



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 19B OF 2008

VINCENT GRADIUS ONYANGO (suing as Administrator

to the estate of PETER GABRIEL ONYANGO AKILEO) PLAINTIFF

VERSUS

LOICE ACHIENG AGENGO DEFENDANT

SAMUEL MUCHIRI WANJAMA INTERESTED PARTY/APPLICANT

R U L I N G

1. The application before me is a Notice of Motion dated 10/11/2017 and filed on the same date. It was filed by the Interested Party/Applicant – **SAMUEL MUCHIRI WANJAMA** – who wants to get the following orders:

Prayer 1: Spent

Prayer 2: That the Interested Party/Applicant be and is hereby granted leave to appoint the firm of A.G. OPIYO & CO. ADVOCATES to act for him in this suit.

Prayer 3: That the consent order dated, signed, and sealed at Busia on the 9th March 2009 be set aside, discharged and/or varied and the alterations and cancellation of the certificate of lease of the Interested Party/Applicant be declared null and void and reinstated forthwith.

Prayer 4: That all matters concluded and/or pending before Busia Law Courts touching on plot No. 332, Busia Municipality to wit: PMCC No. 15 of 2006, Busia HC Succession Case No. 31 of 2008 – estate of the late George Omondi Obonyo, Busia HCCC No. 104 of 2005, Busia Succession Case No. 104 of 2015 including this suit be transferred and consolidated with ELC No. 95 of 2013 now pending before the relevant court and/or forwarded forthwith.

Prayer 5: That the Interested Party/Applicant be allowed to tender his defence in Busia HCCC No. 19 of 2008.

Prayer 6: That costs be provided for.

2. The application is anchored on grounds, *inter alia*, that the Interested Party/Applicant was not a party in this suit and therefore had no knowledge of its existence; that the respondents colluded in order to secretly file this suit and record a consent to the detriment of the Interested Party/Applicant; that the consent order has caused the cancellation of the interested Party/Applicant certificate of lease to the suit property and replaced his name first with the name of the late PETER GABRIEL ONYANGO and now VINCENT GRADIUS ONYANGO; that the consent order effectively compromised this suit; that the consent was fraudulently entered into without the consent of the registered owner who is the Interested Party/Applicant; that the Respondents having been abusing the court process by filing a multiplicity of cases; and finally that this court has jurisdiction to grant the prayers sought.

3. The Respondents – **VINCENT GRADIUS ONYANGO** and **LOICE ACHIENG AGENGO** – are the Plaintiff and the Defendant in the suit. Vincent the current Plaintiff was not the initial Plaintiff in the suit. The initial Plaintiff was **PETER GABRIEL ONYANGO AKILEO**. The initial Plaintiff died and Vincent came in as his legal representative. The initial Plaintiff filed the suit claiming that the Defendant had sold plot no. 332 to him in the year 2007 but had refused to transfer it to him. It is apparent that the Defendant had sold the plot to the Plaintiff as the administrator of the estate of the late George Omondi Obonyo, who was the registered owner. The initial Plaintiff wanted to become the registered owner.

