



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 74 OF 2017

MWAURA KARUGAPLAINTIFF

VERSUS

EMBAKASI RANCHING COMPANY LIMITED.....1ST DEFENDANT

LAND REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

AND

WALTER OTISO OSORO.....INTENDED INTERESTED PARTY

RULING

What is before Court for determination is the Intended Interested Party's application dated the 2nd July, 2019 brought pursuant to section 18 of the Civil Procedure Act. The Applicant seeks to review and /or set aside the orders issued on 17th October 2014; enjoin this suit; have this suit consolidated with ELC 12 of 2017; and obtain conservatory orders restraining the Plaintiff and 1st Defendant from interfering with land parcel number Kajiado/ Kaputiei North/ 11275 hereinafter referred to as the 'suit land'. The Applicant claims to have obtained ownership of the suit land from the 1st Defendant on 29th February, 2005 and is in actual possession of the same. The Applicant learned that the 1st Defendant entered into a transaction with the Plaintiff in respect to the suit land after which he filed a case No. 12 of 2017 (formerly ELC Case No, 206 of 2016) which has since been heard and determined. The Applicant only became aware of this suit through the Plaintiff's statement of Defence filed on 7th June, 2017 in ELC Case No. 12 of 2017. Further, that the said judgment and subsequent ownership of the suit land was obtained by the Plaintiff herein through a process that amounts to concealment of material facts and abuse of the Court Process as the Plaintiff knew that the Applicant herein still had genuine rights in the suit land. The Applicant's inherent rights are being threatened yet he has genuine rights in the outcome of this case as he is in actual occupation of the suit land but was not a party to the suit. It is in the interests of justice that the Applicants should be enjoined as a party to the proceedings herein.

The application is supported by the affidavit of WALTER OTISO OSORO where he reiterates his claim above and avers that he paid Kshs. 210,000 as purchase price in respect of the suit land. He claims that upon payment of the said purchase price, the 1st Defendant indeed delivered to him completion documents which he presented for registration but the same was not registered. He confirms that pursuant to the judgment delivered on 17th October, 2014, the Plaintiff herein obtained ownership of the suit land. He denies receiving any notification of this suit, which has since been heard and determined. He insists the judgment was obtained through non – disclosure of material facts as the Plaintiff knew or had reason to believe that he had an interest in the subject matter. He explains that as per the averments in the Plaintiff's replying affidavit in ELC No. 12 of 2017, he entered into a Sale transaction on 15th July, 2005 and hence his interest in the suit land supersedes the Plaintiff's as he entered into a transaction before him. He reiterates that where there are equal equities, the first in time shall prevail. He avers that vide a letter dated the 9th September, 2010, addressed to the CID Kitengela, the 1st Defendant confirmed he was the lawful owner of the suit land. He hence seeks to be enjoined as an interested party to the proceedings herein. Further, that the orders sought herein will not prejudice the Respondents in any way.

The Plaintiff opposed the application and filed a replying affidavit sworn by MWAURA KARUGA where he contended that transfer of the suit land should have been in writing but the Applicant has not produced an agreement in respect to his claim. He insists the Intended Interested Party's claim is based on a contract and six years have elapsed. He contends that he had no claim against the Interested party and no reasonable cause of action to enjoin him in this suit. He claims the judgment was delivered and the Decree enforced and there is nothing remaining to sustain the interested party. He explains that he is in possession of the suit land and the Applicant's brother who owns several plots around it has confirmed in the pleadings that the only dispute is in relation to the boundaries. He reiterates that the Interested party's remedy lies against Embakasi Ranching Company Limited. Further, that ELC No. 12 of 2017 is not res judicata and / or sub judice as alleged

since the parties are different and the claim is varied. He avers that he had registered a caution on the suit land to safeguard his rights and proceeded to file this suit. Further, that the interested party has no interest in the suit land and his only claim is that of a prospective purchaser who slept on his rights. He states that this court has no power to open a closed case, enjoin a stranger in the proceedings and proceed to set aside a Decree which had already been executed. Further, that the Court is now functus officio and the conservatory orders sought herein had already been declined in ELC No. 12 of 2017.

