



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE No. 332 & 943 OF 2017

ONESMUS SINTOLE SAIDIMU.....PLAINTIFF

VERSUS

THE STATUTORY MANAGER – UNITED INSURANCE CO. LTD

(UNDER STATUTORY MANAGEMENT).....1ST DEFENDANT

INSURANCE REGULATORY AUTHORITY.....2ND DEFENDANT

KAJIADO LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

What is before me for determination are applications dated 25th January, 2016 and 17th April, 2018. In the application dated the 25th January, 2016, the Plaintiff seeks for his substitution with SEMENKURR SANE SAIDIMU. The application is premised on the ground that the Plaintiff was legal and absolute proprietor of land parcel number KAJIADO/ PURKO/ 334 hereinafter referred to as the ‘ suit land’ while the 1st, 2nd, 3rd, 4th and 5th Defendants have conspired to fraudulently, wrongfully, irregularly and illegally defraud him of the same. The Plaintiff died sometime in August, 2015 but had issued instructions to messrs Naikuni, Ngaah & Miencha Co. Advocates in the month of June, 2015 to institute this suit on his behalf to recover the suit land. However, there was a delay in filing the suit as he had not paid filing fees. Further, the instructions fees was brought by the Plaintiff’s son who informed the advocate that he had died in August, 2015.

The application is supported by the affidavit of LUCAS LEPERES NAIKUNI who is the Advocate in conduct of the matter on behalf of the Plaintiff where reiterates the averments above. He contends that the suit was filed in November, 2015 and it is imperative for the Plaintiff to be substituted with his son Semenkur Sane Saidimu who has been given authority by their family to appear as the substantial Plaintiff.

The 3rd Defendant opposed the application and filed a Notice of Objection dated the 12th July, 2016 where he averred that the entire suit is incompetent and fatally defective having been filed way after the death of the Plaintiff and should be struck out in limine.

In the second application dated the 17th April, 2018 the Plaintiff seeks to enjoin SEMENKURR SANE SAIDIMU as an interested party in the suit. He further seeks for orders that the Consent Order/Judgement entered on 31st July, 2017 by the Deputy Registrar be stayed and/or set aside as the same is affecting Kajiado ELC No. 943 of 2017. Further, that Kajiado ELC No. 332 of 2017 and Kajiado ELC 943 of 2017 be consolidated and heard de novo. This application is premised on the ground that the intended Interested Party is the representative of the estate of SANE OLE SAIDIMU who is a Plaintiff in Kajiado ELC No. 943 of 2017. the dispute in ELC 943 of 2017 and ELC 332 of 2017 touch on the same suit land. The consent order/ judgment entered on 31st July, 2017 in ELC 332 of 2017 suit by the Deputy Registrar transferred the suit land from the 1st Defendant to the Plaintiff/Respondent herein without involving the intended Interested Party herein who resides on the suit land. There was a misrepresentation of fact by the Plaintiff/ Respondent and 1st Defendant/ Respondent herein since they failed to disclose the existence of a similar suit. As a result, a Consent Order/ Judgement was entered without the knowledge of the intended Interested Party herein therefore affecting Kajiado ELC No. 943 of 2017. The application is supported by the affidavit of LUCAS LEPERES OLE NAIKUNI where he reiterates the averments above and seeks the Court intervention to stay and or set aside the Consent Order.

The Plaintiff, Intended Interested Party, the 1st and 2nd Defendants 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 application dated the 25th January, 2016 seeking substitution of the Plaintiff with Semenkurr Sane Saidimu in ELC NO. 943 of 2017 should be allowed.
- Whether ELC 332 of 2017 and ELC 943 of 2017 should be consolidated
- Whether the interested party Semenkurr Sane Saidimu should be enjoined as a party to the suit.
- Whether the Consent Order/ Judgement entered on 31st July, 2017 should be stayed or set aside.

As to whether the application dated the 25th January, 2016 seeking substitution of the Plaintiff with Semenkurr Sane Saidimu in ELC NO. 943 of 2017 should be allowed. It was the admission by the Applicant that the suit was filed when the Plaintiff was already deceased. I note the Applicant has not even annexed a copy of the Letters of Administration Ad Litem to confirm that he is the legal representative for the deceased Plaintiff's estate.

Order 1 Rule 1 of the Civil Procedure Rules provides that: **‘ All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise’**

While Order 1 rule 10 makes provisions for substitution of a party to a suit. However, I note in the current application the suit was filed in a deceased person's name, and this in essence demonstrates there was no suit. Insofar as the Applicant has made a case for substitution, I hold that the suit ELC 943 of 2017 is incompetent but opine that there is already a related suit touching on the subject matter where he can canvass his issues. On the question of consolidation, since I have already held that the suit ELC 943 of 2017 is incompetent, as it was filed in the name of a deceased Plaintiff, I will decline to grant the said order. It is against the foregoing that I decline to allow the application dated the 25th January, 2016.

As to whether the interested party SEMENKURR SANE SAIDIMU 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 the applicant claims to reside on the suit land and is the legal representative to the estate of the previous absolute proprietor of the suit land. The deceased had initially filed a suit in respect of the suit land which he claimed was fraudulently transferred by the Defendants. Order 1 Rule 10 (2) allows a party to be enjoined in the proceedings at any time so long as it is just. It is against the foregoing and in the interest of justice that I find that the intended interested party indeed meets the criteria set out for an interested party and his involvement will be necessary to enable the court effectually and completely adjudicate upon this suit. Further that the ultimate orders and decree made in the suit herein will not be enforced without his presence in the matter. I further find that no prejudice will be suffered by the Respondents if Semenkurr Sane Saidimu is allowed to be enjoined in this suit.

As to whether the Consent Order/ Judgement entered on 31st July, 2017 should be stayed or set aside. I note the Respondents have not denied that the Applicant resides on the suit land. From perusal of the said consent, I note it was between two parties who never informed court as to whether there were other affected parties. Further, the Counsels who entered into the consent judgement never informed Court of the existence of the related suit ELC 943 of 2017 where they were parties. Which fact is baffling as to why the other parties were not informed that a consent judgement was being entered in ELC 332 of 2017 which was transferring the whole of the suit land to a third party. Insofar as I have held above that ELC 934 of 2017 was incompetent as it was filed in the name of a deceased person, I note the Defendants therein filed their responses. 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.”

As I have alluded above, I note the Counsels were well aware of the suit ELC 943 of 2017 dealing with the suit land but still proceeded to enter into a consent. I opine that there was an element of concealment of material facts to defeat the ends of justice as it relates to the substratum of the suit ELC 943 of 2017 and ELC 332 of 2017 since they never disclosed the presence of the proposed interested party on the suit land. In the interest of justice and since the Applicant has been residing on the suit land, I will proceed to set aside the consent judgement dated the 31st July, 2017 and direct that the suit be set down for hearing and determined on its merits

The costs of the two applications will be in the cause.

Dated signed and delivered in open court at Kajiado this 27th day of February, 2019

CHRISTINE OCHIENG

JUDGE