



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 71A OF 2014 (ORIGINATING SUMMONS)

FORMERLY KERUGOYA ELC NO. 47 OF 2012 (OS)

FORMERLY EMBU HCC NO. 36 OF 2007 (O.S)

FAUSTINO NJERU NJOKA.....1ST APPLICANT

FRANCIS NJERU NYAGA.....2ND APPLICANT

VERSUS

MWIRECA KIARIRWA & 17 OTHERS.....RESPONDENTS

AND

STEPHEN IGOGO MATHERI.....1ST INTERESTED PARTY

SOSPETER KITHUMBU MURANGIRI...2ND INTERESTED PARTY/APPLICANT

KIMUNYE TEA FACTORY

COMPANY LTD.....3RD INTERESTED PARTY/RESPONDENT

AND

NJAGI NJERU ELLIAS.....NECESSARY PARTIES/APPLICANTS

RULING

1. By a notice of motion dated 13th August 2018 brought under the provisions of **sections 3A, 1A, 1B of the Civil Procedure Act and Order 40 Rules 1, 2, 3, 4 of the Civil Procedure Rules, sections 68, 69 and 70 of the Land Registration Act, 2012 and all enabling provisions of the law**, the 2nd interested party sought the following orders;

a. That an order of prohibition, inhibition and restriction do issue and be registered against parcels of land numbers Mbeere/Mbita/2088/2089/2090/2094/2171/2200/2204/2205/2298/3772/3775/3377 including 2087, 2548 and 2571 until further orders or determination of this suit.

b. That further an order of injunction against the 1st and 2nd Applicant/Respondent 3rd Interested party/Respondent, their agents, servants and workmen be restrained from interfering, dealing or otherwise accessing or possessing the land parcels herein until the suit is determined.

c. That any further or better relief the honourable court may deem fit and just to grant.

2. The said application was based upon the various grounds set out on the face of the motion. It was contended that the consent order recorded on 25th June 2018 for removal of encumbrances against *Title Nos. Mbeere/Mbita/2087, 2548 and 2571* was fraudulently obtained; that it was the 2nd interested party who had procured the registration of those encumbrances in the first instance; and that it was in the interest of justice for the said consent order to be set aside.

3. The said application was supported by an affidavit sworn by the 2nd interested party on 13th August 2018 and the annexures thereto. The said affidavit reiterated and expounded upon the grounds set out in the notice of motion.

4. The record also shows that by a notice of motion dated 24th September 2008 brought under the provisions of **Order 51 (1), Order 1 (10) and Order 40 Rule 1, 3 and 4 of the Civil Procedure Rules, section 3 and 3A of the Civil Procedure Act 21 Laws of Kenya and all other enabling provisions of the law** Josephat Nyaga Mukembo and Njagi Njeru Elias (hereinafter *the Applicants*) sought the following orders;

a. That this application be certified as urgent and service thereof be dispensed with and the same be heard ex parte in the first instance.

b. That this honourable court be pleased to enjoin Josephat Nyaga Mukembo and Njagi Njeru Elias as necessary parties in this matter.

c. That this honourable court be pleased to remove from this matter all the parcels of land named as Mbeere/Mbita/1898, 2093, 2094, 2119, 2165, 2167, 2169, 2171, 2184, 2185, 2191, 2548, 2571.

d. That this honourable court be pleased to issue a temporary injunction restraining the Applicants, jointly and severally, whether by themselves, their servants, agents employees, officials or any other person whomsoever from trespassing, alienating, and or in any way dealing with the suit property known as Mbeere/Mbita/1898, 2093, 2094, 2119, 2165, 2167, 2169, 2171, 2184, 2185, 2191, 2548, 2571, pending determination of this application.

5. The said application was based upon the grounds set out on the face of the motion. The Applicants who claimed to be members of Ikandi clan stated that they were necessary parties to this suit. It was contended that they were aware that the matters in controversy were fully determined in previous proceedings hence the instant suit was *res judicata*. The said application was supported by an affidavit sworn by Josephat Nyaga Mukembo sworn on 24th September 2018 which expounded upon the grounds set out in the motion.

6. When the said two applications were listed for hearing on 15th October 2018 it was directed that the said applications be canvassed through written submissions. It was further directed that the said applications be served upon all concerned parties who were given 21 days to file responses thereto. The parties were also granted 60 days within which to file and exchange their written submissions.

7. There is no indication on record of any affidavits of service with respect to service of the two applications. However, the 1st Applicant in the originating summons filed a replying affidavit sworn on 12th October 2018 in opposition to the notice of motion dated 24th September 2018. It was contended that the properties the subject of the originating summons belonged to members of Mbwe house of Nditu clan and not the entire clan as such. It was denied that the originating summons was *res judicata* since it was simply seeking to implement the orders issued in *Misc Application No. 72 of 2003* and *Misc Application No. 1 of 2004*. It was also contended that the Applicants in the notice of motion dated 24th September 2018 had failed to demonstrate their interest or claim with respect to the suit properties.

8. The court has considered the 2nd interested party's application dated 13th August 2018 as well as his written submissions dated 30th October 2018. The court has also considered the record of proceedings and the issues raised by the application. The court has noted that the consent dated 25th June 2018 for exclusion of encumbrances against the 3 properties stated therein was based on the exclusion of those properties from the amended originating summons by the Applicants in the originating summons. If the 2nd interested party was aggrieved by that consent for removal of encumbrances on account of either fraud or lack of service, then the appropriate mode would have been to file an application for setting it aside. The court is not satisfied that it would be in order for the 2nd interested party to make a fresh application for encumbrances. What, then, would happen if the new orders are set aside on application by any of the parties herein? Would the 2nd interested party apply for fresh orders one more?

9. The other reason why the court is not inclined to grant fresh orders is that the material on record shows that upon amendment of the originating summons some parties and some properties were excluded. That was the basis of the application by the 3 property owners for removal of encumbrances. That factual foundation has not been demonstrated to be fraudulent. The 2nd interested party may be unhappy with the amendment but the Applicants in the originating summons had obtained leave of court to amend their pleading. The court, therefore, finds no legal basis for the orders sought in the notice of motion dated 13th August 2018.

10. The court now turns to the notice of motion dated 24th September 2018. The court has considered the material on record thereon as well as the written submissions by the firm of Kamunde Njue & Co Advocates in support thereof. The court is far from satisfied that a case for joinder has been demonstrated. The mere fact that the Applicants are members of Nditu clan is not sufficient to make them necessary parties. Their contention that the instant originating summons is *res judicata* by reason of previous proceedings and adjudication with respect thereto is hardly sufficient either. The court can call for the decisions, rulings and judgements in those previous proceedings and consider them without the presence of the Applicants.

11. There is a difference between a necessary party and a joinder. As correctly pointed out by the authorities which were cited by the firm of Kamunde Njue & Co Advocates, a necessary party is one without whom the court may not be able to effectually and completely adjudicate upon the questions in controversy. It has not been demonstrated what issues or questions cannot be effectually resolved without their participation.

12. The court has noted from the amended originating summons that the Applicants are seeking the following prayers, that is,

a. That in implementation of the orders made in Judicial Review Misc Application No. 72 of 2003 and Misc Application No. 1 of

2004 in the High Court at Embu, this honourable court be pleased to order the Land Registrar to rectify the registers for land parcels numbers Mbeere/Mbita/2088, 2089, 2090, 2094, 2171, 2200, 2204, 2205, 2298, 3772, 3775 and 3777 by cancelling the names of the persons currently registered as proprietors of the said parcels of land and registering the names of new proprietors as specified in the schedule below as proprietors of the said parcels of land.

b. That this honourable court do order the District Land Registrar to rectify the register by cancelling the names stated in the schedule below and registering the names of the persons set out in the schedule below as proprietors of the respective parcels of land and then issuing title deeds to the said person so registered as proprietors.

c. That this honourable court do order that the title deeds held by the current registered proprietors be dispensed with when registering and issuing title deeds to the new proprietors of the said parcels of land.

13. The said reliefs are being sought on the basis that the current registered owners were registered pursuant to the decision of the District Commissioner (DC) in an appeal to the Minister under **section 29 of the Land Adjudication Act (Cap 284)**. It was further contended that the decision of the DC was quashed vide a court order made in *Embu High Court Misc Application No. 72 of 2003* hence the need for rectification of the register.

14. In the circumstances, the court is of the view that the only necessary parties to such application are the current registered owners whose titles would be affected and the ones sought to be registered. The court has noted that the Applicants in the notice of motion dated 24th September 2018 have not asserted any legal interested in the parcels of land which may be affected by the orders being sought in the amended originating summons.

15. The upshot of the foregoing is that the court finds no merit in the said two applications. Accordingly, the court makes the following orders;

a. The notice of motion dated 13th August 2018 is hereby dismissed with no order as to costs.

b. The notice of motion dated 24th September 2018 is hereby dismissed with no order as to costs.

16. The court has noted from the record that the originating summons herein has been pending for more than twelve (12) years. The court is inclined to hear and dispose of this old matter on priority basis. It shall not allow the parties to distract it through unnecessary interlocutory applications. Accordingly, the court shall give directions on the hearing of the amended originating summons upon delivery of the ruling.

17. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 13TH day of MARCH 2019.

In the presence of Mr. Okwaro for Applicants and Ms. Kiai holding brief for Mr. Migwi for 6th, 7th, 10th, 11th, 12th and 14th Respondents. Ms. Kung'u holding brief for Ms. Ndongoro for the 17th Respondent and in the absence of the rest of the Respondents.

N/A for Interested parties.

Court clerk: Muinde

Y.M. ANGIMA

JUDGE

13/3/2019