

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 105 OF 2013

JOHN GEKANANA MOSIGISI PLAINTIFF

VERSUS

ALOYS RATEMO SIRO 1ST DEFENDANT

MARIA MONGINA SIRO 2ND DEFENDANT

RULING

1. The plaintiff brought this suit on 19th March 2013 seeking an order to compel the defendants to transfer to the plaintiff a portion measuring 50 feet by 100feet of all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/6019** (hereinafter referred to only as “**the suit property**”) and in the alternative, a refund of the sum of kshs. 15,500.00 that was paid by the plaintiff to the defendants as the purchase price for the suit property. The plaintiff claimed that he purchased the suit property from the 1st defendant on 27th March 1982 at a consideration of Kshs. 15,500.00took possession immediately and commenced development thereon. The defendants however refused and/or failed to transfer the suit property to the plaintiff. It is on account of the foregoing that the plaintiff brought these proceedings to compel the defendants to either transfer the suit property to the plaintiff or make a refund of the purchase price.
2. When this suit was filed, the suit property was registered in the name of the 2nd defendant. During the pendency of the suit, the defendants caused the suit property to be transferred to the name of one, **Evans OntitaRatemo** who is the 1st defendant’s son and the 2nd defendant’s grandson. The plaintiff has now brought an application under order 1 rule 10 of the Civil Procedure Rules seeking leave to join the said Evans OntitaRatemo as a third defendant in this suit. The plaintiff’s application was brought by way of Notice of Motion dated 5th December 2013. The application was brought on the grounds that since the suit property has been transferred to the said Evans OntitaRatemo, it is necessary for him to be made a party to this suit so that he may be heard before any order prejudicial to him is made in the matter. The plaintiff’s application was opposed by the defendants through grounds of opposition dated 14th February 2014. The defendants contended among others that the plaintiff’s suit is time barred and as such incompetent. The defendants contended that there is no competent suit before court in which a party can be joined. The defendants contended that this is not an appropriate case in which the court’s discretion to order the addition of a party intoa suit can be exercised. When the application came up for hearing on 5th March 2014, Mr. Anyona appeared for the plaintiff while Mr. Momanyi appeared for the defendants. Mr. Anyona submitted that the person sought to be added to this suit as a third defendant, Evans OntitaRatemo is now the registered proprietor of the suit property. The said person is therefore an interested party in this suit and should be allowed to come on board. Mr. Anyona submitted that the defendants have not put forward any good grounds to warrant the denial of the orders sought by the plaintiff.
3. In his response to Mr. Anyona’s submissions, Mr. Momanyi submitted that the draft amended plaint attached to the plaintiff’s affidavit in support of the application herein is incompetent as it has not set out the reasons why Evans OntitaRatemo is being addedas a party to this suit. Counsel argued that Evans OntitaRatemohas not even been described in the said draft plaint. The defendant’s advocate submitted further that the plaintiff’s suit herein is time barred on account of the fact that the plaintiff has sought in these proceedings to enforce a contract for the sale of land that was entered into 31 years ago. Counsel submitted therefore that the suit herein is a non-starter and as such it will serve no purpose to join a party into the same. I have considered the plaintiff’s application and the grounds of opposition by the defendants in opposition thereto. I have also

considered the submissions made by the advocates for the parties. The court has power under Order 1 Rule 10 (2) of the Civil Procedure Rules to order that any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit be added as a party to the suit. Order 1 Rule 10 (4) provides that where a defendant is added, the plaint shall be amended, summons taken out and served upon the new defendant.

4. As I have stated at the beginning of this ruling, the plaintiff's claim against the defendants is for specific performance of an agreement for sale of the suit property with an alternative prayer for a refund of the purchase price. It is not disputed that the suit property has since been transferred to Evans OntitaRatemo who is sought to be added as a third defendant in this suit. There is no doubt that if this court was to grant the relief sought by the plaintiff herein, the said Evans OntitaRatemo would be affected. I am of the view that if Evans OntitaRatemo is added as a defendant in these proceedings the court would be able to determine once and for all, the interests of all the parties herein to the suit property. I am of the opinion therefore that the said Evans OntitaRatemo is a necessary party in these proceedings. Failure to join him in this suit would lead to a miscarriage of justice as he would risk being condemned unheard in breach of rules of natural justice. The defendants have objected to the joinder of the said Evans OntitaRatemo to this suit on the ground that the suit is time barred and as such is incompetent. I do not think that the competency or otherwise of a suit should be a major factor to be considered when the court is considering whether or not to join a party to a suit.
5. I am of the view that what the court should be overly concerned about in an application of this nature is whether the joinder of a party sought to be added to a suit is necessary for the determination of the real issues in dispute in such a suit and whether the presence of such a party before court is necessary to enable the court to effectively and completely adjudicate upon and determine such issues. Whether or not this suit is competent are some of the issues which this court will have to determine herein. The court would only be able to determine these issues completely when all the parties who may be affected by such determination are before it. The court cannot therefore refuse an application for leave to add a party to a suit on account only of the fact that the competency of such a suit is in doubt. I would wish to add that, I am unable to hold in the application before me that the suit herein is time barred. Such finding would determine this suit and as such would require a substantive application by the defendants. Due to the foregoing, I am of the opinion that no good grounds have been put forward by the defendants that would justify the refusal of the plaintiff's application herein.
6. In conclusion, the plaintiff's application dated 5th December 2013 is allowed in terms of prayer 1 and 2 thereof. The plaintiff shall amend his plaint within 14 days from the date hereof. The defendants shall be at liberty to amend their statement of defence within 14 days from the date of service of the amended plaint upon them. The defendants shall have the costs of the application in any event.

Delivered, dated and signed at Kisii this 21st day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the Defendants

..... Court Clerk

S. OKONG'O

JUDGE