



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.88 OF 2011

JACOB OGOLLA AMBALA.....PLAINTIFF

VERSUS

PROF.BETHWEL OGOT.....1ST DEFENDANT

(REGISTERED TRUSTEES)

JUBILEE HIGH SCHOOL.....2ND DEFENDANT

R U L I N G

1. This ruling follows the hearing of the application filed here on 10/5/2013. The application is dated 6/5/2013 and was heard interpartes on 31/3/2013. Two prayers are sought viz:

(a) One **WILSON ODHIAMBO AMBALLA** of P O Box 2647, **KISUMU**, be joined and added to the proceedings as a necessary party and defendant.

(b) Costs of the application be provided for.

The parties are **JACOB OGOLLA AMBALLA**, who is the plaintiff, and Prof. Bethwel Ogot (1st defendant) together with **JUBILEE HIGH SCHOOL** (2nd defendant).

2. The application is premised on the grounds, interalia, that the 2nd defendant bought land Parcel No. **EAST GEM/NYAMNINIA/864** from the proposed defendant, who is the plaintiff's brother. At the time of purchase, the property did not belong to the estate of the deceased **RUTH APONDI OGOLA**. It was bought on a willing seller/willing buyer basis. According to the defendants, it is necessary to bring the proposed party on board in order to effectively adjudicate on all matters and issues in dispute. The defendants also see a possibility that they may seek indemnity against the proposed party. The application has a supporting affidavit sworn by the 1st defendant. The supporting affidavit is mainly an amplification of the grounds upon which the application is premised.

3. The plaintiff opposed the application through what he called "**OBJECTION TO MOTION**" filed here on 19/9/2013. the objection was filed together with a supporting affidavit. According to the plaintiff, the real issue concerns whether the suit property was transferred to defendants; not who did it.

4. In the affidavit supporting the objection the plaintiff deponed, interalia, that the defendants unprocedurally and unlawfully registered the suit property in 2nd defendants name knowing well that the

property belonged to the deceased – **RUTH APONDI OGOLA**. The defendants knew that the proposed defendant didn't own the property.

5. The court heard the application interpartes on 31/3/2014. Nothing new was said by either side. The verbal engagement between the two sides during hearing was generally a restatement of what each side had already presented in writing. The only new thing was that the plaintiff said the proposed defendant was sick while the defendants denied it and insisted on proof.

6. I have looked at the application, the response and what each side said during hearing.

7. I don't consider it necessary to delve into the merits of the arguments presented because my considered view is that the application is incompetent.

8. The application is styled as having been brought under Order 1 rule 10(2) of Civil Procedure Rules. It is brought as a Notice of Motion. Order 1 rule 10(2) simply empowers the court on its own volition or upon application, to strike out the name of a party who is improperly joined or join a party who should be joined. In the present circumstances, the court is acting upon application to join a party who is not joined. But if the defendants had bothered to look further in the same order, they would have seen that Order 10 rule 14 enjoin that such application should be brought by way of Chamber Summons, not as a Notice of Motion. The application itself should therefore have been brought under Order 1 rules 10(2) and 14 of Civil Procedure Rules, 2010. It was wrong therefore to bring the application as a Notice of Motion.

9. It is usual in application of this nature to invoke Sections 1A,1B, 3A or 63(e) of Civil Procedure Act (Cap 21). It helps to do so because where an error or omission is made, the provisions enable the court to come to the applicants aid. This was not done in this case. It seems like the defendants were so sure of what they were doing that goofing was not in their minds. Well, they goofed and what should have been a Chamber summons is now a Notice of Motion. I am aware of legal provisions enjoining that the court should not have undue regard to procedural technicalities. But I hasten to observe that due regard must be had to procedure and that is what is lacking here.

10. But it is even doubtful if the application would have served its purpose even if it was brought the way the court is suggesting. A look at the contents of the application – particularly ground 2 which talks of seeking indemnity from proposed defendant – seem to suggest that the applicants should have been thinking of bringing third party proceedings against the proposed defendant. The procedure for that is clear from Order 1 rule 15.

11. But it seems like the defendants would have wished to proceed against the proposed party as defendant and then seek indemnity later. I need to observe here that would be an unwieldy task both for the court and the parties. The proper procedure is already spelt out in the Civil Procedure Rules. It is easier, more expedient, and time and cost saving. The defendants proposed route is circuitous and unhelpful. It would fly in the face of overriding objectives envisaged by Sections 1A and 1B of Civil Procedure Act (Cap 21). To me, the issue of third party proceedings is the more compelling reason why I should reject the application herein. The defendants refer to it in the application yet refuse to go the whole hog to actualize it.

12. The application herein therefore fails not so much because of what the plaintiff has said but because of the reasons so far stated. Without much ado, I hereby dismiss the application with costs. I hasten to point out however that the defendants are not barred from bringing the appropriate application to achieve the ends of justice.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

A.K. Kaniaru Judge

Diang'a George – court Clerk

No party present

Interpretation: English/Kiswahili

M/s Otieno for Applicant

Plaintiff in person

COURT: Ruling on application dated 6/5/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days

A.K KANIARU – JUDGE

29/1/2015