



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 88 OF 2011 (OS)

ABISHAI NYAMWEYA MWEBI.....PLAINTIFF

VERSUS

JOANES ABUTO.....DEFENDANT

AND

JOSEPH MAGAKI ISABOKE.....1ST PROPOSED INTERESTED PARTY

FELIX JOSHUA MACHOGU.....2ND PROPOSED INTERESTED PARTY

R U L I N G

1. By an application dated 23rd June 2015 one Joseph Magaki Isaboke and Felix Joshua Machogu seek to be joined as interested parties to the originating summons herein. The application is brought under Order 1 Rules 10 and 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is premised on the grounds set out on the face of the application. The intended interested parties aver as follows:-

(i) That they are the registered owners of the suit properties namely West Kitutu/Bogusero/4343 & 4344 respectively which are the subject matter in this suit.

(ii) That the plaintiff is denying them their right to use the land they have legally acquired.

(iii) That the plaintiff has placed an inhibition on the land and this is obstructing them from enjoying their proprietary rights over their land.

(iv) That the plaintiff will not suffer any prejudice if the application for joinder is allowed.

2. The application is supported on the affidavit sworn in support by Joseph Magaki Isaboke where he depones that he and Felix Joshua Machogu are the registered proprietors of land parcels **West Kitutu/Bogusero/4343** and **4344** respectively as evidenced by copies of certificate of official search annexed and marked "**JM1-01**" which indicate the proposed interested parties were registered as owners on 7th April 2011 and that the plaintiff registered cautions against the titles on 3rd May 2012 claiming an interest as purchasers. The proposed interested parties claim the plaintiff has no claim over the parcels of land and it is in the interest of justice that they be allowed to participate in the suit as interested parties to safeguard their interest.

3. The plaintiff filed a replying affidavit in opposition to the application by the intended interested

parties. The plaintiff avers that the titles held by the applicants were fraudulently acquired and are the subject of criminal proceedings vide Kisii Cr. Case No. 3420 of 2015 as per copy of charge sheet annexed as “ANM-01” where the applicants together with others have been charged with conspiracy to commit a felony. The particulars whereof are as follows:-

“On the 7th day of April 2011 and 11th day of April 2011 at Kisii Lands Office within Kisii County, conspired to commit a felony, namely to defraud one Abisai Nyamweya Mwebi of his parcel of land title number West Kitutu/Bogusero/872 by subdividing the said parcel into three portions West Kitutu/Bogusero/4342, 4343 and 4344 without his consent.”

4. The plaintiff further avers that the originating summons relates to his original land parcel **West Kitutu/Bogusero/872** and not the subsequent titles procured fraudulently. The plaintiff states his land parcel 872, remains intact as evidenced by certificate of official search issued on 15th July 2014. The search certificate shows that the plaintiff was registered proprietor on 16th July 2013 apparently following execution of the judgment and decree entered in favour of the plaintiff on 19th April 2013. By this judgment the plaintiff was declared to have acquired title to land parcel **West Kitutu/Bogusero/872** by adverse possession and the defendant’s title to the land held to have been extinguished. It is the execution of this judgment which led to the plaintiff being registered as owner of the suit property. In the meantime the land parcel **West Kitutu/Bogusero/872** had been subdivided into three (3) parcels being **West Kitutu/Bogusero/4342, 4343 and 4344** which parcels had been transferred to other persons although land parcel **West Kitutu/Bogusero/4342** from the abstract of title (green card) remained in the defendant’s name. At the time of making the judgment the court was not made aware that parcel 872 had been subdivided and that explains why the judgment and orders were directed at the land parcel **West Kitutu/Bogusero/872** which did not in fact exist as at the time the judgment was entered.

5. The defendant by a Notice of Motion application dated 26th July 2013 applied to set aside the proceedings taken ex parte on 5th February 2013 and the consequent judgment delivered on 19th April 2013 and to be granted leave to file his statement of defence. The defendant contended that he was not served with summons to enter appearance to the originating summons and averred he had a good defence to the plaintiff’s claim which he should be allowed to put forth. **Hon. Justice Okong’o** heard the application by the defendant and while acknowledging from the parties averments that indeed land parcel **West Kitutu/Bogusero/872** had been subdivided into parcels **4342, 4343 and 4344** the Honourable Judge held that this fact had not been disclosed to the court. The court in the ruling delivered on 24th January 2014 inter alia observed thus:-

