



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELC CASE NO. 83 OF 2016

GERALD NYAGA NJIRU.....APPLICANT

VERSUS

DORIS NJUTHE.....1ST RESPONDENT

JOSPHAT NJIRU MUTURI.....2ND RESPONDENT

HARRISON NYAGA MUTURI.....3RD RESPONDENT

LAZARO MBOGO.....4TH RESPONDENT

RULING

INTRODUCTION

1. This determination relates to a notice of motion dated 26th October, 2020 filed by the Applicant on 27th October, 2020. The motion is expressed to be brought under Order 1 Rule 10(2), Order 51 Rule 1 of the Civil Procedure Rules 2010, and Sections 1A, 1B 3 and 3A of the Civil Procedure Act. It is essentially about joinder.

APPLICATION

2. The Applicant is GERALD NYAGA NJIRU, the Intended Interested Party in the suit, while the Respondents are DORIS NJUTHE MUNYI, the Plaintiff while JOSPHAT NJIRU MUTURI, HARRISON NYAGA MUTURI and LAZARO MBOGO are the Defendants.

The motion came with two (2) prayers which are as follows:

- i) **THAT** the Applicant be joined as an interested party in this matter.
- ii) **THAT** costs be in the cause.

3. The Application is anchored on grounds inter alia, that the Applicant is the duly elected chairperson of the Mbuya Clan of the Ambeere Community which, according to the Applicant, owns the suit parcel of land Mbeti/Gachoka/1029. It is argued that the clans interest are likely to be affected by the judgment of the court and the applicant has asked to be joined in the suit as an interested party in order to properly represent the interest of the clan.

4. With the Application is filed a supporting affidavit dated 26.10.2020. The affidavit is sworn by the Applicant who reiterates the grounds in the Application and further avers to be chairperson of the Mbuya clan effective 14th January 2020 via minutes of a clan meeting which are attached to the Application. It is his claim that the suit parcel of land Mbeti/Gachoka/1029 was awarded to Mbuya clan in objection No. 20 of 1973. The court has been urged to allow the Application for joinder of the Applicant as an interested party in the suit to enable him represent the interest of the clan.

RESPONSE

5. The Application is opposed by the 2nd and 4th respondents who filed a replying affidavit on 4.12.2020 and dated 2.12.2020. The 2nd and 4th respondents claim that at the time of filing the defence and counterclaim, the 4th respondent was appointed by members of Mbuya Clan to represent their interest in the subject matter. It was therefore denied that the Mbuya clan was not represented in the suit and they argued that the majority of the people who appointed the Applicant are not members of the Mbuya clan. It was argued that the Applicant had not

demonstrated sufficient grounds to be joined in the suit and the court was urged to dismiss the Application with costs.

6. By a further affidavit sworn by the Applicant and filed on 25.1.2021, he concurred that the 4th respondent was indeed the chairman of the clan until the year 2018 when he is alleged to have been directed to step down. According to the Applicant, the 4th respondent collected money from members on behalf of the clan, failed to surrender the amount to the clan, but instead shared it with other individuals. It is pleaded that as a result of this, he was requested to step down as chairman as he did not have the clan's best interest at heart.

7. It is claimed that on 14th January, 2018, a meeting was held by the clan where they resolved to conduct an election upon which the Applicant was elected as chairman. It is pleaded that the members also resolved to register the clan as a self-help group and further to have one of the elected officials represent them in their affairs in the present matter. The Applicant avers that the officials visited the advocate on record for the clan, where they swore an affidavit that the 4th Respondent was no longer the representative of the clan in the matter and the Applicant as the new chairman would act in his place. It was reiterated that the 4th Respondent is no longer an official of the clan and that it was in the interest of justice to allow the Applicant to be joined in the suit in order to represent the clan's interest.

8. A response to the further affidavit was filed by one Jothan Nthiga Mugo on 24.2.2021 in opposition of the Application. He states that he is a member of the Mbuya clan and that he has been treasurer for the past 8 years. He denied that money was collected from members and put into personal use. He argued that members had unanimously elected the 4th Respondent as chairman of the clan and that, the position had never changed. It is his contention that allowing the Application would open doors for other parties to seek to be joined in the suit. Ultimately, the court was requested to dismiss the Application with costs.

SUBMISSIONS

9. The application was canvassed by way of written submissions. The Applicant filed his submissions on 16.11.2021. He reiterated the grounds in his Application and further affidavit in support of his case. It was submitted that the Application be allowed for the purpose of determining the size and extent of the suit Parcel of land. In support of the Application for joinder of the Applicant, reliance was made on the cases of **Brek Sulum Hemed Vs Constituency Development Fund Board & Another [2014]Eklr**, **Mary Njeri Vs AgaKhan Health Sciences t/a AgaKhan Hospital & 2 others, Ricardi Luigi V Porconi Emilietta & another [200]Eklr** and **Joseph Omuombo Owiti V Magadi Soda Company Ltd & 2 others [2004] eKLR**.

10. It was further submitted that the Applicant is the legitimate chairperson of the Mbuya clan and it was contended that no material had been placed before the court to dispute his appointment as chairman. The court was urged to allow the Application pursuant to Order 1 Rule 10(2) of the Civil Procedure Rules.

11. The 2nd and 4th Respondents filed their submissions on 30.11.2021. They traced the law on joinder of parties and relied on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules. They further submitted that the Applicant had not demonstrated that his presence before the court was necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. In opposition to the Application, reliance was made on the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 Others Vs Attorney General and 4 Others (2017) Eklr** where the court expounded on when an interested party can be joined in a case. Further reliance was made to the case of **Skov Estate Limited & 5 Others Vs Agricultural Development Corporation & Another**.

