



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 243 OF 1987

ABSOLOM OPINI MEKENYE.....PLAINTIFF

VERSUS

JAMES OBEGIDEFENDANT

RULING

1. I have before me for ruling the plaintiff's application dated 30th January 2018. The application is expressed to be brought under Order 40, Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act and Section 5 of the Judicature Act. Principally the application sought an order for the eviction of the defendant, 1st interested party and the 3rd interested party from the plaintiff's parcel of land measuring 25feet by 130 feet known as title number **Nyaribari Chache/Boburia/13908**. The plaintiff further sought an order citing the defendant, 1st interested party and the 3rd interested party for contempt for disobeying the orders of the court issued on 5th May 2011 and their committal to civil jail for a period of 6 months.

2. The application is grounded and predicated on the grounds set out on the face of the application. Notably, the plaintiff/applicant asserts that the court rendered its judgment on 16th June 2009 and decreed that the plaintiff be issued with a title for a portion measuring 25feet by 130feet which was to be exercised out of land parcel number **Nyaribari Chache/Boburia/5972**. The judgment was duly implemented and a title deed was issued to the plaintiff as per the decree. The plaintiff asserts that although the surveyor delineated the plaintiff's land on the ground and the plaintiff fenced his portion as per the boundaries shown by the surveyor the defendant, the 1st and 3rd interested parties destroyed the fence and have encroached on the plaintiff's land portion and have proceeded to erect structures thereon thereby denying the plaintiff of the use of the land decreed to him.

3. The plaintiff's application was further supported on the supporting affidavit sworn by Absolom Opini Mekenye the plaintiff/applicant dated 30th January 2018.

4. The defendant, James Obegi Kingoina in opposition to the plaintiff's application swore a replying affidavit dated 16th February 2018. In the replying affidavit the defendant has raised a myriad of issues. The defendant has deponed that land parcel **Nyaribari Chache/B/B/Boburia/5972** in respect of which judgment was entered had ceased to exist as at 16th June 2009 when judgment was entered as it had been subdivided to create land parcels **Nyaribari Chache/B/B/Boburia/7696, 7697 and 7698** and transfers had been effected to third parties. The defendant further deponed that he had not instructed the lawyers who are shown to have appeared and/or acted on his behalf. In particular, he deponed that he had not instructed Mr. L. Ombachi advocate who the record indicates was acting for him and Mr. C. A Okenye who allegedly held his brief on 5th May 2011 and recorded orders by consent that were adverse to his interests. The defendant further averred that this was a conspiracy on the part of the plaintiff to obtain an unfair advantage in the matter. The defendant stated that Ombachi & Company Advocates ceased to act for him immediately after entry of judgment in the matter on 16th June 2009.

5. The 1st interested party, Agnes Nyaboke Obegi, swore a replying affidavit dated 17th July 2018 in opposition to the plaintiff's application. She deponed that the defendant, James Obegi King'oina subdivided his land parcel **Nyaribari Chache/B/B/Boburia/5972** and transferred a portion being **Nyaribari Chache/B/B/Boburia/7696** to her and her children before judgment was entered herein in favour of the plaintiff. The 1st interested party stated she was not a party to the proceedings when the court ordered the revocation of her title in regard to **LR No. Nyaribari Chache/B/B/Boburia/7696**. The orders were granted ex parte in her absence without any notice and/or being served with any pleadings. The 1st interested party contends she cannot be a trespasser in her own land and terms the order leading to the revocation of her title as unfair, illegal and unlawful as the court was misled into making such order. The 1st interested party asserts that the plaintiff's application seeking to cite her for contempt is misconceived and prays for its dismissal.

6. The 3rd interested party, Ogutu Gwaro, filed a replying affidavit in opposition to the plaintiff's application on 19th February 2018. He deponed that on or about 2nd October 2003 he entered into an agreement with the defendant to purchase a portion of land parcel **Nyaribari**

Cache/B/B/Boburia/5972 which was then registered in the defendant's name. He stated that the defendant's said parcel of land was subdivided into 3 portions and a portion thereof being **LR No. Nyaribari Cache/B/B/Boburia/7698** was transferred to him and he was issued a title deed on 14th December 2007 which was earlier than the date judgment was given in favour of the plaintiff. The 3rd interested party avers he was not party to the suit with the plaintiff and the order of 5th May 2011 revoking his title was made without any notice to him. He stated that following his purchase of the property he has developed his property and has constructed a storey building thereon. He further stated that consequent to the further subdivision of land parcel **Nyaribari Cache/B/B/Boburia/5972** into parcels **13907** and **13908** albeit unlawfully his building sits on land parcel **13907** which he asserts the plaintiff does not claim and hence the question of his eviction cannot arise. He further averred that in the judgment and decree no eviction was ordered and the plaintiff thus seeks to mislead the court to sanction what was otherwise not decreed by the court. He further deposed that no contempt of court arises as the prayer in that regard is misconceived as there is no compliance with the provisions of the Contempt of Court Act, 2016.

