



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 165 OF 2016**

**IRINE MWANGO ANASI**

**(Suing as the legal administratrix of the Estate of**

**ABIGAEL KEMUNTO OPANDE – Deceased) ..... PLAINTIFF**

**VERSUS**

**JARED TOM NGITI OPANDE..... 1<sup>ST</sup> DEFENDANT**

**STEVE NYAGAKA ORORA ..... 2<sup>ND</sup> DEFENDANT**

**EEDI KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR, KISII COUNTY..... 4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**INKA HOLDINGS LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. On 17<sup>th</sup> November 2017 the 3<sup>rd</sup> defendant filed a chamber summons application dated 31<sup>st</sup> October 2017 expressed to be made under Order 1 Rule 10(2) (4) and (25) of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act. In the application the 3<sup>rd</sup> defendant sought the following orders:

- 1. That the name of INKA HOLDINGS LIMITED be enjoined in the suit as the 6<sup>th</sup> defendant.**
- 2. That any such orders as this honourable court may deem fit to issue.**
- 3. That the costs of the application be provided for.**

2. The application was supported on the grounds set out on the face of the application and on the supporting affidavit sworn by one Dipen N. Dodhia, a director of the 3<sup>rd</sup> defendant on 31<sup>st</sup> October 2017. It was the 3<sup>rd</sup> defendant's contention that the 6<sup>th</sup> defendant was a proper and necessary party to the suit having been an intermediate party in the change of ownership of the property, the subject of suit.

3. The firm of Nyandieka & Associates who hitherto had appeared for the 2<sup>nd</sup> defendant on 12<sup>th</sup> January 2018 filed a notice of appointment of advocate and a statement of grounds of opposition by the proposed 6<sup>th</sup> defendant and a replying affidavit by one Yunita Akumu a director of the proposed 6<sup>th</sup> defendant. The proposed 6<sup>th</sup> defendant contended that the court lacked the jurisdiction to entertain the intended claim by the 3<sup>rd</sup> defendant against the proposed 6<sup>th</sup> defendant upon joinder. The proposed 6<sup>th</sup> defendant averred that the 3<sup>rd</sup> defendant/applicant had not come to court with clean hands and that the application had not been made in good faith.

4. The 3<sup>rd</sup> defendant/applicant's application was fixed for hearing on 15<sup>th</sup> January 2018. The court directed that the application be argued by way of written submissions and to be mentioned on 19<sup>th</sup> February 2018 for further directions. On 19<sup>th</sup> February 2018 all the parties save for the 4<sup>th</sup> and 5<sup>th</sup> defendants were represented. Mr. Kiprotich advocate appeared for the 3<sup>rd</sup> applicant. Mr. Ochwangi advocate for the plaintiff indicated that they were not opposed to the application for joinder. Mr. Mose Nyambega advocate held brief for Nyandieka advocate and sought extension of time to file submission on behalf of the proposed 6<sup>th</sup> defendant which they had not filed as earlier directed on 15<sup>th</sup>

January 2018. The court directed that the 3<sup>rd</sup> applicant's application be heard on 12<sup>th</sup> March 2018.

5. The matter was listed for the hearing of the 3<sup>rd</sup> defendant's application on 12<sup>th</sup> March 2018. The plaintiff and the 3<sup>rd</sup> defendant were represented by their respective advocates but on the day there was no representation for the 2<sup>nd</sup> defendant and the proposed 6<sup>th</sup> defendant. The court upon hearing the advocates who were present delivered the following ruling on the 3<sup>rd</sup> defendant's application:-

**“The notice of motion dated 31<sup>st</sup> October 2017 by the 3<sup>rd</sup> defendant seeks to enjoin the intended 6<sup>th</sup> defendant as a party. I have considered the application and I am persuaded the intended 6<sup>th</sup> defendant is a necessary party whose presence is necessary to enable the real issues to be fully determined. The 3<sup>rd</sup> defendant seeks to claim against the intended 6<sup>th</sup> defendant as a co-defendant and he can only do so if the 6<sup>th</sup> defendant is enjoined in the suit. I exercise my discretion to allow the intended joinder of the 6<sup>th</sup> defendant as a party to these proceedings. The 3<sup>rd</sup> defendant/applicant is granted leave to amend his defence appropriately. The 6<sup>th</sup> defendant to be served with the pleadings filed herein by the 3<sup>rd</sup> defendant within the next 21 days from today. Matter to be mentioned on 10<sup>th</sup> April 2018 for further directions. The costs of the application dated 31<sup>st</sup> October 2017 will be in the cause.”**

6. Following the delivery of the aforesaid ruling the 6<sup>th</sup> defendant filed the Notice of Motion dated 19<sup>th</sup> March 2018 expressed to be made under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The application inter alia seeks the following orders:-

- 1. That this honourable court be pleased to review and set aside its order given on 12<sup>th</sup> March 2018 and issued on 13<sup>th</sup> March 2018 by this honourable court.**
- 2. That the 3<sup>rd</sup> defendant/respondent's chamber summons application dated 31<sup>st</sup> October 2017 be heard inter partes.**
- 3. Costs of the application be costs in the cause.**

The application was supported on the following grounds set out on the body of the application and on the affidavit sworn in support thereof by Mr. Alfred Nyandieka advocate for the proposed 6<sup>th</sup> defendant.

- 1. The applicant is aggrieved by this honourable court's orders of 12<sup>th</sup> March 2018.**
- 2. The applicant was not heard on the application leading to the orders of 12<sup>th</sup> March 2018 due to an inadvertent mistake of its advocate on record.**
- 3. There is new and important matter that explains the failure of the applicant to attend court on the 12<sup>th</sup> March 2018 to be heard.**
- 4. There is an error apparent on the face of the record.**
- 5. There are other sufficient reasons for review.**

7. The plaintiff through her advocate, Mr. Philemon Ochwangi filed replying affidavit sworn on 19<sup>th</sup> March 2018 in opposition to the 6<sup>th</sup> defendant's application while the 3<sup>rd</sup> defendant through its director Dipen N. Dodhia also filed a replying affidavit in opposition to the application sworn on 3<sup>rd</sup> April 2018.

8. On 10<sup>th</sup> April 2018 the court gave directions that the 6<sup>th</sup> defendant's application be heard and be disposed first before any proceedings are taken in the case and further directed that the application be canvassed by way of written submissions. The applicant (6<sup>th</sup> defendant), the plaintiff and the 3<sup>rd</sup> defendant filed their respective submissions. I have perused and considered the 6<sup>th</sup> defendant's application dated 19<sup>th</sup> March 2018 together with the affidavits sworn in support and in reply thereto including the annexures thereof. I have also considered the written submissions by the parties and the authorities referred to the court by the parties and the twin issues that arise for determination are as follows:-

**(i) Firstly, whether the court properly proceeded to hear the 3<sup>rd</sup> defendant's application on 12<sup>th</sup> March 2018 when the same was scheduled for hearing and if so, whether in allowing the joinder of the 6<sup>th</sup> defendant, the court exercised its discretion judiciously; and**

**(ii) Secondly, whether the 6<sup>th</sup> defendant has satisfied the conditions for review and/or has demonstrated sufficient cause to warrant the court to review or set aside its ruling/order of 12<sup>th</sup> March 2018.**

9. On the first issue there can be no contest that the 3<sup>rd</sup> defendant's application dated 31<sup>st</sup> October 2017 was scheduled for hearing on 12<sup>th</sup> March 2018. I have earlier on in this ruling given a rundown of the scheduling of the application for hearing on 15<sup>th</sup> January 2018 when the same was directed to be mentioned on 19<sup>th</sup> February 2018 to confirm compliance with the directions given respecting the disposal of the application. On 19<sup>th</sup> February 2018, Mr. Nyandieka advocate for the 2<sup>nd</sup> and the proposed 6<sup>th</sup> defendant was properly represented by Mr.

Mose Nyambega advocate who sought extension of time for the 6<sup>th</sup> proposed defendant to file his submissions which was granted. It is at that court sitting the 3<sup>rd</sup> defendant's application was fixed for hearing on 12<sup>th</sup> March 2018. The matter was appropriately listed for the hearing of the 3<sup>rd</sup> defendant's application on 12<sup>th</sup> March 2018. Mr. Nyandieka advocate was not present and was not represented on the date. Equally he had not filed the response submissions on behalf of the proposed 6<sup>th</sup> defendant which he apparently filed on 13<sup>th</sup> March 2018 after the scheduled date of hearing.

