



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 371 OF 2011 (O.S)**

IN THE MATTER OF PARCELS OF LAND REFERENCE NO. 10426/82 I.R NO. 126720 & LAND REFERENCE NO.10426/81 I.R. NO. 126719

AND

THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE LAWS OF KENYA, ORDER 37 RULES 7 OF THE CIVIL PROCEDURE RULES

BETWEEN

1. **JEREMIAH OLE MATURA NKOITIKO**
2. **SIMINKOR NKAMIYA**
3. **KITASI MOITALEL NKIMINIS**
4. **JAMES KINTANYEI KANYORO**
5. **SALAU OLE LOLO MUNANTAUWA**
6. **JAMES KOSEN**
7. **SIMON KOSEN**
8. **PETER SUAKEI OLE PATEI**
9. **ERICK KOISAYO KANYORO**
10. **JEREMIAH OLTITI KUSERO ..... APPLICANTS**

**VERSUS**

1. **AGRICULTURE SYNDICATE LIMITED**
2. **NATIONAL HOUSING CORPORATION ..... RESPONDENTS**

**RULING**

1. The amended **Chamber Summons** dated 9/12/2013 seeks orders that the 1<sup>st</sup> Defendant/Applicant's name be struck out of this suit for misjoinder and that the costs of the application be provided for.
2. The application is supported by the affidavit sworn on 9/12/13 by the **Managing Director** of the Applicant Company **Francis Mburu**. According to the said affidavit, the Applicant was the registered proprietor of Land Parcel **LR No. 10426/82** (original **No. 10426/80/3**) and **Land Ref. No. 10426/81** (original **No. 10426/80/2**) which the Applicant sold to **Palazo Ltd** and to **National Housing Corporation** (2<sup>nd</sup> Defendant) who are now the registered owners of the respective parcels of land sold to them.
3. It is further averred that the Applicant had at all times enjoyed vacant possession of the suit properties and the claims by the Plaintiffs/Respondents regarding ownership of the said parcels of land are therefore

baseless. That the Applicant gave vacant possession to the purchasers as per the terms and conditions of the sale agreements.

4. The Applicant contended that no certified copy of a title deed in the name of the Plaintiffs/Respondents was annexed to the **Originating Summons** as mandatorily provided for by the law. That in any event this suit was instituted when the suit properties had already been sold and that the Plaintiffs/Respondents are not entitled to make a claim for adverse possession.

5. The 2<sup>nd</sup> Defendant/Respondent (**National Housing Corporation**) through a replying affidavit sworn by its Corporation Secretary **Lydia Ng'ang'a** on 10/2/2014 supported the application. It is stated that the suit premises namely **LR No. 10426/80/2** is registered in the name of the 2<sup>nd</sup> Defendant/Respondent (**National Housing Corporation**). That the suit property has been in a continuous possession of the 2<sup>nd</sup> Defendant/Respondent. The 2<sup>nd</sup> Defendant associated itself with the Applicant's sentiments but added that any striking out of the application should not prejudice the 2<sup>nd</sup> Defendant.

6. The 2<sup>nd</sup> Defendant's stand is that the suit ought to proceed as per the directions taken by consent on 1/10/2012, as follows:-

- **That the Originating Summons was to be treated as a plaint.**
- **That the replying affidavit was to be treated as a defence.**
- **That the Originating Summons was to proceed by way of affidavits on record and subsequent written submissions.**

The 2<sup>nd</sup> Defendant's termed the Originating Summons as incompetent, stating that the Plaintiff ought to have moved the court by way of a plaint.

7. In opposition to the application the Plaintiffs/Respondents relied on the affidavit sworn by **Jeremiah Ole Matura Nkoitiko** sworn on 9/10/2013. According to the Plaintiffs/Respondents, the Applicant has failed to comply with the **Civil Procedure Rules (2010)**. That the Applicant had no good title to pass to sell the parcels of land in the first place and that the suit raises weighty legal issues that ought to go to a full trial.

8. The application was canvassed by way of written submissions which I have duly considered.

9. **Order 1 rule 10 (2)** of the **Civil Procedure Rules** provides as follows:-

**“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 involved in the suit be added.”**

10. The issues in the primary suit touch on ownership of the suit property. The Applicant is sued as the one who sold the land in question. The Plaintiff's claim is that of adverse possession. Striking out the Applicant's name from the suit will therefore leave a gap in the chain of events. In my view the presence of the Applicant is necessary in order for the court to effectually and completely adjudicate on all the issues raised in the suit.

11. Although issues of technicalities of procedure have been raised by the parties, this court will not give undue regard to the same at this stage of the proceedings as the same are capable of being rectified so that the case can proceed on merits. Consequently, I dismiss the application with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **19<sup>th</sup>** day of **June** 2014.

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**B. THURANIRA JADEN**

**JUDGE**