



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 88 OF 2013(OS)

IN THE MATTER OF: PLOT NO. KILIFI/MTWAPA/II

**IN THE MATTER OF: APPLICATION FOR DECLARATION THAT THE APPLICANT/PLAINTIFFS
HAVE OBTAINED OWNERSHIP OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION**

BETWEEN

MBIGO KADZO TEMBO

ARNOLD KARISA MUHAMBI.....PLAINTIFFS/APPLICANTS

VERSUS

VINCENT SABASTIAN D’COSTA.....DEFENDANT/RESPONDENT

RULING

1. By this Summons in Chambers Application dated 18th June 2018, the Plaintiffs pray for orders that:-

2. Mr. John Nyagaka Osoro is joined in these proceedings as an interested or affected party, having purchased for good consideration the land known as Kilifi/Mtwapa/II from the registered owners, without notice of any impropriety or defect or otherwise in the decree issued herein and the ensuing title in the name of the Plaintiffs;

3. Directions as to service on the said affected party with the applicants’ application, with leave to answer the same, are given;

4. The costs of this application are provided for.

2. The said application is supported by an affidavit sworn by the said John Nyagaka Osoro and is grounded on the facts that:-

i) The Plaintiffs herein are the registered owners of the suit property known as Plot No. Kilifi/Mtwapa/II.

ii) Mr. John Nyagaka Osoro purchased the said land from the registered owners and had an instrument of Transfer duly executed on or about 20th February 2018 and Stamp duty has already been paid; he was however unable to register the instrument of Transfer, upon the registration of restriction by M/s Hamilton, Harrison & Mathews, Advocates for the applicant in the application dated 5th March 2018;

iii) The said John Nyagaka Osoro has an interest as purchaser for value, without notice of any defect in the Vendor’s title and is a proper party entitled to be heard at the hearing of the applicant’s application, for the effectual determination of the issues in dispute in the suit and the said application; and

iv) The Court has jurisdiction to join an affected party post Judgment.

3. In a Replying Affidavit sworn by Leonardo Da Costa, an administrator of the estate of the defendant Vincent Sabastian D’Costa filed herein on 25th September 2018, the deponent denies that the law Firm Hamilton Harrison & Mathews registered the restriction on the suit property for an undisclosed client. It is his case that he duly instructed the law firm to do so upon making a Statutory Declaration in support

thereto

4. The Defendant proceeds to cast aspersions on the documents relied upon by the Applicant herein in support of the application and concludes that the same are misleading and aimed at duping the Court to believe that the Applicant is an innocent third party and thereby defeat the Defendant's estate's claim to the suit property. The Defendant urges the Court to dismiss the application with costs.

5. I have considered the Chamber Summons application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

6. The two Plaintiffs-Mbigo Kadzo Tembo and Arnold Karisa Muhambi lodged in this Court the Originating Summons giving rise to these proceedings on 4th June 2013- claiming to be entitled to all that parcel of land known as Kilifi/Mtwapa/II by way of adverse possession.

7. From the record, the Respondent-Vincent Sabastian D'Costa was served with the Originating Summons by way of advertisement in the Daily Nation Newspaper of 12th December 2014. The named Respondent neither entered appearance nor a response to the Summons, and the matter thereafter proceeded for hearing ex-parte.

8. On 3rd July 2017 having heard the Applicant's Case, the Honourable Justice Oscar Angote then seized of the matter delivered his Judgment in which he allowed the Originating Summons in the following terms:-

a) The Applicants be and are hereby declared to be the proprietors of (the) parcel of land known as Kilifi/Mtwapa/II having acquired it by adverse possession.

b) The Applicants to be registered as the Owners of (the) parcel of land known as Kilifi/Mtwapa/II forthwith.

c) Each party to bear his own costs.

9. Subsequently and by an application dated 5th March 2018, one Leonardo Da Costa, claiming an interest as the Administrator of the Estate of the Defendant named herein, filed an application seeking to have the orders issued on 3rd February 2017 reviewed and set aside on account that the Defendant passed on six years before the suit was filed and that the Administrator has only recently learnt that the Plaintiffs were registered as proprietors of the land.

10. It is against that background that the present applicant seeks to be enjoined in these proceedings on account that he purchased the suit property from the Plaintiffs on 20th February 2018 and that he is hence a proper party entitled to be heard at the hearing of the application dated 5th March 2018.

11. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:-

“(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 adjudicate upon and settle all questions involved in the suit, be added.”

12. Arising from the foregoing, it is my considered view that for one to qualify to be enjoined in proceedings under Order 1 Rule 10(2) of the rules aforesaid, he must not only be a necessary party but also a proper one against or for whom a remedy must flow to or from the other side. It must be a party whose presence is necessary for the Court to effectually and completely adjudicate the matter and without whose presence any resultant decree cannot be enforced.

