



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

MISC. ELC APPLICATION NO. 21 OF 2017

(FORMERLY NAIROBI MISC CIVIL APPL NO 754 OF 1996)

NAFTALI RUTHI KINYUA.....APPLICANT

VERSUS

MINISTER FOR LANDS &

SETTLEMENT & 2 OTHERS.....DEFENDANTS/RESPONDENTS

AND

RICHARD THAIRU GACHAGUA...PROPOSED INTERESTED PARTY

RULING

1. Before me for determination is a Miscellaneous Civil Application under Certificate of Urgency dated 15th May 2018 brought under the provisions Section 3A of the Civil Procedure Act and *Order 51 Rule 1 and 3 of the Civil Procedure Rules* as well as all enabling provisions of the law, wherein the Proposed Interested Party herein sought for orders that he be enjoined in the suit with a view to being heard on the illegality of the orders made against the Respondents which orders affected his interest over the parcel of land No. Nyandarua/Ndemi/1436.

2. The Application is supported on the grounds set out in the body of the motion as well as on the affidavit sworn by the Proposed Interested Party on the 15th May 2018.

3. In response to the interested party's application dated the 15th May 2018, the Applicant herein filed their grounds of opposition stating among others that the Application was based on an illegality and was Res Judicata in terms of the judicial review orders to the Applicant's Affidavit sworn on the 25th September 1996. That the Application was contemptuous to the orders of the court issued on the 16th August 1996, 8th May 1997 and 20th February 2009 and was an abuse of the court process.

4. The application was disposed by way of written submission.

Proposed Interested Party's case.

5. It was the Proposed Interested Party's case that his application had indeed met the threshold laid down in allowing him to be enjoined in the present proceedings. His reasoning being that as it had been held in the decided case of **West Kenya Sugar Company Limited v Kenya Sugar Board & another [2014] eKLR**, the court in considering the application for joinder ought not to consider the merits of the case but to determine the application on the basis as to whether or not a person intending to be heard is a prima facie proper person.

6. The Proposed Interested Party also relied on the case of **Republic vs District Land Registrar, Naivasha ex-parte Jane Wangechi Kariuki & Another [2016] eKLR** where the court had held that there was need in Judicial proceedings for the participation of all persons directly affected or all proper persons during the hearing stage, stating that there was nothing contained in part IV of the Land Reform Act or under Order 53 of the Civil Procedure Rules to exclude the application of Section 3 and 3A of the Civil Procedure Act to proceedings brought under Order 53 of the Civil Procedure Rules.

7. That the orders dated the 16th June 2015 were issued without the input by the Proposed Interested Party who stands to be adversely affected if the orders are to remain in force, without having an opportunity to be heard which is compelling reason in support of setting aside of the orders of 16th June 2015.

8. The Proposed Interested Party also considered the definition of a Proposed Interested Party by quoting the holding in the case of **Yusuf Abdi Adan & Another vs Hussein Ahmed Farah & 3 others [2016] eKLR** as well as the definition found in the 9th Edition of the Black Law's Dictionary to submit that by virtue of the provisions of Order 32 Rule 13(1) of the Civil Procedure Rules as well as the provisions of Article 22(1), 48 and 50 (1) of the Constitution that he was entitled to be enjoined in the present proceedings.

9. He further relied on the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** to buttress his submission seeking to have the application allowed noting that the order of certiorari issued in favour of the Applicant on the 8th May 1997 had not been executed to date. That by enjoining him to the proceedings, he would acquire the locus standi to demonstrate to the court why the order should not be executed or implemented.

Applicant's Case

10. The Proposed Interested Party's application was opposed by the Applicant through their submissions filed on the 5th October 2018 giving the history of the matter to the effect that he was allocated the suit land, being No. Nyandarua/Ndemi/1436 in the year 1989. That subsequently in the year 1996, the said land was illegally sub-divided into 3 parcels resulting into No. Nyandarua/Ndemi/2286-2288

11. That he had sought leave to institute Judicial Review proceedings for the recovery of his land whereby by an order issued on the 15th August 1996, the High Court sitting in Nairobi had granted him leave to institute the Judicial Review proceedings which leave also operated both as a stay against the Respondents' decision to cancel the allocation of the suit land and as a prohibition order prohibiting the Respondents from effecting the sub-division and transfer of the same. After his application was allowed, the Review Orders of Certiorari were subsequently granted on the 11th November 1996.

