



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 401 OF 2017

LEONARD ROIPA PASHA.....PLAINTIFF

VERSUS

ELIJAH TENDE OLE KULA.....1ST DEFENDANT

JOSEPH NKOSHEHE TOMBO.....2ND DEFENDANT

TIMA OLE MPAASHE.....3RD DEFENDANT

MRS RAHAB NYANGENA.....4TH DEFENDANT

AND

TIGER FARM (ISENYA) LIMITED.....1ST INTERESTED PARTY

PRINCIPLES STYLES LIMITED...2ND INTERESTED PARTY/APPLICANT

RULING

What is before Court for determination is the 2nd Intended Interested Party's application dated the 27th February, 2018 brought pursuant to Article 40 of the Constitution; Section 1A of the Civil Procedure Act; Order 1 Rule 10(2), Order 22 rule 22, Order 45 rule 1 and Order 51 of the Civil Procedure Rules; and Section 19 of the Environment and Land Court Act and all the other enabling provisions of the law.

The application seeks for the following orders:

1. Spent
2. That Principles Styles Ltd be enjoined in these proceedings as the 2nd Interested Party.
3. That pending the hearing and determination of this application, this Honourable Court be pleased to stay execution of its orders made on 27th September, 2017.
4. That the court orders made on the 27th September, 2017 and any earlier orders regarding the establishment of the alleged uncertain or disputed boundaries be reviewed accordingly.
5. That the costs of this application be borne by the Plaintiff/Respondent.

The application is based on the grounds which in summary is that Principles Styles Limited is the registered proprietor of land parcel number KAJIADO/ KAPUTIEI NORTH/ 2334 hereinafter referred to as the 'suit property'. The suit property is subject to a First Charge to Development Bank Limited for the sum of Kshs. 8 million and a Further Charge to the same bank for Kshs. 2 million. The Applicant has learnt that the Court issued an order on 27th September, 2017 for the determination and establishment of the position of the boundaries for land parcels numbers KAJIADO/ KAPUTIEI NORTH/ 20, 917, 712 AND 705 respectively. The Applicant is aggrieved by the said order as the same shall lead to adverse encroachment on its property and it has not participated in proceedings that gave rise to the present orders. That the presence of the Applicant is necessary to enable the court effectually and completely adjudicate the suit herein.

The application is supported by the affidavit of FELISTUS MUKAMI GATONYE who is a Director to the Applicant herein where she avers

that the Applicant acquired the suit property for valuable consideration and a title deed was issued to it on 30th September, 2015. She claims prior to the purchase, due diligence was carried out through a search at the Lands Registry, Kajiado on 23rd July, 2015 which search revealed the said property belonged to one JANE NJOKI NJUNGE and it was free from any encumbrances. She contends that prior to the transfer of the suit property to the Applicant, the vendor pointed out to them the boundary including the beacons as per the Mutation Form attached. She insists as per the official search No. 39/22 conducted on 22nd January, 2018, it confirmed that the Applicant is the proprietor of the suit land. She avers that land parcel numbers KAJIADO/ KAPUTIEI NORTH/ 20, 917, 712 and 705 no longer exists as the same have been variously partitioned. Further, that when the Applicant bought the suit property, no information relating to the dispute of boundaries was brought to its attention and that during the purchasing process, there was no adverse matter affecting the property. She confirms that the suit property is a subdivision of KAJIADO/ KAPUTIEI NORTH/ 1914 which itself is a subdivision of the parcels that the court has made an order in respect of. She reiterates that the Applicant has not been a party to previous proceedings that gave rise to the present orders and as such, the said orders should be set aside or reviewed accordingly. Further, that the Applicant is entitled to have its property protected and should thus be enjoined in this suit to enhance a fair hearing and just determination of the matter.

