



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC JR. CASE NO. 9 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN LAND DISPUTES TRIBUNAL KAKAMEGA

MUNICIPALITY RESPONDENT

AND

ALFRED N. ANDATI

ESTHER B.U. MUHONJA

STANLEY M. LIJINGA

ELIJAH'S FOUR SONS

AMINA ABDI PERIZER

JOHN OTIENDE MASIMBA..... INTERESTED PARTIES

EX PARTE APPLICANT JAMES SAKWA MUKOLWE

RULING

The 1st application is dated 4th March 2019 and is seeking the following orders;

1. That this honourable court be pleased to enjoin the applicant Geoffrey Othwila Oloo as an interested party in this suit.
2. That costs of this application be provided for.

It is based on the affidavit of Geoffrey Othwila Oloo and the following grounds that the applicant's late mother Annah Kalegi Oloo owned a portion of land out of land parcel No. Butso/so/Shikoti/4464. The applicant is the administrator of the estate of his late mother Annah Kalegi Oloo. The applicant is the rightful person to pursue the interests of his late mother.

The 2nd application is dated 1st April 2019 and is brought under section 3 and 3A a of the Civil Procedure Act seeking the following orders;

1. This honourable court be pleased to substitute Bernard Mayodi Agalomba – the applicant herein in the place of Stanley M. Lijinga, the third interested party/deceased.
2. Costs of this application be in the cause.

It is brought on the grounds that on/or about the 20th day of June, 2017, the 3rd interested party passed on before the conclusion of the above case. It is important that substitution take place to enable this court to hear and determine the matter. It is in the interest of justice that the prayers sought be granted.

The respondents submitted that on the 1st application the applicant's mother was never a party to the suit and the matter has been finalized. On the 2nd application they submit that the applicant does not have letters of administration and the suit has since abated.

This court has considered the two applications mentioned above and the submissions therein. Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA NO. 222 OF 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. Be that as it may, I find that on the 1st application the applicant's mother was never a party to the suit and the matter has been finalized. On the 2nd application they submit that the applicant does not have letters of administration and the suit has since abated. The applicant in the second application has no locus standi. I find that the applications have no merit and I dismiss them with costs.

The 3rd application is dated 26th October 2018 and is brought under Sections 1A, 1B & 3A, 63 & 98 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this honourable court be pleased to cancel new title numbers Butsotso/Shikoti/19817 and 19818 and or any other subsequent title numbers created from the original title number Butsotso/Shikoti/4464 and thereafter all new and or subsequent titles to revert into the original title number Butsotso/Shikoti/4464 to facilitate and give full effect and implementation of orders made on 14th December, 2017 and 8th March, 2018 respectively.
2. That the Deputy Registrar be empowered to enforce and or implement the earlier orders made on 14th December, 2017 and 8th March, 2018 respectively and or any further orders of this honourable court.
3. That OCS Kakamega Police Station be ordered to provide adequate security during the survey exercise on the original land parcel known as Butsotso/Shikoti/4464.
4. That costs of this application be provided for.

It is based on the following principal grounds and on the affidavit of the 2nd interested party/applicant herein Esther B.U. Muhonja alias RoseMary Esther Ondisa Muhonja annexed hereto. That the ruling made on 12th June, 2014 by Hon. Justice Said J. Chitembwe – J was made in favour of the interested parties herein. That this honourable court made orders in favour of the 1st interested party Alfred N. Andati and 5th interested party Amina Abdi Perizer on 14th December, 2017 and further made similar orders on 8th March, 2018 in favour of the 2nd interested party applicant herein Esther B.U. Muhonja alias Rosemary Esther Ondisa Muhonja. That the 5th interested party/applicant moved with speed and presented to the County Land Registrar her transfer of land forms and consent from the Land Control Board in compliance with the order made on 8th March, 2018 excluding the 1st interested party and 2nd interested party/applicant. That the 5th interested party Amina Abdi Perizer has caused the original title No. Butsotso/Shikoti/4464 to be sub divided to create new title numbers Butsotso/Shikoti/19817 and 19818. That the 2nd interested party/applicant Esther B.U. Muhonja alias rosemary Esther Ondisa Muhonja presented her documents for transfer pursuant to order made on 8th March, 2018 just to find out that the original title number Butsotso/Shikoti/4464 had been closed upon sub division and creating two Butsotso/Shikoti/19817 and 19818. That the order made on 14th December, 2017 and 8th March, 2018 have not been fully implemented and or enforced to the detriment of the 1st interested party and 2nd interested party/applicant who cannot enjoy the fruits of the judgment of this honourable court. That it is only in the interest of justice that the new title numbers Butsotso/Shikoti/19817 and 19818 be cancelled to revert into the original title number Butsotso/Shikoti/4464 to facilitate enforcement and implementation of the orders made on 14th December, 2017 and 8th March, 2018 respectively. That the 5th interested party/applicant and the Ex parte applicant will not suffer any prejudice since eventually the orders made on 14th December, 2017 and 8th March, 2018 respectively will be implemented in favour of all the concerned parties herein.

The 5th interested party respondent submitted that the court granted her orders on 17th December, 2017 more than a year ago. That after such orders her then advocate Mr. Osango required Ksh. 50,000/= to have the orders effected. That she could not afford the required fees and she therefore took it upon herself to process the title deed for herself. That she duly went through the legal process as ordered and eventually obtained title to herself of 0.1 Ha as granted by the honourable court. That it was never stated in the orders granted to her that she was to have the orders implemented in conjunction with any other party. That in fact the alleged orders granted to the applicant were never made known to her at all. That meanwhile, while she moved with speed, the applicant dragged her feet after obtaining this court's orders. That she did nothing wrong at all following the court's orders. That she stand to suffer immense financial, emotional, psychological damage and loss by the sought cancellation in terms of the time and effort used to get this title. That the applicant has a remedy of seeking the court's review of the orders granted to her in terms of the parcel number to reflect the current number Butsotso/Shikoti/19817 in the name of the ex parte applicant and having the Land Registrar effect the same. This court has considered the application and the submissions therein. I have perused the court file and find that a ruling made on 12th June, 2014 by Hon. Justice Said J. Chitembwe was made in favour of the interested parties herein. That this honourable court made orders in favour of the 1st interested party Alfred N. Andati and 5th interested party Amina

Abdi Perizer on 14th December, 2017. Similar orders on 8th March, 2018 in favour of the 2nd interested party applicant herein Esther B.U. Muhonja alias Rosemary Esther Ondisa Muhonja. However, that the 2nd interested party/applicant Esther B.U. Muhonja alias Rosemary Esther Ondisa Muhonja presented her documents for transfer pursuant to order made on 8th March, 2018 just to find out that the original title number Butso/Shikoti/4464 had been closed upon sub division and creating two Butso/Shikoti/19817 and 19818. That the order made on 14th December, 2017 and 8th March, 2018 have not been fully implemented and or enforced to the detriment of the 1st interested party and 2nd interested party/applicant. The fact of the matter is that the original title number Butso/Shikoti/4464 does not exist. The application orders made on 8th March, 2018 are not enforceable as the suit land no longer exists. I find that this court cannot now go back and forth and repeat the orders issued was back in 2014 when the subject matter has substantially changed. The interested parties have been indolent and would need to present a fresh matter to enforce their rights if at all. The land now does not belong to the ex parte applicant alone and if the 5th interested party obtained the same through fraudulent means then this must be pleaded and proved. I find this application has no merit and I dismiss it with cost.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE