



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 104 OF 2017

JOSEPH GATIA WAMBUGU.....APPELLANT/RESPONDENT

VERSUS

MURIUKI WAMBUGU.....2ND RESPONDENT

AND

PETER NJIRU MOSES.....1ST INTERESTED PARTY/APPLICANT

JOHN MURIITHI NJAGIA.....2ND INTERESTED PARTY/APPLICANT

MARGARET WAMBUI NGIRICI.....3RD INTERESTED PARTY/APPLICANT

ALLOYS NJAGI.....4TH INTERESTED PARTY/APPLICANT

AND

STEPHEN NDEGWA.....5TH INTERESTED PARTY/3RD RESPONDENT

JANET MURANGI.....6TH INTERESTED PARTY/4TH RESPONDENT

RULING

INTRODUCTION

The application before me is the Notice of Motion dated 4th November 2015 brought under **Order 1 Rule 10 (1) & (2), Order 40 Rule 1 (1), Order 45 Rule 1, Order 47 Rule 8 CPA**. The Applicants are seeking the following orders:

- 1. Spent.**
- 2. That the Interested parties/Applicants herein be enjoined as parties in this suit.**
- 3. That the 3rd and 4th Respondents be enjoined in this suit.**
- 4. That the Respondents herein, their servants or anybody claiming through them be restrained from entering, trespassing, occupying or in any way interfering with the Applicants use and occupation of their land parcels number NGARIAMA/THIRIKWA/2071, NGARIAMA/THIRIKWA/3405, 3418 and 3417.**
- 5. That the judgment entered in this matter on 5th March 2015 be reviewed, varied and/or set aside.**
- 6. That the order restoring land parcel Number NGARIAMA/THIRIKWA/413 be reviewed, varied and/or set aside.**
- 7. That all the title deeds issued to the Respondents pursuant to the judgment that is NGARIAMA/THIRIKWA/3442, 3443, 3445, 3446, 3447, 3448, 3449, 3450 and 3451 be cancelled.**
- 8. That the costs of this application be provided for.**

The application is supported by grounds shown on the face thereof and an affidavit sworn by John Muriithi Njagia, the 2nd Applicant/Interested party. Attached to the supporting affidavit are numerous documents also in support of the said application. The said application is opposed by the Plaintiff Joseph Gatia Wambugu who filed a replying affidavit sworn on 9th December 2015.

APPLICANTS CASE

The 2nd Applicant/Interested party stated that sometime in August 2014, he was approached by Muriuki Wambugu, the Respondent herein who was offering him a land for sale. He carried out due diligence at the Lands office and after confirming that the same was registered in the name of the Respondent, he agreed to buy the same at Ksh. 250,000/=.

They entered into a sale agreement dated 31st October 2014. They obtained the requisite statutory consents and thereafter he was issued with title documents. He then took possession and started developing the land by planting 200 coffee stems and 50 banana stems. On 9th October 2015, the 2nd and 3rd Interested parties came to the land and claimed to be the registered proprietors of the same land. He went to the Lands office in Kirinyaga where he confirmed that the 3rd Interested party was indeed registered as proprietor of land parcel Number NGARIAMA/THIRIKWA/345.

The 2nd Interested party also deponed that he confirmed his title No. NGARIAMA/THIRIKWA/3405 was intact and that the title deed has not been cancelled. The 2nd Applicant/Interested party further stated that his advocate informed him that there was a dispute between the plaintiff and the defendant in ELC No. 103/2000 (Embu) in which an order was issued on 5th March 2015 where the Court canceled land parcel No. NGARIAMA/THIRIKWA/2071 and reinstated the original land parcel No. NGARIAMA/THIRIKWA/413 to the plaintiff.

The 2nd Interested party also stated that by the time the said orders were being issued, the defendant had apparently managed to draw mutation forms for the original NGARIAMA/THIRIKWA/413, subdivided the same on paper, obtained new title deed comprising of parcels No. NGARIAMA/THIRIKWA/3445, 343, 3444, 3445, 3446, 3447, 3448, 3449, 3450 and 3451 and sold NGARIAMA/THIRIKWA/3451 to the 3rd Interested party/Applicant who is his wife.

He stated that those titles superimposed on the existing and un-cancelled titles to land parcels No. NGARIAMA/THIRIKWA/3405, 3418 and 3417 belonging to himself, the 3rd and 4th Interested parties/Applicants. On that basis, he contends that there are parcels of land with more than one title deed. The 2nd Interested party stated that he was not a party to the proceedings in the High Court that reinstated land parcel No. NGARIAMA/THIRIKWA/413 to the plaintiff which has negatively affected him.