“Whether the subdivision of the suit property was fraudulent or not is an issue which should have been determined at the hearing of the originating summons. In fact, the court should have been called upon to cancel the purportedly fraudulent subdivisions before it could order the suit property to be transferred to the plaintiff. As things stand now, the decree of the court seems to have been issued against a non-existent property and that the same has been executed going by the letter from the District Land Registrar upon properties which were not the subject of this suit. This court did not at all order the surrender or the cancellation of the titles for LR Nos. West Kitutu/Bogusero/4342, 4343 and 4344 as the District Land Registrar purported to do. The court could not have done this because, first, these parcels of land were not the subject of the suit and; Secondly, Joseph Magaki Isaboke and Joshua Felix Machogu who are the registered proprietors of LR Nos. West Kitutu/Bogusero/4343 and 4344 respectively were not parties to this suit. A court of law would not issue an order or a decree in vain.”

6. The court after observing the decree of the court was executed against properties which were not in dispute in the suit went on to hold that this was a proper and appropriate case where the court should exercise its discretion to set aside the ex parte judgment and decree and consequently directed that the judgment delivered on 19th April 2013 and the subsequent decree extracted therefrom and issued on 2nd May 2013 be set aside together with all consequential actions taken in execution of the decree and/or pursuant to the said judgment and decree. Effectively therefore the act of the land registrar cancelling

land titles in respect of land parcels **4342, 4343** and **4344** were reversed as was the title registered in the plaintiffs name in regard to land parcel number **West Kitutu/Bogusero/872**.

7. The application by the intended interested parties therefore has to be viewed and considered in the context that the land titles that they claim to hold in respect of land parcels **West Kitutu/Bogusero/4343** and **4344** were not affected by the ex parte judgment delivered by the court on 19th April 2013 as the intended interested parties were in fact not parties to the suit. The judgment entered in favour of the plaintiff was equally set aside and the position remains that the suit between the plaintiff and the defendant is yet to be heard on its merits. The title the plaintiff presently claims to hold in respect of **West Kitutu/Bogusero/872** as a consequence of the ex parte judgment delivered on 19th April 2013 was annulled following the setting aside of the judgment and reversal of all actions taken pursuant to the execution of that judgment.

8. As it is apparent the titles that the intended interested parties hold have their origin from land parcel **West Kitutu/Bogusero/872** which the plaintiff claims to have acquired by way of adverse possession it follows that the intended interested parties have an interest in the suit between the plaintiff and the defendant. The issue that arises is whether the defendant had any title to the suit property when he supposedly transferred land parcels **West Kitutu/Bogusero/4343** and **4344** to the intended interested parties and/or whether the defendants' title to the suit property had become extinguished in favour of the plaintiff by reason of adverse possession. Those are issues that can only be determined at the trial by hearing evidence. The issue whether or not the intended interested parties acquired valid titles from the defendant equally can only be determined at the trial. The plaintiff has alleged fraud against the defendant and the intended interested parties but as I have observed the issue of fraud has to be proved by evidence at the trial just like whether or not the plaintiff had acquired title by adverse possession.

9. Under Order 1 Rule 10 (2) of the Civil Procedure Rules the court can order a party to be enjoined to proceedings at any stage if such a party demonstrated they have an identifiable interest in the proceedings and/or that the presence of such a party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Having evaluated the facts and circumstances in this matter, I am persuaded the two proposed interested parties have an interest in the subject matter of the suit as they claim ownership of portions thereof in respect of which they claim to have acquired valid titles. Their presence is necessary so that the validity or otherwise of the titles they hold may be interrogated and determined. As the plaintiff by the originating summons claims title by way of adverse possession of land parcel **West Kitutu/ Bogusero/872** against the defendant but which parcel of land has either validly or illegally been subdivided into land parcels **4342, 4343** and **4344** the latter of which have been transferred to the 1st and 2nd proposed interested parties respectively, the plaintiff may consider amending the originating summons to bring the interested parties as respondents. I will grant the plaintiff leave of 21 days from the date of this ruling to amend the originating summons to enjoin the interested parties as respondents. In case the plaintiff chooses not to amend the originating summons, I hereby allow the said **Joseph Magaki Isaboke** and **Felix Joshua Machogu** to be enjoined to these proceedings as interested parties and to participate in the proceedings as such. The costs of the applicants' application dated 23rd June 2015 shall be in the cause.

Orders accordingly.

Ruling dated, signed and delivered at Kisii this 17th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Ms. Mogushe for the proposed interested parties

Milcent Court assistant

J. M. MUTUNGI

JUDGE