



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 2367 of 2007

HEXMEAD INVESTMENT LTD.....PLAINTIF

VERSUS

ABDULLAHI SALO TULU & ANOTHER.....DEFENDANT

RULING.

BACKGROUND

1. The Plaintiff is the registered owner of LR No.209/10908(suit property). The plaintiff filed this suit against the two defendants on 24th December 2007. As at the time the suit was filed, the defendants had trespassed on to the suit property and had erected temporary structures on it. As the suit was pending, the second defendant started constructing a permanent structure on the suit property. This prompted the plaintiff to file an application for injunction against the second defendant on 28th August 2009.
2. The second defendant opposed the plaintiff's application through a replying affidavit sworn on 17th September 2009 and filed in court on the same date. The application was heard and in a ruling delivered on 27th November 2009, the second defendant was restrained from erecting any structures on the suit property or in any way interfering with the same.
3. The second defendant did not file a defence in this suit. The case proceeded to full hearing with only the first defendant participating. Judgement was delivered in favour of the plaintiff on 20th June 2012. The defendants were found to be trespassers to the suit property and were ordered to remove their structures from the suit property within 3 months in default an order of eviction was to issue. Each of the two defendants were ordered to pay damages for trespass of Kshs.2500/= each. They were also restrained from interfering with the suit property.
4. The plaintiff / decree holder then embarked on the process of eviction of the defendants from the suit property as they did not vacate on their own volition. The eviction is yet to be carried out as the auctioneer who was given the task of evicting the defendants faced resistance on the ground. As the auctioneers were seeking orders of police assistance in evicting the defendants, an application was filed by a party who seeks to be enjoined as an interested party and the setting aside of the judgement .

THE APPLICATION.

5. The application dated 20th July 2017 is brought by Sylvester Mutua Kamwilu who seeks to be enjoined in this suit as an interested party and that the judgement herein be set aside so that he can be allowed to file a defence . The applicant contends that he purchased plot No. 482 from one Bernard Migosi Kamanda on 29th May 2009. Upon purchase of the plot, he was issued with a certificate of ownership by Muungano Youth Self Help Group. The applicant has since erected a permanent structure on the plot he purchased.
6. The applicant contends that on 29th March 2017 he learnt through the plaintiff/respondent's advocates that his plot was subject of the proceedings in this case and that judgement had been entered on 20th June 2012. It was agreed that the applicant was to ascertain whether his plot was within the suit property. The applicant has since ascertained that his plot is within the suit property. He now contends that he was not notified of the filing of this suit; that the respondent should have advertised in the press so that third parties who were on the suit property could come up. He therefore prays that the judgement herein be set aside so that he can defend himself.
7. The respondent has opposed the applicant's application based on grounds of opposition filed on 16th November 2017 and replying affidavit sworn on 16th October 2017 and filed in court on 16th November 2017. The respondent contends that the application by the applicant is incompetent and is an abuse of the process of the court; that the applicant acquired the plot from the second defendant during the pendency of this case and he is therefore caught up by the doctrine of lis pendens; that a party can only be enjoined in proceedings which are pending and not where a judgement has been entered and that the court is functus officio judgement having been delivered on 20th June

2012.

8. The Court directed parties to put in written submission in respect of the application. The directions were given on 24th January 2018. As at the time of writing this ruling, it is only the plaintiff/respondent who had filed its submissions. I have carefully gone through the applicant's application as well as the opposition to the same by the plaintiff/respondent. I have also considered the submissions by the plaintiff/respondent. The issues which emerge for determination are firstly whether the applicant should be enjoined in these proceedings as an interested party. Secondly whether the judgement herein should be set aside.

9. On the first issue, it is important to note that this suit was filed on 24th December 2007. The applicant purchased plot 482 from Bernard Migosi Kamanda on 29th May 2009. This Bernard Migosi Kamanda is the same person known as Robert Migosi Kamanda who is the second defendant herein. The second defendant whom I shall hereinafter refer to as Kamanda sold plot 482 to the applicant on 29th May 2009 while this suit was pending. Other than filing a replying affidavit to the plaintiff's application for injunction against him, he did not bother to file a defence in this case because he knew that he had already sold his portion of the suit property to the applicant.

10. There is no way the plaintiff/respondent would have sued the applicant in 2007 because the applicant had by then not acquired the plot. The applicant's argument that the plaintiff /respondent should have advertised the filing of the suit in the papers has therefore no basis. Even after the applicant acquired plot 482 the plaintiff/respondent had no obligation to enjoin him. The applicant acquired plot 482 from Kamanda pendente lite i.e when there was a pending litigation and is therefore bound by the doctrine of lis pendens. In the case of William Ole Nabaala Vs Attorney General & 9 others (2015) eKLR Justice Angote referred to another case he had dealt with being Malindi ELC No 55 of 2011 between Carol Silcok Vs Kassim Sharrif Mohammed where he quoted the case of Bellenny Vs Sabine (1857) 1 Dej 566 at 584 where Turner LJ held as follows:-

“ where a litigation is pending between the plaintiff and the defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigation parties but also on those who derive title under them by alienating pending the suit whether such alienees had or had no notice of proceedings. If that were not so, there could be no certainty that the proceedings would ever end.....”

11. The applicant acquired plot 482 from Kamanda who was litigating in this suit. The plaintiff/respondent therefore had no obligation to enjoin him in the suit as the applicant was not the registered owner of plot 482 which he purported to acquire from Kamanda. For the sake of finality of litigation the applicant cannot be enjoined in these proceedings as he has been caught by the doctrine of lis pendens.

12. The applicant is seeking to be enjoined in these proceedings after entry of judgment. I do not think that the applicant may not have had wind of the litigation which was pending in court. This is more so given the fact that Kamanda purported to sell him the plot while the case was still pending in court . It is not possible that the applicant came to know of the case for the first time in 2017 a period of over 8 years since he purchased the plot.

13. Order 1 Rule 14 of the Civil Procedure Rules is clear that an application for joinder has to be made at any time before trial. Even order 1 Rule 10(2) of the Civil Procedure Rules contemplates that an application for joinder of a party can be made where proceedings are pending. In JMK Vs M W M and another (2015) eKLR the court of appeal judges had this to say regarding order 1 Rule 10(2).

“ We would however agree with the respondent that order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sakar's Code (supra) quoting as authority decisions of Indian Courts, on the provision, express the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the court of appeal of Tanzania while considering the equivalent of order 1 Rule 10(2) of our Civil Procedure Rules in Tanga Gas Distributors Ltd vs Said and others (2014) EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before or during the trial; that it can be done even after judgement where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable ;and that a party can even be added at the appellate stage”.

14. In the present case, judgement was delivered on 20th June 2012, costs of the suit have been taxed . Execution of the decree is ongoing. There is therefore nothing remaining in this suit which would require the applicant to be added as a party to the proceedings. I therefore find that the applicant cannot be enjoined in this suit at this stage.

15. On the second issue as to whether judgement should be set aside I say that it will be superfluous to consider that issue in view of the finding on joinder hereinabove. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this 4th day of **April, 2018**.

E.O .OBAGA

JUDGE

In the presence of;-

Mr Kioko for Mr Mutua for intended interested party

Mr Shivachi for Mr Ombati for Plaintiff

Court Assistant: Kevin

E.O .OBAGA

JUDGE