



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.207 OF 2010

JACKSON KAHARO KAMONJO.....PLAINTIFF

VERSUS

IBRAHIM NDEGWA.....1ST DEFENDANT

ESTHER WANJIRU.....2ND DEFENDANT

RULING

1. Jackson Kaharo Kamonjo who is the plaintiff brought this suit against Ibrahim Ndegwa (hereinafter referred to as the 1st defendant), seeking a declaration that the plaintiff is the legal owner of property known as LR 31/11/20 (part LR 31/11) Ruaraka (hereinafter referred to as the suit property), and that the 1st defendant is a trespasser on the suit property. The plaintiff also sought damages for trespass and an order of injunction restraining the 1st defendant from interfering with the plaintiff's quiet enjoyment of the suit property.

2. The 1st defendant filed a defence in which he denied having any interest over the suit property. The 1st defendant maintained that the plaintiff has no claim against him, and that the plaint as filed does not disclose any cause of action against him. The 1st defendant contended that he has only gone to the suit property in his capacity as a police officer to intervene when there was threat of breach of peace by other parties also claiming the suit property.

3. As a result of that defence, the plaintiff filed an amended plaint in which he brought in one Esther Wanjiru as a 2nd defendant. The plaintiff maintained that the 1st defendant was using Esther Wanjiru as his proxy. He therefore claimed orders against the two defendants jointly and severally.

4. The 1st defendant has now moved the court under Order 1 Rule 10(2) of the Civil Procedure Rules and Section 3A of the Civil procedure Act, by way of a chamber summons dated 19th November, 2010, seeking to have the name of the 1st defendant struck out from the pleadings and a claim against him dismissed with costs. The 1st defendant maintains:

5. That the plaint filed herein does not disclose any or any reasonable cause of action against him; that he was only involved in the suit property in his official capacity as a police officer but has no interest whatsoever in the suit property or the plaintiff's suit; that he has communicated this information to the plaintiff's advocates and urged them to withdraw the claim against him but they have refused, failed and/or neglected to do so hence this application.

6. The plaintiff has objected to the 1st defendant's application contending that it is unmerited, premature misconceived, defective and untenable. The plaintiff also alleges that the application is frivolous and an abuse of the court process.

7. I have considered the application and the submissions which were made by counsel. Order 1 Rule 10 of the Civil Procedure Rules 2010 states as follows:

“(1)

(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.

(3)

(4) Where a defendant is added or substituted the plaint shall unless the court otherwise direct be amended in such manner as may be necessary and amended copies of the summons and of the plaint shall be served on the new defendant and if the court thinks fit, on the original defendants.”

8. It is evident from the above that contrary to the submissions of the plaintiff's counsel, this court has powers to strike out the name of any party who has been improperly joined as a plaintiff or defendant. The application is therefore properly before the court. The court must however be satisfied that the name of the 1st defendant has been improperly joined. In determining this, Order 2 Rule 15(2) of the Civil Procedure Rules 2010 which restricts the admission of evidence is not applicable as the application has not been brought under Order 2.

9. Be that as it may, although the 1st defendant maintains that he has no interest in the suit property, the plaintiff maintains that the 1st defendant is in fact using a proxy i.e. the 2nd defendant who is claiming the suit property. I think it would be premature and prejudicial to the plaintiff to strike out the name of the 1st defendant from the suit at this stage. It is in the interest of justice that the plaintiff be given an opportunity

to ventilate his case against 1st defendant. I therefore disallow the application dated 19th November, 2010. Costs shall be in the cause.

Dated and delivered this 20th day of June, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Kareu H/B for Njiraine for the plaintiff

Advocate for the defendants absent

B. Kosgei - Court clerk