



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE NO.2 OF 2018

MNM.....PLAINTIFF

-VERSUS-

SMK.....DEFENDANT

RULING

Before me is the Chamber Summons dated 3rd December 2018 brought by RMK (Applicant) under Order 1 rule 10(2) and Rule 25 of the CPR, sections 3A, 1A and 1B of the CPA, Article 159 (2) (d), (e) and all other enabling provisions of the law.

She seeks orders: -

1. That this Honourable Court be pleased to add the applicant as an interested party in this suit.
2. That costs of the application be provided for.

The application is supported by the affidavit sworn by the applicant on 3rd December 2018 and the grounds on the face of the chamber summons viz:-

1. THAT the dispute relates to land parcel No. Iria-ini/ Kiaguthu/[xxx], Iria-ini/Kiaguthu [xxx], Iria-ini/Kiaguthu Iria-ini/Kiaguthu Iria-ini/Kiaguthu [xxx], Iria-ini/Kiaguthu [xxx], Iria-ini/Kiaguthu [xxx], Iria-ini/Kiaguthu [xxx] and Iria-ini/Kiaguthu [xxx] (formerly known as Iria-ini/Kiaguthu [xxx] and Land Parcel No. Mweiga/Muthuini/[xxx].
2. THAT she is the second wife of the respondent and therefore an interested party in this cause.
3. THAT it is meet and just that she be enjoined in the cause to enable the court determine the issues in finality.
4. THAT it would be in the interest of justice if the prayers sought are allowed.
5. THAT no prejudice would be occasioned to the petitioner and the Respondent if the orders sought are granted.

From the supporting affidavit the key averment is that the petitioner herein MNM (Petitioner) is seeking that the suit properties be declared matrimonial properties without having disclosed that the respondent is a polygamous man, whom, she the applicant is taking care of after been abandoned by the respondent. That in any event the petitioner has never disputed that she the applicant is the 2nd wife of the respondent.

The petitioner filed Grounds of Opposition on 17th January 2019 and contends that the application is an abuse of the court process, vexatious, delaying tactic, calculated to obscure the real issues in the suit, and that her addition will add no value to the instant proceedings as her interests are represented by the respondent, that the application is superfluous and unmeritorious.

Counsel for parties agreed to proceed by way of written submissions which I have considered.

The only issue for determination is whether the applicant may be added as an interested party into this suit. 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 person who ought to be joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit, be added”(emphasis added)

Section 3A saves the inherent jurisdiction of the court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the court process, while section 1A and 1B are about the overriding objective of the Civil Procedure Act and Rules, to facilitate the just, expeditious proportionate and affordable resolution of civil disputes, with the appropriate support and participation of the parties and their counsel.

It is argued for the applicant that the orders sought will have adverse effects on her and her siblings (sic), and that there is no dispute that she is the respondent's 2nd wife having been mentioned by the respondent in an affidavit sworn on 22nd December 2017.

That there will be the necessity to determine whether the applicant has made any monetary or non-monetary contribution towards the respondent(sic) which issues will be determined by way of calling evidence. Relying on **Nairobi ELC case No.119 /2014 Habiba W Ramadhan & 7 others vs. Mary Njeri Gitiba (2017) eKLR** where the court stated;

*“As already observed by the court, under Order 1 Rule 10(2) the court has discretion to order joinder of any party to a suit any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. However, the said discretion must be exercised judiciously. The interested party herein has averred that he is the legitimate owner of the suit property in dispute and that the plaintiff herein are his tenants and that this matter cannot effectively and completely be decided in his absence. The Court has noted that in the pleadings filed by the plaintiffs herein, they mentioned one **Kibungei Arap Kogo** who is the applicant herein”.*

The applicant argues that the mere fact that the respondent mentioned her in his affidavit is sufficient to warrant her joinder. She also relied on **Nairobi Civil case No.100/2016 Jusuf Abdi Adan Vs.Hussein Ahmed Farah & 3 others (2017)eKLR** where the court was of the view that since the applicant therein was alleging that his fundamental rights under Article 35(2) and 33(3) of the constitution had been infringed that he had a right to be enjoined in the suit as an interested party under Article 48 and 50 of the Constitution.

The petitioner on her part argues that the applicant purports to be a 2nd wife of the respondent hence her interests if any are already represented by the 2nd respondent. She relied on the definition of an interested party in the case of **Trusted Society of Human Rights Alliance Vs. Mumo Matemo & 5 others (2014) eKLR** where the Supreme Court said: -

“Consequently an interested party is one who has an identifiable stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his/her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her own cause”.

And also of the expansion of the same **Judicial Service Commission vs. Speaker of National Assembly & 8 Others (2014) eKLR** and **Francis Karoki Muruatetu & Another vs.Republic & 5 Others (2010)eKLR** where in the latter case the Supreme Court went on to state;

“From the foregoing legal provisions, and from the case law the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party. (emphasis mine)

The elements were listed as follows:

- i) Since enjoined is not a right, a party has to lay before the court sufficient grounds by way of a formal application.
- ii) The party must demonstrate the personal interest/stake in the matter in the application.
- iii) The interest must “be clearly identifiable and must be proximate enough” so as not to appear peripheral.
- iv) The intended interested party must demonstrate the prejudice to be suffered in the event of non-joinder to the satisfaction of the court. This prejudice must be “clearly outlined and not something remote”.
- v) The party must “set out the case and/ submissions it intends to make before the court and demonstrate the relevance of those submissions.”

The applicant argued that the *Muruatetu case* was not applicable as it dealt with a very specific case where the intended interested party therein was framing issues that were different from the issues that the actual parties to the suit had framed.

Nevertheless, I find that all the authorities cited are relevant in as far and each party has cited to support their rival positions. In the end the issue is whether the applicant has complied with the requirements that give the court the authority to exercise its discretion in her favour.

The suit to which the applicant seeks to be joined is the matrimonial property Cause No.2/12 brought by the petitioner. A perusal of the Originating Summons clearly indicates that every allegation is made against her husband SMK.

In his replying affidavit sworn on 15th February 2018 the respondent-SMK mentioned the applicant herein in paragraph 2 of the affidavit where he states: -

“That it is true the petitioner herein is my 1st wife while one RM is the second wife hence I have contracted polygamous marriage

under Kikuyu customary law”

Nowhere in her Originating Summons in her supporting affidavit does the petitioner mention the applicant. The only thing she does at paragraph 3 of her affidavit is to acknowledge that she is the 1st wife of the respondent.

The matter for determination is that suit appears to be whether the respondent has caused the matrimonial home where they have lived since they married in 1970 to be subdivided into several portions unlawfully and without the consent of the petitioner. Nowhere in his replying affidavit does the respondent allude to any participation in any manner by the applicant the circumstances leading to the said subdivision.

I have perused the supporting affidavit of the applicant very carefully. Does it set out her interest/ stake in the matter? Or the prejudice she will suffer if the application is not allowed? Does the mere fact that she is the 2nd wife of the respondent warrant her joinder?

The affidavit in support of the application is bare in that regard. The applicant has not set out what her identifiable interest/stake in the dispute. Neither has she set out the prejudice she will suffer. By merely being the 2nd wife of the respondent does not of right give her the right to be enjoined in these proceedings. She must establish what her interest is in the matter. She does not say that she occupies any of those properties. She does not state that she made any contribution to the acquisition of any of those properties, or has made any developments therein. Her stake or prejudice cannot be left to the speculation.

She only states that she is the one currently taking care of the respondent who has since been abandoned by the petitioner. How does that establish an interest on the suit properties?

On his part the respondent clearly states in the affidavit that he is the absolute registered owner of the said properties and hence no issue arises with regard to the applicant’s personal interest in the suit properties. This appears to be is an issue between this wife and her husband, and not an issue between the wives and the husband. The respondent’s affidavit makes it very clear that this is between him and his 1st wife and her children. It relates to a parcel of land which from the record was acquired before the applicant came onto the scene. If the interest of the applicant was indeed at stake it would be the easiest thing for the respondent to say so. In my view, his demonstrated lack of interest in this application is telling, that this is an issue that is purely between him and the petitioner.

Coming back to **Order 1 rule 10(2)** of the CPR, the question is whether the applicant has demonstrated that her presence before the court will be necessary to enable the court determine the issues therein effectively and completely?

I must answer in the negative.

It is clear from the pleadings so far that the issue before the court is between the two parties and the applicant has not demonstrated that her non joinder will hurt her interest or cause her prejudice or that her participation will add any value to the suit.

The application is disallowed without any orders as to costs.

Dated, delivered and signed in open court at Nyeri this 18th March 2019.

Mumbua T.Matheka

Judge

In the presence of: -

Court Assistant: Juliet

Mwaura for respondent N/A

Kinuthia for applicant.

Mumbua T.Matheka

Judge

18/3/19