10. The court on the basis of the foregoing was perfectly entitled to proceed with the hearing of the 3<sup>rd</sup> defendant's application on 12<sup>th</sup> March 2018 as the date was given in court in the presence of all the interested and affected parties and there was therefore no issue as to whether or not all the parties had been served. Thus the issue would be whether the court having heard the parties before it and on the basis of the material placed before it, there was justification to grant the 3<sup>rd</sup> defendant's application for the joinder of the 6<sup>th</sup> proposed defendant as it did.

11. Order 1 Rule 10(2) makes provision for joinder of parties and it provides thus:-

**(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.**

12. It is clear that under the above provision the court has unfettered discretion to order the joinder of a party at any stage of the proceedings either on its own motion and/or on application by a party. The principal consideration before an order for joinder of a party to the proceedings is whether the presence of such a party is necessary in order to enable the court to effectually and completely adjudicate and settle all the issues arising in the suit. Thus, where the court is of the opinion that there may be issues and/or questions that such a party would be well placed to respond to and/or answer to enable the court to get a clearer picture of the issues and/or provide a basis for the court to effectually and completely adjudicate upon the issues, the court will order that such a party be enjoined to the proceedings.

13. In the present matter the 3<sup>rd</sup> defendant has stated that it acquired land parcel **Nyaribari Chache/Keumbu/3303, 3304, 3305, 3306, 3307 and 3308** which were all registered in the name of Inka Holdings Limited, the 6<sup>th</sup> proposed defendant. The six parcels of land were all consolidated to form land parcel number **Nyaribari Chache/Keumbu/ 3728** now registered in the name of the 3<sup>rd</sup> defendant. The plaintiff in the present suit claims that the land parcels **Nyaribari Chache/ Keumbu/3303, 3304, 3305, 3306, 3307 and 3308** were fraudulent subdivisions from land parcel **Nyaribari Chache/Keumbu/ 3017** owned by and registered in the name of Abigael Kemunto Opande (now deceased) represented in this suit by the plaintiff as the administrator of the estate. The plaintiff in the suit contends land parcel **Nyaribari Chache/Keumbu/3017** was subdivided fraudulently when there was a subsisting prohibitory order of injunction. The plaintiff seeks the cancellation of the subdivisions and the restoration of the original land parcel **Nyaribari Chache/Keumbu/3017**. In effect the plaintiff wants the title created following the consolidation of the subdivisions being **LR No. Nyaribari Chache/Keumbu/3728** registered in the 3<sup>rd</sup> defendant's name cancelled.

14. The 3<sup>rd</sup> defendant filed a defence to the suit by the plaintiff dated 11<sup>th</sup> November 2016 where he averred that it purchased the suit properties after carrying out appropriate due diligence and that the properties were clear of any encumbrances. The 3<sup>rd</sup> defendant denied any knowledge of and/or being party to any fraudulent dealings leading to the subdivisions complained of by the plaintiff maintaining that it purchased the property for value without notice of any defect in the title. The 3<sup>rd</sup> defendant further pleaded that the properties have been amalgamated and now form one parcel **LR No. Nyaribari Chache/Keumbu/3728**.

15. The 3<sup>rd</sup> defendant acknowledging that its title to the various parcels of land prior to the amalgamation, acquired from the 6<sup>th</sup> defendant, were under challenge opted to file the instant application so that the 6<sup>th</sup> defendant is enjoined as a party to give account as to how it acquired ownership of the properties it sold to the 3<sup>rd</sup> defendant. It is the 3<sup>rd</sup> defendant's assertion that having purchased the property from the 6<sup>th</sup> defendant and the title of that property before the sale to the 3<sup>rd</sup> defendant being under challenge by the plaintiff, the 6<sup>th</sup> defendant is a necessary party so that it could offer explanation as to how it came to own the property. The 3<sup>rd</sup> defendant further contends in the event the title the 6<sup>th</sup> defendant held before the sale is successfully impugned by the plaintiff, the 3<sup>rd</sup> defendant would be entitled to make a cross claim from the 6<sup>th</sup> defendant. It is in those circumstances that the 3<sup>rd</sup> defendant avers that the 6<sup>th</sup> defendant is a necessary party and relevant party to enable all the issues and questions that arise in the present suit to be adjudicated finally and completely.

