



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC. APPLICATION NO. 106 OF 2017

LWG (Suing as an administrator in the Estate of KNM).....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE LAND REGISTRAR KAJIADO.....2ND RESPONDENT

AND

HASSAN SHABA ADAN.....INTENDED INTERESTED PARTY

RULING

What is before Court for determination is the Intended Interested Party's Notice of Motion application dated the 25th May, 2018 brought pursuant to Sections 1, 1B, 3, 3A and 80 of the Civil Procedure Act and Order 1 and 45 of the Civil Procedure Rules. The Intended Interested Party seeks the following orders:

1. That the intended interested party be enjoined in this case.
2. That the consent order dated the 31st July, 2017 be reviewed and set aside.
3. That the title issued to the applicant herein be nullified and cancelled.

The application is premised on the grounds that the intended interested party was erroneously left out of the proceedings. The interested party has built a permanent house and resides on KAJIADO/ KITENGELA/ 3707 hereinafter referred to as the 'suit land' and is in possession of a title deed to it. The order for reconstruction of the Green Card for the suit land was obtained by non disclosure of material particulars. The consent order has prejudiced the interested party who is a beneficial purchaser for value and is aggrieved by the said order.

The application is supported by the affidavit of HASSAN SHABA ADAN who avers that he is the proprietor of the suit land alongside David Kipkoech Korir, which they purchased from Margaret Koech Talam (deceased). He contends that they were not informed of the suit herein and the Applicant does not reside on it. He insists there was material non disclosure when the consent order was obtained.

The application is opposed by the Applicant LWG where she claims that the application is based on documents which were fraudulently obtained as all the signatures appended on them are forgeries. She contends that the orders sought are substantive in nature and can only be determined in a substantive suit and not in a Miscellaneous Application. She avers that the Intended Interested Party is on a fishing expedition since he filed another suit on 17th April, 2018 being Kajiado CMCC No. 114 of 2018 which is pending. Further, that the agreement annexed to the instant application cannot stand as it has been drawn and witnessed by an incompetent person who did not have a practicing certificate. She insists the Intended Interested Party and his co- owner was well aware of the dispute herein since she reported them to Kitengela Police Station where they were summoned. Further, they were requested to produce their documents of ownership but they declined to do so. She states that a Grant of Letters of Administration in respect of her late husband's estate was gazetted on 4th December, 2015 but no one challenged it. She confirms that she advertised the loss of the Green Card in the Daily Nation Newspaper on 5th September, 2016 and caused the gazette of the lost Green Card on 28th October, 2016 and no one came forward to claim ownership. She further claims the Intended Interested Party was summoned to the NEMA offices to produce his documents of ownership but he never did so.

Both the Applicant and the Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials filed in respect of the applications dated 25th January, 2016 and 17th April, 2018, the following are the issues for determination:

- Whether the interested party HASSAN SHABA ADAN should be enjoined as a party to the suit.
- Whether the Consent Order/ Judgement entered on 31st July, 2017 should be reviewed or set aside.
- Whether the title deed issued to the 1st Respondent should be nullified/cancelled.

As to whether the interested party HASSAN SHABA ADAN should be enjoined as a party to the suit.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

'(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. (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.'

In the case of *Joseph Njau Kingori vs. Robert Maina Chege & 3 others* [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party seeks to be joined in a suit and stated as follows: **' When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.'**

I note this is a miscellaneous cause that was filed for purposes of reconstructing the Green Card and issuance of a title deed. I further note that the miscellaneous cause was compromised vide the consent order dated the 31st July, 2017. The applicant claims to reside on the suit land and is also the registered proprietor and yet the Respondent proceeded to get registered as its owner. The applicant annexed copies of the title deed, search and Sale Agreement as support documents. However, I note this is a miscellaneous cause and I opine that for the prayers the Applicant seeks, the Court can only make a proper determination of the same in a substantive suit. Insofar as this is a miscellaneous cause, I note the Intended Interested Party meets the criteria of an interested party, I will allow him to enjoin the suit but ponder whether the issues he is raising will be dealt with substantively in this instant suit.

As to whether the Consent Order/ Judgement entered on 31st July, 2017 should be reviewed or set aside. The Applicant claims to have purchased the suit land and resides thereon. Further, that the Respondent failed to inform Court at the time of entering into the consent that he was present on the suit land. From a perusal of the Court record, it emerges that the 1st Respondent vide the Certificate of Confirmation of Grant from the Nairobi HCSuc Cause No. 711 of 2015 was appointed one of the Administrators of the Estate of KNM and allocated the suit land to hold in trust for LMN who is a minor. It is on this basis that she proceeded to lodge the current miscellaneous cause so as to get a title over the suit land. The Law of Succession Act is explicit on the role of an Administrator of an Estate, and I note that 1st Respondent who is the legal representative of the proprietor of the suit land proceeded to apply for a title deed so as to safeguard the deceased estate and minors' interest. In the case of *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR, the Court of Appeal in laying down the basis for setting aside a consent judgement stated as follow: **' The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of *Flora Wasike v. Destimo Wamboko* (1982 - 1988)1 KAR 625, said in his judgment at page 626 -"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out." See the decision of this Court in *J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983*, This Court in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 held:- "A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement."**

From the facts as presented, I note the Respondent advertised the loss of the Green Card on 5th September, 2016 and the same was gazetted on 28th October, 2016. The Applicant never objected to the said advertisement nor gazetement. The Applicant further never lodged any objection proceedings in the succession cause. From the said proceedings I do not decipher any collusion or fraud by the time the consent judgement herein was entered into as the Respondents adhered to the requisite legal procedures before doing so. Further, that the 1st Respondent was capacitated by virtue of the order from the succession cause to obtain title as an administrator of the deceased estate in accordance with the Certificate for Confirmation of Grant dated the 13th February, 2016 and not to defeat the Applicant's alleged title. I note that if the Applicant had an issue with the alleged title, he ought to have lodged objection proceedings within the succession cause. Further, I note that the Applicant had already filed a suit Kajiado CMCCC no. 114 of 2018 in respect of the suit land which suit is still pending. It is against the foregoing that I decline to set aside the consent judgement herein.

As to whether the title to the suit land can be cancelled. As I have alluded to above, the 1st Respondent is simply an Administrator of an estate acting on behalf of a minor who she is holding the title

in trust for. The Respondents adhered to all the legal processes before the title was issued to the 1st Respondent. From the Green Card which has been furnished by the Applicant, I note the deceased was the owner of the suit land. Since the Applicant's averment touch on the validity of title over the suit land, and since the 1st Respondent also holds a title to the same. In respect of the suit land, it is my considered view that the issues the applicant is raising will be best determined in Kajiado CMCC No. 114 of 2018. However from the evidence presented at this interlocutory stage, I am unable to make an order for cancellation of the title.

Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 28th day of February, 2019

CHRISTINE OCHIENG

JUDGE