12. It was the Applicant's contention that the Interested Party's application sought to re-open this issue. He thus framed their matters for determination as;

- i. Whether a party can be enjoined after a judgment.
- ii. Whether the issues raised are Res judicata.
- iii. Whether the Application is an abuse of the court process.
- iv. Whether the intended third party has any right, legal or equitable over the suit property.
- v. Whether the contempt of court, illegal occupation and trespass can create a right, legal or equitable over the land.

13. On the first issue, the Applicant relied on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and on the decided cases of **Lilian Wairimu Ngatho & Another vs Moki Savings Co-operative Society Limited & Another [2014] eKLR** and **Moses Wachira vs Niels Bruel & 3 others [2014] eKLR** to submit that a party can only be enjoined in a suit during the pendency of the suit but not after the same has been concluded.

14. Further that the Proposed Interested Party had no cause of action against the Applicant since he had not sold to him the parcel of land, but rather, that the same was against the sellers of the land and the Respondents.

15. Their contention was that there was no legal basis upon which to enjoin the Proposed Interested Party to the proceedings. That the Application was just intended to delay and embarrass the proceedings herein.

16. On the second issue, it was the Applicant's submission and while relying on the provision of section 7 of the Civil procedure Act and the decided case of **William Koross vs Hezekiah Kiptoo Komen and 4 others [2015] eKLR** that based on the Respondent's sworn affidavit dated the 25th September 1996, the Proposed Interested Party herein was litigating under the same title as the Respondent who, having no right to cancel and sub-divide the suit property could not transfer any legal interest in the same to Joseph Kipngeno Korir who having no ownership rights to the land, could also not transfer interest to the same to the Proposed Interested Party herein. To this effect the court was functus officio in respect to the issue of sub-division and the purported transfer to the third party.

17. The Applicant further submitted that regardless of the fact that the court, after the conclusion of the matter, issued final orders on the 11th November 1996, the Proposed Interested Party had proceeded to buy the suit property in December 1996. In the circumstance, he could not have acquired any right, legal equitable over the suit land and had no cause of action against the Applicant having purchased the suit land despite knowing that there existed final court orders.

18. Further, it was the Applicants submission that since Joseph K Korir had not acquired any interest whether legal or equitable over the suit land that was capable of being transferred as at December 1996, the principle of **nemo dat quod non habet** was applicable in the sense that he who does not own property cannot confer it on another except with the true owners' authority.

19. That the case of **Republic vs District Land Registrar, Naivasha ex-parte Jane Wangechi Kariuki & Another [2016] eKLR** relied upon by the Proposed Interested Party was distinguishable in the circumstance of the present case, the sale in the present suit having been conducted after the matter was concluded. That the documents relied upon by the Proposed Interested Party and marked as annexure RTG2 were unregistered and therefore by virtue of Section 36(2) of the Land Registration act 3 of 2012, could only operate as a contract between parties.

20. That this contract could not override court orders. That the Respondents had alleged that the file was missing yet the Interested party had annexed a copy of the official search dated the 7th May 2018 which clearly demonstrated the collusion between the Proposed Interested Party interested party had the Respondents to the effect that the Proposed Interested Party had come to court with tainted hands seeking to assist the Respondents to continue ignoring and violating court orders and to defeat justice.

21. That despite there being orders issued by the court in place, the Proposed Interested Party had deponed in his affidavit that he took possession of the suit land and has even developed the same. This was after the final judgment. By enjoining him thereof, the court would be condoning his illegal acts and defiance of the court orders.

22. The Applicant thus prayed for the dismissal of the application stating that the same was an abuse of the court process and further was intended to delay and embarrass the just conclusion of the case. That the Proposed Interested Party has not accrued interest over the suit property and should obey the court order by vacating the suit premises.

23. I have considered the Application, the submissions by Counsel and authorities cited. In my considered opinion the issue that arise for determination is:

i. Whether the Proposed Interested Party has certified the legal requirement for enjoining a party to proceedings.