16. The root of the title that the 3<sup>rd</sup> defendant holds in regard to the suit property **LR No. Nyaribari Chache/Keumbu/3728** can be traced to the parcels of land namely **Nyaribari Chache/Keumbu/3304 – 3308** which the 3<sup>rd</sup> defendant purchased from the 6<sup>th</sup> defendant before causing the same to be amalgamated to form land parcel **Nyaribari Chache/ Keumbu/3728**. The plaintiff claims land parcels **Nyaribari Chache/ Keumbu/3304-3308** were fraudulently created by subdividing of land parcel **Nyaribari Chache/Keumbu/3017** which was registered in the name of Abigael Kemunto (deceased) now represented by the plaintiff as administrator of the estate.

17. The proposed 6<sup>th</sup> defendant in the replying affidavit sworn in opposition to the 3<sup>rd</sup> defendant's application admitted that it was the registered owner of land parcels **Nyaribari Chache/Keumbu/3304 – 3308** before selling them to the 3<sup>rd</sup> defendant. The 6<sup>th</sup> defendant averred that the 3<sup>rd</sup> defendant following the purchase took possession of the properties and subsequently amalgamated them to the current title **Nyaribari Chache/Keumbu/3728**. The 6<sup>th</sup> defendant further avers that the sale and transfer of the property to the 3<sup>rd</sup> defendant was successfully completed and there was no dispute at all that arose and/or was notified to the 6<sup>th</sup> defendant respecting the sale. The 6<sup>th</sup> defendant avers that the plaintiff's suit only raises claims of fraud against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants who are separate and distinct from the 6<sup>th</sup> defendant and that no claim of fraud is alleged against the 3<sup>rd</sup> defendant by the plaintiff.

18. The 6<sup>th</sup> defendant further asserts that the 3<sup>rd</sup> defendant's application is not brought in good faith as the agreement entered into between

the 3<sup>rd</sup> defendant and the 6<sup>th</sup> defendant provided that any disputes arising out of the agreement would be referred to arbitration in terms of Clause 23 of the agreement and therefore the court lacked the jurisdiction to entertain such a claim as is contained in the notice of claim against co-defendant marked as exhibit “DND-11”.

19. The court upon appraisal of the material placed before it by the 3<sup>rd</sup> defendant in support of its application and the 6<sup>th</sup> defendant’s replying affidavit sworn in opposition was satisfied that there was necessity to enjoin the 6<sup>th</sup> defendant as a party to these proceedings so that all the issues in dispute in the suit may be completely adjudicated. The consideration the court made was that the property the 3<sup>rd</sup> defendant purchased from the 6<sup>th</sup> defendant was being challenged under grounds of fraud perpetrated by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants from whom the 6<sup>th</sup> defendant acquired the property from. There appears to have been a series of transactions which were initiated through the filing of Keroka SRMCC Succession Cause No. 4 of 2012 where the 1<sup>st</sup> defendant was issued letters of administration to the estate of Abigael Kemunto Opande (deceased). The letters of administration issued to the 1<sup>st</sup> defendant were revoked on 7<sup>th</sup> April 2016 vide a ruling made in Kisii HC Misc. Application No. 187 of 2012. Before the grant was revoked, the same had been utilized to cause the distribution of the deceased estate notwithstanding that the High Court had on 23<sup>rd</sup> May 2012 in the said Kisii HC Misc. Application No. 187 of 2012 issued a prohibitory order of injunction in the following terms:-

**“There be and is hereby granted a prohibitory order of injunction and/or conservatory order restraining the respondent from disposing of, selling and/or appropriating the assets of Abigael Kemunto Opande, the deceased herein, more particularly, LR No. Nyaribari Chache/Keumbu/3017, in any manner whatsoever and/or howsoever, pending the hearing and determination of the summons herein.”**

20. Notwithstanding the subsistence of the order of injunction the original land parcel **Nyaribari Chache/Keumbu/3017** was subdivided and the subtitles transferred out to third parties after the injunction was allegedly illegally removed. The subdivided titles were initially transferred to the proposed 6<sup>th</sup> defendant by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in October 2014 and the 6<sup>th</sup> defendant in turn sold and transferred the subtitles to the 3<sup>rd</sup> defendant in March 2016 as per the abstracts of title and search certificates annexed as exhibits. These are the transactions that have been put to question by the plaintiff and in my view the proposed 6<sup>th</sup> defendant would not extricate itself merely by saying that its sale transaction with the 3<sup>rd</sup> defendant was completed and it gave title to the 3<sup>rd</sup> defendant. In the suit by the plaintiff, the issue does arise whether the 6<sup>th</sup> defendant had good title which it could pass to the plaintiff. The 6<sup>th</sup> defendant would need to establish that the title it passed to the 3<sup>rd</sup> defendant was good. The 3<sup>rd</sup> defendant would only look upon the 6<sup>th</sup> defendant to offer that explanation as the 3<sup>rd</sup> defendant in its dealing in regard to the suit property never dealt with the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 3<sup>rd</sup> defendant as the present holder of the titles would be entitled to seek answers to the allegations of fraudulent dealing from the party with whom it dealt.