The Plaintiff LEONARD ROIPA RORIAN PASHA opposed the application and filed Grounds of Opposition as well as a replying affidavit where he deposed that the dispute in respect of land parcels numbers KAJIADO/ KAPUTIEI NORTH/ 20, 917, 721 and 705 was first raised with the Kajiado District Land Registrar who determined the same on 11th May, 1990. He explains that as a result of the findings of the Kajiado District Land Registrar, his late father DAVID RORIAN OLE PASHA filed a Civil Case No. 5363 of 1990 in the Nairobi High Court against the Defendants herein challenging those findings and sought the Court's intervention to determine the matter through rectification of the boundaries. Further, that the 1st, 2nd, 3rd and 4th Defendants herein were parties in that case and raised a Preliminary Objection contesting the said suit and in a ruling dated the 15th July, 1997 ruled against them. He contends that his father died on 9th February, 2001 before the Nairobi HCC NO. 5368 of 1990 was finalized and the suit hence abated. He states that he filed the instant case because in 1999 his father had allocated to him parts of his parcel of land KAJIADO/ KAPUTIEI NORTH/ 20 that borders the Defendants herein and his said portion became KAJIADO/ KAPUTIEI NORTH/ 6687 which he later subdivided without interfering with the disputed area. He avers that the Applicant bought a portion of land in the disputed area around 2015 from a member of the 3rd Defendant's family while the dispute had been lodged first with the Kajiado District Land Registrar in 1990 and thereafter in the High Court of Kenya on 16th October, 1990 in respect of the same parcel of land, hence the Applicant cannot claim it was not aware of this suit. He insists it was the duty of the 3rd Defendant to ensure that either himself or a member of his family did not sell to an innocent person any part of the land that he had found to have unlawfully acquired or is still in dispute. He reiterates that failure of the 3rd Defendant to disclose to the Applicant any defects in his title relating to the parcel of land that he was selling to the Applicant, cannot bar him from recovering all land wrongfully taken him or his late father. Further, that the Applicant has not shown any good reason for not making the instant application earlier and the beacon has already been fixed on 8th November, 2017 by the District Land Registrar Kajiado, as directed by the Court. He states that no sufficient reasons have been advanced by the Applicant to warrant a review of the orders of the Court dated the 27th September, 2017 and any other earlier orders affecting the fixing of boundaries in respect of the parcels of land mentioned therein. He further reiterates that he has not sold any of his portions of land to the interested parties, hence they should take the persons who sold them their respective portions to court and claim them and should not encroach on the disputed land.

On the 23rd May, 2018, both the Applicant and the Plaintiff submitted on the instant application where they reiterated their respective claims, which arguments I have considered.

Analysis and Determination

Upon perusal of the interested party Notice of Motion application dated 27th February, 2018 including the supporting and replying affidavits plus the annexures thereon as well as the Grounds of Opposition, the following are the issues for determination:

- Whether PRINCIPLES STYLES LIMITED should be enjoined in this suit
- Whether there should be a stay of execution of the Orders of the Court granted on 27th September, 2017.
- Whether Orders of the Court granted on 27th September, 2017 should be reviewed and or set aside.

On the question as to whether PRINCIPLES STYLES LIMITED can be enjoined in this suit, it contends that it is a registered proprietor of the suit property, was not aware of the dispute herein, and will be adversely affected by the Orders of the Court. The Plaintiff opposed the application and insisted that the application does not disclose a reasonable cause of action, it may delay his realization and enjoyment of the fruits of the Orders of the Court. Further, that no reasonable grounds have been given to warrant the setting aside of the orders granted on 27th September, 2017.

I note the Applicant admits that the suit property is a resultant subdivision of the parcels of land where the Court had made an order over. I note none of the Defendants as well as the 1st Interested party is opposing the application by the proposed Interested Party. Further, that the Interested Party bought the suit land from a family member of the 3rd Defendant when the suit herein was pending. It is unfortunate that the Applicant was a purchase for value and yet the vendor failed to inform him of the pending suit herein.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

'(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 bona fide 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.'

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.***'

In relying on the facts as presented, Order 1 Rule 10 of the Civil Procedure Rules and Judicial Authority cited above, it is evident that the presence of the 2nd Intended Interested party is necessary to enable the court effectually and completely adjudicate upon this suit. ***I find that it is in the interests of justice and proper if PRINCIPLES STYLES LIMITED was joined in this suit., since*** the ultimate orders and decree made in the suit herein will not be enforced without its presence in the matter. I disagree with the Plaintiff that they are not necessary to be part of the suit as they intend to delay the Plaintiff's enjoyment of the fruits of the Orders of Court. I find that it would be pertinent if PRINCIPLES STYLES LIMITED was enjoined in the suit to enable the Court arrive a proper determination of the suit herein and no prejudice will be suffered by any party if they were enjoined in the suit.

As to whether the Court should review/set aside and or stay execution of the Order granted on the 27th September, 2017, I note the Applicant filed this application almost five months after the said order. Further, it is the Plaintiff's contention that the District Land Registrar Kajiado had already proceeded to the disputed land in November, 2017 and placed a beacon thereon, which averments were not controverted by the Applicant herein. In the circumstances, I find the prayer for review as well as for stay of execution have been overtaken by events and will decline to grant the two prayers as sought.

It is against the foregoing that I allow prayer No. 2 only of the application dated 27th February, 2018.

The costs of this application will be in the cause.

I so order.

Dated signed and delivered in open court at Kajiado this 17th day of July, 2018.

CHRISTINE OCHIENG

JUDGE