



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL CASE NO. 71 OF 2012

TALAM SAMSON KIPROTICHPLAINTIFF

VS

ALBERT KIPTINGOS BIWOTTDEFENDANT

AND

AN APPLICATION

BETWEEN

**ALBERT KIPTINGOS BIWOTT.....DEFENDANT/
APPLICANT**

AND

**TALAM SAMSON KIPROTICH.....1ST INTENDED
DEFENDANT/RESPONDENT**

**ZIPPORAH JELANGAT KIPTINGOS2ND INTENDED
DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL3RD INTENDED
DEFENDANT/RESPONDENT**

**LAND REGISTRAR, KERICHO4TH INTENDED
DEFENDANT/RESPONDENT**

RULING

1. By an application by way of notice of motion dated **29th August 2013**, the defendant/ applicant seeks orders *inter alia*;

- i. **THAT** the defendant/applicant be granted leave to enjoin 2nd, 3rd and 4th respondents in this suit as the 2nd, 3rd and 4th defendants in the defendant's proposed counterclaim.

ii. **THAT** if leave is granted the defendant/ applicant be allowed to file an amended defence and counterclaim within such period as may seem just and expedient in the circumstances.

iii. **THAT** the Costs of this application be provided for.

2. The application is based on the grounds:

a. **THAT** the joinder of the 2nd, 3rd and 4th Respondents as defendants in the proposed counterclaim will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

b. **THAT** the sale of the suit land by the intended 2nd defendant/respondent to the plaintiff/ 1st respondent was in fraud of the defendant/ applicant.

c. **THAT** the suit land is matrimonial property and the plaintiff/1st respondent knew or ought to have known that the same was in fact matrimonial property and that the defendant/applicant was in occupation and use of the same.

d. **THAT** the Plaintiff/1st respondent entered into the sale transaction in respect of the suit land without carrying out due diligence.

e. **THAT** the 4th respondent acted in dereliction of his duties by registering the transfer of the suit land in favour of the plaintiff.

f. **THAT** the defendant/applicant has a legal and beneficial interest in this suit land.

3. The application is predicated upon the annexed affidavit of **Albert Kiptingos Biwott** sworn on the **29th August, 2013**.

4. For the applicant, it was argued that he bought **Kericho/Kapsoit/2463** (*hereafter referred to as the suit property*) which is matrimonial property, jointly with the proposed 2nd defendant (his wife) in the proposed counterclaim. A copy of the sale agreement is exhibited marked **(AKI)**. The proposed 2nd defendant without his knowledge fraudulently transferred the suit land to herself prompting him to register a caution **(AK2)** against the suit property.

5. The 4th proposed defendant proceeded to register the transfer in favour of the plaintiff without regard to the caution registered therein. It is therefore necessary in the interests of justice that the proposed parties be enjoined in the substantive suit as prayed for in the application.

6. The respondent opposed the application and filed grounds of opposition dated **20th September, 2013** on the following grounds;

i. The application is bad in law, wanting in procedure, devoid of merit and ought to be dismissed with costs.

ii. The application has not satisfied threshold for the joinder of parties as set forth in the Civil Procedure Rules.

iii. The application is made in bad faith, namely to delay justice at the Plaintiff's detriment.

iv. The whole application is frivolous, vexatious, scandalous, and abuse of judicial process and ought to be dismissed with costs.

v. The proposed counterclaim is a nullity *ab initio*.

vi. The suit herein belongs to the plaintiff and the defendant cannot purport to introduce other defendants into the Plaintiff's suit.

vii. The application is overly strange in law and is not supported by any provisions and ought to be struck out with costs

7. I have carefully analyzed the rivaling arguments.

The issue for the court to consider in the present matter therefore would be:-

- i. **Whether the 2nd 3rd and 4th proposed respondents ought to be joined as Defendants,**
- ii. **Whether the 2nd 3rd and 4th proposed respondents would be necessary parties to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.**

8. The law on the point is donated by dint of the provisions of **Order 1 Rule 10 (2)** in the **Civil Procedure Rules, 2010**. I have addressed my mind to the law on the point. Accordingly, any persons may be joined in the suit as defendants if-

(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 the 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 involved in the suit, to be added."

Order 1 rule 3 provides on who should be joined as a defendant and provides thus:-

"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 questions of law or fact would arise."

9. The thrust of the applicant's case is that the 2nd proposed Defendant is a necessary party in this suit because she fraudulently transferred the matrimonial property to her name, sold it to the plaintiff and was assisted by the 4th proposed Defendant to transfer the same while there was a caution subsisting. The Plaintiff has brought this suit against the Defendant/applicant praying for an eviction order and permanent injunction as registered proprietor of the suit property. The presence of the proposed defendants in this suit will enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

10. In my view, the jurisdiction of this court under the above rule can only be invoked in the two circumstances where a party has been wrongly enjoined in the suit and requires his name to be struck out or where the court is of the opinion that it would be necessary to enjoin a party to the suit for the effective determination of the matters in dispute.

11. I have carefully evaluated the reasons advanced by the applicant and why he wishes the proposed defendants to be enjoined in this suit. Fortunately the reasons put forward fall within the ambit of the provisions of **Order 1 Rule 10 of the Civil Procedure Rules**. I am persuaded that the presence of the proposed Defendants in this suit is necessary for the just determination of the pending suit between the plaintiff and the defendant.

12. In the result, I allow the application in terms of prayer 1 and 2 of the notice of motion. The Defence and counterclaim to be filed within fourteen (14) days from the date hereof. Costs to abide the outcome of the suit.

Dated and delivered at Kericho this 25th day of June 2014

L N WAITHAKA

JUDGE

In the presence of:

N/A for Counsel for Plaintiff

N/A for Counsel for Defendant

Plaintiff: present in person

Defendant: present in person