7. The 3rd interested party further filed a notice of preliminary objection dated 19th February 2018 whereof he set out 8 grounds of objection. Inter alia he averred that the application relates to the execution of the decree of the court and is improperly brought before the court, that the decree did not grant an order of eviction and therefore eviction could not issue; that the application is at variance with the decree and judgment and further contravenes the provisions of Order 22 Rule 18 of the Civil Procedure Rules which requires a Notice to Show Cause to be served where execution is made more than one year from the date of the decree. The 3rd interested party further contends he was never served with the court orders he is said to have disobeyed and hence he cannot therefore be held to be in contempt of the same orders.

8. The plaintiff's application and the 3rd interested party's preliminary objection were canvassed by way of written submissions. The plaintiff in his filed submissions argued that the court has no jurisdiction to hear and determine the application. The jurisdiction of this court is conferred under Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act and therefore to the extent that the application by the plaintiff related to matters/issues relating to ownership and title to land it follows this court would have jurisdiction to determine the application on its merits.

9. The defendant has contended that the judgment/decreed issued by the court on 16th June 2009 was incapable of being enforced as land parcel **Nyaribari Cache/B/B/Boburia/5972** had as at the time of judgment ceased to exist following its closure on subdivision in 2004. In concluding his judgment delivered on 16th June 2009 Musinga, J. (as he then was) stated thus:-

"In the circumstances, I order that the defendant's title deed in respect of Nyaribari Cache/B/B/Boburia/5972 be cancelled forthwith. The District Surveyor, Kisii Central should excise out of the land currently registered as Nyaribari Cache/B/B/Boburia /5972 a parcel of land measuring 25feet x 130feet. A title deed in respect of the excised parcel of land as hereinabove stated should be issued to the plaintiff. The remainder of the land may be registered in the name of the defendant." (emphasis mine)

10. The Judge clearly had proceeded to render judgment on the basis that land parcel **Nyaribari Cache/B/B/Boburia/5972** was in existence as at the time of judgment and was as well registered in the defendant's name. The mutation form annexed to the defendant's replying affidavit dated 20th July 2004 marked "JOK007" shows that this land parcel was subdivided into parcels **7696**, **7697** and **7698**. Land parcel **Nyaribari Cache/B/B/Boburia/7698** was sold and transferred to the 3rd interested party who was issued a title deed on 14th December 2007. Land parcel **Nyaribari Cache/B/B/Boburia/7696** was registered in the name of the 1st interested party. I have perused the record of the proceedings and the judgment and it is evident that it was not brought to the Judge's attention that indeed land parcel **Nyaribari Cache/B/B/Boburia/5972** had in fact been subdivided and had ceased to exist as at the date the judgment was given.

11. It appears that upon the plaintiff coming to the realization that land parcel **Nyaribari Cache/B/B/Boburia/5972** was no more, he engaged in a series of applications before the court in a bid to circumvent the defect in the judgment which he could now not enforce.

12. On 16th February 2010 vide an application dated 8th October 2009 the plaintiff obtained an order for the Deputy Registrar to execute the necessary documents to effectuate the decree of the court in the event the defendant defaulted in signing. The plaintiff by an application dated 28th July 2010 sought to have the interested parties enjoined to the suit as he stated he had found the defendant had subdivided the suit land into 3 parcels being **Nyaribari Cache/B/B/Boburia/7696**, **7697** and **7698** which he had transferred to the interested parties. The application also sought the cancellation of the subdivision and revocation of the titles registered in the names of the interested parties. The order for joinder of the interested parties was granted ex parte on 24th March 2011 in the absence of the affected interested parties.

13. The interested parties have all stated they had no notification before their titles were revoked. It is their position that they were not served with any court process and/or proceedings which they could have responded to. The ex parte order dated 24th March, 2011 entered into by consent by one Absalom Opini Mekenye for the plaintiff and C. A Okenye holding brief for Ombachi for the respondent as extracted was in the following terms:-

1. That the application dated 28th July 2010 be and is hereby allowed in terms of prayer 2 hereof so as to make Agnes Nyaboke Obegi as 1st interested party, Jeremiah Kerubo Nyangau as 2nd interested party and Ogutu Gwaro as the 3rd interested party to this suit.

2. That prayer number 3 of the application be and is hereby withdrawn.

3. That prayers 4, 5, 6 and 7 do proceed to inter partes hearing on 5th May 2011.

4. That the applicant do extract and serve this order together with the hearing notice upon the interested parties herein within 21 days from today's date.

14. Order 1 Rule 10(2) of the Civil Procedure Rules which the plaintiff invoked in the application for joinder provides as follows:

“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.”

15. In the present matter the plaintiff sought the joinder of the 1st, 2nd and 3rd interested parties after the court had heard the case and rendered judgment. A party under Order 1 Rule 10(2) of the Civil Procedure Rules can either be joined as a plaintiff and/or defendant. It is not difficult to appreciate why the rule makes that provision. If a party is being enjoined, it would be because either he is making a claim, in which case he would be a plaintiff or because someone is making a demand against him and wants some relief from him, in which case he would be enjoined as a defendant. The rule has no provision for a party being enjoined as an interested party. What would be the role of such a party in the suit?

16. Order 1 Rule 10 (2) in my view envisages a situation where the suit has not been heard and determined and that is why it provides for joinder of a party either as plaintiff or defendant or a party 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** (emphasis added). Where a judgment has been entered it is my considered opinion that a party cannot be enjoined to the proceedings unless the judgment is either reviewed and/or set aside in a manner to accommodate the participation of the enjoined party.

17. The Court of Appeal in the case of **JMK -vs- MWM & Another [2015] eKLR (Civil Appeal No. 15 of 2015 – Mombasa)** while considering the application of Order 1 Rule 10(2) of the Civil Procedure Rules stated thus:-

“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. Sarkar’s Code [supra] quoting authority, decisions of Indian courts on the provision, expresses 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 Civil Procedure Rules in Tanga Gas Distributors Ltd –vs- Said & Others [2014] E. A 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 trial; that it can be done even after judgment 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 in applicable...”

18. In the present matter at the time the plaintiff applied for the joinder of the interested parties’ judgment had been entered and the plaintiff was in the process of executing the decree. The joinder of the interested parties at that stage would not have enabled them to participate in the proceedings as parties. The interested parties would not have had a fair trial. The interested parties had become registered as owners of the parcels of land **Nyaribari Chache/B/B/ Boburia/7696, 7697 and 7698** and had acquired rights of ownership that could not be taken away from them without due process being followed. They have asserted that their titles were cancelled and/or revoked without being heard and they have argued that was against the rules of natural justice. They have further faulted the plaintiff’s quest to have them evicted yet the judgment that the plaintiff seeks to enforce did not decree eviction.

19. In the case of **Onyango -vs- Attorney General (1987-1989) E.A 456** the Court of Appeal as per Nyarangi, JA asserted thus:-

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect them to act fairly.”

The Judge went on to state thus:-

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

In the case of **Mbaki & Others –vs- Macharia & Another [2005] E.A 206** the Court of Appeal further stated:-

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

20. I have observed earlier in this ruling that the interested parties were not parties to the suit during the trial. Their joinder to the proceedings after judgment and during the execution process could not afford them the opportunity to ventilate their cases. The joinder has the hallmarks of having been irregularly obtained. There was no variation of the judgment and decree issued in this matter and the subsequent orders that were subsequently obtained in this matter relating to the cancellation of the interested parties titles to land and eviction of the defendant and the interested parties was a clear departure from the judgment that was given by the court. I agree with the 3rd interested party’s advocates submissions that parties are bound by their pleadings and that the court ought not to grant orders not sought and/or pleaded.

21. In the present matter, the plaintiff was not granted an order of eviction and in any event his prayer was for the delivery of possession of Plot No. **B19 Gekomu Market** being part of the land constituting title No. **Nyaribari Chache/B/B/Boburia/5972** to the plaintiff. At the time judgment was delivered land parcel **5972** had been subdivided and did not exist and therefore could not be enforced unless the judgment was reviewed and/or varied which was not done.

22. From what I have discussed hereinabove, it must have become clear that the plaintiff's application dated 30th January 2018 is not for granting. The circumstances under which the orders granted on 5th May 2011 were obtained are not entirely clear. The defendant claims that C. A Okenye advocate who appeared apparently holding brief for Mr. Ombachi advocate was without instructions as Mr. Ombachi had ceased to represent him. The advocate for the plaintiff is on record on 2nd February 2010 informing the court that the defendant was acting in person. The defendant had also personally filed the Notice of Appeal to the Court of Appeal on 19th June 2009 soon after the judgment was delivered. The chamber summons dated 28th July 2010 as per the affidavit of service sworn by Isaiah Miruka on 22nd March 2011 filed in court on the same date, was served directly upon the defendant which gives some credence to the defendant's averment that Mr. Ombachi advocate had ceased to act for him after the delivery of judgment.

23. In the foregoing circumstances, I cannot find there was any willful disobedience of any court order. Besides, the plaintiff had invoked the execution process for the enforcement of the judgment. My position is that where a party chooses to invoke the execution of decree process under Order 22 of the Civil Procedure Rules such party cannot at the same time invoke contempt proceedings under the provisions of Contempt of Court Act.

24. The upshot is that I find no merit in the plaintiff's Notice of Motion dated 30th January 2018 and I accordingly dismiss the same. I make no orders as to costs of the application. Each party to bear their own costs.

25. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 23RD DAY of NOVEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Magara for Opini for the plaintiff

Mr. Ochwangi for 3rd Interested party

Mr. Morara for 1st interested party

N/A for defendant

Saitoti Court assistant

J. M. MUTUNGI

JUDGE