12. It was submitted that the 2nd and 4th Respondents had filed a counterclaim on their own behalf and in a representative capacity of the Mbuya clan based on authority granted to them by the members. It was argued that the Applicant had failed to demonstrate that the 2nd and 4th Respondents were conducting the counterclaim in an improper manner and that the contents of their Application did not show how they would assist the court in settling the questions in the suit. If anything, his presence was said to likely be that of a mere spectator in the suit and that he has no capacity to change the issues presented by the parties in the court. In support of this the Applicant relied on the case of **Methodist Church In Kenya Vs Mohammed Fugicha & 3 Others (2019)**. The court was cautioned from allowing the Application as according to the 2nd and 4th Respondents it would open a floodgate for any busy body with a cursory interest to seek to be joined in the matter.

ANALYSIS AND DETERMINATION

13. I have considered the Application, the responses made, and the rival submissions. I have also looked at the court record. There is only one issue that commends itself for determination to me viz: whether the Applicant should be joined in the suit as an interested party.

14. The legal position on joinder of parties is stipulated under Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:

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."

15. From the legal provision, a party can seek to be joined in a suit not only as a plaintiff or defendant but also as an interested party when their presence before the court is necessary to enable the court effectually and completely determine all questions in the suit. The Applicant seeks to be joined as an Interested Party and according to him, his presence is necessary before the court to enable him represent the interests of the Mbuya clan which the Applicant avers to be the chairman of the clan, by virtue of an election conducted on 14th January 2018.

16. The 2nd and 4th Respondents have disputed this by arguing that the 4th Respondent was the chairman at the time of filing the defence and

counterclaim. It is argued that the position has remained the same and further that the members who elected the Applicant were not members of clan. I have looked at the Application herein and there are various annexures attached to it which include, minutes of a meeting dated 14th January 2018 that stipulate the manner and mode of election and the officials elected. There is also a consent signed by the officials and witnessed by the advocate on record for the 4th Respondent to the effect that the Applicant shall act on behalf of the clan in the suit herein. I have no doubt whatsoever that the Applicant has the mandate to act on behalf of the clan. It is of importance to now determine whether the Applicant ought to be joined as an Interested Party or in some other capacity.

17. Under the **Black's Law Dictionary, 11th Edition at page 1351 an interested party is defined as "a party who has a recognizable stake (and therefore standing) in a matter"**.

18. Further the Supreme Court defined an interested party in the case of **Communications Commission of Kenya & 4 Others Vs. Royal Media Services Limited & 7 Others (Supra)** where they cited with authority the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others**: Civil Appeal No. 290 of 2012, which stated:

"An interested party is one who has a stake in the proceedings, though he or she was not 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 or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

19. The Applicant seeks to be joined in the suit as an interested party to act in trust for the Mbuya clan which he alleges owns the suit parcel of land and thus has a stake in the proceedings. However, though having a personal stake in the proceedings, the Applicant seeks to take over the role and replace the 4th Respondent in the suit who was initially acting on his own behalf and on behalf of the clan. I have looked at the pleadings filed by the 4th Respondent and I note that he is a defendant and is an active participant in the suit; one who has a direct claim in the suit on behalf of the clan by virtue of the counterclaim filed on 24.5.2017 in which he sought recognition of ownership of the suit parcel of land on behalf of the Mbuya clan.

20. As stated above, the Applicant is seeking to take over the role of the 4th Respondent in the suit and I believe he will be relying on the same prayers and pleadings as those initially filed by the 4th Respondent. I say this for reason that in the application herein, the Applicant has not in any way faulted the averments in the pleadings as filed on behalf of the clan. If anything, he agrees that the 4th Respondent at the time of filing the suit was acting on behalf of the clan. What I do not understand is how the Applicant, if seeking to represent the clan, can be an active participant in the suit as an interested party. He would need to be a defendant in order to agitate the clan interests effectively.

21. The role and place of an interested party was well articulated in the case of **Marigat Group Ranch & 3 others v Wesley Chepkoiment& 19 others [2014] eKLR** where the court held the view that:

"For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit..."

In the same case the court relied with approval on the case of **Joseph Leboo v Director, Kenya Forest Service & Others (Eldoret ELC No 273 of 2013)**, wherein the following appears:

"It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it....."

"It follows therefore that applications seeking to join proceedings as interested parties ought to be handled with caution so that a person does not come to a suit, disguised as an interested party, while all along he/she wishes to agitate rights of his/her own over the subject matter of the suit."

22. The Applicant has filed this suit seeking to replace the 4th Respondent in his capacity as chairman of the clan and as stated above the 4th Respondent is a defendant in the suit. The Applicant has in his Application stated that they wish to advance the clan's interest in the suit. This, in my view, can only be done if the clan is actively involved in the suit. Furthermore, replacing the 4th Respondent would essentially mean being a defendant the same way that the 4th respondent is. The role of an interested party as discussed in the above case is not of one who seeks to agitate his right over a subject matter but one who has a close connection to it but not seeking any rights over it.

23. The clan is seeking establishment of a right over the subject suit of land. They are therefore seeking to actively participate in the affairs of the suit by advancing their rights. This, they cannot do in their capacity as an interested party. It is not in doubt that the Applicant, acting on behalf of the clan, has a personal stake in the suit but the capacity in which he seeks to participate in the suit is what is mistaken. He should have sought to be a defendant, not an interested party.

24. I therefore find that the Application before the court lacks merit and is dismissed with costs to the respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 19TH DAY OF JANUARY, 2022.

In the presence of Kimanzi for M/s Bwiria for applicants; in the absence of Rose Njeru for 2nd & 4th respondent and in the absence of Njeru Ithiga for the plaintiff.

CA: Leadys

A.K. KANIARU

JUDGE

19.01.2022