24. Looking at the matter in issue, I find that the suit was instituted by the Applicant vide an application dated the 15th August 1996 wherein he had sought leave to institute the Judicial Review proceedings against the Respondents wherein leave was granted vide an Order dated the 16th August 1996 by the High Court sitting in Nairobi and which leave also operated as a prohibition order prohibiting the Respondents from effecting the sub-division and transfer of land known as Ndemi Scheme plot No. 1436.

25. The Application for Judicial Review dated the 5th September 1996 was argued on the 17th October 1996 wherein the ruling was delivered on the 11th November 1996 granting both Certiorari and Prohibitory orders as prayed, with costs to the Applicant. This marked the matter as finalized.

26. Following the delivery of the said ruling, it is on record that a certificate of order against the Government was issued on the 18th February 2009 wherein on the 7th October 2008 the certificate of costs payable to the Applicant herein was issued by the Deputy Registrar of the High Court at Nairobi.

27. It is on record that after the said ruling was delivered, efforts to execute it were fruitless as the parcel file of the subject in this suit at the lands registry went missing. It is also on record that efforts have been made to try and procure the said file so as to execute the orders issued in the year 2009 in vain.

28. Pending the execution of the order against the Government issued way back on 2009, the Proposed Interested Party filed the present application to be enjoined in the suit for reason that he was the equitable owner of the LR No. Nyandarua/Ndemi/2488 a subdivision of the suit land herein having purchased the same on the 4th December 1996.

29. Legal Notice No 117 of 2013 further provides that, a person with leave of the Court may make an oral or written application to be joined as an interested party or the Court, on its own motion, may also join an interested party to the proceedings before it.

30. The Legislative framework on the issue of joinder of parties to a suit is spelt out in Order 1 of the Civil Procedures Rules. Order 1 Rule 10 provides a framework for substitution and addition of parties to a suit. Under Order 1 Rule 10(2), the same provides that:

The court may at any stage of 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 the name of any person who ought to have been joined either as plaintiff or defendant or whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added. (my emphasis)

31. The Civil Procedure Act is silent on the concept of "interested party". However, under Order 41 Rule 5 of the Civil Procedure Rules 2010, make a reference to the term "interested party" and states;

"The court either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit"

32. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"

33. Whereas, the Black's Law Dictionary 9th Edition, page 1232 defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

34. The Court of Appeal in **Meme vs. Republic (2004) KLR 637** set out circumstances which would warrant grant of leave to enjoin a party to wit:-

“(i) Whether the presence of the party will result in the complete settlement of all the questions involved in the proceedings;

(ii) Whether the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and

(iii) Whether the joinder will prevent a likely course of proliferated litigation.”

35. I note that the facts surrounding this Petition originated from Nairobi High Court Civil suit No. 754 of 1996 wherein parties were the Applicant vs the Respondents herein. On the 11th November 1996 a ruling was delivered quashing the decision of the Respondents cancelling the plot allocation to the Applicant herein. There were further orders prohibiting the Respondents from effecting the sub-division and transfer of the said land No. Ndemi Scheme plot No. 1436.

36. Up to this point, it must be noted that the Proposed Interested Party was not in the picture as he had not acquired any proprietorship to the suit property. It therefore follows that by the time the Proposed Interested Party entered into a sale agreement with one Joseph Kipngeno Korir to purchase LR No. Nyandarua /Ndemi/2488, which was a subdivision of Ndemi Scheme plot No. 1436, the said Joseph Kipngeno Korir had no interest to pass to him in line with the order issued by the High Court on the 11th November 1996.

37. The order having become a Judgment of a Court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings. It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable.

38. I find that even though the Applicants may have substantial interest in the suit, an application for joinder at this stage is of no use for reasons that the case has been concluded, Judgment entered and a certificate of order against the Government issued.

39. **The circumstances surrounding this case do not** warrant grant of leave to enjoin the Proposed Interested Party as is stipulated in the case of **Meme vs. Republic (supra)**. For the foregoing reasons, the court finds that the Proposed Interested Party’s Notice of Motion application dated on 15th May 2018 and filed on 16th May 2018 is not merited and in the circumstances, the same is hereby dismissed with costs to the Applicant herein.

40. It is so ordered.

Dated and delivered at Nyahururu this 17th Day of January 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE