



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 243 OF 2018

KARIM H. SHARIFF.....PLAINTIFF

VERSUS

JOEM CONSULTANTS LIMITED.....1ST DEFENDANT

EMMANUEL OKELLO.....2ND DEFENDANT

ELIZABETH WAIYEGO.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

NAIROBI CITY COUNTY.....6TH DEFENDANT

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

N.K MUGO & CO. ADVOCATES.....2ND INTERESTED PARTY

DIRECTORATE OF CRIMINAL

INVESTIGATIONS.....3RD INTERESTED PARTY

RULING

The 2nd Interested Party’s application dated 17/11/2020 sought to have the 2nd Interested Party struck out of the suit and to have the costs of that application borne by the Plaintiff. The application was made on the grounds that the Plaintiff sued the 2nd Interested Party, N.K Mugo & Company Advocates which was the firm of Advocates that represented the Plaintiff and the 1st Defendant in the conveyancing transaction in respect of the Suit Property yet there was no cause of action against the 2nd Interested Party disclosed in the pleadings. It was also contended that the 2nd Interested Party is not a legal entity capable of being sued and as such dragging it to the proceedings was unjust, vexatious and prejudicial.

The application was supported by the affidavit of Norman Asega, an advocate and partner in the firm of N.K Mugo & Company Advocates who deponed that the 2nd Interested Party was not incorporated under the Companies Act as the Plaintiff alleged in paragraph 9 of the plaint and that as such it was not capable of being sued. He also deponed that the 2nd Interested Party’s presence in the suit was not necessary just because it acted as counsel for the purchaser and vendor and added that there was nothing the 2nd Interested Party is being called upon to answer. He deponed further that it was unjust for the 2nd Interested Party to be forced to engage an advocate to defend it in these proceedings while the Plaintiff had no case against it.

The Plaintiff opposed the application through the replying affidavit of its counsel, Ms. Waithira Kamau, sworn on 26/11/2020. She deponed that joining the 2nd Interested Party in the suit was justified since the 2nd Interested Party represented both the Plaintiff and the 1st Defendant in the sale of land reference number 12239/72 (original Number 12239/6/2/2) which transaction is the subject of **Criminal Case No. 354/2018** in which the 1st, 2nd and 3rd Defendants are accused of forging the transfer documents and the fraudulent transfer of the Suit Property. She further deponed that since the 2nd Interested Party represented both parties and conducted due diligence in execution of its professional duties to both the vendor and purchaser in the transaction, it was a material witness for both parties and that its participation in the suit would enable the court effectually and completely adjudicate upon and settle all questions in the suit. She also deponed that Order 30

of the Civil Procedure Rules provides that where a firm has two or more partners, a suit can be instituted in the firm's name.

Parties filed submissions which the court has considered. The 2nd Interested Party submitted that the Plaintiff's replying affidavit sworn on 26/11/2020 was incompetent because it was sworn by the Plaintiff's counsel without the Plaintiff's authority yet it touched on contentious matters which the Plaintiff's counsel lacked knowledge of. She added that the affidavit offends Order 19 Rule 3 of the Civil Procedure Rules which requires affidavits to be confined to facts that the deponent is able of his own knowledge to prove. The 2nd Interested Party also submitted that a party is only joined to a suit as an Interested Party if he has a real stake in the judgement that will be rendered but that in this case, the 2nd Interested Party will not be affected by the final outcome of this dispute in any way. On the Plaintiff's contention that joining the 2nd Interested Party to the suit was necessary because it was going to be a witness for both the Plaintiff and the 1st Defendant, it was submitted that the procedure for getting a material witness was not by making it a party to the suit.

The Plaintiff submitted that the question of joining the 2nd Interested Party to the suit was not contentious since the issue of the 2nd Interested Party having represented the Plaintiff and the 1st Defendant in the sale transaction which is subject matter of this suit was not disputed. The Plaintiff therefore submitted that the replying affidavit sworn by the Plaintiff's advocate on 26/11/2020 did not offend Order 19 Rule 3 of the Civil Procedure Rules. It was further submitted that the 2nd Interested Party fits the purpose for being joined under Order 1 Rule 10 (2) of the Civil Procedure Rules which provides that a party can be joined to enable the court to effectually and completely adjudicate a matter.

The issue for determination is whether the 2nd Interested Party's presence in this suit is necessary. Looking at the plaint which was filed in court on 25/5/2018, the court notes that the Plaintiff does not seek any orders against the 2nd Interested Party. The Plaintiff contended that the 2nd Interested Party may be called as a witness for the Plaintiff and the 1st Defendant. While the court agrees with the Plaintiff that the 2nd Interested Party may be called as a witness at the hearing of this suit, its participation in the proceedings as a party is not necessary. The Plaintiff will be at liberty to take out witness summons for an advocate from the 2nd Respondent to attend court and give evidence to assist the court to effectually and completely adjudicate upon and settle all questions in the suit.

The 2nd Interested Party has demonstrated that it does not have an interest in this dispute. The application dated 17/11/2020 is allowed. The costs of the application shall be borne by the Plaintiff.

Delivered virtually at Nairobi this 10th day of February 2021.

K.BOR

JUDGE

In the presence of:-

Mr. R. Manyara holding brief for Mr. R. Kamotho for 2nd Interested Party

Mr. V. Owuor- Court Assistant

No appearance for the other parties