



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

E.L.C. NO. 384 OF 2017

JANET MUTHONI MURIITHI.....1ST PLAINTIFF

MARGARET WANJUGU NDUNG’U.....2ND PLAINTIFF

MARY WAIRIMU GAKANGA.....3RD PLAINTIFF

VERSUS

LYDIAH WANJIRU KAMAU.....1ST DEFENDANT

PETER GICHUKI KAMAU.....2ND DEFENDANT

AND

MIRIAM NJOKI KAMAU.....1ST INTERESTED PARTY

TABITHA WAMAITHA KAMAU.....2ND INTERESTED PARTY

RULING

1. By a notice of motion dated 14th August, 2019 expressed to be brought under **Sections 3A and 27 of the Civil Procedure Act (Cap. 21), Order 51 Rule 1 of the Civil Procedure Rules 2010 (the Rules), and all other enabling provisions of the law**, the 1st, 2nd and 3rd Plaintiffs sought the following orders:

(a) That this Honorable Court be pleased to grant leave to the Plaintiffs/Applicants to join the Interested Parties for purposes of reimbursement of costs and disbursements incurred by the Applicants in prosecuting this suit.

(b) That the Plaintiffs’ costs and disbursements of this suit be reimbursed by the Interested Parties/Respondents to the extent of one-fifth (1/5) each.

(c) That all subsequent costs and disbursements necessary for execution of the decree herein be contributed by the Plaintiffs, 2nd Defendant and the Interested Parties to the extent of one-sixth (1/6) each.

(d) That alternatively, 3 acres out of the Interested Parties’ share in LR. Nyandarua/Upper Gilgil/935 be transferred to the Plaintiffs/Applicants in equal shares to defray the costs of litigation of this suit.

(e) That directions be given as may be necessary to meet the ends of justice on the issue of costs and disbursements amongst the Plaintiffs and the Interested Parties/Respondents.

(f) That the costs of this application be paid for by the Respondents in any event.

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Plaintiff, Janet Muthoni Muriithi, on 15th August, 2019. The Plaintiffs contended that they had incurred costs and expenses in prosecuting the suit which the Defendants and the Interested Parties had refused to reimburse. They further contended that all subsequent costs and disbursements necessary for the execution of the decree should be shared by the parties and the Interested Parties since they were

also beneficiaries of the decree.

3. The 1st Interested Party filed a replying affidavit sworn on 15th September, 2020 in opposition to the said application. She stated that she was not party to the suit and that she did not testify at the trial hereof. She contended that in its judgment the court had clearly directed that there shall be no order as to costs hence the Plaintiffs could not validly seek a variation of that order through the instant application.

4. The 1st Interested Party further contended that she had never instructed the Plaintiffs to file the instant suit on her behalf hence she should not be called upon to incur any costs on account thereof. She was of the opinion that the instant application was misconceived and lacking in merit and prayed for its dismissal.

5. When the said application came up for hearing on 17th June, 2020 it was directed that the same shall be canvassed through written submissions. The record shows that the whereas the Plaintiffs filed their submissions on 17th June, 2020 there were no submissions on behalf of the Defendants and the Interested Parties by the time of preparation of the ruling.

6. The court has considered the Plaintiffs' said application, the 1st Interested Party's replying affidavit in response thereto as well as the material on record. The court is of the opinion that there are two main questions for determination herein namely:

(a) *Whether the Plaintiffs have made out a case for joinder of the 1st and 2nd Interested Parties in the suit.*

(b) *Whether the Plaintiffs are entitled to the orders sought on costs and disbursements.*

7. The court has considered the material and submissions on record on the first issue. The Plaintiffs submitted that under **Order 1 Rule 10 (2) of the Rules** the court had jurisdiction to join additional parties to a suit at any stage of the proceedings. The said rule stipulates as follows;

“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 that 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.”

8. It must be remembered that the purpose of such joinder under **Order 1 Rule 10 (2)** is to enable the court to effectively adjudicate and determine the issues in controversy in the suit. The court is of the opinion that the joinder contemplated under the said rule must be undertaken before trial of the action. There is no doubt that the instant suit was heard and determined way back in 2018. No explanation was tendered by the Plaintiffs as to why they did not apply for joinder of the Interested Parties before the suit could be heard and determined. The court is not persuaded that they should be joined in the suit after judgment simply for the purpose of claiming reimbursement of costs and disbursement against them. The court is thus not satisfied that the Plaintiffs have made out a case for joinder of the Interested Parties after judgment.

9. The court has also considered the submissions and material on record on the second question. The Plaintiffs submitted that since the Interested Parties are beneficiaries of the decree they should be ordered to bear some of the costs incurred in the prosecution of the suit and the disbursements to be incurred in the execution of the decree. The Plaintiffs further submitted that under **Section 27 of the Civil Procedure Act (Cap. 21)** the court has wide discretion to make any order as to costs as the justice of the case may require. They cited the cases of **Party of Independent Candidates of Kenya & Another v Mutula Kilonzo & 2 Others [2013]eKLR** and **Jasbir Singh Rai & 3 Others v Tarcholan Singh Rai & 4 Others [2014]eKLR** in support of their submission.

10. The response by the 1st Interested Party was quite straightforward. That she did not instruct the Plaintiffs to file or prosecute the suit on her behalf and that in any event the court had already decreed that there shall be no orders as to costs.

11. **Section 27 (1) of the Civil Procedure Act** which the Plaintiffs relied upon stipulates as follows;

”Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

12. The court is of the opinion that whereas the court has the discretion to determine by whom costs of a suit or proceeding are to be paid, the trial court did exercise that jurisdiction by its judgment dated 29th October, 2018. The trial court considered the fact that the parties to the suit were relatives hence the reason it directed that there shall be no order as to costs. There being no application for review of the order on costs, this court cannot lawfully revisit that order or vary the same.

13. The court is further of the opinion that it was incumbent upon the Plaintiffs to seek appropriate prayers on disbursements at the trial of the suit since they fully knew the nature of prayers they were seeking and that some expenses and disbursements would be involved. It must

also be remembered that the Plaintiffs did not controvert the 1st Interested Party's allegation that she never instructed them to file the suit in the first place. Accordingly, the court is not satisfied that the Plaintiffs have made out a case for the prayers sought with respect to sharing of both costs and disbursements. It would therefore follow that the alternative prayer for transfer of 3 acres out of the Interested Parties' share of the suit property to the Plaintiffs to defray costs and disbursements is not tenable.

14. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 14th August, 2019. Accordingly, the same is hereby dismissed in its entirety with no order as to costs

It is so decided.

RULING DATED and SIGNED at NYAHURURU and DELIVERED via Microsoft Teams Platform this **21st** of **January, 2021**.

In the presence of:

Mr. Kariuki Mwangi for the Plaintiffs

No appearance for the Defendants

No appearance for the Interested Parties

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

21.01.2021