



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ELC CIVILCASE NO. 136 OF 2012

PETER RIANGA MAKORI.....PLAINTIFF

VERSUS

MARY KEMUNTO ORANGO DEFENDANT

AND

BEATRICE KEMUNTO ONGORI.....PROPOSED INTERESTED PARTY

RULING

1. The proposed interested party, Beatrice Kemunto Ongori by an application dated 3rd December 2015 expressed to be brought under order 40 Rule 2A of the Civil Procedure Rules 2010, Sections 3 and 3A of the Civil Procedure Act seeks the leave of the court to be enjoined as an interested party in these proceedings. The grounds upon which the application is founded are set out on the face of the application and are as follows:-

- (a) That the plaintiff herein purchased the land the subject of this suit from the grandmother of the applicant herein.**
- (b) That the court may make orders against the applicants' interest in the land.**
- (c) That the court shall be in a position to effectually determine all issues in controversy if the applicant is enjoined in these proceedings. That it is in the interest of justice if, the applicant is enjoined in this suit.**

2. The intended interested party has sworn a supporting affidavit in support of the application dated 3rd December 2015. In the affidavit she states that Nyoero Ongori (deceased) was the owner of the suit property before she sold the same to the plaintiff. The applicant states the applicant vide an agreement made in 1997 the plaintiff was to buy alternative land for her for kshs. 100,000/= as she was giving up land that had been given to her as a gift by her grandmother. The applicant further states that the plaintiff relocated to the USA before honouring his part of the agreement having paid only kshs. 20,000/= of the agreed sum of kshs. 100,000/=. The intended interested party states further that when the plaintiff came back in 2008 he fenced off the entire parcel of land and did not pay the balance. The applicant avers under paragraph 8 of her affidavit that the plaintiff is in actual possession of the suit property which she claims he fraudulently and illegally registered in his name and exclusively fenced since 2000.

3. The plaintiff/respondent filed grounds of opposition on 1st March 2016 and states thus:

1. The applicant's application is utterly misconceived and is otherwise an abuse of the court process.

2. That the application does not lie.

3. That the application is bad in law.

4. The parties argued the application by way of written submissions. The firm of Moronge & Company Advocates who filed the application dated 3rd December 2015 for the intended interested party on 4th April 2016 filed submissions dated 1st April 2016 which were headed **"Plaintiffs submissions"** and equally signed by the firm for the plaintiff. I would like to believe this was an inadvertent error as they were not on record for the plaintiff but for the intended interested party. The plaintiff filed his submissions on 18th July 2016. I have considered the application, the grounds of opposition and the parties filed submissions and the singular issue to determine is whether the proposed interested party has demonstrated that she has a legitimate interest in the suit to warrant her to be enjoined as a party in the suit so that she can ventilate and/or safeguard such interest in the course of the proceedings.

5. By the suit the plaintiff avers that he is the registered owner of land parcel **Wanjare/Bogiakumu/3266** and the copy of the title deed he has exhibited in his bundle of documents shows that he was so registered on 14th June 2001. His claim is that the defendant sometime in September 2011 wrongfully and unlawfully trespassed onto the parcel of land and he seeks an order of eviction, permanent injunction and general damages against the defendant. The defendant for her part alleges fraud on the part of the plaintiff in acquiring title to the suit land and seeks the cancellation and nullification of the title held by the plaintiff.

6. The proposed interested party acknowledges that the plaintiff purchased the land which belonged to her grandmother and her only quarrel appears to be that the plaintiff had agreed to purchase for her an alternative parcel of land way back in 1997. This agreement according to the proposed interested party was not honoured by the plaintiff. The transaction in favour of the plaintiff was completed in 2001 as the record shows that he was registered owner of the suit property on 13th June 2001. The alleged agreement that the proposed interested party places reliance on has not been exhibited and even if it was there, it would not be a basis for a cause of action as the interested party would be precluded by the Limitation of Actions Act, Section 4 (1) Cap 22 Laws of Kenya from placing any reliance on it as the same would be statute barred by reason of limitation of time.

7. The applicant's application apart from being grounded on inapplicable legal provisions (Order 40 Rule 2A of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act) lacks any merit such that even if the appropriate legal provision, Order 1 Rule 10 (2) had been invoked no basis to enjoin the interested party has been shown. Order 1 Rule 10 (2) provides:-

"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 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."

8. The suit between the plaintiff and the defendant concerns the process through which the plaintiff acquired title to the suit property. Was there any fraud committed or not and/or whether the defendant was entitled to the suit land as a beneficiary to the estate of the late Nyoero Ongori under the Gusii Customary Law. The issues are distinct and have no correlation with the interested party claims in regard to the suit land. My view is that any claim the proposed interested party may have had against the plaintiff is separate and distinct and the same could not be conveniently handled in these proceedings.

9. Be it as it may be, my view is that the applicant cannot show that she has an identifiable interest in the

suit property to merit her to be enjoined as a party to the suit. She cannot demonstrate she has any proprietary interest and at best her claim is farfetched and it is my conclusion that she is not a necessary party to these proceedings and her presence is not necessary to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

10. Accordingly, I find no merit in the Notice of Motion dated 3rd December 2015. I order the same dismissed with costs to the plaintiff.

11. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 25th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Ogonjo for Bosire for the plaintiff

Ms. Shitwaso for the defendant

N/A for the proposed interested party

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE