



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 145 OF 2016

ERNEST ODHIAMBO..... INTERESTED PARTY/APPLICANT

= VERSUS =

DAVID LUBONDI ONYANGO.....PLAINTIFF

AND

FRANCIS OKUMU.....1ST DEFENDANT

VINCENT GRADIUS ONYANGO.....2ND DEFENDANT

RULING

1. The application for determination before me is a Motion on Notice dated 23/5/2018 and filed on 24/5/2018. It is expressed to be brought under Sections 1, 1A, 1B, 3, 3A, 63(c) and 80 of Civil Procedure Act (cap 21) and Orders 21, 22(1) (2) (3) and 43 Rules 1(1)(a) and (b) of Civil Procedure Rules, Article 159(2) of the Constitution of Kenya, 2010 and other enabling provisions of law. The Applicant – **ERNEST ODHIAMBO** – seeks to join the suit as an interested party and while so joining, he also wants to get the following orders:

- That the honourable court be pleased to set aside orders issued on 2/6/2017 and other consequential orders following from the consent filed between the Respondents herein.
- The honourable court be pleased to consolidate this suit with ELC No. 139 of 2013 pending before this court.
- That the honourable court do issue any and all such orders as are necessary to meet the circumstances of this case.

2. The Respondents – **DAVID LUBONDI** (Plaintiff), **FRANCIS OKUMU** (1st Defendant), and **VINCENT GRADIUS ONYANGO** (2nd Defendant) – are the parties in the suit. They are wrongly shown as Plaintiff/Respondents in the application. They compromised the suit vide a consent entered on 2/6/2017. Essentially then, this is a concluded matter as between the parties. The Applicant is therefore seeking to join a concluded suit.

3. The application is anchored on grounds, *inter alia*, that the orders issued on 2/6/2017 following the consent between the parties had the effect of depriving the Applicant of his land parcel No. BUNYALA/MUDEMBI/1735 which is a subject of trial in ELC No. 139 of 2013, BUSIA still pending before the court. It also affected and/or interfered with prohibitory orders issued by the High Court in respect of the land. There are also other related cases pending in court concerning the same parcel of land.

4. According to the Applicant, there was apparent misrepresentation of facts regarding the consent made between the parties which led to removal of inhibition entered by the High Court in Civil Suit No. 18 of 2006 now consolidated with ELC No. 139 of 2013. The matters are still awaiting determination.

5. The supporting affidavit that came with the application shows the Applicant deposing, *inter alia*, that the parties, who are brothers, brought this case as a ploy to get an order to remove inhibition placed by this court on Land parcel No. BUNYALA/MUDEMBI/1735. The Applicant is the one who had placed the inhibition and, said he, the parties were trying to circumvent justice. The court was said not to have been given all the facts. The compromise reached by the parties was said to be fraudulent. The order issued pursuant to the consent entered was said to affect other people who should have been involved before it was issued.

6. The Defendants/Respondents responded in two ways *viz*: grounds of opposition filed on 11/6/2018 and a replying affidavit filed on

17/10/2018. According to them, the Applicant has no locus in the matter as the consent being challenged can only be set aside by the parties to the suit. His counsel was also said to be improperly on record. Further, the Applicant was said to be a stranger to the proceedings as he has never been the registered owner of the land. The land itself was said to have ceased to exist as it was, having been subdivided into various portions.

7. The Plaintiff/Respondent responded vide a replying affidavit filed on 17/10/2018. Like the Defendant/Respondents, he deposed that the Applicant has never been the registered owner of the land and that the land has been subdivided and has therefore ceased to exist as it was. He further said that the Applicant's counsel is improperly on record and that the consent being challenged can only be removed by the parties to the suit.

8. The application was canvassed by way of written submission. The Applicant's submissions were filed on 27/9/2018. It was submitted, *inter alia*, that the Respondents are attempting fraud and/or collusion in order to defeat the hearing and determination of another related suit – ELC No. 139/2013. The subject matter in that suit is the same piece of land. The Respondents are said to have conspired among themselves to file this suit and then enter a consent in order to remove an inhibition already placed on the land. And for this reason the Applicant was said to have demonstrated the need to allow the application herein. This court was urged to use its inherent jurisdiction to administer justice in line with the provisions of Article 159(2) of the Constitution and Sections 1, 1B, 3 and 3A of the Civil Procedure Act (cap 21).

9. The 5th Respondent's submissions were filed on 22/1/2019. He submitted that the Applicant needed to resolve the issue of boundary before filing her suit. The court was asked to dismiss the application.

10. The other Respondents submissions were filed on 5/12/2018. They submitted that the issue in this matter are settled as between the parties and the Applicant's recourse should probably be to file a fresh suit. The land was said to have been subdivided and nothing remains for the Applicant. And that is the position even if he were to be joined as an interested party.

11. It was submitted too that other than seeking to be enjoined as an interested party, the Applicant has not made it clear as to what he wants to do once he is enjoined. Further, it was submitted that if the Applicant were to seek a reversion of the title to parcel no. 1735, that would affect other parties who are not part of this case. The subdivision is said to have given rise to ten (10) titles and new title holders who are not parties stand to be affected.

12. I have considered the application, the responses made, and the rival submissions. The Applicant is seeking very weighty orders and it seems to me that he does not appreciate well what his role as an interested party is, or should be. Even if the court were to allow him to join the suit as such, his scope of action would be limited. He would not be allowed to play a central role in this case. And this is because he would not be a substantive party. As an interested party, it is difficult to see how the Applicant would cause consolidation of the suits or setting aside of the orders granted in this matter.

13. But this is not to say that the Applicant's grievances are worthless. I have looked at them and they deserve judicial scrutiny. But the approach taken is wrong. As an interested party, his grievances would not get the kind of attention they deserve or even attract possible issuance of the necessary orders.

14. An explanation of the limited scope of action of an interested party in a case is useful at this stage. In **METHODIST CHURCH OF KENYA Vs MOHAMED FUGICHA & 3 others [2019] eKLR**, the Supreme Court was emphatic that an interested party cannot raise a preliminary objection on a point of law or even file a counter-claim. In **KARIUKI MURUATETU & Another Vs REPUBLIC & 5 others: Sup. Ct. Pet. 15 and 16 of 2015 (consolidated); [2016] eKR**, the Supreme Court observed as follows:

“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. 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...”.

The court continued: **“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by 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”.**

15. I think it is clear from this that though the Applicant may have genuine grievances against the Respondents in this matter, he cannot effectively agitate these grievances in court as an interested party. His scope of action would be limited. In my view, it is necessary for the Applicant to think of another approach. As pointed out earlier, this is a concluded case. The Applicant is an outsider; he was never part of it. He cannot be allowed to revive it via an application like this one. It is only the primary parties who can be entertained to take that kind of action.

16. It is in light of the foregoing that the application herein must be treated as one for dismissal. And I hereby dismiss the application with costs to the Respondents.

Dated, signed and delivered at Busia this 10th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Interested Party/Applicant: Absent

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

Counsel for the Interested Party/Applicant: Present

Counsel for the Plaintiff: Absent

Counsel for the Defendants: Present

CA: Nelson Odame