REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2534 of 1994

BERNARD WAMENJU KABUGA …….....……PLAINTIFF

VERSUS

JOHN KIHENYO KANGETHE …….....……..1ST DEFENDANT

JAMES MAMBO KANGETHE …….....……. 2ND DEFENDANT

AND

JONATHAN MBUGUA MWIRUTI ……..……INTENDED 2ND PLAINTIFF/APPLICANT

R U L I N G

Jonathan Mbugua Mwiruti ("**the Applicant**") has taken out a Chamber Summons dated the 31st March 2005 and filed on the 1st April 2005 under Order 1 rules 1 and 10 (2), Order 6A rules 3, 4 and 5 and Order 36 rule 12 of the Civil Procedure Rules seeking, among other orders, to be enjoined as a co-plaintiff in this suit.

The grounds upon which the Application is made are that the Applicant, with the full knowledge of the Defendants, has been and still is in occupation of the suit premises uninterruptedly for a period of over twelve years and has therefore acquired a vested interest therein; and that it will be in the interests of justice that he be enjoined in order to ensure a conclusive and just determination of the suit. These grounds are reiterated in the Applicant's affidavit sworn on the 31st March 2005 and filed on the 1st April 2005 in support of the Application.

The Application is opposed by the Defendants on the Grounds of Objection dated and filed on the 13th April 2005 ranging from frivolity to abuse of process of the court.

The hearing of this suit commenced on the 20th January 2005 and the Plaintiff and his only other witness, the Applicant, have already finished giving evidence. The First Defendant has also completed giving his evidence and the Defendants' only other witness is about to commence his testimony.

Having considered the Application in light of submissions of both learned counsel, I am of the view that it must fail for a number of reasons. First, because the Application was made far too late and long after the trial had commenced as the Plaintiff had already given evidence and the Defendants' first witness had also completed his evidence. Secondly, the Applicant, who has himself also testified in this case, has offered no explanation whatsoever of the considerable delay, which I consider to be inordinate and inexcusable, in bringing the Application. This suit was instituted in July 1994 by the Applicant's late father and the hearing thereof commenced on the 20th January 2005 as I have already observed. If, as is deponed to in paragraph 2 of his said Supporting Affidavit, the Applicant has been in occupation of the suit premises since 1978, the Applicant ought to have explained why he did not until now seek to be enjoined in this suit or sue the Defendants in another suit.

In my judgment, it is neither fair nor just that the Applicant should now be allowed to be enjoined as a co-

plaintiff after the Plaintiff has closed his case and the Defendants completed the evidence of their first witness. Allowing the Application would result in re-opening the Plaintiff's case, and consequently that of the Defendants, and it would be wrong to put the Defendants to this expense and inconvenience without just cause. Thirdly, my refusal to allow the Application will not in any manner prejudice the Applicant's right to institute another suit against the Defendants on the basis of the averments made in his said Supporting Affidavit and even if the Plaintiff is successful in these proceedings, the Applicant will still be at liberty to pursue his claim against the Plaintiff on the same basis.

For the reasons I have given, the Chamber Summons Application dated the 31st March 2005 and filed on the 1st April 2005 fails and I order that the same be and is hereby dismissed with costs to the Defendants.

Dated and delivered at Nairobi this Thirty-first day of March 2006.

P. Kihara Kariuki

Judge