4. The Defendant admitted liability and the parties entered into a consent dated 9/3/2009 which essentially granted the Plaintiffs wish. The effect of the consent was that the suit became concluded as between the parties.
5. But it would appear that when all this was going on, the Interested Party/Applicant had at some point become the registered owner of the plot through a different process. When implemented, the consent order between the parties to the suit led to de-registration of the Interested Party/Applicant as owner, with the new owner ultimately becoming the current Plaintiff. This is what the Interested Party/Applicant is contesting. His position is that he was condemned unheard.
6. The Respondents filed their responses to the application. There were grounds of opposition filed on 13/11/2017 and two replying affidavits, one of each Respondent, filed on 14/6/2018. According to the respondents, the Interested Party/Applicant is alien to the suit. He was said to have no contractual obligations with the parties and therefore ought not to have any interest. Further, he was said not to be a beneficiary of the estate of the late George Omondi Obonyo, the original owner, or the estate of the late father of the current Plaintiff, who was the purchaser. And the vesting order that the Interested Party/Applicant purports to have provided the basis of his ownership was said to have been set aside by the court.
7. The application was canvassed by way of written submissions. The Interested Party/Applicant's submissions were filed on 16/7/2019. The submissions generally reiterate and amplify the substance of the application, with the Respondents being said to have prejudiced the interests of the interested Party/Applicant. According to the Interested Party/Applicant, at the time the Respondents were entering into consent, they were well aware that he was the registered owner of the plot.
8. The Respondents also filed their submissions. The Respondent who is Plaintiff filed his submissions on 19/9/2018 and followed up with supplementary submissions on 15/1/2019. It was submitted that the Interested Party/Applicant cannot set aside a consent in a matter where he is not a party. It was submitted that allowing him to set it aside would amount to a miscarriage of justice. It was also submitted that the order which was acted upon to make the Interested Party/Applicant the registered owner of the plot was set aside in proceedings to which the Interested Party/Applicant was a party. The application was also said to be overtaken by events as title has already been issued. The issue of jurisdiction was also raised. It was submitted that this court has no jurisdiction over some of the matters sought to be consolidated with the other suit in this court.
9. The submissions of the Respondent who is the Defendant in the suit generally have the same thrust as the submission of the respondent who is the Plaintiff. For instance, she also submitted that the Interested Party/Applicant cannot set aside a consent order in a matter to which he is not a party. Similarly, she also submitted that the vesting order that the Interested Party trumpets as the basis of his ownership was set aside by the court.
10. I have considered the application, the responses made, and the rival submissions. I have also examined the pleadings. The Interested Party/Applicant omitted and/or overlooked one simple but crucial step in his application. And the step is this one: He never sought to be enjoined as an interested party. He filed his application and assumed that the fact of his being accepted or allowed to be a party is a foregone conclusion. Infact in his application, he is not seeking to become one. And it seems to me that he had not become such party in the suit earlier. In a matter where you are not a party, you cannot impose yourself as one. The law requires that you obtain leave of the court. The Interested Party/Applicant was wrong to assume that his inclusion in the suit as a party is a given. As I write this ruling, the Interested Party/Applicant is not a proper party in this suit.
11. But even if we were to assume that the Interested Party/Applicant is a proper interested party in the suit, that still would pose problems considering the role he intends to play in the suit. The Interested Party/Applicant would wish to come to the suit, file defence, and/or cause consolidation of various matters. He seems not to understand that the scope of action for an interested party in a given case is always narrow and/or limited.
12. It is necessary to explain by citing decided cases: In **METHODIST CHURCH OF KENYA Vs MOHAMED FUGICHA & 3 others: [2019] eKLR** the Supreme Court made it clear that an interested party cannot raise a preliminary objection or lodge a counter-claim. In **Kariuki Muruatetu & Another Vs Republic & 5 others: Sup. Ct: pet 15 and 16 of 2015 (consolidated); [2016] eKLR** the Supreme Court expressed itself thus:
- “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**
- “... 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 for determination by the court”**
13. The point here is that even if the supposed Interested Party/Applicant were to be enjoined as an interested party, he wouldn't have the freedom to do the things he wishes to be done. It is clear therefore that a different approach is required altogether. This is a concluded matter as between the primary parties. An interested party cannot be allowed to upset or undo what the primary parties have done. It appears to me that the Interested Party/Applicant does not understand or appreciate well what his role as an interested party is, or should be.
14. It would appear to be true that the interested party became owner of the disputed plot through a vesting order granted by the court. The Respondents were able to show that the vesting order was set aside in proceedings in which the Interested Party/Applicant participated. He does not seem to have challenged the ruling that set aside that order. Yet in this matter, he seems to assume that the vesting order still has legal validity. This application itself cannot revive that order. The ruling that set aside that order needs to be challenged in a different way or approach. I agree with the respondents on this score.

15. The Interested Party/Applicant is also seeking to have matters concluded and/or pending before both the High Court and the lower courts here brought to this court and consolidated with a related matter pending here. Some of the matters mentioned – like Succession Cases – are suits over which this court has no jurisdiction. Some are matters concluded, meaning they are determined. Yet the Interested Party/Applicant is talking of consolidating and determining them. This prayer is clearly outrageous. The Interested Party/Applicant does not seem to understand or appreciate the procedural and/or jurisdictional challenges that would arise if the prayer is granted. Again here, the Respondents are right in their observations and/or submissions.

16. The upshot, in light of all the foregoing, is that the application herein is one for dismissal. And I hereby dismiss it 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:

Plaintiff: Absent

Defendant: Absent

Interested Party/Applicant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Absent

Counsel for the Interested Party/Applicant: Present

CA: Nelson Odame