



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 105 of 1996

KIPROTICH BORE.....APPELLANT

VERSUS

JOSEPH TUEI KOECH.....RESPONDENT

RULING

I have before me in this appeal a Chamber Summons dated 15th July 2005 and brought by one Kiprotich Bore (the Applicant) under **Order 1 Rules 10 and 13** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law. It seeks an order that this honourable court be pleased to order the substitution of the Applicant for Joseph Tuei Koech for the Respondent in this appeal. It is based on the ground that the applicant is registered proprietor of the piece of land known as **Title No. Nakuru/Olenguruone/Amolo/8** (the suit land) which is the subject of the proceedings herein. In his affidavit in support of this application, the applicant deposes that at the time of filing the suit from which this appeal is preferred the suit land was in the name of the respondent in this appeal but it has now been transferred to him. He further deposes he has since fallen out with the respondent who has now sided with the appellant. Since the appellant is in possession of the suit land, he has done nothing to prosecute this appeal thus causing the applicant loss and damage. He therefore prays that he be substituted in this appeal for the respondent so that he can prosecute it and protect his interest.

The respondent cannot hear of that. Relying on the grounds of opposition, his counsel submitted that this application is incompetent as the applicant has no locus standi in the matter. He said the reason why this appeal has not been prosecuted is because the court file had gone missing. He urged me to dismiss the application with costs.

I have considered these submissions and the pleadings in this application. As I have pointed out at the beginning of this ruling, this application is made under **Order 1 Rules 10 and 13** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law. **Order 1 Rule 10(2)** of the **Civil Procedure Rules**, distinguishes between a “necessary” and “proper” party. A necessary party is a party “who ought to have been joined”, that is, a party necessary to the constitution of the suit without whom no decree can be passed at all. Failure to implead a necessary party as a party to the proceeding is fatal.

A proper party, on the other hand, is one whose absence, an effective order can be made, but whose presence is necessary for a complete and

final decision on the question involved in the proceedings. In other words a proper party is one whose presence enables the court to adjudicate more effectually and completely the issue or issues before it. So a person may be impleaded as a defendant in a suit, though no relief may be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit.

In this case I understand the Applicant to be saying that he is a proper party to be joined in this appeal as the respondent so that he can fix it for hearing. Before I allow this application I must therefore be satisfied that the person who is proposed to be brought on board, that is the Applicant, is one whose presence is necessary for an effective adjudication of the question in dispute. As I have already pointed out such party is one who has a direct legal interest in the subject matter of the suit. Only a person, who has a direct interest in the subject matter of the litigation, whether it raises questions relating to moveable or immoveable property can be impleaded as a party.

The question then is: what is this direct interest? Lindley LJ explained it in the old English case of **Moser v Marsden, [1892] Ch 487** as a direct interest in the issues between the plaintiff and the defendant. Only a person who is so interested can be impleaded as a defendant. Lord Greene MR has further explained the nature of this interest in **Re IG Farbenindustrie AG Agreement, [1943] All ER 525** where he stated that in order for a party to be added as a defendant in the suit he should have a legal interest in the subject matter of the litigation. He added that the legal interest is not one distinguishable from an equitable interest, but an interest which the law recognizes. The learned Judge went on to state that the court had no jurisdiction to add a person as a party to the litigation if he had no legal interest in the issue involved in the case.

What a direct legal interest is was also elaborately dealt with by Devlin J (as the learned Judge then was) in the Queen's Bench Division) in **Amon v Raphael Tuck & Sons Ltd, [1966] 1 All ER 275** in which he reiterated that it was not enough that the intervener was commercially or indirectly interested, he must be directly and legally interested. He said a person is legally interested in the question involved in the suit, only if he can show that it may lead to a result that may affect his legal rights.

It follows from the foregoing discussion that a proper party under **Order 1 Rule 10(2)** is one who has a defined, subsisting, direct and substantive legal interest in the issues arising in the litigation. An interest which will be cognisable in the court of law. That is, an interest which the law recognizes and which the court will enforce. A person who is only indirectly or commercially interested in the proceedings, is not entitled to be added as a party. If he is a person who is not interested in the questions which arise between the parties to the litigation that is, a question with regard to the right set up and the relief claimed by one side, and withheld by the other, he cannot be impleaded as a party as in such case the result of the proceedings will not affect him. The trial of the suit will be embarrassed and considerable prejudice caused to the contesting parties, if irrelevant matters are allowed to be agitated or considered, by adding a new party whose interest in the litigation has no nexus to the subject matter of the suit. The court should therefore be cautious of adding parties and converting the suit into the adjudication of collateral matters. That would lead to a protracted litigation and lead to a decision of an intricate matter which is totally outside the ambit of the suit.

The appellant has not contested the applicant's assertion that he is the registered proprietor of the suit land and that at the time the suit giving rise to this appeal was filed the land was still in the name of the respondent in this appeal. The applicant is therefore an interested party and cannot be said to be a busybody who has no locus standi in this matter.

There is nothing on record to show that the court file in this appeal at any time went missing. In the circumstances I agree with the applicant that because the appellant is in possession of the suit land and the Applicant's representative who is the respondent is now lethargic, this appeal has been left dormant thus causing the Applicant loss and damage. I therefore allow this application as prayed with costs to the Applicant.

DATED and DELIVERED this 28th day of April, 2010.

D. K. MARAGA

JUDGE.