13. In *Jan Bonde Nielsen –vs- Hersman Philipus Steyn & 2 Others(2012)eKLR*, Mabeya J observed as follows:-

“In my view, “a necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the Court. If a necessary party is not impleaded, the suit may be a non-starter as the reliefs sought if granted, may be ineffective.”

14. Quoting from the decision in the English authority of *Amon –vs- Raphael Tuck & Sons LN (1956)1 ALL ER 273*, Mabeya J. in the Jan Bonde Nielsen Case(Supra) went on to state that:-

“The party to be enjoined must be someone whose presence is necessary as a party. What makes a person a necessary party?The only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the questions to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.....

It is not enough that the intervener should be commercially or indirectly interested in the answer to the questions; he must be directly and legally interested in the answer to the question. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally-that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something on which he is legally interested.”

15. In the matter before me, the Applicants avers that he has learnt from the Daily Nation issue of 21st May 2018 that an application dated 5th March 2018 has been made by an unnamed applicant against the Plaintiffs herein. He further avers that he knows the Plaintiffs having purchased the suit property from them in January 2018 and that they have already executed an instrument of transfer in his favour.

16. The Applicant further avers that his efforts to register a transfer has been unsuccessful as an instrument has been registered on the title restricting any dealings therewith. As evidence, the Applicant exhibits copies of a Certificate of Search issued on 19th March 2018, an application for a letter of consent and a letter of consent issued on 6th March 2018; Valuation Requisition for Stamp Duty dated 19th March 2018 and KRA Stamp Duty dated 19th March 2018, with National Bank Pay-in-Slip number M023997 of 20th March 2018 for Kshs 240,040; and an Application for Registration of Transfer lodged on 19th April 2018.

17. It is the Applicants case that having purchased the suit property from the Plaintiffs in the manner exhibited, it is only fair that he be joined in these proceedings so that he may be heard on any of the proceedings that may take place, and probably affect one way or the other, his interests in the suitland.

18. A perusal of the pleadings herein reveals that the Plaintiffs were declared to be entitled to the suit property by way of adverse possession consequent to an Originating Summons filed herein on 4th June 2013. The Respondent in the Originating Summons Vincent Sabastian D'Costa failed to enter appearance and/or file a response to the summons and the Court proceeded on 3rd February 2017 to determine that his right or title to the suit property was extinguished and time-barred by virtue of Section 17 of the Limitation of Actions Act.

19. The Application dated 5th March 2018 seeks a review of the orders of 3rd February 2017 principally on the basis that when the suit was filed the Respondent had long passed on and that therefore no order ought to have been made adverse to his estate without giving the Administrator of his Estate an opportunity to be heard.

20. Section 80 of the Civil Procedure Act permits this Court to revisit its own previously concluded decision, re-open the same and to re-determine it. The power of review grants the Court an opportunity to correct certain errors that may have been made in a decision within certain limits. Order 45 Rule (1) of the Civil Procedure Rules on the other hand sets out the grounds upon which an application for review may be made.

21. Those rules lay down the jurisdiction and Scope of review limiting it to the following grounds:-

a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b) On account of some mistake or error apparent on the face of the record, or

c) For any other sufficient reason.

22. Mr. John Nyagaka Osoro, the Applicant herein was neither the Applicant nor the Respondent in the Originating Summons giving rise to these proceedings. As at the time the Judgment sought to be reviewed was delivered on 3rd February 2017, he had absolutely no interest in the subject matter herein. In his own pleadings, he claims to have purchased the property from the Plaintiffs in January 2018, almost one year after the decision sought to be reviewed was rendered.

23. In my considered view, any issue that may arise herein can only be between the Plaintiffs and the Legal representatives of the estate of the Respondent for an application for review cannot be used to re-open the case afresh for hearing and to determine the interests of those who have subsequently acquired interests, financial or otherwise in the subject matter of the dispute.

24. The presence or absence of the Applicant before me is in my view unnecessary in determining whether or not the Plaintiff/Applicants had acquired the suit property by way of adverse possession. Where the present Applicant was to be enjoined herein, that would lead to separate and new issues being pleaded and/or raised in order to capture the Applicant's grievances yet the clear issues herein between the Applicant in the Originating Summons and the Respondent therein will remain pending determination.

25. Accordingly I am not satisfied that the Applicant is a necessary party and that his joinder in the suit would enable the Court to determine the real issues in question.

26. The Chambers Summons Application dated 18th June 2018 is consequently dismissed with costs.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE