



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO 132 OF 2007

REHEMA RAIBUNI.....1ST PLAINTIFF

JANE MPINDA.....2ND PLAINTIFF

MARY ALIMA RAIBUNI.....3RD PLAINTIFF

ABDALLA MANYARA.....4TH PLAINTIFF

JOSHUA NGATU..... INTERESTED PARTY/APPLICANT

VERSUS

MOHAMMED IQBAI ABDUL KARIM.....1ST DEFENDANT

RAMJI DEVJI PATEL.....2ND DEFENDANT

MEHBOOB SALE MOHAMMED HAJI.....3RD DEFENDANT

VALJI HIRJI SENGHANI.....4TH DEFENDANT

RULING

1. The applicant is one Joshua Ngatu who is not a party in these proceedings. In his application dated 23.1.2017 and filed on 24.1.2017 he is seeking the following orders:

(i) That applicant be enjoined as an Interested Party in this matter.

(ii) An order of inhibition against all dealings in land parcels No. NTIMA/IGOKI/7321 and NTIMA/IGOKI/7322 pending the hearing and disposal of this application and the entire suit.

(iii) Orders of injunction against the respondents, their agents, representatives or any other persons claiming through them from, trespassing, entering, disposing off, selling, transferring and evicting the applicant from the land, and preventing them from his utilization of parcel No. NTIMA/IGOKI/7322 pending the hearing of the application and the suit.

2. The grounds in support of this application are;

(a) That the applicant was the original owner of the land in question, whereby, he is now in danger of being evicted through fraudulent transfers of land to third party respondents and his sisters without his knowledge or consent.

(b) That the applicant and his family have been living on the land for more than 40 years up to date and has extensively developed it.

(c) That he only came to learn recently that the property had been transferred to his sisters to his exclusion.

(d) That the land is now in imminent danger of being sold off to third parties and his family stands the danger of forceful eviction at any time now.

(e) That the applicant stands to suffer irreparably if the orders sought for are not granted by the Court.

3. The applicant has filed two supporting affidavits. One is filed on 24.1.2017 while the other was filed on 3.5.2017.
4. The application is opposed by the plaintiffs (vide a replying affidavit of Jane Mpinda filed on 13.2.2017) as well as by the defendants (vide a replying affidavit of Ramji Devji Patel filed on 6.3.2017).
5. Way back on 13.2.2017, directions were given for the application to be canvassed by way of written submissions. Such submissions have since been filed by all the parties.

HISTORY

6. A brief history of the case is necessary before embarking on the analysis of the issues at hand. Plaintiffs and the applicant are family, siblings for that matter.
7. In 1976, Josy Said Ngatu who happens to be the applicant herein was the registered owner of parcel of land No. Ntima/Igoki/3117. He apparently transferred the land to the defendants through sale. The plaintiffs stayed put and refused to move away from the portions of the land they were occupying.
8. The plaintiff's then filed this suit vide an Originating Summons dated 28.11.2007 (filed on 30.11.2007) claiming entitlement to a portion of the suit land (1.7 acres) by way of adverse possession.
9. Down the line, the suit land 3117 appears to have been subdivided with resultant portions being NTIMA IGOKI 7322 registered in the name of 1st – 3rd plaintiffs and NTIMA/IGOKI/7321 registered in the name of Salpro Kenya Ltd who had been enjoined as 5th defendant on 3.7.2012. The subdivisions appear to have occurred in 2009.

Case for the Applicant

10. The applicant avers that he was the original owner of the land No. Ntima/IGOKI/7176 since 30.7.1976, which he inherited from his father's estate. He avers that his sisters and brothers had filed the present case against defendants in 2007 but had excluded him. He then filed an application of 30.4.2008 to be enjoined in this matter but that his counsel failed to prosecute the same.
11. Applicant states that the suit land was subdivided into parcel no. 7321 and 7322. He contends that the transfer of the land to parcel's No. Ntima/Igoki/7321 and 7322 to third parties and to his sisters without his consent was illegal.
12. Citing the case of **Republic versus The Honourable Chief Justice of Kenya & others Exparte Moiwa Ole Keiwa Nairobi HCC court of Appeal No. 1298 of 2004**, applicant submits that he should not be condemned unheard.
13. In support of the prayer for injunction, applicant has proffered the following authorities;
 - Noormohamed Jonmohamed versus Kasamali Virji Madhani (1953) 20 EACA 8,
 - Jirbash Singh & Sons Ltd and others versus Bank of Credit & Commerce International (Overseas) Ltd H.C.C.C No 2435 of 1982
 - Giella versus Cassman Brown
 - Kitir and Another versus Standard Chartered Bank & 2 others (2002) IKLR
 - Mrao Ltd versus Fina American Bank of Kenya Ltd & 2 others (2003) KLR 125
 - Aril Shah versus Akiba Bank Ltd
 - Nsubuga & Another versus Mutowe.

Case for the plaintiffs

14. The plaintiffs aver that the suit land was parcel No. NTIMA/IGOKI/3117, which was family land whereby family members had agreed that the land be registered in the name of their brother Josy Saidi Ngatu Raibuni who is the applicant. And that is how Josy Ngatu became the registered owner of that land in 1976.
15. Plaintiffs aver that the applicant sold the Suitland to Omar Rehemtulla and Suleiman Rehemtulla without the knowledge of the family members. By the time this case was being filed, the land was in the hands of defendants after changing hands. Plaintiffs contend that after their brother sold the family land, he left. However they (plaintiffs) stayed put and refused to move from the land.
16. Before filing this suit, plaintiffs had tried to seek redress through the tribunal.
17. Plaintiffs aver that at some point during the trial, they discovered that the suit land had been sold to Salpro Kenya Ltd by defendants and they (plaintiffs) made an application to enjoin this party as a 5th defendant.

18. The parties then explored Alternative Dispute Resolution mechanism culminating in an agreement whereby the suit land parcel no. 3117 was subdivided into two, and the resulting parcels No. 7321 was transferred to Salpro Kenya Ltd while 7322 was transferred to plaintiffs.

19. Plaintiffs aver that the applicant is a fraudster and that he changed his name from Josy Saidi Ngatu Raibuni to Joshua Ngatu in order to hide his past fraudulent actions.

20. Plaintiffs also state that applicant had filed a similar application dated 29.4.2008 but that he failed to prosecute the same all this time.

21. The plaintiffs aver that the applicant's claim cannot fit in the present suit where the prayer is for adverse possession.

Defendant's case

22. Defendants aver that this matter was settled as between the plaintiffs and defendants hence the transfer of 2.1 acres of land to plaintiffs.

23. Defendants further argue that the applicant was all along aware of this case and that is why he filed his application of 2008 which application he failed to prosecute.

24. Defendants argue that the present application amounts to an abuse of the courts process and ought to be dismissed.

Determination

25. The main provisions of law of procedure on addition of parties relied on by the applicant are order 1 rule (1) & (10) the civil procedure rules.

26. Order 1 rule (1) provides that; ***"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise"***.

27. Order 1 rule (10) provides that; (1) ***"Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (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."***

28. In the present case, the applicant admits that he is a brother of the plaintiffs. He avers that it was illegal and fraudulent to transfer the land to his sisters. However, he has not given any plausible or any explanation at all as to how the land ceased to be in his name in the first place. This court notes that the transfer of the parcel of land NTIMA/IGOKI/3117 from one Josy Said Ngatu Raibuni to other entities like Rahemtullas is the basis upon which this suit was filed.

29. The first point to consider is the cause of action and relief sought. For the plaintiffs, their cause of action is definite. It arose from their occupation of the land no.3117 for a period of over 12 years. Their claim is based on S. 38 of limitations of actions act. That is what prompted them to approach the court on 30.11.2007 to file a suit by way of Originating summons. Plaintiffs' grievances appear to have been addressed as the land they were claiming is now in their hands as parcel no. 7322.

30. On the part of the applicant/ interested party, I am unable to discern his cause of action. His claim is anchored on fraud/illegality. It is not clear if his cause of action arose from the transfer of the land from Josy Ngatu to the Rehemutlas in 1977 or the transfer of the land from defendants to plaintiffs in 2016.

31. As rightly submitted by the plaintiffs, the claim for adverse possession is individualist and is personal to the claimants. The plaintiff's claim and that of the defendant are therefore at variance and ought not to be handled in the same suit.

32. Secondly I find that the applicant has admitted that he was aware of this suit hence his application to be enjoined in the suit dated 29.4.08. He has not given any plausible explanation as to why that application was never prosecuted. If indeed the applicant was keen on protecting his interest in the land, why didn't he lodge a caution on the land before the subdivision into 7321 and 7322.

33. The applicant has invoked the provisions of article 159 of the constitution in his application; Proviso 2 (b) states that **"Justice shall not be delayed"**. Justice delayed is indeed justice denied. This is a 2007 matter, one of the oldest cases in this station. It would be rather unjust and unfair to allow this applicant an opportunity to ride in this suit when all along he was aware of this matter.

34. Thirdly, I find that a serious issue has been raised by the plaintiff's that the applicant was known as Josy Saidi Ngatu Raibuni and he has now changed his name to Joshua Ngatu in order to hide his fraud.

35. The green card on record indicates that indeed Josy Said Ngatu Raibuni was registered as the owner of the land 3117 on 30.7.1976. The applicant is mute on this issue. Why?. The logical conclusion to make is that indeed applicant is trying to hide his identity.

36. Fourthly, I find that applicant appears to thrive on confusion. Though he admits that he was the original owner of the land, he proceeds to identify that land as parcel no NTIMA/IGOKI/7176 in paragraph 2 of his affidavit of 24.1.2017. He has no supporting document regarding the existence of parcel 7176. However, all the copies of green cards in this file indicate that the parcel land No. NTIMA/IGOKI/3117 was registered in name of Josy Said Ngatu Raibuni on 30.7.1976 and that the said parcel was as a result of a subdivision from parcel no. 2962. It is this parcel No. 3117 which was then subdivided into 7321 and 7322. The contents of paragraph 2 of the applicants' affidavit of 24.1.2017 are hence unfounded and misleading.

37. The fifth point to note is that the parties herein appear to have settled the case even if such settlement has not formerly been recorded. The plaintiff and defendant are no longer at war with each other. If indeed the suit was filed as a collusion between the plaintiff and defendant, why then would the case have stayed for so long in court.

38. The court has a duty to define the parameters of involvement of an interested party in a suit. This was so held in **Joseph Leboo & 2 others versus Director Kenya Forest Services & another ELC No. 273/12 Eldoret** where it was held that; **"There had to be a clear demonstration that the suit affected the person directly. If the test was too liberal, then the courts would be inundated by numerous applications for joinder"**.

39. The court had gone further to state that; **"An applicant had to demonstrate a direct interest in the subject matter or show that the questions in the suit could not be determined adequately without his input, even where he was not strictly plaintiff or defendant Since there were no defined rules as to how involved in the litigation on interested party could be, it fell upon the discretion of the court to define the parameters of involvement of the interested party. This depended on the circumstances of each case....."**.

40. The circumstances of this case are that the applicant was the registered owner of the suit land in 1976. 40 plus years down the line, he is awakening from undefined slumber to tell the court that he has an interest in the land. If anything, applicant is a spoiler, for he is trying to assert his claim when the parties to the suit appear to be settling their issues.

41. My conclusion is that the applicant is not a genuine Interested party and his application should not be allowed. In the circumstances the prayers for inhibition and injunctions must also fail.

42. The application dated 23.1.2017 is hereby dismissed with costs to plaintiffs and defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 18th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Munene holding brief for plaintiff for Rimita

Miss Njenga holding brief for defendants for Omari

Muthamia holding brief for applicant/Interested party for Kiome

HON. LUCY. N. MBUGUA

ELC JUDGE