



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

Civil Suit 32 of 2005

LORNAH JEBIWOTT KIPLAGAT PLAINTIFF

VERSUS

RHODA MASIT 1ST DEFENDANT

ESTHER CHERUIYOT 2ND DEFENDANT

WINNIE KIBISACH (as the trustee of Mosop Marichor

Women Group of Chepkorio..... 3RD DEFENDANT

J. W. ODUOR..... 4TH DEFENDANT

CHIEF LAND REGISTRAR) 5TH DEFENDANT

COMMISSIONER OF LANDS) 6TH DEFENDANT

RULING

Order 1 rule 10 of the Civil Procedure Rules Stipulate that:

“10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instated in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instated through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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 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) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, 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.”

Mr. Momanyi, learned Counsel for Rhoda Masit, Esther Cheruiyot and Winnie Kibisach, who claim to be trustees of Mosop Marichor Women’s Group of Chepkorio, and who I shall hereinafter refer to as the 1st, 2nd & 3rd defendants respectively, has now taken out a preliminary objection herein, and while relying on the above mentioned provisions of the law, he urges this court to find that his three clients have been improperly joined in these proceedings as no leave was sought and obtained. He therefore prays that he pleadings be struck out.

The preliminary objection is opposed by the plaintiffs who rely on Order VIA rule 1. It was the submission of Mr. Kemboi, the plaintiffs learned Counsel that the objection cannot be since the pleadings had not closed.

I have taken the submissions of both counsel into account. I have also considered the case of Atieno V. Omoro(1985), KLR 677 where it was held that where an amendment has the effect of adding a new party, that new party should not be prejudiced: The Court held further that there is a destructions as laid out in the Civil Procedure Rules between the substitution or addition of a party to proceedings and the amendment of the pleadings and the position that case was governed by Order 1 rule 10.

It is evident that this suit was initially filed against these 3 defendants, and that it was later amended twice to join the 4th to 6th defendants.

The wording of Order 1 rule 10 is clear and as supported by the holding in the above-mentioned case, the party who should move the court on the grounds that it is aggrieved by the amendments which led to its being joined in the suit, is the party who is joined by virtue of the amendment. It cannot be the party who was sued at the 1st instance to try and step into the shoes of the newly joined party, to claim that such joinder is improper.

It is worthy to note that the 4th, 5 & 6th defendants who have already filed their defence were not party to this particular application.

In view of the above and since Mr. Momanyi is not representing the newly joined defendants, I find that the Preliminary Objection cannot be sustained.

Costs to the plaintiff.

Dated and delivered at Eldoret this 19th day of September 2005.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

No appearance for plaintiff

Mr. Momanyi for 1st – 3rd defendants

No appearance for 4th – 6th defendants