



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 113 OF 2014**

**LEVY SIXTUS EMOJONG EMONGOR.....APPLICANT**

**= VERSUS =**

**BENJAMIN EKISA EMUKULE.....PLAINTIFF**

**AND**

**FAUSTINE OKWARA ITANGASA.....1<sup>ST</sup> DEFENDANT**

**EKISA OTWANI ORIDI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application for determination before me is a Motion on Notice filed here on 19/2/2018 and dated the same. It is brought under Sections 1A, 1B, 3A, 3B, of Civil Procedure Act (cap 21), Order 40 Rules 1, 2, 3, Order 42 Rules 1, 2, 3, Order 45 Rules 1(1) (a) (b), 2 of Civil Procedure Rules and all other enabling provisions of law. The Applicant – **LEVY SIXTUS EMOJONG EMONGOR** – is not a party to the suit. He wants to join as an interested party and that is one reason for filing the application. The parties to the suit are **BENJAMIN EKISA EMUKULE**, as Plaintiff, and **FAUSTINE OKWARA ITANGASA** and **EKISA OTWANI ORIDI**, as Defendants. The bone of contention is ownership of land parcel No. SOUTH TESO/AMUKURA/3226. As between the Plaintiff and the Defendants, this is a concluded matter, the court having delivered its judgement on 29/11/2017.

2. A brief highlight of the history and/or background is necessary in order to have a better appreciation of the matter. The Plaintiff filed the suit against the Defendants by way of originating Summons sometimes in 2011. He was claiming the disputed land parcel as an adverse possessor, having first purchased it and then gone into possession. The matter proceeded without the Defendants and the court found for the Plaintiff in its judgement. The application herein is essentially a contestation of that judgement. The Applicant avers that he owned the land.

3. At this stage, the relevant prayers in the application for consideration are as follows:

Prayer 2: That the honourable court be pleased to grant leave to the interested party to be enjoined in the suit.

Prayer 4: That pending hearing and determination of this application interparties and thereafter, there be an order of interim injunction restraining the plaintiff and/or any person claiming under him from interfering with quiet possession of all this parcel of land known as LR. SOUTH TESO/AUKURA/3226 registered in the name of the interested party.

Prayer 5: That this court be pleased to set aside its orders issued and/or granted on 29/11/2017.

Prayer 6: That the honourable court be pleased to order fresh hearing of the case with the Applicant as a party.

Prayer 7: That costs be provided for.

4. The application is anchored on grounds, *inter alia*, that the Applicant is the registered owner of the disputed land; that he was not made a party to this suit; that orders were issued affecting his title without hearing him; that he stands to lose irreparably through a process he did not participate in; and that it is only just that judgement be set aside. The supporting affidavit that came with the application merely amplified the grounds.

5. The Plaintiff, who is essentially the party against who the application is brought, filed his response vide a replying affidavit filed on 2/3/2018 and dated the same. He deposed, *inter alia*, that judgment in this matter was delivered in his favour on 29/11/2017 and the disputed land was transferred to him. He already has a title deed. The Plaintiff denied that the Applicant is the registered owner. He further deposed that the case is already concluded and there is nothing to be heard. He also said that no process of execution is remaining and the application was said to be overtaken by events. The Plaintiff opined that if the Applicant has a claim over the disputed land, he should file a separate substantive suit.

6. The response made by the Plaintiff elicited the filing of a supplementary affidavit by the Applicant. In it, he deposed that he purchased the disputed land from the 2<sup>nd</sup> Defendant in the suit. At the time the 2<sup>nd</sup> Defendant was in occupation and after purchase the 2<sup>nd</sup> Defendant delivered vacant possession to him. All along, he has been using the land. He said that the judgement affects him gravely as what happened amounts to compulsory acquisition of the disputed land from him.

7. On record also is a replying affidavit from the 1<sup>st</sup> Defendant. According to the first Defendant, the Applicant is his neighbour and is the registered owner of the disputed land. He is said to have bought the land from 2<sup>nd</sup> Defendant. The Plaintiff on the other hand was said to have been purchasing land from 1<sup>st</sup> Defendant. The size of the land was one acre. He paid 8,500/= leaving a balance of 1,500/=. The Plaintiff was said never to have resided on the disputed land.

