REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMNAI LAW COURTS

ELC JR MISC CIVIL CASE NO. 253 OF 2012

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDER SO JUDICIAL REVIEW OF MANDAMUS AND PROHIBITION AGAINST THE ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR AND THE COMMISSIONER OF LANDS

IN THE MATTER OF THE LAND REGISTRATION ACT 2012 SECTIONS 107 AND 108, ARTICLES 10, 73 AND 159 OF THE CONSTITUTION

IN THE MATTER OF LAND REFERENCE NUMBER 8747 THIKA

REPUBLIC .....APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL [SUED FOR AND ON BEHALF OF THE MINISTRY OF LANDS].....1ST RESPONDENT**
2. **THE CHIEF LAND REGISTRAR.....2ND RESPONDENT**
3. **THE COMMISSIONER OF LANDS.....3RD RESPONDENT**

SOUTH AND CENTRAL [THIKA] INVESTMENTS LIMITED.....EX PARTE

RULING

1. By a Chamber Summons dated 3rd February, 2015, the Interested Party herein, **Thugi River Estate Limited**, (hereinafter referred to as "the Applicant") seeks to be joined to these proceedings as Respondent.
2. According to the Applicant, it is the registered proprietor of LR 8747 Thika which was transferred pursuant to an order of this court. It was its case that it was condemned unheard and that the said orders were obtained irregularly as the applicant was not involved in the proceedings leading to the said decision despite it being a necessary party thereto.
3. It was contended that the said order continues to sit in stark conflict with another order made by a court of concurrent jurisdiction and it is imperative that the order made by this court is varied to avoid further embarrassment.
4. The application was supported by affidavits sworn by **Anthony Muriithi Kireria**, the applicant's advocate on 3rd February, 2015 and a further affidavit sworn by **Paul K. Muite**, the applicant's director sworn on 16th July, 2015.
5. On the issue of the competency of the supporting affidavit sworn by **Anthony Muriithi Kireria**, the law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which

may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure. In the case of **Yussuf Abdulgani Vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463, Ojwang, J** (as he then was stated as follows:

"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to Order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".

6. In this case, deponent of the supporting affidavit, **Anthony Muriithi Kireria**, did not even pretend to be acting on information obtained from the client. Similarly, in **Small Enterprises Finance Co. Ltd. vs. George Gikubu Mbuthia Nairobi HCCC No. 3088 of 1994** it was held that advocates should not depose to contested matters of facts.
7. It has been held and it is the law that an affidavit based on information and belief without disclosing the source of information and the grounds for holding the belief are worthless.
8. This rule was eloquently propounded by the East African Court of Appeal in **Life Insurance Corporation of India vs. Panesar [1967] EA 614** (**Sir Charles Newbold, P**) as hereunder:

"Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. That the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings does not therefore mean that there exist no rules as to what may be set out in the affidavits, other than rule 3 of Order 18, or as to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before…I would accept it…the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of Order 18 rule 3(1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise rule 3 would be a classic example of straining at a gnat but swallowing the camel. Even in relation to rule 3 the court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact…It is clear that the court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out precisely which are the facts based on information and the source of that information. To suggest that the court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is manifestly absurd. Whereas it is true that the Evidence Act does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence instead of oral evidence is destroyed at a blow."

9. It is therefore my view and I hold that the affidavit sworn by **Anthony Muriithi Kireria** is worthless. Mercifully there is a further affidavit on record. The law is now clear that the Court ought not to ignore documents on record even if irregularly filed unless the filing thereof has prejudiced the other party in material respect. See **Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000 [2002] 2 KLR 627; [2003] 1 EA 350** and **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998.**
10. As was held in **Abdul Aziz Suleman vs. South British Insurance Co. Ltd. Nairobi HCCC No. 779 of 1964 [1965] EA 66:**

    "To say that an affidavit filed by the plaintiff cannot be supplemented by further affidavit by the plaintiff, with the leave of the court, is something which startles one, and no case has ever suggested that with the leave of the court the plaintiff's affidavit cannot be supplemented."

11. I therefore do not see the reason why I should ignore the affidavit sworn by **Paul K Muite** herein.
12. The ex parte applicant and the respondents have however opposed the application. Their ground for the opposition of the application is that the applicant has come to court too late in the day. It is further contended that the subject land having been transferred and the orders granted herein effected, there is no basis for allowing the application. There were other grounds which in my view were speculative as to the steps which the applicant herein intends to take after being joined to these proceedings. I however do not feel compelled to consider the same at this stage as to do so would prejudice any application that the applicant might feel necessary to make after being joined to these proceedings. At this stage the Court is only restricted to the determination whether or not the applicant ought to be joined to these proceedings.
13. I have considered the application, the affidavits on record and the submissions made.
14. That the Court has the power to join parties to proceedings was placed beyond paradventure in **Meme vs. Republic [2004] 1 EA 124; [2004] 1 KLR 637** where it was held that at a very basic level the Court is empowered to draw from the ***Civil Procedure Rules*** in its exercise of powers under the ***Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practise and Procedure Rules*** and by virtue of Order 1 Rule 10(2), the Court is empowered to direct joinder of parties in such a way as to "enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit". In **Duncan M Michira & Others vs. Fidelity Commercial Bank Ltd Nairobi (Milimani) HCCS NO. 654 of 2007** the Court appreciated that Order 1 rule 10(2) of the ***Civil Procedure Rules*** grants the court jurisdiction to join any party to a suit at any stage of the proceedings provided that such joinder would assist the court to effectually and completely adjudicate upon and settle all the questions in dispute in the suit. The same provision was given effect to by the Court in **Ian Gwonda vs. James Nyangai Osoro & 2 Others Kisii HCCS No. 25 of 2008** where it held that under Order 1 rule 10(2) of the ***Civil Procedure Rules***, it is clear that addition of any party to a suit requires leave of the court, unless the court directs so on its own motion. The same provides that 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 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. It was therefore held in **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55** that:

    "A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit…A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter."

16. I associate myself with the decision in **Macademia Nuts Dealers vs. Horticultural Crops Development Authority & Others [2014] eKLR** that:

    "an interested party is a party who has a stake/interest directly in the matter before the Court, though he or she is not a party to the case. He must be a party who is likely or who will be affected by the decision of the court and he or she is of the view that unless he or she is enjoined (sic) in the matter his/her interest will not be well articulated or protected unless she or he is made a party to ventilate his or her cause."

17. The applicant herein avers that it was the registered proprietor of the suit property and that he was never joined to the proceedings. That averment in my view gives the applicant sufficient interest in these proceedings. As to whether the application it intends to make, if any, after being joined will succeed is another matter altogether.
18. It was contended that the ***Civil Procedure Act*** and the Rules do not apply to the instant application hence ought to be disallowed on that basis. Whereas the provisions of the ***Civil Procedure Act*** and the Rules made thereunder, save for Order 53 thereof do not apply to judicial review proceedings, the Court always has an inherent jurisdiction to ensure that the ends of justice are met and to make orders designed to prevent the abuse of its process. One of the circumstances under which the Court would be entitled to exercise such powers is in order to ensure that the rules of natural justice are attained.
19. Having considered the application and the response thereto I do not see any serious hindrance to the grant of the orders sought.
20. Accordingly, the applicant herein, **Thugi River Estate Limited**, is hereby joined to these proceedings as an interested party. The costs of this application will be in the cause.

Dated at Nairobi this day 28th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Macharia for Mr. Gatheru for the ex parte applicant

Mr. Munene for Mr. Odhiambo for the Respondents

Mr. Mcronald for the Intersted Party/Applicant

Cc Patricia