



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 705 of 2012**

**Formerly HCC 63 OF 2011**

**LUKA KIPLELEI KOTUT..... PLAINTIFF**

**VS**

**JOSEPH CHEBII & ANOTHER.....DEFENDANT**

***(Parties to suit; application by plaintiff to strike out interested party from suit; suit filed by plaintiff against defendant alleging trespass; interested party filing appearance and defence; whether proper to do so; interpretation of Order 1 Rule 6 and Order 7 Rule 1; who may file appearance and defence; no leave of court sought by interested party; whether interested party entitled to enter proceedings by filing appearance and defence; held improper for interested party to file appearance and defence; interested party struck off the suit; application allowed)***

**RULING**

The application before me is the Motion dated 27 July 2011 filed by the plaintiff. It is an application brought under the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010, and Section 3A of the Civil Procedure Act, CAP 21 , Laws of Kenya. The plaintiff is seeking orders :

1. *That this Honourable Court be pleased to strike out the memorandum of appearance and the statement of defence filed by the interested Party/Respondent herein.*
2. *That costs of this application be in the course.*

The grounds upon which the application is based are that

- (i) *The interested party/respondent lacks locus standi to claim any interest in the suit property.*
- (ii) *The plaintiff/applicant is the first allottee and first registered owner with an indefeasible title.*
- (iii) *The interested party/respondent statement of defence does not raise any reasonable defence to the plaintiff/applicant's claims.*
- (iv) *The interested party's statement of defence is scandalous, frivolous and vexatious.*
- (v) *The interested party's statement of defence is prejudicial , embarrassing and a delay to the fair trial.*
- (vi) *The interested party's statement of defence is serious (sic) abuse of the process of this*

*Honourable court.*

(vii) *The purported interested party is not a party to this suit.*

The application is supported by the affidavit of the plaintiff.

This suit was instituted by way of Plaint filed on the 8<sup>th</sup> April 2011. In the suit the plaintiff has pleaded that he is the first registered owner of the land UASIN GISHU/CHARAO SCHEME/160 (the suit land). His claim against the two defendants is one of trespass. It is pleaded that the 1<sup>st</sup> defendant in November 2010 trespassed onto the plaintiff's land, erected a fence and a temporary structure and later leased the said land to the 2<sup>nd</sup> defendant who proceeded to plough the same. It is the plaintiff's pleading that the defendants do not have his permission to be on the suit land. The prayers sought in the plaint are a declaration that the defendants are trespassers on the suit land, an order of eviction, and an order of permanent injunction to restrain them from interfering with the suit land.

The record is not clear whether the defendants have been served as there is no affidavit of service on record. However, on the 27 May 2011, a document titled "INTERESTED PARTY STATEMENT OF DEFENCE UNDER PROTEST" was filed in person by one Jacksaline Jepkosgei Kiptuei (hereinafter the interested party). The document is drawn in the character of a Statement of Defence but proceeds to assert that the suit land belonged to one Rotumoi Kiptuei (deceased). The interested party is a daughter to the said Rotumoi Kiptuei. The pleading by the interested party is a lengthy one. In brief, it is the case of the interested party that the land belongs to one Rotumoi Kiptuei (deceased). The interested party has asserted that the suit is "inept ambiguous and does not sufficiently disclose a cause of action against the right defendant and whom was suppose (sic) to be served with the suit papers and is liable to be dismissed with costs."

What I gather from the interested party's pleading is that she has a claim over the said land and that the plaintiff has not sued the right defendants.

The plaintiff has now applied that the memorandum of appearance and the statement of defence be struck out. The respondent did not file any replying affidavit or grounds of opposition to the said application.

This matter was canvassed before me on the 17 January 2013. Mr.T.K Kiplimo, learned counsel for the applicant was present for the applicant. There was no appearance on the part of the firm of M/s S.M Nyagaka & Company who were appointed by the interested party after she had filed her pleadings. The interested party was present and sought an adjournment which I refused to grant. Mr. Kiplimo urged me to allow the application. He pointed out that the application was unopposed. It was his view that the pleadings filed by the interested party were scandalous. He pointed out that the interested party has not been sued in this matter and is strictly not a party to this suit. He argued that the plaintiff's suit is a simple case of trespass against the defendants. He faulted the interested party for filing a Memorandum of Appearance and Defence without leave of court. It was his view that the plaintiff has no locus to claim any interest in the present suit.

I have considered the application. It may be that the interested party has a claim to the suit land. I do not however think that she has approached the court in the correct way. If she has a claim to the suit land, then she needs to file a suit asserting her claim to the suit land and clearly setting out the reasons to her claim. I agree with the submissions of Mr. Kiplimo that the interested party is not a defendant to this suit. She therefore had no mandate to enter an appearance and defence. Under Order 6 Rule 1, provides that

*Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.*

It is therefore discernable that an appearance to a suit can only be entered by a defendant. Not any busy body can enter appearance to a suit. The Rules do not envisage a situation where a stranger to the suit enters appearance to the suit.

A defence can also not be filed by a person who is not a defendant to the suit. Order 7 Rule 1 provides that :-

*Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.*

A person who is not a defendant cannot therefore simply walk into the proceedings by filing a Statement of Defence.

The discretion to enjoin a person as a defendant to a suit is one that is solely granted to the plaintiff. This discretion is granted under Order 1 Rule 6 which provides that :-

*The plaintiff may at his option (emphasis mine) join as parties to the same suit all or any of the persons severally, or jointly and severally liable, on any one contract, including parties to bills of exchange and promissory notes.*

The court of course has leeway under Order 1 Rule 10 to order that a person be enjoined as a defendant upon an application being made.

Taking all the above provisions into consideration, it was improper for the “interested party” to enter appearance to this suit and file defence. If the “interested party” feels that she has a legitimate claim, she is at liberty to file a separate suit to agitate her case. She could also not impose herself as an interested party to this suit without leave being granted to her to be in this suit as an interested party.

I therefore find that her presence in the suit herein is scandalous, frivolous and vexatious. I am also of the view that her “pleadings”, if I am to refer to them as pleadings, will prejudice, embarrass and delay the fair trial of the plaintiff’s case. The same are an abuse of the process of court. I allow this application and strike out all “pleadings” and/or documents filed by the said Jacksaline Jepkosgei Kiptuei. Costs of this application shall be borne by the said Jacksaline Jepkosgei Kiptuei.

It is so ordered.

DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JANUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Delivered in the Presence of

Mr. T.K Kiplimo of M/s Gicheru & Company for the plaintiffs.

No appearance for M/s Nyagaka S.M for the interested party.

Interested party present.