



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 688 OF 2012

TIMOTHY ATAMBA ABOKI.....PLAINTIFF

VERSUS

ELIZABETH MMBONE MUSA.....1ST DEFENDANT

BENSON TOY MBBULIKA.....2ND DEFENDANT

SALIM KIPTANUI ROTICH.....PROPOSED 3RD DEFENDANT

ALEXANDER NATSE ANDEKA.....PROPOSED 4TH DEFENDANT

EZEKIEL MULUSA.....PROPOSED 5TH DEFENDANT

RULING

The proposed 3rd, 4th and 5th defendants have come to court seeking this court's leave that they be enjoined to this suit as co-defendants and that they be allowed to file defence in terms of the draft defence and that the plaintiff to file amended originating summons within 14 days of service of defence. The judgment entered in this case and all consequential orders that directly affect the applicants herein be varied and/or set aside.

The application is based on grounds that the applicants' inherent rights are being threatened and that they have genuine rights in the outcome of the case as they are in actual occupation of the land in issue and yet they were not named in the suit. They are directly affected by the judgment. They are faced with eviction as a result of the judgment. The applicants seek to be enjoined as defendants in the suit. The applicants seek to defend their interest. The application is supported by the affidavit of Salim Kiptanui Rotich that reiterates the grounds above stated.

Timothy Atamba Aboki, Decree holder filed a replying affidavit opposing the application and stating that the defendants have never stated having sold the land to somebody else. Moreover, that when the Deputy Registrar visited the suit land, none of the proposed defendants were in possession of the suitland. The only house on the land belonged to the defendants.

According to the respondent, when the suit was filed, none of the proposed defendants were on the land. Any purchase of land from the defendants was a violation of the consent order issued on 6.4.2011. According to the respondent, the proposed defendants could not have purchased land that was cautioned. The defendant by purporting to sell the land was violating the consent order issued on 6.4.2011.

When the Deputy Registrar visited the land, the 1st defendant denied having sold the land to Salim Kiptanui Rotich. The plaintiff states that the agreement attached are not valid as they have not been attended to.

The Decree holder states that the letters of the Surveyor and Chief are dated 18.6.2018 after judgment hence of no value. The agreements are nullities as there is no consent of the Land Control Board or application for the same within six months after the signing of the agreements.

Salim Kiptanui Rotich filed a supplementary affidavit stating that they were not issued with a notice of the intended site visit and that the defendants received a total of Kshs.2,000,000 for the sale of the property and that they have been in occupation of the suit property.

When the matter came for hearing, Mr. Kibii, learned counsel for the applicants submitted that the plaintiff who is the Decree holder has written to the proposed defendants to vacate the suit property and yet the proposed 3rd, 4th and 5th defendants are owners of the property. They purchased the property from the 1st defendant and are in actual possession and occupation. Though the Decree holder has a vesting order, he is not in occupation. The applicants entered land in 2010. There are six houses and Salim put up his house in 2010.

Mr. Ndege, learned counsel for the Decree holder submits that the proposed 3rd, 4, and 5th defendants are in possession now but were not in possession at the time of filing suit. The 1st defendant stated that when the Deputy Registrar visited the suit land that she had not sold the land to anyone including Salim Kiptanui Rotich. There was a consent order dated 6.4.2011 on how the Decree holder and judgment debtor were to utilize the land and not to sell. The learned counsel submits that Order 1 Rule 10(2) on joinder of parties can only be done during the pendency of the suit. The court is currently functus officio as it has rendered its judgment.

Mr. Kibii argues in response that under Section 13 of the Environment & Land Court Act, Article 48 and 50 of the Constitution of Kenya and overriding objective, the court has the power to re-open the proceedings.

I have considered the application, all affidavits on record and the rival submissions and do find that the applicants are seeking to be enjoined in the originating summons as defendants and not as the plaintiffs. An originating summons is premised on Order 37 of the Civil Procedure Rules, 2010. The applicants claim is based on adverse possession or purchase. The applicants have no joint title to the property as required by Order 37 of the Civil Procedure Rules and therefore cannot be Co-Defendants with the defendants in a suit based on adverse possession.

Order 37 rule 7 of the Civil Procedure Rules, 2010 provides for adverse possession thus an application under section 38 of the Limitation of Actions Act shall be made by originating summons. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. The court shall direct on whom and in what manner the summons shall be served

Orders 37 and 38 are premised on Section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. This section provides for limitation on actions to recover land thus:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

Section 37 provides for the application of the Act to registered land thus that the act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300), in the same manner and to the same extent as it

applies to land not so registered, except that—

a. where, if the land were not so registered, the title of the person

registered as proprietor would be extinguished, such title is not

extinguished but is held by the person registered as proprietor for

the time being in trust for the person who, by virtue of this Act, has

acquired title against any person registered as proprietor, but without

prejudice to the estate or interest of any other person interested in the

land whose estate or interest is not extinguished by this Act;

Section 38 of the Limitation of Actions Act provides for Registration of title to land or easement acquired under Act thus;-

(1) Where a person claims to have become entitled by adverse possession

to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

The proposed defendants can only be plaintiffs in this matter as their claim is against the defendants for having purchased the property and yet they have not received their titles. A claim based on adverse possession can only be lodged against a title holder.

It would be imprudent to enjoin the proposed 3rd, 4th and 5th defendants and yet they are not title holders. Moreover, they have not been in possession for more than 12 years. What would be the claim by the plaintiff against the proposed defendants? On this point alone, the application to be enjoined fails.

This court further finds that the letter by Wahome Werunyu, licenced land surveyor, which is handwritten, stamped, dated 18.6.2018 is written after the judgment is not helpful. It does not state when the survey and subdivision was done. Moreover, the plaintiff, who is the proprietor of the land subject to the judgment of this court has kept silent on the issue of subdivision. In fact, when the Deputy Registrar visited the land, she denied having sold the suit land. The proposed defendants could not have demarcated and subdivided their land before purchasing the same.

The letters by the chief, Kamobo Location dated 18.6.2018 was also written after judgment and therefore, not helpful. He is not sure of the exact date when purchasers entered the land. He states generally that they have lived in parcel number Nandi/Kamobo/358 since the year 2010. It is not clear whether it is the year 2010 or the year 2011.

The sale agreement between the Judgment debtor and proposed 1st defendant was signed on 29.9.2011, when this matter had been filed and after consent entered between the Decree holder and Judgment debtor on 6.4.2011.

The same applies to the agreement between the Judgment debtor and Alexander Natse Andeka dated 9.8.2013 and 20.4.2012 and 23.04.2014 and Ezekiel Mulusa dated 27.11.2014. All these agreements were entered when the suit was pending and after the consent order

This offends the doctrine of *lis pendens*. The doctrine of *lis pendens* is well captured by Turner L. J, in ***Bellamy vs Sabine [1857]*** 1 De J 566 thus: -

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of ***Mawji vs US International University & another [1976] KLR 185***, Madan, J.A. stated thus: -

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed inter alia that: -

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

The upshot of the above is that the application lacks merit and is dismissed with costs to the Decree holder.

Dated and delivered at Eldoret this 27th day of November, 2018.

A. OMBWAYO

JUDGE