



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**Civil Case 6 of 2011**

**ZAKARIA KIRUKI ..... PLAINTIFF**

**VERSUS**

**SHADRACK MWITI.....DEFENDANT**

**R U L I N G**

The 1<sup>st</sup> and 2<sup>nd</sup> applicants through an application dated 4<sup>th</sup> July, 2011 brought under Order 1 rule 8(3),10(2) Laws of Kenya, I think the applicant meant Order 1 rule 8(3) and 10(2) of the Civil Procedure Rules seeks the following orders:-

- 1. Janet Marina M'Ikiara and Evangeline Nkirote M'Ikiara be joined/added in this suit as defendants.**
- 2. The annexed defence and counter-claim by the intended defendants be deemed as duly filed once the court fees is paid, in the event prayer (a) above being granted.**
- 3. Costs of this application be provided for.**

The application is grounded on the following grounds:-

- i. The applicants have an interest over the suit land which belonged to their father.**
- ii. The applicant's presence in this suit is necessary for the court to effectually and completely adjudicate upon and settle all questions involved in this suit.**

The application is supported by an affidavit sworn by 1<sup>st</sup> applicant on her behalf and that of her co-applicant. The applicant states that the disputed land belonged to their deceased father and the plaintiff had it fraudulently transferred into his name. That the disputed land was left to the applicants and one of their cousins the defendant in this case. That the applicants state that they have come to know after the defendant informed them that he has been sued for second time he had counterclaimed 1 acre only leaving the applicant's without any relief. The applicants averred that they had entrusted the defendant with this case but they insisted from pleadings their interest over the rest of the land has not been catered for. That

the defendant though he has mentioned the disputed land is his property jointly with the applicants, he has omitted the applicants interest by failing to specifically spell it out. The applicants have stated that they need to be added in this suit or enjoined in the suit as defendants to enable them counter-claim against the plaintiff who is holding title to the land so that the land may be transferred to the applicants.

The plaintiff opposed the applicants' application and filed a replying affidavit dated 9<sup>th</sup> November, 2011.

The respondent in his affidavit has stated as follows: That it is not true the suit land belonged to the applicants' father as of the time of his demise in 1976. That the suit property came to be registered in respondent's name on 16<sup>th</sup> December, 1974 as per the register (Greencard) attached and marked "ZKKI". That the respondent averred that he has been advised by his advocates the applicant's claim of the suit property after 37years is time barred pursuant to Section 7 of the Limitation of Actions Act (Cap.22) Laws of Kenya. The respondent further stated that the applicants are married women who have no proprietary interest in the suit land whatsoever. The respondent further stated the provisions of law or which this application is brought is not clear. He further contended that the applicants cannot put in a defence and counterclaim in this suit without the leave of the court.

When the application came up for hearing the advocate for applicants strongly canvassed for the same to be allowed whereas on the other hand the advocate for the respondent strongly opposed the same.

Miss Mwangi the learned Counsel for applicants relied on grounds on the face of the Notice of Motion and submitted that they have annexed to the affidavit draft defence and counterclaim which is not frivolous. The learned Counsel further argued if application is allowed no one would be prejudiced. She further submitted that law provides for application for parties to be joined and the application before court was proper. On issues raised in the respondent's replying affidavit the learned counsel for the applicants contended the matters raised the relying affidavit are issues which can be raised during the hearing of the suit but at the stage of hearing of this application. She contended that the replying affidavit do not raise any issues as to why the applicants cannot be joined.

The learned counsel for the respondent Mr. Riungu opposed the applicant's application. He relied on the respondents replying affidavit dated 9<sup>th</sup> November 2011 and urged the court to look at the entire pleadings on record and see whether there is any genuine claim for applicants to seek to come on record. He referred court to paragraph 7 of the Replying Affidavit in which the respondent claimed the applicant's claim is time barred and pointed that the applicant's had not obtained leave of the court to put in the defence and counterclaim. The learned counsel argued that the applicants can only come to court by way of adverse possession. He referred court to Order 37 rule 1 of Civil Procedure Rules and submitted the applicants has to file fresh suit against the plaintiff in the manner provided by law. He concluded by praying that the application be dismissed.

On the other hand, the learned Counsel for the applicants Miss Mwangi in reply, argued as regards issues under Paragraph 7 of the respondent's replying affidavit, those issues can only be raised during the hearing of the main suit once the applicants are joined.

The learned Counsel further argued this suit was filed in 2011 seeking to evict the defendant from the suit land but the plaintiff left out the two applicants. That the applicants want to be joined in the interest of justice. The learned counsel submitted that Order 37 rule 1 of civil Procedure Rules is not applicable in this case and that the orders quashed are the one which are applicable in this application.

The issue for determination in this application is whether the applicants have met the conditions for them to be joined or added in this suit as defendants and whether the draft defence and counterclaim can be deemed as duly filed once the court fees is paid, in event of the applicants being allowed to be joined or added in this suit as defendants.

The applicants application as pointed out by court is based on Order 1 Rule 8,10(2) of Civil Procedure Rules which is the correct order for an application such as the one before the court but not Order 1 rule 8(3),10(2) Laws of Kenya.

Under Order 51 rule 10(1) of Civil Procedure Rules it is required that every Order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated that no application shall be refused mainly by reason of failure to comply with this rule. In view of the above-mentioned Order, I find that the quoting of the wrong order by applicants not to be fatal to this application.

Under Order 1 rule 8(3) of Civil Procedure Rules it is provided as follows:-

***“(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.”***

Further Order 1 rule 10 (2) of Civil Procedure Rules provides:-

***“(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.***

A quick perusal in defendant’s defence dated 22<sup>nd</sup> February, 2011 reveals that the suit is defended for the benefit of the defendant and the two applicants. The defences raises issues of ownership and entitlement of the applicant’s though the defence is home drawn. I find that from the defence and the applicants’ affidavit as well as submissions by both counsels the applicant’s presence before this court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The defendant in his defence avers that he has his portion which had been given to him and which he continues to occupy, whereas on the other hand the applicants have their portions which they have been in occupation and cultivating for a long time. The plaintiff on the other hand in his plaint, avers that the defendant has on various occasion been trespassing into the suit premises and cultivated some portions and seeks an order of eviction.

Having considered this application, and having considered the affidavit in support and replying affidavit as well as having considered counsel submissions and relevant provisions of Civil Procedure Rules and Section 1A(1) and 1(B) (1) (a) (b)(c)(d) of Civil Procedure act which provides:-

***1A (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***And***

***1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—***

***(a) The just determination of the proceedings;***

***(b) The efficient disposal of the business of the Court***

I find that this application ought to be allowed. I therefore make the following orders:-

***1. That the applicants namely Janet Maringa M’Ikiara and Evangeline Nkirote M’Ikiara be joined /added in this suit as defendants.***

***2. That the annexed defence and counter-claim by the applicants intended defendants be deemed as duly filed upon payment of court fees within 14 days from today.***

***3. That costs of this application be in the cause.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 24<sup>TH</sup> DAY OF MAY, 2012.**

**J. A. MAKAU  
JUDGE**

***DELIVERED IN OPEN COURT IN PRESENCE OF:***

1. Miss Mwangi for applicant
2. Mr. Riungu for the respondent

**J. A. MAKAU  
JUDGE**