It is only the Respondent who filed written submissions, which I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion application dated 2nd July, 2019 including the partes' affidavits and submissions, the following issues are for determination:

- Whether the Court should review and /or set aside its judgment issued on 17th October 2014;
- Whether the intended Interested Party should enjoin the suit;
- Whether conservatory orders should issue restraining the Plaintiff and 1st Defendant from interfering with land parcel number Kajiado/ Kaputiei North/ 11275

As to whether the Court should review and /or set aside the orders issued on 17th October 2014.

The Intended Interested Party has sought for review and or setting aside of the judgment issued on 17th October, 2014. The Plaintiff has opposed the application. Section 80 of the Civil Procedure Act provides:-**“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: **‘ Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.’**

In the case of MUYODI v INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243, the Court of Appeal while dealing with an issue of review and describing an error apparent on the face of record, held as follows: **‘ In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.’**

In the current case, judgment was delivered in 2014, Decree extracted and the Plaintiff registered as owner of suit land. I note the Intended Interested party seeks to now review the said orders but had not indicated which errors were apparent on the face of record. He insists that the Plaintiff failed to disclose to the court material facts in respect to the suit land. He claims to be residing thereon but the Plaintiff also insists he is in occupation of the land and the only issue in dispute is a boundary. In relying on the Court of Appeal decision and applying it to the current scenario, I opine that the Intended Interested party has not demonstrated any errors apparent on the face of record to warrant the review and or setting aside of the judgment. Further, there has been inordinate delay in applying for review of the judgment which has since been executed with the Plaintiff being registered as the owner of the suit land.

As to whether the Intended Interested Party should enjoin the suit;

The Intended Interested Party has sought to enjoin this suit claiming he resides on the suit land. The Plaintiff opposed the application and insists he did not have a reasonable cause of action against the Interested Party to warrant enjoining him in the suit. Order 1 Rule 10 (2) of the Civil Procedure Rules stipulates as follows:

‘ (2) 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.’

Black’s Law Dictionary, 9th Edition, and defines **‘Interested Party’** as **“A party who has a recognizable stake (and therefore standing) in a matter”**.

In the case of **Trusted Society of Human Rights Alliance V Mumo Matemu & 5 Others (2015) eKLR** the Court defines an interested party as follows: ***'(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.'***

Based on the evidence before me and in associating myself with the cited decisions, I note the fulcrum of the suit herein revolves around ownership of the suit land which is registered in the name of the Plaintiff as a result of the judgment delivered in 2014. The Interested Party insists he purchased the land before but was not registered as its owner. I note the judgment herein was delivered five years ago and the Decree has since been executed. The Plaintiff insists the Interested Party should have a claim against Embakasi Ranching Limited and not him. Since the Decree herein has been executed and the Plaintiff is already the registered owner of suit land, I concur with the Plaintiff that the Interested party's claim should be against Embakasi Ranching which he has already sued in Kajiado ELC 12 of 2017. In the circumstance, I do not deem his involvement necessary in these proceedings which were determined. I hold that the Court is functus officio in this instance. Further since he had already filed a suit against Embakasi Ranching Company Ltd, whatever prejudice he will suffer can be compensated by way of damages

As to whether conservatory orders should issue restraining the Plaintiff and the 1st Defendant from interfering with land parcel number Kajiado/ Kaputiei North/ 11275. The Applicant has sought for conservatory orders to issue restraining the Plaintiff and 1st Defendant from interfering with land parcel number Kajiado/ Kaputiei North/ 11275, which prayer is opposed by the Plaintiff.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff has a title deed to the suit land, which title is being challenged by the Defendant who claims to be in actual possession of the said land. The Applicant claims to have purchased the land from Embakasi Ranching but his title was never processed. The Plaintiff has opposed the said claim and insists he is the owner of the land and the Applicant should pursue his claim with the said Embakasi Ranching Company Ltd. Section 24 (a) of the Land Registration Act further stipulates as follows: **' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'**

In the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: ***' the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.'***

In relying on the legal provisions cited above and associating myself with the quoted judicial authorities, I hold that the Applicant has not established a prima facie case against the Plaintiff in respect to suit land to warrant the grant of injunctive relief which is an equitable remedy.

It is against the foregoing that I find the application dated 2nd July, 2019 unmerited and proceed to dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 25th day of November, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Kerongo for Respondent

Matundura for Intended Interested party

Court assistant Mpoye