



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 21 of 2018

GILBERT KIOGORA MWIRICHIA.....APPELLANT

VERSUS

JUDSON MWENDA GITONGA.....RESPONDENT

KENNETH GITONGA M'NDEGWA.....APPLICANT

[Being an appeal from the decision and Ruling of J Irura (SRM) delivered on 27th June 2018

in Nkubu Pmcc No. 95 of 2015 Judson Mwenda Gitonga vrs Gilbert Kiogora Mwirichia]

RULING

1. This ruling is in respect of the **application dated 30th August 2018**, where by one **KENNETH GITONGA M'NDEGWA** is seeking to be enjoined as an interested party and as the second respondent herein and to be allowed to file his pleadings herein in order to defend his interests in land **parcel no. L.R. Abogeta/U-Kithangari/2734**. He is also seeking for a stay of execution of the decree and order in **NKUBU P.M.C.C CASE NO.95 OF 2015**.

2. The application is premised on the grounds set out on the face of the application and in the affidavit of the applicant. Applicant avers that he was not a party in **NKUBU PMCC NO. 95 OF 2015** as he was not aware of its existence. He owns 3 acres of land being part of **L.r. Abogeta/U-Kithangari/2734** as a bonafide purchaser for value having bought the same from the appellant at the consideration of Kshs. 3,600,000/=, whereby he took over occupation of the said 3 acres of land and has developed the same extensively. He also states that the respondent, **Judson Mwenda** is not in occupation of the suit land.

3. The applicant further avers that he has obtained orders in **GITHONGO SRMCC NO. 57 OF 2017** where the appellant herein agreed to transfer the land to him. He therefore stands to suffer irreparable loss and damage if this appeal proceeds without his participation and he will be condemned unheard.

4. The Respondent, **Judson Mwenda** has opposed the application vide his replying affidavit filed on 22.10.2018. Respondent contends that he entered into a consent with the appellant herein before the trial court at Nkubu where the Appellant voluntarily agreed that he would transfer to him 3 acres out of his entitlement in **L.R. Abogeta/U-Kithangari/2734**. However, the Ruling in Meru **HCC. SUCC CAUSE NO.630 OF 2009** barred him from interfering with the transmission process, but he was not barred from getting his portion from the appellant once distribution was concluded. He further contends that the appellant was engaged in a process of running away from the said consent when he purportedly sold the same parcel of land to the interested party. Respondent got wind of the appellant's fraudulent actions and he applied to be enjoined in the Githongo case and also sought a stay of execution of their fraudulent consent order, which order was granted.

5. The appellant filed a response on 21st February 2019 wherein, he is in support of the applicant's application dated 30.8.2018. He contends that the substratum of this appeal is whether the Magistrate Court at Nkubu had jurisdiction to overrule the High Court of Kenya and evidently the Magistrate's Court at Githongo rightly held that the alleged court orders at Nkubu were invalid. He contends that the Interested party has a valid court order to have three (3) acres over **L.r. Number Abogeta /U- Kithangari/2734** and is therefore a necessary party.

Analysis and Determination

6. I have considered all the arguments raised by the parties in their various affidavits as well as the rival submissions. This application brings to core the intertwined nature of the parties claim to three acres in **L.R. Number Abogeta /U- Kithangari/2734** (herein also referred to as the suit premises). The issues to determine are 1), whether the applicant should participate in these proceedings and 2), whether the court

should grant a stay of execution of the orders given in the Nkubu court.

Joinder of the interested party

7. Order 1 Rule 10(2) of the Civil Procedure Rules provides that;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added” . (Emphasize added)-See Parsaloi Ole Meikoki & others v Commissioner of Lands & 9 others [2017] eKLR

8. In the case of **Trusted Society Of Human Rights v Mumo Matemo & 5 others [2014] eKLR**, the Supreme Court held that:

“An interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

9. Further in the case of **Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002] eKLR** Nambuye J as she then was, provided the following as the guiding principles to be adhered to when an intending interested party is to be joined in a suit:

“(1) He must be a necessary party;

(2) He must be a proper party;

(3) In the case of the Defendant there must be a relief flowing from Defendant to the Plaintiff;

(4) The ultimate order or decree cannot be enforced without his presence in the matter;

(5) His presence is necessary to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit.”

10. In **Nairobi Court of Appeal Civil Appeal No. 172 of 2006, Joseph Kamau Musa and 4 Others vs. Ereri Company Limited & 3 Others**, the court while allowing applicants to be enjoined in the appeal made reference to the case of **Ahn -v- Openda [1982] KLR 87**, where it was held that a party who has taken no part in the lower court's proceedings may nevertheless, be a person directly affected by the appeal and that this was reiterated in the case of **Onjula Enterprises Ltd., -v- Sumaria [1986] KLR 651** where the said Court of Appeal had held **that persons directly affected by an appeal need not be those who were parties to the proceedings.**

11. The Appellant herein was the defendant in **NKUBU PMCC.NO. 95 OF 2015**, while the current respondent was the plaintiff. The original suit parcel was **no.Abogeta/U-Kithangari/123**, which land was subdivided and defendant got his share thereof identified as **Abogeta/U-Kithangari/2734** measuring 1.49 Ha. (or 3.6 Acres). In the **Nkubu case No. 95 of 2015** the Respondent herein averred that he had bought 3 acres from the Appellant and prayed the court to cause the Appellant herein to transfer the same by executing the relevant forms. From the proceedings, the parties recorded a consent which was adopted as a judgement of the court on 4th November 2015. The Appellant would later dispute the consent and allege fraud on the part of the Respondent. The Nkubu court however did not agree with the averments of the defendant and vide the ruling delivered on 27th June 2018, the court gave effect to the consent Orders triggering this appeal.

12. The Interested party also lays his entitlement to 3 acres out of **Abogeta/Kithangari/2734** which he averred he bought from the Appellant vide Sale Agreement dated 17th February 2016. He equally filed a suit in **GITHONGO SRMCC NO. 57 OF 2017** wherein they entered into a consent with the Appellant which in essence transferred the property to him. He averred that he is in occupation of the property and relies on the court's Ruling where the court held that the dispute in **NKUBU CMCC NO. 95 OF 2015** dealt with **Abogeta/ U-Kithangari/123** as opposed to **Abogeta/ Kithangari/2734**.

13. The Appellant does not oppose the interested party's application and admits that the interested party is the legitimate/valid proprietor of the suit premises.

14. I find that both courts (Nkubu and Githongo) clearly dealt with the same property. The site visit to the scene confirms as much. I have no doubts that the interested party fits the definition of an affected party and his presence in these proceedings are indeed necessary to enable this court to effectively and completely adjudicate all the questions involved in the suit.

Stay of Execution

15. I find that way back on 19.7.2018, the appellant herein filed an application for stay of execution of the orders given by the Nkubu court. That application is still pending. However, on 4.10.2018, I did give directions that the suit land should not be alienated, while on 27.11.2018, I gave directions that the Nkubu file be availed in this court. That being the case, I find it necessary to grant an order of stay of execution of the Nkubu matter, since in any event, the execution should not be proceeding when the lower court file is here.

16. **Final orders;**

1) **The application dated 30.8.2018 is hereby allowed.**

2) **The costs of the application to abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 27TH NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kiogora A. for applicant

Mutegi holding brief for Kimaita for appellant

Mwirigi for the respondent

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE