



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC MISC. APPL. NO. 7 OF 2020**

- 1. VERONICA CHESEMES AKOKOR**
- 2. PAULINE KOKITA**
- 3. CHRISTIPHUS TOROITICH KOKITA**
- 4. TOBIAS KEMEI KOKITA**
- 5. ANASTANCIA CHEPTOO KOKITA...APPLICANTS**

**VERSUS**

**BEN VERONICA C. KITELAPONG**

**SOLOMON PKACH KOKWO**

**ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

1. There is in the court record an application dated **24/7/2020** and filed in court on **11/8/2020**. The application is supported by the sworn affidavit of **Chrispine Toroitich Kokita**. It is brought under **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 1 Rule 14, Order 51 Rule 1** of the **Civil Procedure Rules**. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 5<sup>th</sup> plaintiffs/applicants (herein after also referred to "*the instant applicants*") seek the following orders:

**1. That the names of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs/applicants be struck out from the proceedings herein.**

**2. That costs of this application and the main suit be borne by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and Mr. S. Nyakundi personally in any event.**

2. The grounds on the face of the application are that the applicants have never instructed the firm of Ms. Nyakundi & Co. Advocates to institute the instant suit on their behalf; that they have never authorized **Veronica Chesemes Akokor** and **Pauline Kokita** to sign any affidavits on their behalf. The applicants aver that the action of filing suit by the said Veronica Chesemes Akokor and Pauline Kokita is intended to sow discord between the applicants and their mother.

3. The 1<sup>st</sup> plaintiff filed a replying affidavit on **3/9/2020** opposing the instant application. Having reiterated that the instant applicants are the offspring of **James Mariachi Kokita** and that they are the *cestui que trust* in respect of the trust bestowed on the 1<sup>st</sup> defendant in respect of the suit land, she depones that the estate of the late James has an interest in the trust and that his children must benefit from the trust as intended by the court. The 1<sup>st</sup> plaintiff avers that in the year **2019** the instant applicants sought her help in regaining the suit land from the 2<sup>nd</sup> respondent and she therefore sought legal advice from the firm of S. Nyakundi & Co. Advocates who wrote a demand letter to the defendants which has not been answered to to date. Further, she states that the beneficiaries of the trust have filed the application only for fear of incurring their mother's wrath, and adds that the court can not properly adjudicate the suit if they are struck off the proceedings. It is further deponed that the lands purchased by the 1<sup>st</sup> defendant between **2010** and **2014** were bought in her name and that no title deeds in the names of the instant applicants have been demonstrated to have been obtained by the 1<sup>st</sup> defendant.

4. The applicants filed their submissions on **9/12/2020**. The respondents written submissions was filed on **18/12/2020**.

5. I have considered the application, the response and the filed submissions.
6. The issues that arise for determination in the instant application are whether the names of the applicants should be struck out of these proceedings and whether the costs of the application and of the main suit should be borne by Mr. S. N. Nyakundi personally.
7. The background to the instant application is that a Miscellaneous application (being the main suit herein was filed on **16/3/2020** alleging that the High Court in Kitale **HCCC No. 74 of 2002** had ordered the 1<sup>st</sup> defendant to hold part of **LR No. West Pokot /Keringet”A” /2728** in trust for the applicants herein; that the 1<sup>st</sup> defendant was subsequently registered as proprietor of the said land in trust for the instant applicants but she subsequently transferred the suit land to the 2<sup>nd</sup> respondent in a fraudulent manner. It is sought that the trust bestowed upon the 1<sup>st</sup> respondent be determined and that the suit land do vest in the names of the instant applicants. By the instant application the instant applicants now seek to disown the instant suit and that Mr. Nyakundi the counsel who filed it, do meet the costs of the suit personally.
8. Veronica and Pauline, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the main suit aver that they are the legal representatives of the estate of James Mariach Kokita who was the former husband to the 1<sup>st</sup> respondent. Veronica also refers to James as “*my late husband*” in her supporting affidavit.
9. The further facts revealed in the main suit are that after James and the 1<sup>st</sup> defendant divorced, the former sued seeking deletion of the latter’s name from the title to the suit land but the court ordered the rectification of the land register to read that the 1<sup>st</sup> defendant holds her part of the land in trust for the instant applicants. The suit land was then registered as ordered by court in **2007** but in **2010** the 1<sup>st</sup> defendant sold the suit land to the 2<sup>nd</sup> defendant. It is alleged that the Land Registrar allowed the transfer of the land without an order of the Court dissolving the trust, which trust he was aware of. Consequently the instant applicants dropped out of school and the 2<sup>nd</sup> respondent evicted them from their home and they have been living in penury ever since. It is also alleged that the 1<sup>st</sup> defendant has abandoned the instant applicants. The plaintiffs seek that the suit land be registered in the instant applicant’s names in equal shares and payment of *mesne profits* and that all buildings erected on the suit land be demolished. The plaintiffs deny having any interest in the land and aver that they are only acting in the best interests of the instant applicants.
10. This is an application in which the good Samaritans’ apparently selfless and benevolent acts strangely appear to be rejected by the intended beneficiaries. The beneficiaries, the instant applicants claim that they are now adults and could have brought the suit in their own names if they had wished to do so. That is not in doubt as the court has seen the birth certificates attached to the instant application. It is however noteworthy that by **2010** when the suit land was sold the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were **21** and **11** years old respectively while the 6<sup>th</sup> plaintiff was **13** and the 5<sup>th</sup> plaintiff was **9**.
11. The foregoing notwithstanding it is noteworthy that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have sued in their capacity as the legal representatives of the deceased father to the instant applicants who also happened to be a husband to the 1<sup>st</sup> plaintiff. Subject to further evidence, they *prima facie* have capacity to institute some proceedings on behalf of his estate, and whether the extent of their liberty to do so extends to filing the instant proceedings can only be examined at the main hearing.
12. In the event the instant applicants are struck out of these proceedings as sought, that would leave only the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs as parties in the suit. The orders sought would not have the effect of terminating the entire suit and the proceedings would still pend before this court.
13. Ordinarily a plaintiff voluntarily chooses who to sue and the cause of action to plead. The suit herein is in respect of whether land was sold in breach of a trust in favour of the **4** applicants who now seek to be struck out of the suit.
14. This is an application that in my view is rightly filed by the applicants; however, this court also finds that during the proceedings in this suit the presence of the applicants may still be rendered necessary as they were the intended beneficiaries of the trust.
15. I must state that in a case of this nature where the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have attempted to paint a picture of the adverse social consequences on the instant applicants of the disposal of the land, the propriety of that disposal has to be examined in a substantive hearing and the sale either upheld or nullified depending on the evidence.
16. In the light of the foregoing I find that the instant application should be granted only in so far as the instant applicants seek to be struck out in their capacity as plaintiffs and no more.
17. Consequently, only **Prayer No. (1)** of the application dated **24/7/2020** is granted and that only to the extent that the names of the applicants in their capacity as plaintiffs shall be struck out. As the court has found that by reason of having been named as the *cestui que trust* they are necessary parties in the suit, I hereby issue an order *suo motu* that the instant applicants shall be enjoined as interested parties in the same order in which they appeared when listed as plaintiffs.
18. I hereby also order that the plaintiffs shall amend the Originating Summons dated **11/3/2020** to reflect on the face thereof the changes wrought by the foregoing orders.
19. Each party shall bear their own costs of the application.

**Dated, signed and delivered at Kitale via electronic mail on this 26<sup>th</sup> day of January, 2021.**

**MWANGI NJOROGE**

JUDGE, ELC, KITALE.