



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 20 OF 2015

JOHN NDERITU KARIUKI.....PLAINTIFF/RESPONDENT

-VERSUS-

RAYMOND WANJAU.....1ST DEFENDANT

WALTER NGUTURI KARANJA.....2ND DEFENDANT

PURITY WAMBUI WAIHUMBU.....3RD DEFENDANT/APPLICANT

ANTHONY WAIKUMA.....4TH DEFENDANT

RULING

1. The 3rd defendant/applicant has taken out a Notice of Motion dated 3rd October, 2018 and the same stands supported by the grounds set out on the face thereof and the facts deponed in the affidavit sworn by the 3rd defendant. The following prayers are sought thereunder:

i. THAT the suit/amended plaint dated 19th November, 2014 be dismissed as against the 3rd defendant/ applicant.

ii. THAT without prejudice to the foregoing, the 3rd defendant's/applicant's name be struck out of the suit.

iii. THAT the costs incidental to the application be borne by the plaintiff/respondent.

iv. Any such or further orders that this Honourable Court may deem just and expedient.

2. The applicant in her affidavit essentially deponed that the respondent has failed to establish the applicant's involvement and connection in the suit, since the applicant sold the property LR No. 57/222 to the 1st defendant in December, 2013 hence the claim ought to be against the 1st defendant and not the applicant.

3. The deponent further asserted that the amended plaint does not disclose a reasonable cause of action against her.

4. In response, the respondent filed a replying affidavit on 1st November, 2018 stating that prior to filing the suit, he sought to enquire about the ownership of the aforesaid property titled LR No. 57/222 and was informed by the Agricultural & Industrial Holdings Limited that the same belonged to the applicant.

5. The applicant swore a further affidavit in resistance thereto, averring that whereas the Agricultural & Industrial Holdings Limited was the original owner of the subject property, its letter indicated that the current status of ownership ought to have been ascertained from the Lands Office. The applicant further stated that upon conducting a postal search at the Lands Office, she was able to confirm that Saltway Investments Limited is the registered owner thereof.

6. The Motion was canvassed by way of written submissions which this court has considered together with the grounds stated on the face of the Motion and the facts deponed to in the affidavit filed in support of and against the said Motion.

7. The brief background of the dispute is that the plaintiff/ respondent was at all material times the registered owner of LR. No. 57/223 and had put up flats for residential purposes. It is claimed that sometime in November, 2013, the defendants began excavating the property known as LR No. 57/222 which was adjacent to the plaintiff's property, resulting in the damage of the plaintiff's property.

8. The plaintiff, being aggrieved, filed an action at the Environment and Land Court and which action was later transferred to this court.
9. The 3rd defendant/applicant is now before this court seeking to have her name struck out of the suit and for the dismissal of the suit against her.
10. The principles offering guidance to the court in determining whether or not to strike out and/or substitute the name of a party are encapsulated under *Order 1, Rule 10 (2)* of the Civil Procedure Rules as hereunder:

i. Whether or not the party to be substituted or struck out is a necessary party to the suit; and

ii. Whether or not the presence of such party will assist the court in effectively adjudicating upon and settling all questions arising out of the suit.

11. In her submissions, the 3rd defendant/applicant admitted that she was the previous owner of the property known as LR No. 57/222 until the year 2013 when she sold the same to the 1st defendant.
12. On his part, the plaintiff/respondent maintained that the applicant is the registered owner of the property in question. The plaintiff/respondent is of the submission that the issues raised and argued by the 2nd defendant/applicant can be settled via a trial.
13. Having considered the material placed before this court, I find that the 3rd defendant has failed to present credible evidence showing how and when she transferred the suit property to 1st defendant. Similarly, no evidence has been placed before this court to ascertain whether the alleged transaction took place before or after the cause of action arose.
14. In the premises, I am of the humble view that the issue touching on the ownership of L.R. No. 57/222 would require further investigation and articulation, which can only be done at the hearing. It therefore follows that the 3rd defendant is a necessary party to this suit.
15. The 3rd defendant has urged this court to dismiss the suit as against her on the basis that no cause of action has been disclosed.

Having come to the conclusion that the 3rd defendant/applicant is a necessary party to this suit, I find that the plaint discloses, *prima facie*, a cause of action against her and therefore there is no justification to dismiss the same at this stage.

16. Consequently, the Motion lacks merit and is hereby dismissed.

Costs to abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 27th day of March, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant/Applicant

..... for the 4th Defendant