



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.128 OF 2009

SAMUEL ANTHONY MBOGO KIIRU
(Suing as Administrator of the Estate of
KIIRU WANJOHI – Deceased)PLAINTIFF
VERSUS

BURUBURU FARMERS CO. LTD.....1ST DEFENDANT
THE CHIEF LANDS REGISTRAR.....2ND DEFENDANT
THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

R U L I N G

1. The plaintiff has come to this court under Order I Rule 10(2) of the Civil Procedure Rules seeking to have Eric Mbaya Nkaabu added as a 4th defendant in the suit. It is contended that the suit premises LR Nairobi Block/102/38, was transferred to Eric Mbaya Nkaabu on 13th March, 2009, notwithstanding the restriction placed on the title for the suit premises by the Land Registrar. Therefore it is maintained that the presence of Eric Mbaya Nkaabu in the suit will shed light on the issues in dispute. Although the 2nd and 3rd defendants did not object to the application, the application was opposed by the 1st defendant.

2. Written submissions were filed on behalf of the plaintiff in which reliance was placed on Order I Rule 10(2) which allows the court to amend pleadings at any stage in order to enable the court effectually and completely adjudicate upon and settle all questions.

3. In support of the plaintiff's submissions, the case of *Eastern Bakery vs Castelino [1958] EA 461*, was relied upon. Counsel urged the court not to follow the authorities which were cited by the 1st defendant as the same were distinguishable.

4. For the 1st defendant, it was submitted that the ordinary meaning of Order I Rule 10 is that it contemplates a situation where one litigant is replaced by another. It was contended that the plaintiff's application flouted the provisions under which it was brought, as it only seeks to add a litigant without the removal or replacement of another litigant. It was noted that the plaintiff also sought to amend his plaint and introduce a new cause of action. It was argued that the plaintiff's failure to endorse the amended plaint with the rule of procedure permitting the amendment was a breach of Order VIA Rule 7(1) of the Civil Procedure Rules. It was maintained that that rule was mandatory.

5. The following authorities were relied upon:

- *HCCC NRB No.1835/99 Alice Wairimu Njihia & another vs John K. Rukunga.*
- *HCCC NRB 1168/2001 Stockman Rozen (K) Ltd vs Dagama Rose Group of Companies.*
- *HCCC NRB 259/2005 Wilfred Dickson Katibi vs Barclays Bank of Kenya & 2 others*

6. I have given due consideration to the application. In my view, Order I Rule 10(2) of the Civil Procedure rules allows a party not just to apply for substitution or striking out of the name of any party but allows the joining of any person whose presence is necessary before the court in order to enable the court adjudicate upon the issues before it. It has not been denied that the suit property is now registered in the name of the intended 4th defendant. Indeed, this was deponed to by Waweru Nginya, the 1st defendant Chairman. Further, I note that the draft amended plaint which has been annexed to the plaintiff's application merely gives effect to the addition of the 4th defendant to the suit, and pleads facts

in support of the cause of action against the intended 4th defendant. The failure to endorse the amendment is a mere irregularity. In any case what is before the court is in actual fact a draft amended plaint.

7. In the circumstances, I find it fair and just that the application to add Eric Mbaya Nkabu as the 4th defendant be granted..

Dated and delivered this 5th day of November, 2010

H. M. OKWENGU
JUDGE

In the presence of: -

Plaintiff present but counsel absent

Ms Kisa for the defendants

B. Kosgei - Court clerk