PLAINTIFF/RESPONDENT'S CASE

The plaintiff/Respondent through his replying affidavit has stated that the application herein is frivolous, vexatious and an abuse of the Court process as the Applicants were all along aware of the existence of this suit when they purchased their respective parcels of land from the defendant. The plaintiff also contends that the defendant in this case sold the parcels of land to the Interested parties/Applicants while the suit herein was pending in Court and that the Applicants remedy lies elsewhere. The plaintiff further stated that it will be a mockery of justice for the Court to subject him to another rigour of litigation as against the Interested parties bearing in mind that he has been through the corridors of justice since 1988 and has a valid judgment and decree of a competent Court.

The plaintiff also stated that he has been advised by his advocate that the orders being sought by the Applicants cannot be granted as the Court has become functus officio upon delivery of the judgment. The plaintiff stated that the decree issued by this Honourable Court on 28th March 2015 had an implication of cancelling all sub-divisions to the suit land including the resultant parcels and titles thereto. He also stated that he has always had the original title to his land parcel No. NGARIAMA/THIRIKWA/413 and only surrendered the same to effect sub-divisions and transfer upon obtaining the decree from this Honourable Court. He contends that the orders of this Honourable Court have never been appealed against and that the same are still binding. In conclusion, the Plaintiff stated that he is elderly and that he would love to be allowed to enjoy the fruits of the judgment issued to him by this Honourable Court.

ANALYSIS AND DETERMINATION

I have considered the affidavit evidence and the submissions by counsels for both the Applicants and the Plaintiff/Respondent.

It is not in dispute that the Applicants/Interested parties are seeking to review the judgment and decree of this Court issued on 5th March 2015. The power to review orders or decrees is ordinarily the creation of statute. It has to be conferred by law specifically or by necessary implication. In *Benjoh Amalgamated Limited & another Vs Kenya Commercial Bank Limited (2014) e K.L.R.*, the Court of Appeal rendered itself as follows:

“(57) Jurisdiction that emerge shows that notwithstanding that it (the Court) has not explicitly been statutorily conferred with the jurisdiction to re-open a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to (sic) correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection”.

61 this is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice (Emphasis mine)”.

This Honourable Court in the judgment and decree issued on 5th March 2015 held as follows:

“1. THAT the sub-division of the original suit land into land parcels Numbers NGARIAMA/THIRIKWA/2071 and NGARIAMA/THIRIKWA/2072 in the name of the Respondent be and is hereby cancelled.

2. THAT the original suit land Reference Number NGARIAMA/THIRIKWA/413 be and is hereby restored fully to the Respondent.

3. THAT there are no orders as to costs as the Appellant and Respondent are brothers”.

The Court of Appeal in case of *Benjoh Amalgamated Limited* (supra) clearly stated that a Court has only residual jurisdiction to re-open a decided matter only in cases of fraud, bias or other cases of injustice committed to an Applicant. The Applicants in this case have not given any of the grounds leading to this Court’s exercise of its residual jurisdiction to re-open the judgment. I also wish to note that the orders and decree of this Honourable Court issued on 5th March 2015 had an implication of cancelling all sub-divisions to the original suit land including the resultant parcels and titles which are being dangled by the Applicants herein. The application by the Applicants is one where the finality principle must be upheld in order to promote public confidence in our justice system.

Before concluding my analysis, I also note that the Applicants were not parties when judgment was entered on 5th March 2015. They are now seeking to be enjoined as parties to the suit. The Court has pronounced itself on numerous decisions on when one should be enjoined in a suit as a party. In *Lilian Wairimu Ngatho & another Vs Moki Savings Co-operative Society Ltd & another (2014) e K.L.R.*, the Court held as follows:

“... the provisions of Order 1 Rule 10 (2) state that joinder of a party can be made at any stage of the proceedings. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at Page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been conducted. This finding is premised on the basis that the purpose for joinder is to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the Court has already made its findings on the issues arising”.

I find that decision sound and relevant to this case. The application will be of no help to determining issues in this case since the Court has already pronounced itself on all the issues involved. The titles held by the Applicants are resultant titles from parcels of land which this Court had ordered to be cancelled. Those titles in my view are a nullity and of no legal effect.

In the result, the application dated 4th November 2015 lack merit, is frivolous, vexatious and the same is hereby dismissed with costs to the Plaintiff. It is so ordered.

READ, DELIVERED and SIGNED at Kerugoya this 20th day of September 2019.

E.C. CHERONO

ELC JUDGE

20TH SEPTEMBER, 2019

In the presence of:

1. Mr. Muriuki Wambugu for 2nd Respondent - present

2. John Muriuki Njagi – 2nd Interested party - present

3. Mbogo Court clerk - present