



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 410 OF 2008

SUKHDEN SINGH..... 1ST PLAINTIFF

JANET LEELAND..... 2ND PLAINTIFF

VERSUS

JANET LEELAND..... DEFENDANT

ADAM FRANK THOROGOOD INTERESTED PARTY

RULING

The intended interested party's Notice of Motion dated 6th August 2013 inter alia seeks an order that the Applicant one **Adam Frank Thorogood** be joined in the suit as an interested party forthwith before the matter is listed for hearing of the main suit. The basis upon which the Applicant's application is founded is contained in the supporting affidavit sworn by the Applicant on 6th August 2013. The Applicant claims that his late father, **David Campell Thorogood**, as at the time of his death on 6th August, 2000 owned **L.R. NO. 1870/247/11 I.R. NO. 23124** Nairobi among other assets. The Applicant avers that at the time of his father's death he was a minor and that his uncle one **Raymond Frank Thorogood** and **Robert Anthony Humble Smith** applied for probate to his late father's Estate in 2003 in the **United Kingdom (UK)** and a grant **Ad Colligenda bona** was issued which was subsequently resealed in the High Court of Kenya vide **HC Succession cause NO.2642 of 2004**.

The applicant deposes in the supporting affidavit that after his uncle on the basis of the grant Ad Colligenda bona traced all the assets of his late father after which the solicitors firm of **Neville Jones & company Solicitors of United Kingdom** appointed **Gary Martin Pick** to petition for grant of letters of administration intestate for the applicant's late father. The grant was issued in the United Kingdom and the petitioner made an application in the High Court of Kenya Nairobi vide succession cause **NO.967 of 2011** for the sealing of the grant which was duly done. The suit property stated in the resealed as **L.R.NO.1870/1/247** was included in the schedule of the deceased assets. The Notice for the resealing of the said grant was published in the Kenya Gazette on 15th July 2011 and no objection was made by any person.

The applicant deposes that before his death, his late father was leasing the suit property to several tenants including the defendant who after the deceased demise was left as the incharge of the property and was collecting rent from the other tenants. The applicant has annexed a bundle of lease/tenancy agreements marked "**AFT-7**" to his affidavit. The applicant states that it is the Defendant who has been paying land rent and rates for the suit property since the death of the applicant's father as per the bundle of receipts

annexed and marked “AFT12” to the applicants supporting affidavit. The applicant avers that the suit property could only have been transferred to **Pascalina Pamba** who later transferred the property to the plaintiff through fraudulent means and contends that the transfer to **Pascalina Pipa Pamba** was a forgery.

The applicant contends he has a genuine interest in the suit to warrant him to be enjoined in the suit as a party and seeks the leave of the court to be so enjoined.

The plaintiff **Sunkhder Singh Laly**, has sworn a replying affidavit in opposition to the applicant’s application dated 6th August 2013. The plaintiff deposes that the instant suit was instituted way back in 2008 and that the applicant has not explained the delay in bringing the instant application. The plaintiff further deposes that the applicant has not shown that he is entitled to the property and further states that the affidavit sworn in support of the petition for sealing of the grant indicated the property as **L.R. 1870/1/247/11 (original number 102/2)**.

The plaintiff further dismisses the allegations of fraud and forgery relied upon by the applicant as unfounded. The plaintiff contends that the suit property was regularly transferred to him by **Pascalina Pipa Pamba** who was living with the deceased as his wife and was gifted the property. The plaintiff further states that he purchased the property from **Pascalina Pipa Pamba** and that he had no obligation to investigate how she got to be registered as the owner of the property.

The parties filed written submissions as directed by the court articulating their respective positions in the matter. I have perused and reviewed the filed submissions, the application together with the affidavits in support and in opposition and the annexures thereto. The issue that stands to be decided by the court is whether the applicant has demonstrated that he has an interest that is identifiable in law to warrant him to be made a party to these proceedings. The plaintiff claims he is the only child and sole beneficiary of the estate of his late father, **David Campell Thorogood** who was the registered owner of the suit property before it was transferred to **Pascalina Pipa Pamba** in what he claims to be a fraudulent transfer and subsequently to the plaintiff in yet another transfer which he alleges to have been fraudulent. The applicant has tendered evidence to show that his deceased father was indeed so registered as owner and was infact letting out the houses that are in the premises to various tenants and that the Defendant was one of the tenants. There does not appear to be any indication whether **Pascalina Pipa Pamba** at any time asserted any rights of ownership by taking occupation and possession Equally there is no evidence that the plaintiff ever exercised any ownership rights over the persons who were in occupation as tenants before filing this suit.

Although there is a reference of property **L.R. NO. 1870/1/247** in the grant of probate there cannot be any doubt that the property referred to in the petition for grant is the suit property. The applicant contends that his late father did not gift the suit property to **Pascalina Pipa Pamba** and that the latter could not properly transfer the property to the plaintiff and therefore he (**the applicant**) is the person entitled to the ownership of the property as the deceased sole beneficiary. Quite clearly the allegations of fraud cannot be established at this interlocutory stage of the proceedings without hearing the parties and taking of evidence having regard to the standard of proof required to prove and establish fraud in Civil Suits which is proof higher than a balance of probability but certainly lower than proof beyond a reasonable doubt.

Order 1 rule 10 gives the court a wide discretion to join any person as a party to a suit provided the presence of such party is necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit.

Order 1 Rule 10 (2) provides-

10.(2) 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 party 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 in the suit, be added.

Having regard to the above provision the consideration that a court is called upon to make in an application for joinder is whether a party's presence is necessary to enable the court to effectually and completely adjudicate all questions in the suit and whether the party making the application for joinder has shown that he/she has some interest in the matter in dispute.

In the present case the applicant has demonstrated that he has some interest in the suit property as the sole beneficiary of his late father's estate and that having regard to the evidence and material tendered by the applicant there is an issue whether or not the suit property formed part of the deceased estate at the time of his death or whether he had lawfully transferred the suit property during us lifetime as alleged by the plaintiff.

In the premises therefore I find the applicant's application for joinder dated 6th August 2013 to have merit and I accordingly allow the application but I direct that the applicant be enjoined in the suit not as an interested party but as a defendant and I accordingly order that the applicant be added as the 2nd Defendant to the suit. I further grant leave to the applicant to file his defence with or without a counterclaim within 14 days of this ruling. The plaintiff will equally have leave of 14 days from the date of service of the defence upon him to file a reply to the defence.

The cost of application shall be in the cause.

Ruling dated, signed and delivered Nairobi this...30thday of...June.....2014.

J.M. MUTUNGI

JUDGE

In the presence of:

.....For the Plaintiff

..... For the Defendant