



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

Civil Case 73 & 25 of 1986

KAROGO M'NKOROI PLAINTIFF

VERSUS

**NKIROTE M'IRAI 1ST DEFENDANT
ISSACK MUTUIRI 2ND DEFENDANT
KAROGO NKOROI 3RD DEFENDANT**

CONSOLIDATED WITH SRMCC MERU 25 OF 1986

ISAAC MUTWIRI PLAINTIFF

VERSUS

KAROGO NKOROI DEFENDANT

RULING

The plaintiff Karogo M'Nkoroi has filed a Notice of Preliminary Objection dated 24th May 2010. The essence of that objection is that Karogo Nkoroi who is named in HCC No. 73 of 1986 as the 3rd defendant filed her defence in the High Court matter and thereby imposed herself as the 3rd defendant whereas she was not so named in the plaint. The original title of HCCC No. 73 of 1986 was:-

KAROGO M'NKOROI PLAINTIFF

VERSUS

***NKIROTE M'IRAI 1ST DEFENDANT
ISSAC MUTUIRI 2ND DEFENDANT***

The action in the High Court as it can be seen was filed in 1986. The 1st defendant filed a Notice of Motion dated 9th November 2007 seeking to be allowed to file appearance and defence out of time. In that application, the said 1st defendant stated that she came to learn of this action in September 2007 when the plaintiff was heard to boast that the case was about to be concluded and he would be given parcel number *Abothuguchi/Makandune/47*. That prompted the 1st defendant to instruct an advocate to carry out an inquiry and that inquiry led the said advocate to find that indeed HCC No. 73 of 1986 was on record and was due for hearing. The application made by the 1st defendant was heard and a ruling was delivered in her favour on 30th June 2008 whereby the court gave her leave to file her defence and Memorandum of Appearance. The 1st defendant filed her defence as ordered and so did Karogo Nkoroi who named herself as the 3rd defendant in HCCC No. 73 of 1986. It is that defence that has provoked the plaintiff's preliminary objection. That objection was opposed on the basis that the High Court suit had been consolidated with the magistrate suit as stated before and that the now named 3rd defendant was a defendant in the magistrate court suit. The title of SRMCC No. 25 of 1986 is:-

ISAAC MUTWIRI PLAINTIFF

VERSUS

KAROGO NKOROI DEFENDANT

Indeed the record shows that on 15th March 1991 HCC No. 73 of 1986 was consolidated with SRMCC Meru 25 of 1986. It was ordered that

the SRMCC matter was to be heard under the High Court matter. It should be noted that the now named 3rd defendant did also make a similar application as the 1st defendant seeking to be allowed to file her defence and appearance out of time. It does however seem that that application of the 3rd defendant which is also dated 9th November 2007 was not the subject of the ruling dated 30th June 2008. The objection raised that the now named 3rd defendant is not a party in this matter is simply responded to by reference to the order of 15th March 1991 which consolidated the two suits together. By virtue of that order, Karogo Nkoroi became a party in HCC 73 of 1986. The problem is that the said Karogo Nkoroi in filing her defence and appearance did so without the leave of the court. What then should be done with her defence which she filed on 1st July 2008? The answer, perhaps lies in her application which however was not argued. In her affidavit in support of that application, Karogo Nkoroi stated that she is the registered owner of parcel number *Abothuguchi/Makandune/47*. She had been given this land by her grandfather before his death. She stated that she too came to learn of the existence of this suit when the plaintiff, while drunk, was heard to boast that he would soon be the owner of that land. In HCC No. 73 of 1986, the plaintiff, Karogo M'Nkoroi, alleges that he is the registered owner of that land. It is on that basis that Karogo Nkoroi seeks to defend this suit. In the light of the new amendments to the Civil Procedure Act that is, section 1A which gives the overriding objective of the Civil Procedure Act and Rules, I find that it would be more just to allow the defence which is already on record to remain. The overriding objective of the Civil Procedure Act in Section 1A (1), (2) and (3) provides as follows:-

“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.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act.”

That overriding objective has of late been the subject of much interpretation in our courts. In the case M.S.K. Vs. S.N.K. Civil Appeal (Application) 277 of 2005 the Court of Appeal in considering that overriding objective which is now dubbed, “Double “O” principle had this to say:-

“Expressed differently, the purpose of the “double“O” Principle” in its application to the civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings and the court cannot claim to have before it real issues where affected parties have been excluded.”

That quotation is very apt to our case here. To allow the 3rd defendant to remain on that cause will in my view facilitate a just, quick and cheap resolution of the real issues in this case. The issue for determination is, who is the registered owner of the parcel *Abothuguchi/Makandune/47*. The Court of Appeal again in the case Muthike Mwaniki Vs. Genesio Kubunya Njagi Civil Application No. NAI. 92 of 2009 [UR 57.2009] stated:-

“We also take into account the provision of Section 1A and 1B of the Civil Procedure Act and Section 3A and 3B of the Appellate Jurisdiction Act which provisions came into force on 23rd July,2009. The courts including this court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

Bearing in mind the application now given by the courts of the overriding objective of the Civil Procedure Act, if indeed the court was to accede to the preliminary objection raised by the plaintiff, the end result would be that the 3rd defendant's defence would be struck out. Thereafter, the 3rd defendant would probably agitate her application to be allowed to file that same defence. In all probability, that application will be allowed and if that be so, the defence would again be filed. To strike out the already filed defence by the 3rd defendant would go against the spirit of the overriding objective. It would involve wastage of time and cause parties to incur costs. I therefore decline to entertain the objection raised by the plaintiff. The plaintiff's preliminary objection dated 24th May 2010 is hereby dismissed and the costs

thereof shall be in the cause.

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO
JUDGE