Gatuma v Kiragu; Mihari & 9 others (Interested Party) (Environment & Land Case 189 of 2017) [2023] KEELC 20153 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20153 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 189 OF 2017

JG KEMEI, J

SEPTEMBER 27, 2023

BETWEEN

SIMON CHOGI GATUMA .... PLAINTIFF

AND

PETER KAGUNYU KIRAGU .... DEFENDANT

AND

BENSON MIHARI & 9 OTHERS .... INTERESTED PARTY

RULING

1. The Applicants/Interested parties filed the Motion dated the April 12, 2023 seeking joinder to the suit as well as leave to file pleadings therein.
2. The application is supported by the grounds annexed thereto and the Supporting Affidavit of Benson Mihari sworn on the April 12, 2023 deposed on his behalf and that of the co-Applicants.
3. The deponent states that pursuant to a sale agreement dated the October 13, 2009 the Plaintiff sold the suit land parcel Ruiru/Ruirueast Block2 /3445 (suit land) to the Defendant. Upon purchase the Defendant sold the land to the intended Interested Parties, issued them with certificates of proof of ownership and put them in possession whereupon they have developed the land and are in occupation todate. That they are necessary parties to aid the Court to reach a just decision. That they are likely to be affected by the decision of the Court unless they are allowed as parties.
4. The Plaintiff Respondent opposed the application and filed grounds of opposition as follows:-
    a. That there has been inordinate delay in making the application, which delay has not been explained and which is inexcusable.

b. That the Applicants have not explained when they came to know of the existence of the above case and why they did not move the Court earlier.

c. That the application is belated and the same is otherwise an abuse of the process of the Court.

d. That the suit to which the Applicants intend to be joined has been heard fully and both the Plaintiff and the Defendant closed their respective cases.

e. That there is no evidence of the alleged sale and purchase of land.

f. That the Defendant did not have a good title to the suit land and could not therefore pass any title to the Applicants over the suit land.

g. That the suit land has since been transferred to the Plaintiffs name and there is no longer any Parcel of land in the name of Jacinta Waithira Chogi.

h. That the application is misconceived and the same is unmerited.

i. That the application is the Defendants ploy to try to scuttle the finalization of the case.

5. The application is not opposed by the Defendant despite being given additional time to so file his response to the application.

6. Parties elected to canvass the application by way of written submissions. The Plaintiff Respondent filed written submissions on the June 7, 2023 while the other parties failed to comply with the directions of the Court. The Court has read and considered the written submissions on record and is grateful to counsel for the illuminating highlights therein.

7. The key issue for determination is whether the application is merited.

8. It is not in dispute that the suit has been heard and concluded and what was pending were directions on compliance with the filing of the written submissions and the date for Judgment.

9. The observation by the Plaintiff Respondent that the same has been brought at the tail end of the suit is correct. That said, the provisions of Order 1 Rule 10 (2) of the *Civil Procedure Rules* provide 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."

10. The question the Court should ponder on is whether the delay in joining the suit is inordinate or in other words whether it is too late for the Applicants to be part of the suit. The provisions of the *Civil Procedure Rules* above state that "the Court may at any stage of the proceedings." The proceedings in this case are undoubtedly still alive given that the Court has not pronounced itself on the Judgement. The Court observes that though it is a good practice to enjoin parties before the commencement of the hearing of a suit, there is no time bar to the Applicant's application being enjoined at this stage of the proceedings.

11. I am guided by the decision of the Court in the case of *Kingori Vs Chege* (2002) 2 KLR whether it was stated as follows;

> " In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or bound by the outcome of the suit. However, the Court must guard against frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before the Court for determination."

12. The Court is also enjoined to look favourably at an application for joinder if it is in the best interest of justice and would not prejudice the interests of the Defendant. See the case of *Anthony Gachoka Vs National Hospital Insurance Fund & 3 Others* (2005)eKLR.

13. In the case of *Francis Karioki Muruatetu & Anor Vs Republic & 5 Others* (2016)eKLR the Court held that an Applicant must demonstrate the personal interest that he has in the matter by laying sufficient grounds before the Court; the prejudice he would suffer if he is not enjoined as Interested Party; set out the case that he intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy. In other words, a party must disclose a cause of action which is either not before the Court or if it is before the Court, the nature of it is such that it cannot be effectually and completely determined by the Court without the party being heard.

14. In addition, the Court should look at the rights being claimed and reliefs that would flow from the party being sought to be enjoined. The safeguard being so as not to throw out a litigant from the seat of justice without being heard. The Court is guided by the decision in the case of *Lucy Nungari Ngigi & 128 Others Vs National Bank of Kenya Limited & Anor* Civil case No 517 of 2014 (2015)eKLR which stated as follows;-

> " Joinder of parties is governed by Order 1 of the *Civil Procedure Rules*. In law, joinder should be permitted of all parties 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 such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the *Civil Procedure Rule*s. The Court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties."

15. Joinder of a party is a discretionary relief and like all discretions flowing from the Court, Courts are called upon to be guided by the principles set out in the case of *Shah Vs Mbogo* [1967] E A 116 and 123B where Judge Harris J as he then was, had this to say –

> " The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person

who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

16. In this case it is the Applicant's case that they purchased the parcels from the Defendant, occupied them and developed houses in which they live todate. Similar evidence was led by the Defendant at the hearing which evidence has not been rebutted by the Plaintiff. It is the Applicants case that the decision of the Court is likely to affect them and that joinder will give them the opportunity to be heard so that the Court can arrive at a just decision.

17. The sale of the suit land to the Defendant is not disputed by the Plaintiff and his case is that the Defendant breached the agreement of sale by failing to pay the balance of the purchase price; that the transaction has been vitiated by lack of Land Control Board consent to transfer and that he repudiated the contract. He sought for interalia eviction and damages for breach of contract.

18. It is the Defendant's case that he paid fully the consideration of the sale and the only monies pending is Kshs 50,000/- which is payable upon obtaining the Land Control Board consent. It was his evidence that upon purchase of the land he sold the same to the Applicants who have settled on the land. The Court finds that the rights being sought by the parties arise from the same transaction and the reliefs undoubtedly flow from the parties therein. The Court finds that even if the orders of eviction are awardable the issue of the Applicants occupation of the land will have to be determined and to avoid multiplicity of suits, the Court finds that justice will be served when the Applicants are enjoined to the suit so that all the issues are heard and determined once and for all.

19. With respect to the prejudice that the parties shall suffer, the Court agrees with the Plaintiff that the suit having been filed in 2017, any further delay is prejudicial to the parties. Save for the expectation to conclude the case, the Court finds that the prejudice can be ameliorated by payment of costs. I shall make the necessary orders in the end.

20. Final orders for disposal:-

    a. For the reasons above the Court finds the application merited. It is allowed as prayed.

    b. The Applicants are directed to file their pleadings within the next 15 days in default the order shall lapse.

    c. The Applicants shall pay throw away costs in favour of the Plaintiff in the sum of Kshs 20,000/- within the next 30 days.

    d. Thereafter the parties to fix the matter for hearing at the earliest.

    e. Costs shall be paid by the Applicants in favour of the Plaintiff.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Masore Nyangau for Plaintiff

Ms. Chirchir HB Mrs. Njoroge for Interested Party

Interested Party - Absent

Court Assistants – Phyllis/Lilian