



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 266 OF 2017 (O.S)**

**NYAEGA MOGOCHA ONSESE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MAGABE MWITA NGWEINA.....DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of motion dated 23<sup>rd</sup> May, 2018 and filed on even date under **Order 1 Rule 3,10 of the Civil Procedure Rules**, the applicant namely Dinah Matinde Nyaisara (intended interested party) is seeking the following orders:-

- a. **THAT** this honourable court be pleased to enjoin the purchaser, Dinah Matinde Nyaisara as an interested party to the application.
- b. **THAT** the parcel of land BUKIRA/BWISABOKA/1660 measuring 2.65 hacteres be transferred to the interested party/purchaser.
- c. **THAT** the Executive officer Kehancha Law Courts be compelled by court to transfer on behalf of the surety MAGABE MWITA NG'WEINA.
- d. **THAT** the cost of the application be provided for.

2. The Notice of motion is premised on the applicant's supporting affidavit sworn on 23<sup>rd</sup> May, 2018 to the effect that she is a purchaser for value and legal owner of the suit land LR NO. BUKIRA/BWISABOKA/1606 to which the respondent/plaintiff lays his claim. The motion is further based on the grounds which include; that the applicant bought the suit land for Kshs. 200,000/= from a public Auction. Annexed documents marked DMN 1 to 5, among them, an advertisement, a notification of sale and a certificate of sale, are in support of the motion.

3. In his replying affidavit sworn on 6<sup>th</sup> June 2018 and filed on 7<sup>th</sup> June 2018, the respondent through one Cellah Ariri Odingi to whom he had donated a power of Attorney dated 23<sup>rd</sup> October 2017 and registered as number. 001/01/2018 on 30<sup>th</sup> January, 2018, opposed the motion. The respondent deponed, inter alia, that he purchased the suit land measuring 25 hactares, a sub-division of LR NO. BUKIRA/BWISABOKA/1261 and from LR NO. BUKIRA/BWISABOKA/1962. That the defendant herein caused the subdivision resulting into the suit land and he registered himself as it's proprietor. That he is the lawful owner of the suit land on which he stays.

4. The plaintiff/respondent filed this suit by way of an originating summons dated 11<sup>th</sup> February 2005 whereby he has claimed that he is entitled to 2.65 hectares of the suit land by adverse possession. He has sought to be registered as he sole proprietor of the said portion of the suit land in place of the defendant.

5. The defendant opposed the suit by a replying affidavit sworn on 20<sup>th</sup> April 2005. He averred, inter alia, that he is the registered owner of the suit land having purchased it from Teresa Mogesi Wambura in the year 1994 or thereabouts. That at the time of the said purchase, the suit land was in vacant possession and in the same year, the plaintiff trespassed into the land.

6. The applicant is represented by learned counsel Mr, Mwita Kerario who also represents the defendant in the suit. The plaintiff/respondent is represented by learned counsel S.M. Sagwe.

7. Learned counsel for the applicant filed submissions dated 23<sup>rd</sup> July, 2018, whereby he identified the point for determination as follows:-

**“Whether the applicant is the rightful owner of BUKIRA/BWISABOKA/1606 and therefore entitled to be enjoined as an interested party in ELC NO. 266 of 2017.”**

8. Counsel submitted that the respondent stood surety for the Suleiman Mwita Moka (accused person) where he offered the suit land as security in Kehancha Senior Resident Magistrate’s Court Criminal case no. 987 of the 2010. That the accused person absconded and the suit land was sold to the applicant by way of Public Auction in execution of the decree in that criminal case.

9. Counsel further submitted that the applicant is the rightful owner of the suit land and that he is entitled to be enjoined as an interested party in the suit. He relied **on Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 (the Rules) and NBI HCCC NO. 517 of 2014; Lucy Nungari Ngigia and others –v- National Bank of Kenya and another.**

10. In their submissions dated 9<sup>th</sup> October 2018, learned counsel for the respondent made reference to Orders sought in the plaint, sale of land agreement between the respondent/plaintiff and one Terasa Mogesi Wambura. That the defendant fraudulently altered title of Teresa Mogesi Wambura, who unlawfully obtained consent of land control board and that the respondent filed a caution in respect of the suit land.

11. Counsel also urged that status quo order made on 1<sup>st</sup> November 2016, be maintained until the hearing and determination of the suit. He had no objection to grant of prayer 2 sought in the application and that prayer 3 should wait the hearing of the suit on merit.

12. I have considered the entire motion, the replying affidavit, the pleadings and submission in this matter. Therefore, are there common questions of fact or law between parties or intended parties to the suit to entitle the applicant to the orders sought in the motion?

13. The applicant has sought to be enjoined to the instant matter. The concise Oxford English Dictionary 12<sup>th</sup> Edition, defines the term “**Joinder**” as follows:-

**“The act of bringing parties together.”**

14. Under **Order 1 Rule 10 (2) of the (supra)** the court of has the discretion to add or enjoin a party to a suit on such terms as may be. The objective is to enable the court to effectually and completely adjudicate upon and settle all question involved in the suit.

15. A party has a right to put his or her case forward in writing in a defined case. The applicant has a right to be made aware of the existence of the suit and to be served with all the necessary documents to enable her appear or decline to appear in the suit ; see **Ogada –v- Mollin (2009) KLR 620.**

16. The applicant claims ownership of the suit land for being purchaser for value of the land. The plaintiff and defendant also claim ownership of the suit land as revealed at issues 1 and 2 of the originating summons and paragraphs 2 and 4 of the defendant’s replying affidavit. Therefore, orders 2 and 3 sought in the application are final in nature and call for their determination at the hearing of the suit on merit.

17. Since the applicant has shown that she has a claim which calls for adjudication and or settlement together with the issues raised by the plaintiff and the defendant. I find that she is entitled to be enjoined to the suit, (not the application as referred to in the motion) and the application is merited in the circumstances.

18. In the result and for the above reasons, I allow order 1 sought in the Notice of motion dated 23<sup>rd</sup> May, 2018.

19. Orders 2 and 3 sought in the motion are hereby declined.

20. Costs of the motion be in the cause.

**DELIVERED, SIGNED and DATED** in open court at MIGORI this **14<sup>th</sup> day of November 2018.**

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of:**

Mr. Odhiambo Kanyangi holding brief for Mwita Kerario for the applicant/interested party.

Tom Maurice, Court Assistant