8. The application was canvassed by way of written submissions. The Applicants submissions were filed on 4/6/2019. The submissions give a background of the matter and then substantial space is spent trying to justify the need for review of the judgement. Nothing at all is said about joinder as interested party and nothing too is said about the interim injunction sought. And though Order 45 of Civil Procedure Rules (which deals with review) was invoked in the application, the action prayer for review was not made. Instead, what I see is a prayer to set aside (prayer 5), which is not the same as review. A lot of focus is given on the substance of the suit and the judgement. All this is done as if the Applicant is already a party.

9. The Plaintiff's submissions (styled respondents written submissions) were filed on 2/7/2019. The application was said to be **"incompetent, scandalous and an abuse of the court process"** when regard is had to the manner it was brought. The Applicant was faulted for seeking various substantive orders while his joinder as a party has not yet been accepted by the court. In the Plaintiff's view, such orders should on have been sought if joinder is first allowed.

10. The Plaintiff further submitted that judgement in this matter is already delivered and fully executed. According to the Plaintiff, there is nothing to be heard and joinder of the Applicant is a waste of time. The Plaintiff reiterated that if the Applicant has any claim over the disputed land, he should file a suit. The court was asked to dismiss the application.

11. I have considered the application, the responses made, and the rival submissions. As pointed out earlier, this is a concluded matter. The Applicant was not a party. Judgment was issued and executed. The Applicant wants to join at a very late stage as an interested party. Even then however, the submission he has filed do not advance his cause for joinder. It would appear to me that there is lack of proper focus in the submissions as joinder is the single most important issue to be considered in the application. Instead of focusing on this issue, the Applicant went straight to the substance of the suit and the judgement issued. On reading the submissions, one would be excused to view the Applicant as if he is submitting on an appeal.

12. But that is not the only weakness in the approach taken. The Applicant seems not to have a proper appreciation of the capacity in which he seeks to join the suit. It is clear that he has substantial issues to raise. But as an interested party, his space to wiggle, or scope of action if you like, is limited.

13. It pays to cite a few cases in order to make the matter clearer: In **METHODIST CHURCH OF KENYA Vs MOHAMED FUGICHA & 3 others: [2019] eKLR**, the limited freedom of action for an interested party in a case was captured when the Supreme Court observed that such a party cannot raise a preliminary objection on a point of law or a counter-claim. And in **Kariuki Muruatetu & Another Vs Republic & 5 others: Sup. Ct: pet 15 and 16 of 2015 (consolidated); [2016] eKLR** (paragraphs 41, 42), the Supreme Court referred to this limitation of choice when it observed:

**"Having carefully considered all the 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 .....**

**"Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first move the court .....**

**"An interested party may not frame its own fresh issues or introduce new issues for determination by the court..."**

14. I think it's clear now from the above that what the Applicant seeks to achieve would not very much be possible in his capacity as an interested party. The Plaintiff chose to sue the two Defendants. That is his freedom of choice and it should be respected. Besides, it seems clear that at the time the suit was filed, the Applicant was not yet in the picture. He came in later. The suit belongs to the Plaintiff. It is only him who can choose whom to sue.

15. A suggestion was made by the Plaintiff that if the Applicant has a claim, he can file it as a suit. This is sound advice in my view. In a suit, the Applicant will have full freedom of action. And the Plaintiff seems ready to face him. A point was made too in the Plaintiff's submissions that the Applicant is seeking various other substantive orders before he is even made a party to the suit. This is a valid point. The prayers made by the Applicant shows that he wants to have substantial control of the proceedings. Yet he is not yet a party and he does not even bother to give the issue of joinder the attention it deserves in his submissions.

16. Further, and as an example, the Applicant wants an interim injunction. A question arises: In a concluded suit, the injunction is interim to what? And if one bothers to consider the basic principles of granting an injunction, it is clear that a suit should already exist so that the court, for instance, can consider whether a *prima facie* case is made. Which suit has the Applicant filed?

17. When all is considered, one clearly notices that the Applicant's approach is wrong and/or ill-informed. He has not thought through his matter properly. He clearly requires a better approach.

18. It is in light of the foregoing that the application herein is found unmeritorious. The same is hereby dismissed with costs to the Plaintiff.

**Dated, signed and delivered at Busia this 10<sup>th</sup> day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Absent

Plaintiff: Absent

1<sup>st</sup> Defendant: Absent

2<sup>nd</sup> Defendant: Absent

Counsel for the Applicant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendants: Absent

CA: Nelson Odame