



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 320 OF 2011**

**JOHN ELIAS KIRIMI.....PLAINTIFF**

**VERSUS**

**MARTIN MAINA NDERITU.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**MARGARET WANJIRU NGARACHU.....INTERESTED PARTY**

**RULING**

Coming up before me for determination is the Notice of Motion dated 2<sup>nd</sup> October 2013 in which the Plaintiff/Applicant seeks orders that the amended plaint be deemed as properly filed and served upon payment of the requisite court filing fees and that costs of this Application be in the cause.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, John Elias Kirimi, sworn on 2<sup>nd</sup> October 2013 in which he averred that at the time of filing this suit, he was not aware that the 1<sup>st</sup> Defendant had sold the disputed property to one Margaret Wanjiru Ngarachu who has been participating in this suit as an interested party. He further averred that for an effective adjudication on the legality of the rival titles herein, the interested party must be made a defendant as the court is likely to issue orders averse to the title she holds and if so she then ought to be a defendant to enable the said orders to be enforced.

The Application is contested. Grace Gacambi Ngarachu filed her Replying Affidavit sworn on 28<sup>th</sup> October 2013 in which she averred that the Interested Party is her daughter now a resident of the United States of America and that she holds a power of attorney from her said daughter allowing her to swear this affidavit. She averred that it is not true that the Plaintiff/Applicant was not aware that the Interested Party was the registered owner of the suit property at the time of filing this suit. She further averred that the Interested Party voluntarily applied to be enjoined as such in this suit and the Plaintiff/Applicant has not explained why he did not enjoin her as a defendant at that time. She further averred that the Interested Party was merely an innocent purchaser without notice and has no privity of contract with the 2<sup>nd</sup> Defendant.

Both the Plaintiff and the Interested Party filed their written submissions.

The issue which I am called upon to determine is whether to allow the joinder of the Interested Party, Margaret Wanjiru Ngarachu as the 3<sup>rd</sup> Defendant in this suit and whether the Amended Plaint attached may be admitted. The relevant provision of the law is **Order 1 Rule 3** of the **Civil Procedure Rules, 2010** which provides as follows:

**“All persons may be joined as defendants against 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, if separate suits were brought against such persons any common question of law or fact would arise.”**

It is the Interested Party’s argument that at the time this suit was filed, the suit property was already in her name and therefore that the Plaintiff should have named her as a defendant at time or even sometimes later in the year 2013 when she applied to be enjoined as an interested party in this suit. She contends that the Plaintiff is therefore estopped to request for her to be enjoined as a defendant in this suit at this late stage. The Plaintiff on his part submitted that at the time of filing suit, he was not aware that the Interested Party was in fact the registered proprietor of the suit property. He further submitted that it is only after the Interested Party filed her application to be enjoined as an interested party that he came to the realization that she is the registered proprietor of the suit property having bought the same from the 1<sup>st</sup> Defendant. The Plaintiff argues that he claims proprietorship of the suit property and therefore seeks to challenge the title held by the Interested Party. He further submitted that for this court to make any orders affecting the title that the 1<sup>st</sup> Defendant purported to pass to the Interested Party, she must be made a defendant in these proceedings, a course she declined to be undertaken by consent of the parties herein, necessitating this application.

To my mind, I can see quite clearly that the issue of the proprietorship of the suit property lies at the heart of this suit. The court is called upon to adjudicate over which of the claimants thereto is legitimate as far as the law and the facts are concerned. The fact that both the Plaintiff and the Interested Party lay claim over the suit property means that the court will have to hear and determine the rival claims. In order for this court to do so comfortably, the Interested Party will no doubt require to be enjoined as a defendant herein.

In the circumstances, I hereby allow this Application and order that costs be in the cause.

**DELIVERED AND DATED IN NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2015.**

**MARY M. GITUMBI**

**JUDGE**