



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**HIGH COURT CIVIL CASE NO. E007 OF 2021**

**GLADYS NDUKU NTHUKI.....APPLICANT**

**VERSUS**

**LETSHEGO KENYA LIMITED.....DEFENDANT**

**AND**

**MUENI CHARLES MAINGI.....APPLICANT**

**RULING**

1. By Motion dated 26<sup>th</sup> July, 2021, the Applicant herein substantially seeks an order that he be joined to this suit either as the Plaintiff or an intended Interested Party.

2. According to the Applicant, he is the registered owner of Land Parcel No. Muputi/Kiima-Kimwe/1285 which the Plaintiff used as security in obtaining a loan facility from the Defendant. According to him, the Plaintiff has partly paid the amount advanced but has difficulties in clearing the balance due to the current hard economic times occasioned by Covid 19 since March, 2020. It has however come to his attention that the Defendant intends to exercise its statutory power of sale by selling the said parcel of land to recover the outstanding balance.

3. The Applicant however laments that the Defendant did not serve him with a statutory notice as required by sections 90 and 96 of the Land Act, 2012 before exercising its said power of the suit parcel. That action, he stated is likely to highly prejudice him. It was his case that the intended sale of the suit property is unlawful, unprocedural, null and void in law for want of service on him of the said statutory notices.

4. The applicant contended that any judgement, orders or directions that this court may issue without his participation in this matter are likely to affect him without him being given an opportunity of being heard. It was his view that were he to file a separate suit the prayers would be the same as those sought by the plaintiff herein since the same question of law or fact would arise hence the need to join him in these proceedings.

**Determination**

5. I have considered this application.

6. Order 1 rule 1 of the ***Civil Procedure Rules*** under which the application is brought provides as hereunder:

***All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.***

7. Order 1 rule 10(2) of the said Rules provides that:

***“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.”***

8. A reading of both rules reveals that an application for joinder or addition of parties can be made by the court on own motion or at the instance of either party. In this case the application has been made by an intending party as either Plaintiff or Interested Party. Whereas there is nothing inherently objectionable in a person applying to be joined as an interested party in a pending suit, it is doubtful whether such a person joined as an interested party can transform the suit into one in which he becomes the principal claimant and seek substantive reliefs in the suit. In this case, it is clear that the Applicant intends to protect his rights in the suit property by contending that he was not served with the statutory notice. That in my view is a substantive claim that cannot be determined by the Applicant being joined as an interested party.

9. As regards his joinder as a Plaintiff, as indicated above he may only be so joined by the court on own motion or by an application by *either party*. **Nambye, J** (as she then was) in **Kingori vs. Chege & 3 Others [2002] 2 KLR 243** held that:

**“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed. Therefore in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. *The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.*” [Emphasis added].**

10. Similarly, in this case none of the parties to the suit has sought to have the Applicant joined as a party to the suit. Accordingly, the Applicant cannot seek that he be joined as a Plaintiff to these proceedings.

11. In the premises, this application is incompetent and is struck out but with no order as to costs as the applicant is as yet not a party to these proceedings.

12. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 16<sup>TH</sup> DAY OF AUGUST, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Nthiwa for the Plaintiff**

**Mr Kilonzo for the Applicant.**

**CA Geoffrey**