



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 176 OF 2011

ANGATA BARGOI FARMERS

CO-OPERATIVE SOCIETY LTD..... PLAINTIFF

-VERSUS-

DAVID KIPTUNUI KORIR & 87 OTHERS.....DEFENDANT

AND

JONATHAN KIPLANGAT BOR & 523 OTHERS.....APPLICANTS

RULING

1. I have before me an application dated 16th December, 2011 brought by one, Jonathan Kiplangat Bor on his own behalf and on behalf of 523 others (herein after referred to only as “**the applicants**”). The application which has been brought under among others Order 1 rules 3,5,8,9,10,11,12,13 and 14 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act, Cap. 21 Laws of Kenya seeks orders that the applicants be added as defendants in this suit and that Jonathan

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Kiplangat Bor be granted leave to act on behalf of the applicant’s in this suit. The application that is supported by the affidavit and supplementary affidavit of the said Jonathan Kiplangat Bor sworn on 16th December, 2011 and 16th April, 2012 respectively is brought on the grounds that the applicants are in occupation of the entire parcel of land known as L.R No. TRANSMARA/MOYOI/2 (hereinafter referred to as “**the suit property**”) which is registered in the name of the Plaintiff and which is the subject of this suit between the Plaintiff and the defendants. The applicants claim that they are bound to be affected by any decision that the court may make in this suit and that it is only fair and just if the applicants are granted leave to join this suit as defendants so that this court would be able to determine the interests of all the parties who claim to have interest in the suit property once and for all. The applicants claim that they are in occupation of the suit property and that during the two successive adjudication processes in

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the area that created the title held by the Plaintiff and the titles that had been issued to the defendants, they were ignored. The applicants claim that they are the genuine owners of the suit property and that they have been in occupation of the same from time immemorial. They claim that the orders sought by the Plaintiff in the Plaintiff will directly affect them. The applicants claim to have a genuine claim to the suit property being claimed by the Plaintiff. It is their prayer that they be given an opportunity to prove their claim. They have annexed to the supplementary affidavit of Jonathan Kiplangat Bor a draft statement of defence and counter-claim against the Plaintiff.

2. The applicants' application is opposed by the Plaintiff and the defendants. The Plaintiff filed grounds of opposition dated 5th January, 2012 while the defendant filed neither grounds of opposition nor replying affidavit but associated themselves with the grounds of opposition filed by the Plaintiff. The application is opposed by the Plaintiff and the defendants

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mainly on points of law. The applicants filed written submissions which they adopted at the hearing of the application while the Plaintiff and the defendants made oral submissions before me on 25th February, 2013. In their written submissions, the applicants reiterated the contents of the affidavit and further affidavit that they had filed in support of the application. The applicants submitted that on the material placed before the court this is an appropriate case in which the court should exercise its discretion to allow the joinder of the applicants as defendants in this suit and to grant leave to Jonathan Kiplangat Bor to represent them in the suit. On its part, the Plaintiff submitted that the dispute before the court concerns only the Plaintiff and the defendants and that the applicants are busy bodies who have no interest whatsoever on the subject matter in dispute. The Plaintiff submitted that they have no claim against the applicants and as such the applicants cannot be joined in this suit as defendants. The Plaintiff

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submitted further that the issues raised in the applicant's affidavit which they intend to raise in their defence and counter-claim are concerned with the legality of the adjudication process. The Plaintiff submitted that the applicant's proposed defence and counter-claim has no merit as this court is not seized of jurisdiction to determine the legality or otherwise of an adjudication process. The Plaintiff submitted that it would be futile in the circumstances to join the applicants in this suit as defendants. The Plaintiff submitted further that the contents of the applicants' affidavit and further affidavit show clearly that the interest of the applicants and those of the current defendant are in conflict. It is the Plaintiff's contention therefore that in the circumstances, the applicants cannot be joined in this suit as additional defendants. According to the Plaintiff, the applicants would be better off filing a separate suit. In conclusion, the Plaintiff submitted that the applicants have not satisfied the provisions of order 1 rule 10 of

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the Civil Procedure Rules and as such are not entitled to the orders sought. The defendants associated themselves with the submissions of the Plaintiff and added that the applicants had not established a cause of action to warrant being joined in this suit. The defendants submitted further

that the applicants had made a similar application based on the same grounds in another case between the parties herein before the High Court in Nakuru which application was rejected and dismissed with costs.

3. I have considered the applicant's application together with the affidavits and the submissions filed in support thereof. I have also considered the grounds of opposition filed by the Plaintiff to the application and the submissions that were made before me by the Plaintiff's and the defendant's advocates. The following is the view that I take on the matter. Whether to add or substitute a party to a suit is a matter at the discretion of the court. The discretion must however be exercised judiciously in

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accordance with the laid down principles of law. The applicants are seeking leave of this court to be joined in this suit as defendants. They claim that they are in possession of the suit property which is the subject of the suit before the court and that the orders sought by the Plaintiff will affect their rights. The applicants claim that the Plaintiff and the defendants who are fighting over the suit property are not the genuine owners of the same, the occupiers and genuine owners of the said property being they. They claim that due to acts of corruption and negligence, they were not considered during the adjudication process in the area through which the Plaintiff and the defendants claim to have derived their titles to the suit property. Neither the Plaintiff nor the defendants filed affidavit to deny the allegations contained in the two affidavits filed by the applicants in support of their application. The factual averments in the said affidavits are therefore uncontroverted and are taken by the court as true. I am satisfied that the

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applicants have shown sufficient interest in the subject matter of this suit to warrant their joinder as defendants in the suit. I am of the view that the Plaintiff and the defendants have not shown any compelling reason why the applicants should not be joined in this suit. They have not shown any prejudice or injustice that would be occasioned to them by the joinder of the applicants in the suit. I am of the view that on the material placed before the court, the presence of the defendants before the court would be necessary to enable the court to effectually and completely determine and settle all questions involved in this suit. Contrary to the submissions made by the Plaintiff, I am of the opinion that the applicants have satisfied the provisions of Order 1 rule 10 of the Civil Procedure Rules to warrant the joinder sought. Most of the issues raised by the Plaintiff and the defendants go to the merit of the defences and claims that the applicants intend to put forward once they are joined in the suit. I am of the view that those issues should be raised in

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response to the defence and the claims that the applicants would put forward once they are joined in the suit but not at this stage to bar their joinder. I also don't think that the mere fact that the interests of the applicants and those of the current defendants in the suit are in conflict is a good ground to refuse the present application. Defendants in a suit do not normally need to have the same defence to the plaintiff's claim more particularly where they are more than one and are represented by different advocates. The defendants had claimed that the applicants had made a similar application before a Nakuru court that was rejected. This court was not furnished with a copy of the said decision made by the Nakuru court and as such I am unable to express any view on the same. Due to the foregoing, I am satisfied that the application dated 16th December, 2011 is well merited. The same is allowed as

prayed save that the costs thereof shall be in the cause. I make further order that the Plaintiff shall within 14 days from the date

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hereof amend its Plaint dated 2nd September, 2011 to join **Jonathan Kiplangat Bor** as the 89th defendant in his on behalf and on behalf of the 523 persons that he has been granted leave to represent in this suit.

Signed, dated and delivered at Kisii this 24th day of May, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Oguttu for the plaintiff

No appearance for the defendant

No appearance for the applicant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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