



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 22 OF 2013**

**NORBERT MAKWARA OPIYO.....PLAINTIFF**

**VERSUS**

**THE CHAIRMAN ESEGERO ROMAN**

**CATHOLIC CHURCH.....1<sup>ST</sup> DEFENDANT**

**THE SECRETARY ESEGERO ROMAN**

**CATHOLIC CHURCH.....2<sup>ND</sup> DEFENDANT**

**ESEGERO ROMAN CATHOLIC CHURCH.....3<sup>RD</sup> DEFENDANT**

**AND**

**BOARD OF MANAGEMENT**

**ESEGERO PRIMARY SCHOOL.....INTENDED INTERESTED PARTY**

**RULING**

1. The Application for determination is the Notice of Motion Application dated 6<sup>th</sup> December 2016 and later amended on 7<sup>th</sup> July 2017. It is brought under Sections 1A, 1B, 63(e) of the Civil Procedure Act, Articles 159(1) and (2) of the Constitution, the inherent powers of the Court and all enabling provisions of the law. The Applicant - **NORBERT MAKWARA OPIYO** is a decree holder in the suit herein. The Respondents are - **ESEGERO ROMAN CATHOLIC CHURCH** - being the judgment debtor in the suit and the **BOARD OF MANAGEMENT, ESEGERO PRIMARY SCHOOL**, the intended Interested Party.

2. The Applicant having been successful in the main suit has brought this Application after hitting a snag in the implementation of the Court order resulting from the Judgment of Hon. S. M. Kibunja delivered on 21<sup>st</sup> May 2014 that states verbatim as follows:

- (i) THAT the Plaintiff herein transfers land parcel BUKHAYO/KISOKO/2693 to the 3<sup>rd</sup> Defendant.
- (ii) THAT the 3<sup>rd</sup> Defendant transfers land parcel BUKHAYO/KISOKO/2694 to the Plaintiff.
- (iii) THAT each party bears its own costs.

3. The judgment arose from a unique set of circumstances. The Plaintiff/Judgment Creditor had initially claimed the land parcel known as BUKHAYO/KISOKO/2693 measuring approximately 0.4ha whose ownership devolved to him through succession proceedings. The property was previously registered in the name of his late father. The Defendant/Judgment Debtor opposed the claim on basis that the property had been gifted to them during the lifetime of the deceased Plaintiff's father and they had erected a church thereon in 1972. A surveyor who was brought on board during the subdivision erroneously indicated that the Defendant had been allocated BUKHAYO/KISOKO/2694 measuring 0.66ha which led to the registration of the said property in the Defendant's name. The Court took cognisance of the error and exercised its discretion in a unique decision that would be beneficial and just to both parties. He ordered that they swap properties.

4. In the Supporting Affidavit to the Application, the Plaintiff depones that he transferred **BUKHAYO/KISOKO/2693** to the 3<sup>rd</sup> Defendant in accordance with the judgment. However, the 3<sup>rd</sup> Defendant is yet to transfer **BUKHAYO/KISOKO/2694** to him. The process was hindered by the Intended Interested Party who lodged a restriction against its title. The Plaintiff states further that the Intended Interested Party is a stranger to the suit property without any viable claim to it and was not involved in the hearing of the case which was finalized. He prays that the Intended Interested Party be enjoined to the suit and that the Busia County Lands Registrar be compelled to remove all cautions, encumbrances and restriction placed on **BUKHAYO/KISOKO/2694** by the Intended Interested Party.

5. The Application is opposed vide a Replying Affidavit sworn by the 1<sup>st</sup> Defendant, **-INYASI ODITI HASAKI-** on 9<sup>th</sup> January 2017 in his own right and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He depones that the Applicant sued them and the case proceeded to conclusion. After judgment they obtained the title deed for the parcel on which their church is built, **BUKHAYO/KISOKO/2693**. He claimed that the application having been brought with inordinate delay was overtaken by events as judgment had already been delivered and executed in part.

