title no. L.R.1092 in the counter claim.

11. I do find the application has merit and allow prayer (a). The Applicant did not prove the interested

party was the one responsible for the creation of the new titles. I will therefore not condemn the Interested Party to pay costs of the application. In the circumstances I direct each party to bear their respective costs of the application.

Dated, Signed and Delivered this 13th of day of May 20

A. OMOLLO

JUDGE.