



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 160 OF 2011

HIRAM BERE KINUTHIA..... PLAINTIFF

VERSUS

EDICK OMONDI ANYANGA1ST DEFENDANT

ANNE ANYANGA2ND DEFENDANT

THE REGISTRAR OF TITLES3RD DEFENDANT

THE HONORABLE ATTORNEY GENERAL4TH DEFENDANT

RULING

The Applicants are Elizabeth Wanjiru Ngige and Robert Matathia Ngige, and are seeking in an application dated 29th July 2011 as amended on 25th November 2011, to be joined as the 2nd and 3rd Plaintiffs respectively to the suit filed herein. The Applicants are the Administratrix and Administrator of the Estate of the Late Francis Ngige Matathia. The main grounds for their application is that at all material times the late Francis Ngige Matathia (now deceased) and the Plaintiff were tenants in common in equal shares of the property known as Land Reference No. 28/6 situated in Garden Estate. Further, that Land Reference No. 28/6 was sub-divided and gave rise to, *inter alia*, LR No. 28/14 which is the subject property of the suit filed herein (hereinafter referred to as the suit property), and which is alleged to have been unlawfully allotted to the 1st and 2nd Defendants. The Applicants state that it is in the interest of justice that they be enjoined so as to take care of the interest of the Estate of the late Francis Ngige Matathia.

The Applicants in the supporting affidavit sworn by Robert Matathia Ngige on 29th July 2011 state that the Late Francis Ngige Matathia died on 13th May, 2002, and Grant of letters of Administrator was issued to them on 30th September 2003. A copy of the said Grant is annexed to the affidavit as evidence. The Applicants also state that the Late Francis Ngige Matathia and the Plaintiff were embroiled in a legal suit in HCCC No. 2917 of 1997 arising out of the sharing of the partnership property including LR No. 28/14. The Applicants believe that their exclusion from the present suit is calculated to deny them an equal share of the suit property.

The Plaintiff has responded by filing grounds of objection dated 30th August 2011, and a Replying

Affidavit sworn by the Plaintiff on 12th September 2011. The gist of his response is that the initial property known as L. R. No. 28/9 was held by the Plaintiff and the Late Francis Ngige Matathia in fee simple as joint tenants, as the title documents do not show that the property was actually held in common tenancy in equal shares. Further, that upon the demise of the deceased, the property vested exclusively in the Plaintiff as the surviving tenant, and the Applicants do not have any right to the property as the rights of the deceased were extinguished upon his demise.

The Applicants thereupon filed a Further Affidavit sworn by Robert Matathia Ngige on 31st October 2011, in which they reiterated that the suit property traces its roots to land parcel number LR 28/6 and that the title issued in respect of parcel number L.R. No. 28/6 was held by the Plaintiff together with the Late Francis Ngige Matathia as tenants in common in equal shares. The Applicants attached various documents in support of their assertion, including a Conveyance dated March 1965 for the purchase of land parcel number LR 28/6, various mortgage documents, conveyances and reconveyances with respect to the said parcel of land, a consent order entered into and adopted by this Court in HCCC No. 2912 of 1997 dated 2nd June 2009, and a title number for LR. 14702 issued on 8th November 1988.

The 1st and 2nd Defendant's Advocates filed Grounds of Opposition dated 9th November 2011, in which they state that the application is bad in law, misconceived, fatally defective, incompetent, and prejudicial to the Defendants and hence an abuse of the Court process. The reasons given by the Defendants is that the applicants lack any interest in the current suit and consequently the application is an effort to delay the prosecution of the matter to the prejudice of the Defendants' rights and interests in land parcel L.R. No. 28/14 and that this application cannot stand in light of **Republic vs the Registrar of Titles, Miscellaneous Civil Case No. 1291 of 1999**, to which the current suit is a *res judicata*.

The Advocates for all the parties filed written submissions, which were also reiterated at the hearing of the application on 19th January 2012. The Applicants' Advocate in submissions dated 13th December 2011 contended that the evidence contained in the Applicants' affidavits clearly show that the Plaintiff and the Late Francis Ngige Matathia held the property known as L.R 28/6 as tenants in common in equal shares. The Advocate relied on the authorities of **Werrot & Company Ltd v Andrew Douglas Gregory & 2 others Milimani HCCC No, 2363 of 1998** and **Benjamin Kipketer Tai v KCB Kisumu, Kisumu HCCC No. 87 OF 2003** to show that the Applicants are necessary parties and ought to be joined as Plaintiffs as they have an interest in the suit property.

The Plaintiff's Advocate in submissions dated 11th January 2012 argues that the conveyance produced in relation to LR No 28/6 is totally ineligible and there is nothing to support the statement that the Plaintiff and the Late Francis Ngige Matathia were tenants in common. Further, that the mortgages exhibited are not documents of title and cannot prove any ownership in respect of any property. The Advocate contended that the Plaintiff and Deceased were joint tenants and that this is clearly set out in the amended Plaintiff filed herein dated 23rd August 2011.

The Plaintiff's Advocate's claim is that the Indenture of Conveyance dated 14th February 1986 accompanying the Plaintiff is the title document held by the Plaintiff and the Late Francis Ngige Matathia. The Advocate submitted that unless the said title document clearly provided that the two owners of the property held it in common and in equal shares, the tenancy is taken to be joint. He relied on various academic authorities on the features of joint tenancy including that of *jus accrescendi*, and also relied on the decisions in **Jerusha Nyakerario Obare v Samuel Omoni Obare (2007) eKLR**, **Charles Phillip Mason v Vanessa Kahaki Mason(2008) eKLR** and **Irungu v Thayu (2004) eKLR** to buttress his arguments.

The Defendants' Advocate has argued in written submissions dated 18th January 2012 that the Applicants lack capacity to join the current suit in light of the controversy between them and the Plaintiff, and are bringing a new cause of action which does not involve the Defendants to the suit. The Defendants in this regard rely on **Kingori v Chege & Others (2002) 2 KLR 243**

The Defendants argue that they will be thereby be prejudiced by being reduced to spectators in the suit.

The Defendants have also submitted that the application is incompetent and fatally defective since the provisions of the Civil Procedure Rules that have been invoked by the Applicants are inapplicable and insupportable in the circumstances. It is submitted that Order 1 Rule 8(1) has nothing to do with joinder of parties and that Order 1 Rule 10(2) requires existing parties to move the court or the Court to move *suo moto*.

It is further submitted by the Defendants that the conditions of joining a party as was held in **Kamau v Makomboki Tea Factory (2008) 1 EA 154**, have not been met. These are namely, that the omission has been made through a *bona fide* mistake, and that the applicant is a necessary party for the determination of the real matters in dispute and ought to have been joined in the first instance. Finally, the Defendants claim that, but do not show how, the current suit is *res judicata* in light of **Misc. Civil Case No. 1291 of 1999 (Republic v Registrar of Titles)**.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The main issue is whether the Applicants can be added as Plaintiffs to this suit. This application is brought under the provisions of Order 1 Rule 8(1), Order 1 Rule 10(1) and (2), Order 1 rule 14 of the Civil Procedure Rules and other enabling provisions of the law as per the amended Notice of Motion dated 25th November 2011. I agree with the Defendants that Order 1 Rule 8(1) is inapplicable to the facts of this application, as its provisions apply to representative suits. Order 1 Rule 10(1) and (2) are the applicable substantive provisions, and deal with the substitution or addition of parties. I disagree with the Defendants submission that orders for addition or substitution of parties can only be upon application by the existing parties or the court *suo moto*. Under Order 1 Rule 10(1) the discretion is given to the Court to make such orders without any restriction and upon application by any party.

I must point out that in the context of the present application, the provisions of Order 1 Rule 10 must be read together with those of Order 1 Rule 1, which detail who can be joined as a Plaintiff. Order 1 Rule 1 states as follows:

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. “

It is clear from this provision that the right or relief claimed is not required to be established but alleged. Such right or relief can only be established by way of evidence at the trial, and the arguments by the Defendants in this respect cannot hold. All the Applicants are required to do at the present stage is to bring evidence of the alleged right or interest arising from the same act or transaction. The act or transaction alleged here is the transfer of the suit property to the Defendants and the Applicants allege that they have a right to the suit property.

The conveyance dated March 1985 although illegible in some parts does show on the first page that the purchasers were the Plaintiff and the Late Francis Ngige Matathia, and on page two that the property being conveyed in LR. No. 28/6. The words “in fee simple as tenants in common in equal shares” are also legible on page two with respect to their holding. Further, the Plaintiff has conceded in his witness statement accompanying the Plaintiff filed herein, that he and the Late Francis Ngige Matathia were tenants in common of all that parcel of land known as land reference number 28/6 situated in Garden Estate, and that has over the years been sub-divided and sold.

In addition, even though the mortgage documents presented as evidence are not documents of title, they are evidence that the Borrower is the Plaintiff the Late Francis Ngige Matathia, and that the land being mortgaged is LR 28/6. The schedules to all the mortgage documents state that the land being mortgaged was conveyed to the Borrower by a conveyance dated the third day of March 1965, and is held by the Borrower for an estate in fee simple as tenants in common in equal shares. All the mortgage documents are shown to have been executed by the Plaintiff the Late Francis Ngige Matathia.

The Plaintiff has also conceded that the suit property is a sub-division of LR No 28/6. The Plaintiff

provided as part of the documents accompanying the Plaintiff filed herein, the pleadings in **R v Registrar of Titles, Miscellaneous Civil Case No 1291 of 1999** (Documents No 22-25). The application dated 15th June 2010 filed in the said suit was seeking judicial review orders with regard to the issuance of a certificate of title of the suit property to the Defendants. It is clear in from the said pleadings that the applicants in the judicial review application were the Plaintiff and the Applicants in the present application. The Defendants also entered appearance and participated in the in the said judicial review proceedings as interested parties.

I particularly want to refer paragraphs 1 and 3- 6 of the Further Affidavit sworn by the Plaintiff on 2nd Sept 2010 in support of the judicial review application, wherein he states as follows:

1. "I am one of the Applicants in these proceedings. The 2nd Applicant is now deceased and his estate is being administered by his legal representatives Elizabeth Wanjiru Ngige and Robert Matathia Ngige. I make this affidavit on my behalf and on behalf of the legal representatives of the estate of the 2nd Applicant who have given me authority to do so.
3. I confirm that the 2nd Applicant and I were the owners of all that piece of land known as Land Reference Number 28/6 comprised of approximately 28 hectares (the original land).
4. The 2nd Applicant and I sought to subdivide the original land and the first subdivision was carried out sometime in June 1984. Copies of letters confirming this are annexed at page 1-2 of the exhibit marked "HBK 3" annexed to this affidavit.
5. Subsequently there were further sub-divisions carried out on the original land and the sub-plots arising from the original land (*see pages 6-10 of the exhibit marked HBK 2 annexed to my affidavit sworn on 15th June 2010 in support of this application*)
6. I confirm that Land Reference Number 28/14 (the suit property) is a sub-division of a sub plot of the original Land Reference Number 28/6 as shown in the sub division plan issued to the 2nd Applicant and 1 (Page 3 of the exhibit)"

It is also clear from the said sub-division plans presented by the Plaintiff in the documents accompanying his Plaintiff (Documents No 6 and 7), that LR No 28/14 was a separate sub-division from LR No 28/16. The indenture of conveyance dated 14th February 1986 which is submitted by the Plaintiff to be the evidence of title and of joint tenancy is with respect to LR No. 26/16, and is not relevant in this application as it does not apply to the suit property. The submissions by the Plaintiff on joint tenancy are also consequently inapplicable. I must at this stage observe that arising from the foregoing facts, it is my opinion that there has been material non-disclosure on the part of the Plaintiff in the present application.

Finally, the Applicants have also brought evidence of the consent order adopted by the court on 2nd June 2009 and issued on 17th June 2009 in Civil Case No 2912 of 1997 between the Late Francis Ngige Matathia and the Plaintiff. It is clear from the consent order that with regard to LR 28/14 the parties were to negotiate and amicably agree how the plot was to be dealt with, failure of which the court was to arbitrate in the matter.

In light of the reasons given in the foregoing, I find that the Applicants have demonstrated that they have an interest in the suit property, and that both the Plaintiff and Defendants are estopped from denying this interest. The Applicants are therefore a proper and are a necessary party to this suit in light of the requirements laid out in **Kamau v Makomboki Tea Factory (2008) 1 EA 154**. I hereby therefore order that Elizabeth Wanjiru Ngige and Robert Matathia Ngige be joined as the 2nd and 3rd Plaintiffs respectively to the suit filed herein.

The Plaintiff shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of ____March____, 2012.

P. NYAMWEYA
JUDGE