6. A Replying Affidavit sworn by – **TOM ORAMISI ETYANG-** on behalf of the Intended Interested Party was filed on 19<sup>th</sup> October 2017. He stated that he was the Chairman of the Board of Governors, Esegero Primary School. The narrative that arose was that on 13<sup>th</sup> December 1972, a 1½ acre portion of the original property which later became the resultant subdivision **BUKHAYO/KISOKO/2694** was donated to the school by the Plaintiff's late father, **OPIYO MAKOLI YOYO**. A barely legible handwritten agreement allegedly by the late OPIYO was annexed as evidence of the same. The school occupied the land from 1972. However, the property was erroneously registered in the name of the 3<sup>rd</sup> Defendant. Upon the demise of their late benefactor, the Plaintiff secretly conducted succession proceedings as well as the current suit and obtained ownership of the suit property upon which the school stands.

7. It was deponed further that when the management of the school became aware of the aforesaid developments, they contacted the Plaintiff and tried to explain to him that the property had been gifted to them but he was adamant in his position and demanded Kshs.1,300,000 as compensation. The school then registered a caution against the title of the property to preserve the status quo and buy time to challenge the succession proceedings. The Intended Interested Party contends that they should have been involved in the current case from inception. They echoed the 3<sup>rd</sup> Defendant's sentiments that the Application is brought with inordinate delay as the judgment was partly executed and that it is hopelessly defective.

8. Parties elected to canvass the Application by way of written submissions. The Plaintiff's submissions were filed on 17<sup>th</sup> December 2018 while the Interested Party's submissions were filed on 19<sup>th</sup> December 2018. They basically reiterated each party's stance as presented in their pleadings. The 3<sup>rd</sup> Defendant/Judgment Debtor did not file submissions.

9. Ideally, the proper position is for a Plaintiff to enjoin all parties necessary for the determination of the suit and from whom relief will flow in the event that the Plaintiff is successful in his case. The correct section on joinder which has not been quoted in the Application is Order 1 Rule 10(2) of the Civil Procedure Rules. It states that joinder is permissible at any stage of the proceedings if a party's presence is deemed necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. With regard to this case, the Plaintiff sought **BUKHAYO/KISOKO/2693** and may not have foreseen the outcome where he was ordered to cede ownership of the same and receive **BUKHAYO/KISOKO/2694** in turn which the 3<sup>rd</sup> Defendant admitted was in use by the school during the hearing. However, he also seeks orders against the enforcing authority, the Busia County Lands Registrar who was not a party to the main suit.

10. Moreover, the Intended Interested Party's Response has raised weighty issues of ownership of the suit property which cannot be determined by way of an Application. Such issues are ventilated at full hearing based on evidence adduced with the involvement of all parties whose rights would be affected by the resultant decision. I opine that joinder of the school as an interested party would not give it the requisite capacity to ventilate its ownership claim. The role of an interested party is normally peripheral in a case, yet this school is raising ownership issues similar to those of the principal parties in the main suit. On this aspect, I am guided by the sentiments of the Supreme Court on the status of an Interested party in **Methodist Church in Kenya Vs Mohamed Fugicha & 3 others [2019] eKLR** while quoting the following case:

**Francis Kariuki Muruatetu & Another Vs Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, (paragraphs 41, 42):**

**“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court.**

**Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court** [emphasis supplied].

These pronouncements were made in the context of locus standi of interested parties in petitions governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) but are fully applicable to this Application.

11. Despite the foregoing, the Plaintiff has the benefit of a judgment which has since stalled as the 3<sup>rd</sup> Defendant is yet to discharge its

obligation of transferring the suit property to the Plaintiff. The Court having already made its orders on the merits of the case before it cannot turn a blind eye and render its own orders ineffectual. However, the school's ownership claim cannot also be ignored nor determined at this stage. It is not clear whether there are buildings erected on the suit property or if the school's claim lacks merit. The Court therefore has no choice but to dismiss the Application. The Plaintiff is however urged to approach the Court appropriately and involve all parties from whom reliefs sought will flow. Each party will bear its own costs.

**Dated and signed at Busia this 12<sup>th</sup> day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**Delivered at Busia this 24<sup>th</sup> day of September, 2019 by**

**A. OMOLLO**

**JUDGE**