



**WILLIAM LAWRENCE WACHIRA .....APPLICANT**

**VERSUS**

**SEWANI OLE NTANI MOINAMI .....RESPONDENT**

**AND**

**1. JOSEPH LEMAYIAN KAPAITO**

**2. NJENGA WAMBU MIMIRI.....INTETERESTED PARTES /APPLICANTS**

**RULING**

1.The Application before the Court is by two parties – **Joseph Lemanyian Kapaito** (suing on behalf of the estate of the late **Samuel Matanya Ole Kapaito**)(“1<sup>st</sup> Interested Party”) and **Njenga Wambu Mimiri** (“2<sup>nd</sup> Interested Party”) (collectively, “Interested Parties”) – dated 15/12/2011 (“Application”). The Application is expressed to be principally brought under **Order 1, Rule 10(2)** of the **Civil Procedure Rules**. It prays for orders that the two Interested Parties be granted leave to be joined as interested parties in this case.

2.Both Interested Parties say that they have genuine and legitimate interests in the subject matter of the suit namely that each of them have previously purchased portions of the land from the defendant in the suit (**Sewani Ole Ntani Moinami**) (“Defendant”) comprised of the same parcel of land which is the subject matter of the dispute between the Plaintiff and the Defendant herein.

3.The Application is supported by the affidavits of each Interested Party. That of the 1<sup>st</sup> Interested Party dated and filed on **15/12/2010** depones that the late **Samuel Matanya Ole Kapaito** entered into an Agreement of Sale for land dated **18/11/1988** with the Defendant. The purchase was to be for **30 acres** but the parties mutually reduced it to **5 acres**. He duly made payments pursuant to that Agreement as acknowledged by written instruments copies of which are attached to the affidavit. The 1<sup>st</sup> Interested Party says that the subject matter of that Sale Agreement is, at least in part, the same subject matter in the present suit.

4.The affidavit of the 2<sup>nd</sup> Interested Party similarly depones that he entered into an Agreement for Sale dated **12/06/1988** to purchase 1 acre of land from the Defendant. Pursuant to that agreement, the 2<sup>nd</sup> Interested Party depones that he duly made payments to the Defendant. He also avers that the subject matter of the Sale is the original undivided parcel of land which, at least in part, forms the subject matter of this suit.

5 .The Application is opposed by the Plaintiff. Apparently, the Defendant does not oppose it. The Plaintiff, who appears in person, filed what he styled as Notice of Preliminary Objection dated **09/05/2011**. In it, he raises twelve separate grounds of what he calls “Grounds of Objections.” Looking at the grounds, they are more accurately termed such and not Preliminary Objections. It was therefore just as well that the parties agreed to canvass the Application and the Preliminary Objection simultaneously and

both by way of Written Submissions. The Plaintiff also filed a Replying Affidavit on **31/05/2011** upon leave of the Court.

6. In essence, the Plaintiff raises arguments which can be categorized under three headings. First, the Plaintiff complains that the Interested Parties are strangers to him and that the parcels of land they claim from the Defendant are different than the one he is claiming. He depones that his claim is for **LR No. Kajiado/Kitengela/16500** ("Parcel No. 16500") which measures 50 acres. His claim against the Defendant is for the full portion of 50 acres. It follows, he says, that the Interested Parties have no claim to that parcel. It is telling, the Plaintiff avers, that the late **Samuel Matanya Ole Kapaito** died before **Parcel No. 16500** was in existence.

7. As for the 2<sup>nd</sup> Interested Party, the fact that he has placed a caution on parcel **No. LR Kajiado/Kitengela/16499** also owned by the Defendant proves that any claim he has is on that parcel and not **Parcel No. 16500**.

8. Second, the Plaintiff complains that this Application has been brought in collusion with the Defendant, and that it will prejudice his rights.

9. Third, on the legal front, the Plaintiff argues that the purported Agreements for Sale between the Interested Parties and the Defendant have "lapsed" and are not legally enforceable anyway. As I understand it the Plaintiff gets to this result by arguing that any actions based on the Sale Agreements are statute-barred. He also says that both are now incapable of conveying any land because the consent of Land Control Board was not obtained as required by **section 8(1)** of the **Land Control Act**. Ironically, the Defendant had earlier attempted both these legal arguments to bar the Plaintiff's suit on a preliminary point. Both points were overruled by **Justice Lenaola**.

10. Starting with the Plaintiff's third objection, I will do the same here. Both of these objections will have to be taken up in the trial. My view of the law is that although the legal objections the Plaintiff raises they are weighty, neither is fatal to the Interested Parties' claims. In any event, there is a real question whether these objections are for the Plaintiff to raise.

11. Yet, that does not settle the matter. The factual objection that the Plaintiff raises is that the suit property is entirely different than the parcels of land claimed by the Interested Parties. If so, that would be a ground to decline to accede to the Interested Parties' prayers to be enjoined to the suit. It is important to recall that the legal principle applicable is articulated in **Order 10, Rule 10(2)** of the **Civil Procedure Rules**. It states:

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 adjudicate upon and settle all questions involved in the suit be added.

12. Hence, a party who can be joined is one who ought to have been joined in the first place. Such a person is one whose presence would be necessary in order for the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. See *Lucas Kabobia Njuguna v Consolata Bank of Kenya Ltd* [2005] eKLR.

13. Applying this standard to the instant Application, I am of the view that the Interested Parties herein ought to be enjoined to the suit. Looking at the circumstances in totality, it is obvious that the claims of both the Interested Parties and the Plaintiff all arise from sale agreements of land with the Defendant whose root title traces back to **Share No. 46** in the **Oloolokitoshi Kitengela Group Ranch** which, originally comprised of about 250 acres. By the Plaintiff's own admission, that land allotted to that share number was later processed to be Land Parcel no. **Kajiado/Oloolokitoshi/Kitengela/1847**. This latter parcel was then subdivided into various other parcels including Parcel No. 16500 which the Plaintiff lays

claim to.

14.It follows that the Interested Parties have an interest in the determination of this suit and their legitimate rights might be affected by its resolution. Consequently, it is both fair, prudent, and in preserving judicial resources that the Interested Parties be enjoined to this suit so that all the various claims can be interrogated, ascertained and determined. I therefore order as such.

15.In reaching this conclusion, and with respect to the Plaintiff, I have seen no evidence at all of collusion between the Interested Parties and the Defendant. I have also detected no bad faith on the part of the Interested Parties. The fact that the Defendant acquiesces to the Application, without more, is not a pointer to collusion or bad faith or conspiracy to defraud the Plaintiff as he claims. The Interested Parties have shown that they have legitimate interests in the subject matter and since, as shown above, they relate to the subject matter of the dispute between the Plaintiff and the Defendant, they are entitled to ventilate them in the same suit to avoid duplicity of causes of action and potential prejudice of their rights.

16.In the result, I direct that the Interested Parties do file and serve their pleadings within **fourteen (14) days** of today's date.

The Plaintiff and Defendant will be at liberty to file and serve responding pleadings or amend their existing ones within **fourteen (14) days** of being served.

17.Costs of this Application shall be in the cause.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.**

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**J.M. NGUGI**  
**JUDGE**