



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
LAND AND ENVIRONMENT COURT
LAND CASE NO. 10 OF 2013

JUMA FADHILI OMAR.....PLAINTIFF/RESPONDENT

=VERSUS=

KITSAO NZAI

KARISA KAHINDI NZAI.....DEFENDANTS

KAHINDI NZAI

KIRAGA.....INTENDED DEFENDANT/APPLICANT

RULING

1. Before me is an application dated 7th December 2016. The Applicant Kahindi Nzai Kiraga prays for a number of orders, namely: -

- (i) THAT Kahindi Nzai Kiraga(himself) be enjoined in the suit herein as 3rd Defendant.**
- (ii) THAT pending the hearing and determination of the Application herein, there be a stay of execution of the decree arising from the Judgement delivered on 13th May 2016.**
- (iii) THAT the intended 3rd Defendant do have leave to file a defence, witness statements and lists of witnesses annexed to this application within such time as the court may deem fit.**
- (iv) THAT this Honourable Court be pleased to stop the eviction by the Plaintiff as stated in the Warrant dated 11th August 2016, herein.**
- (v) THAT this Honourable Court be pleased to set aside the Judgement entered on 13th May 2016 and any subsequent order thereof;**
- (vi) THAT this Honourable Court be pleased to order the hearing/proceedings in this matter commence de novo.**
- (vii) THAT the costs of this application be provided for.**

2. The Application is supported by the Applicant's Affidavit sworn on 7th December 2016 and is based on a number of grounds listed on the face of the application. In summary the Applicant states that the Defendants and himself were neither served with summons to enter appearance nor any pleadings and/or notices as required by law. It is the Applicant's case that he and his brothers(1st and 2nd Defendant) only became aware of the suit and judgement delivered on 26th October 2016 when the Plaintiff went to the suitland accompanied by Police Officers for the purpose of demolishing his home. It is his case that he stands to suffer irreparable prejudice, loss and damage unless execution is stayed herein.

3. The application is opposed. In a Replying Affidavit sworn on 20th February 2017 and Grounds of opposition filed on 31st March 2017, the Plaintiff- Juma Fadhili Omar avers that the Applicant is a stranger to the suit and has no locus standi to bring the case having not sought leave to be enjoined as a party to the suit. The Plaintiff further contends that the Applicant does not reside on the suitland otherwise he would have been sued for trespass.

4. I have considered the application and the affidavit in Reply thereto. In my view, two major issues arise for my determination herein. These are

(i) Whether or not the Applicant should be enjoined in the suit herein; and

(ii) Whether or not the Judgement delivered herein on 13th May 2016 should be set aside.

5. In regard to the first issue for determination Order 1 Rule 10(2) of the Civil Procedure Rules under which this application is partially brought, empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

6. In my considered view, Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. When the Applicant filed this application on 16th December 2016, there were in actual sense no pending proceedings before this court to which he could be made a party, the Judgement having been delivered on 13th May 2016 and execution process having ensued.

7. In regard to the second ground, the Warrant dated 11th August 2016 whose execution the Applicant seeks to stop are in actual sense addressed to the Defendants herein whom the Applicant indicates are his brothers. While the Applicant claims to be a resident of the suit property for the past 64 years, there is no evidence whatsoever annexed in support of that contention. It is instructive that the Applicant's brothers against whom the decree is addressed have not filed anything in this case disputing service upon themselves even though the Applicant contends at grounds 2 and 3 of the application that both the Applicant and the defendants have been unaware of the case and the resultant decree issued herein.

8. In *Patel -vs- EA Cargo Handling Ltd (1974) EA 75*, the court held: -

“That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, the defence on the merits does not mean a defence that must succeed. It means a triable issue” that is an issue which raises a prima facie defence which should go to trial for adjudication.

9. I have looked at the Draft Statement of Defence annexed to the Supporting Affidavit. Other than denying that the Respondent bought the entire suit land. I do not see any triable issue raised therein.

10. The upshot is that the application is dismissed with costs.

Dated, signed and delivered in Malindi this 2nd day of June, 2017.

J.O. OLOLA

JUDGE