



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L 272 OF 2013

MARIGAT GROUP RANCH1ST PLAINTIFF

FREDRICK KILLEN.....2ND PLAINTIFF

JOHN CHEBII.....3RD DEFENDANT MICHAEL

CHEROP.....4TH DEFENDANT

VS

WESLEY CHEPKOIMENT.....1ST DEFENDANT

JAMES BARKWONG.....2ND DEFENDANT

JOHN CHEMASE3RD DEFENDANT

JOSEPH LENASIEKU.....4TH DEFENDANT

JACKQUINE.....5TH DEFENDANT

LONGILAI MUKOMOI KIRIYA.....6TH DEFENDANT

SALINA KUSONYIKE.....7TH DEFENDANT

SILVYA KANDIE.....8TH DEFENDANT

ERICK SIMOTWO.....9TH DEFENDANT

MAMA MERCY.....10TH DEFENDANT

JOSHUA KWARKWAR.....11TH DEFENDANT

ARAP SAIDI.....12TH DEFENDANT

LABAN KEMEI.....13TH DEFENDANT

KIPLAGAT KIBERENGE.....14TH DEFENDANT

BENARD CHEMJOR.....15TH DEFENDANT

JOSEPH KIPRUTO.....	16TH DEFENDANT
STELLA LOTOLE.....	17TH DEFENDANT
TARIKAK CHEBON.....	18TH DEFENDANT
RODGERS KIBET.....	19TH DEFENDANT
MOSES CHEBOR.....	20TH DEFENDANT

(Application to be enjoined as interested party; principles to be applied; applicants seeking to come into proceedings as interested parties and be allowed to file defence and counterclaim; whether such applicant is an interested party or a substantive party; plaintiff's choice in suing a party; such choice to be given paramount consideration; when such choice can be disturbed by court; in instant suit plaintiffs not wishing to proceed against applicants; best avenue is for applicants to file their own substantive suit; application dismissed)

RULING

1. The application before me is that dated 22 November 2013 filed by 110 persons seeking to be enjoined to these proceedings as interested parties. That application is opposed by the plaintiff. Before I go to the gist of the application and the reasons for opposing it, I think it is prudent that I lay a little background to this suit.

2. This suit was instituted by way of plaint filed on 6 May 2013. The suit is against 20 persons. The 1st plaintiff, Marigat Group Ranch, is a Group Ranch registered under the provisions of The Land (Group Representatives) Act, CAP 287, Laws of Kenya. The Marigat Group Ranch is registered as proprietor of the land parcel Baringo/Marigat/1 (the suit land) which is land measuring approximately 6,644 Hectares. Its representatives are the 2nd, 3rd and 4th plaintiffs. In the plaint, it is pleaded that the Group Ranch has 333 members and has embarked on the process of sub-division of the land so that each member of the Group Ranch can have his/her share. However, it is claimed that the defendants, without any colour of right, have trespassed into the land, have started constructing temporary shelters, cultivating and grazing their cattle on the suit land. This is asserted to be illegal as the defendants are not members of the Marigat Group Ranch. The plaintiffs have stated that owing to trespass by the defendants, they have been unable to proceed with the exercise of sub-division, and further, the defendants have denied the plaintiffs and members of the Group Ranch beneficial use of the land. In the suit, the plaintiffs have sought inter alia orders to have the defendants evicted from the suit land.

3. The defendants filed a joint Statement of Defence. They inter alia denied that Marigat Group Ranch has 333 members. It is also claimed that the 2nd, 3rd and 4th plaintiffs are in office illegally. The defendants have averred that they have been in occupation of the suit land since their childhood and have made substantive developments on it. They claim that they are members of the Marigat Group Ranch and claim that the plaintiffs have failed to update the register. An application was made by the plaintiffs to amend the Defence to include a counterclaim. In the Counterclaim, they have sought orders that they are entitled to the suit land and that the plaintiffs should be compelled to include them in the register as they are members of Marigat Group Ranch.

4. In the subject application, the 110 persons want to be enjoined as interested parties to this suit on the grounds that :-

(a) They are residents of Perkerra Sub-Location within the purported Ranch.

(b) That none of the residents is registered as a member.

(c) That in the event that judgment is entered in favour of the plaintiffs, they may evict the applicants.

(d) That the applicants intend to put in a counter-claim to compel the plaintiffs to have them registered.

(e) That the entire registration was a fraud.

(f) That the purported Group Representatives are self-seekers who are pursuing their own interests other than the interests of the inhabitants.

5. The application is supported by the affidavit of Christopher Kandie, who is among the 110 persons sought to be enjoined. He has stated that the plaintiff's case will affect their interests, since if they get judgment, they may decide to abuse it by enforcing a blanket eviction to the detriment of the intended interested parties. It is further stated that as inhabitants of the sub-location, they are entitled to be registered as of right and that they have been waiting for the land to be sub-divided and individual shares to be given. They also want to file a defence and counterclaim to this suit.

6. The application is opposed by the plaintiffs. They have averred that the 110 persons are not members of the Marigat Group Ranch and that they are also not habitants of the ranch. It is said that they are strangers who want undue benefit from the suit land, upon getting wind, that the sub-division process is due to commence. It is averred that the applicants live in Perkerra Irrigation Scheme, which neighbours the Group Ranch, but that they have started encroaching into the Group Ranch. It is further said that the Group Ranch is in Yator Sub-Location and not Perkerra Sub-Location where the interested parties live. It is stated that the register of the Group Ranch closed way back in the year 1988 and that they cannot now be heard to claim to be members over 22 years later. The replying affidavit has also stated that one of the persons said to be an interested party, James Loriko, has neither given his consent to be an interested party, and that another, Kamau Magu, is long dead.

7. Mr. Kipkenei for the applicants urged me to allow the application. He stated that the interested parties were not involved nor sensitized when the Ranch was registered yet they have been on the land all along. He submitted that he register of members should be opened and the applicants registered as members as they are rightful shareholders.

8. Mr. Mutei for the plaintiffs opposed the application. He submitted inter alia that the register of members was closed in the year 1993 and that it is now 21 years later. He referred to Section 28 of Cap 287. He submitted that the 110 persons are strangers to this suit and that if they have any claim, they should file a separate suit.

9. I have considered the opposing views expressed.

10. What the applicants want is to be enjoined as interested parties so that they can file a defence and counterclaim in which they assert that they have a right to be registered as members of the plaintiff Group Ranch. They have brought this application under the provisions of Section 3A of the Civil Procedure Act. Section 3A provides as follows :-

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

11. It will be seen that Section 3A is a general section and does not provide for any specific rights including the right to be enjoined to proceedings as an interested party. There is indeed no clear-cut provision in the Civil Procedure Act, Cap 21, or Civil Procedure Rules, 2010, making allowance for a party to be enjoined into proceedings as an interested party. The closest provision that I have come across is Order 1 Rule 10 (2) which provides as follows :-

Rule 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 involved in the suit, be added.

12. It will be seen from the above that a party can seek joinder as plaintiff or defendant. In such case, there would be no problem because a person may ask to be enjoined so as to agitate the same claim or defend it. For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the the catch words "*whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit...*". This is the same position I took in the case of **Joseph Leboo v Director, Kenya Forest Service & Others (Eldoret ELC No 273 of 2013)**.

13. It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it. For example, if two parties are feuding over the ownership of property which is rented to a particular tenant, I can envisage a situation where the tenant comes to court seeking to be enjoined as interested party. In such instance, he/she is not strictly a party, in the sense that he/she does not wish to agitate any rights of ownership of the property in dispute, but is interested in the subject matter for the reason that he/she does not know to whom rent should be paid to. But if such tenant would wish to also agitate a claim towards ownership of the same property, then such tenant is no longer an interested party, in which case, he/she will need to apply to be enjoined to the proceedings either as plaintiff or defendant.

14. It follows therefore that applications seeking to join proceedings as interested parties ought to be handled with caution so that a person does not come to a suit, disguised as an interested party, while all along he/she wishes to agitate rights of his/her own over the subject matter of the suit. In such a case such person needs to apply to be plaintiff or defendant and not interested party.

15. In this case, the applicants want to be enjoined as interested parties and be allowed to file defence and counterclaim to the suit. Clearly, they do not just want to come into these proceedings as "interested parties" but as defendants with a counterclaim. Caution needs to be exercised when a party wants to join proceedings as defendant. This is because the court would not want to impose a party upon the plaintiff unless it will not be prudent to determine the matter without such party being defendant. For example, if in an action against a tortfeasor, an employer of such tortfeasor applies to be enjoined as defendant because the tortfeasor was acting under the command of the employer, there should be no problem with such application, for the plaintiff's claim against the chosen defendant is the same claim against the principal. But where the plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him, for each person has a right to choose against whom to assert his claims against. The plaintiff could have his genuine reasons as to why he does not wish to proceed against other persons, and issues of costs will also be involved. This is not to say that in an appropriate case, the court cannot insist that a certain person be made defendant irrespective of the protestations of the plaintiff; it all depends on the circumstances of the case, but the plaintiff's choice on whom he has chosen to sue, ought to be given paramount, though not absolute, consideration.

16. In this case, the plaintiffs have made a choice on whom to sue. They have chosen to sue the 20 persons named as defendants. They have sued them because they say that it is these 20 persons who are trespassers and who are an impediment to the sub-division of the Group Ranch. In their replying affidavit, they have said that the intended interested parties are strangers to them, and that they are persons who are not residents of the suit land, but reside elsewhere. It is apparent that they have avoided suing the applicants because they do not consider the applicants to have trespassed on the suit land. That is their view of the matter and I think that view needs to be respected.

17. I agree with Mr. Mutei for the plaintiffs, that if the applicants want to agitate certain rights of their own over the suit land, then the proper avenue is for them to file an appropriate suit, through which they

can assert such rights. Such suit will then be considered on merits.

18. I have deliberately avoided going into the arguments whether the applicants are entitled to the suit land, or whether the register of the Group Ranch was properly closed, or whether the applicants are entitled to be registered as members. These, I think, form the dispute that may be agitated by the parties and it will not be wise for me to be mired in their arguments at this stage of the proceedings. Suffice it to state that I do not think that the applicants have a right to be enjoined to this case as interested parties, for they are actually asserting claims over the suit land, and the right avenue for such person is not to join as an interested party but to apply to be a substantive party to the suit.

19. Even if I were to take this application as an application by persons who want to be enjoined as defendants with a counterclaim, I am unable to allow it, for the plaintiffs do not wish to proceed against them, and as I earlier said, such choice needs to be given paramount consideration. I am unable to bring myself to including the applicants as defendants when the plaintiffs clearly state that they have no claim against them. I think the proper way is for the applicants to proceed to file a suit of their own if they feel that they have certain rights over the suit land.

20. For the above reasons, this application is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. T. Mutei for the plaintiff/respondent.

Mr. R. Kipkeni for the proposed interested parties/applicants.