21. In the premises, it is therefore my view that the 6<sup>th</sup> defendant would be a necessary party in these proceedings and I find no fault in the exercise of my discretion to have the 6<sup>th</sup> defendant enjoined in these proceedings. It is thus my finding that the exercise of my discretion on 12/3/2018 to order the enjoinder of the 6<sup>th</sup> defendant in this case was justified and was judicious.

22. On whether the applicant has satisfied and/or demonstrated any grounds upon which the court could review, vary and/or set aside the order for joinder of the 6<sup>th</sup> defendant as a party made on 12<sup>th</sup> March 2018 my answer is in the negative. Order 45 Rule 1 of the Civil Procedure Rules pursuant to which the applicant’s application is brought provides:-

**45(1) 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.”**

23. For an applicant for review to succeed in an application for review such an applicant must demonstrate or show:-

- (i) There has been discovery of important matter or evidence which was unavailable at the time the order and/or decree was made; or**
- (ii) There was some mistake or error apparent on the face of the record; or**
- (iii) There is some other sufficient cause;**
- (iv) The application is made without unreasonable delay.**

24. In the present case the 6<sup>th</sup> defendant’s advocate states that his office inadvertently misdiarised the date the application was to be heard as 13<sup>th</sup> March 2018 instead of 12<sup>th</sup> March 2018. That would only be a mistake on the part of counsel which would certainly not qualify as a ground to warrant a review but perhaps one to seek to set aside an order that may have been obtained ex parte. In the present case, I do not consider that the proceedings of 12<sup>th</sup> March 2018 were ex parte as all the parties had notice and had filed their respective pleadings in regard

to the 3<sup>rd</sup> defendant's application dated 31<sup>st</sup> October 2017 save the 6<sup>th</sup> defendant had not filed its written submissions.

25. The decision to order the 6<sup>th</sup> defendant to be enjoined as a party did not turn on the submissions filed by the parties but on the consideration of the pleadings and the material on record. The court was persuaded that the 6<sup>th</sup> defendant was a necessary party in the proceedings. Considering that under Order 10 Rule (2) of the Civil Procedure Rules the court can even order the enjoinder of a party *suo moto* even where no party has made an application, the court was fortified that it was the proper and right thing to do for the ends of justice to be met. The 6<sup>th</sup> defendant will suffer no prejudice as he will have the opportunity to file his defence as appropriate and make an answer to the cross action by the 3<sup>rd</sup> defendant.

26. The 6<sup>th</sup> defendant in its response to the application had contended that the dispute between it and the 3<sup>rd</sup> defendant arose from the agreement of sale between them that had an arbitration clause and hence the same could only be handled through arbitration as provided in the agreement and the court has no jurisdiction to entertain the same. The dispute in this suit does not arise from the contract of sale between the 3<sup>rd</sup> defendant and the 6<sup>th</sup> defendant as that contract was fully performed. The dispute predates the agreement between the 3<sup>rd</sup> defendant and the 6<sup>th</sup> defendant. The issues in the suit as I have pointed out elsewhere in this ruling question the authenticity of the titles the 6<sup>th</sup> defendant acquired from the 1<sup>st</sup> and 2<sup>nd</sup> defendants which he subsequently sold and transferred to the 3<sup>rd</sup> defendant. The court has the jurisdiction to determine those issues.

27. The upshot is that I find no merit in the 6<sup>th</sup> defendant's application dated 19<sup>th</sup> March 2018 and the same is hereby ordered dismissed with costs to the plaintiff and the 3<sup>rd</sup> defendant.

28. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 12<sup>TH</sup> DAY of OCTOBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

M/s Ollando for the plaintiff

Mr. Godia for Mutua for the 1<sup>st</sup> defendant

Mr. Godia for Nyandieka for the 2<sup>nd</sup> and 6<sup>th</sup> defendants

Mr. Kiprotich for the 3<sup>rd</sup> defendant

N/A for the 4<sup>th</sup> and 5<sup>th</sup> defendants

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**