



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 346 OF 2002

MUNGAI & OTHERS.....PLAINTIFF

VERSUS

JOHN WAINAINA.....1ST DEFENDANT

JOHN GATHUMU.....2ND DEFENDANT

NZAU MWALIMU NZAU.....3RD DEFENDANT

FRANCIS MIKUNYUA KIRIMA.....4TH DEFENDANT

AND

JOSEPHAT MATHIA MUIGAI

SAMUEL KUNGU MUIGAI.....INTERESTED PARTIES

(On behalf of Estate of late James Muigai)

RULING

The court on 20/1/2014 gave directions that the two applications dated 3/12/2013 and 11/12/2013, by proposed interested parties be heard together. The Chamber Summons application dated 3/12/2013 is by one **Benedict Hongo acting for and on behalf of members of Githu-Zima Society** who seek to be enjoined in the instant suit as interested parties. The society members state they wish to be enjoined in the suit so that they can participate in the hearing of the application by way of Notice of Motion by the plaintiffs dated 23rd October 2013 which seeks orders of eviction against the Defendants/Respondents from the suit property known as **L.R. NO. Nairobi/Block/123/1-279 formerly L.R. NO. 57/26**. The society claims that the application by the plaintiffs would have devastating consequences on their members who number more that 1900 and who have lived on the suit property as squatters and have effected substantial developments on the property. The members thus claim they have an interest in the subject suit property and it would be in the interest of Justice that they be enjoined in the suit so that they can participate and safeguard their interests.

The application for joinder dated 11th December 2013 is still by the same society **Githu Zimma Society** but fronted by a different set of officials led by **Charles Otemwa Nyamwanga** who swore the supporting affidavit claiming to be the Chairman. It does appear that there was wrangling as to who the bonafide officials of the proposed interested party are and the matter was the subject of litigation. Fortunately, **Hon. Justice Odunga** in a ruling delivered in HC MISC. Application NO. 309 of 2013 on 18th December 2013 declined to quash the appointment of the currently registered office bearers of **Githu Zima Society** who include **Benedict Hongo** as Secretary as sought by Charles **Otemwa Nyamwanga** meaning that the only persons who would have the authority to represent the proposed interested party are the officials who are currently the registered officials.

In the premises the application for joinder dated 11/12/2013 filed by **Charles Otemwa Nyamwanga** as Chairman of the proposed interested party would be incompetent as the said Charles **Otemwa Nyamwanga** would have no capacity to represent the proposed interested party and could not properly swear an affidavit in support of the application. In the circumstances I order the Notice of Motion application for joinder dated 11th December 2013 struck out for being incompetent as the party who filed the same did not have any locus or capacity to represent the proposed interested party.

Turning to the chamber summons application dated 3rd December 2013 the applicant seeks leave that **BENEDICT HONGO (for & on behalf of members of GITHU- ZIMA SOCIETY)** be enjoined in the suit as interested parties. The applicants state that the majority of them have been on the suit property as descendants of their parents who used to work in the said farm owned by East African Sisal Estates Ltd up to 1957 when the land was surrendered to the Government. The applicants acknowledge they are and have been squatters in the suit property and in May 2006 constituted themselves into a Self Help Group known as **Githu-Zimma squatters Project Help Group** and was registered as **Githu-Zimma Society** in November 2011. The applicants contend that they have lived on the suit property and have effected developments thereon and have dwellings thereon. They claim they acquired an interest in the suit land to entitle them to be heard on any matter affecting the suit property.

The Applicants claim to have peacefully lived on the suit property until the year 1995 when the plaintiffs invaded the suit property alleging that they had purchased the same from a company known as **Kentiles Limited**. The applicants claim the plaintiffs and the Defendant have no bonafide title to the suit property and they have not exhibited any title to demonstrate their ownership. The Applicants contend that they have sufficient interest to entitle them to be enjoined as interested parties to the suit. In an endeavour to demonstrate their interest the applicants on 30/8/2013 even went ahead and paid a sum of **Kshs.48,665/-** to the Commissioner of Lands on account of land rent in respect of the suit property notwithstanding that the rent demand was not made to them.

The Applicants acknowledge the plaintiffs have filed the application dated 23rd October 2013 which seeks the delivery of vacant possession of the suit property by the Defendants and failing which an order of eviction to be issued against the Defendants, employees and/or agents. The court had directed this limb of the plaintiffs application to be heard interpartes and the proposed interested party considers that any such order may adversely affect them and it is for this reason they sought to be enjoined and be heard as interested parties in regard to the application.

Order 1 Rule 10 (2) envisages a party being enjoined as a plaintiff or as a defendant to the suit while **order 1 rule 22** envisages a situation when a party has been enjoined as a 3rd party. The applicants are not seeking to be enjoined either as plaintiffs or Defendants and have sought to be enjoined as interested parties. Order 1 Rule 1 of the Civil Procedure Rules provides who may be joined as plaintiffs and the criteria is that there has to be a common right to relief arising out of the same act or a series of acts where a common question of law or fact arises.

Order 1 Rule 3 provides who may be joined as defendants and as in the case of plaintiffs the test is that a right of relief against the defendants arising from the same act or transactions exists and a common question of law or fact arises. Based on this criteria a plaintiff determines which defendant to sue and for what reliefs. A plaintiff cannot and ought not to be saddled with a party as a plaintiff with whom there is

no commonality of interest. Equally a plaintiff cannot and ought not to be loaded with Defendants in his suit against whom he has no claim and/or whom he does not wish to bring an action against.

This matter has had various turns and twists in the law courts. There have been both criminal proceedings and civil proceedings. From the material placed on record by the plaintiffs, the Defendants and now the proposed interested party the matter has been to the Judicial Review Division and to the Constitutional and Human Rights Division of the High court and is now back to this Division. The Applicant has been active at all forums a but it is only now the applicant seeks to be enjoined as a party to the instant suit.

The issue for the court to determine is whether the Applicant has demonstrated that they have any interest that warrants them to be enjoined to these proceedings as an interested party at this stage. At the time the plaintiffs filed the instant suit in 2002 the applicant was non existent having only come into being in 2006 as a self Help Group and converting later in 2011 as a society. It is thus clear that the plaintiffs could not have enjoined a non existent entity as a defendant at the time they filed suit.

The Applicants through their present application acknowledge they are squatters on the suit property and even state they have applied to the National Land Commission to be allocated the suit property. The issue thus does arise if the applicants can then claim to have any proprietary interest over the suit property in view of their admitted status of squatters and if the National Land Commission would have any basis to allocate the land to the squatters if the land is privately owned by the Plaintiffs. That is not for the court to determine at this stage.

As the Applicants claim to be squatters in occupation of portions/parts of the suit property it is apparent they stand to be affected should the plaintiffs be granted the order of injunction they seek in the Notice of Motion dated 23rd October 2013. In the premises and in the interest of fairness and Justice, the court will grant leave to the proposed interested party to be enjoined in the proceedings as an interested party and to participate in the hearing of the plaintiffs application dated 23rd October 2013 as such. In that regard the now enjoined interested party has leave of 14 days from the date of this ruling to any response, they may have to the plaintiffs application dated 23rd October 2013.

The Court will mention this matter on 6th May 2014 for directions on the disposal of the plaintiffs application dated 23rd October 2013.

The costs for the instant application will be in the cause.

Orders accordingly.

Ruling dated signed and delivered at Nairobi this...27th.....day of...March.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....**for the Plaintiffs**

.....**for the Defendants**