



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 134 OF 2018**

**1. MZEE ADAMA MAKINJA**

**2. MUGANGA TSUMA**

**3. ALI JUMA KAHINDI.....PLAINTIFFS**

**VERSUS**

**1. LIVINGSTONE NDUNGU WAITHAKA**

**2. ELLEN PROPERTIES**

**3. OCS BAMBURI POLICE STATION**

**4. DISTRICT COMMISSIONER KISAUNI**

**5. OCS KIEMBENI POLICE STATION**

**6. OCPD KISAUNI.....DEFENDANTS**

**RULING**

1. This application before me for determination is the notice of motion dated 5<sup>th</sup> June, 2020 brought under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 1 Rule 10, Order 8 Rule 3 and Order 51 of the Civil Procedure Rules. The plaintiffs/applicants are seeking the following orders:

1. That the plaintiffs be allowed to add one more party to the suit, namely JUNAC SOLUTIONS LTD as they are directly affected by the matter in this suit who will be affected by an order of judgment to be issued.
2. That the Honourable Court do allow the plaintiffs to amend their pleadings in view of the illegal, gross and violent eviction that was carried out on the 9<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> and 30<sup>th</sup> March 2020 by the defendants and the police from Bamburi Police Station.
3. That the Honourable Court to order that the order issued on 6<sup>th</sup> March 2020 to the defendants was obtained by fraud, non-disclosure of material facts and misrepresentation as such should be set aside.
4. That any other order that the court deems fit to grant and cost of this application be provided for.

2. The application is supported by the affidavit of Benson Asangai Onjole sworn on 5<sup>th</sup> June, 2020 and is premised on the following grounds:

- i. That the proposed 4<sup>th</sup> plaintiff is directly affected or will be directly affected by the issues in this suit and will be affected by any judgment or ruling to be delivered.
- ii. That the proposed 4<sup>th</sup> plaintiff property was maliciously and recklessly destroyed by the defendants using police.
- iii. That the defendants used fraud, misrepresentation and non-disclosure of material facts to destroy property worth

millions of shillings using an order of injunction.

**iv. That the defendants obtained orders for injunction and then fraudulently used it during covid-19 pandemic period to illegally and unlawfully evict the plaintiffs and their families.**

**v. That the court had never issued an eviction order and the defendants illegally evicted the plaintiffs using the police and vigilantes.**

**vi. That it is only fair that the application be allowed as prayed, and that no prejudice shall be suffered by the defendants.**

3. In the affidavit in support of the application, Benson Asangai Onjole avers at that is a director of Junac Solutions Ltd, the proposed 4<sup>th</sup> plaintiff and that the company has been running its car wash and hotel business at PLOT NO. MN/I/264 for more than five years. That the company purchased part of the land on 8<sup>th</sup> February, 2019 from one James Kiage Orwaru. That the company knows for a fact that the ownership of the suit property is still pending in court and the property is registered in the name of Livingstone Ndungu Waithaka, the 1<sup>st</sup> defendant herein. He has annexed copies of the said agreement and search certificate dated 28<sup>th</sup> November, 2018. He states that they caused extensive investigation of title to the suit land to be carried out by a surveyor who made a report which has also been annexed. That from the said investigation it is clear that the purported subdivision of the land is false and is fraud as the same was not registered and the subdivisions were used to fraudulently obtain orders dated 5<sup>th</sup> March, 2020. That using the said orders the police, and the defendants moved in and completely destroyed property worth millions of shillings and violently evicted everyone in the property, including destroying the said company's business. He urged the court to grant the orders sought in the application herein.

4. In opposing the application, the 2<sup>nd</sup> defendant filed a replying affidavit sworn by its Director Margaret Muthoni Ndungu, on 22<sup>nd</sup> September, 2020. It is averred that the 2<sup>nd</sup> defendant is the owner of the suit property being subdivision NOS.MN/I/16636 to MN/16663 and MN/I/18816 to MN/I/18873 after subdivision of the original PLOT. NO.264/II/MN. Copies of the title deeds and rates payments have been annexed. That the suit property has been under constant invasions by squatters who have been trying to enter the plot and forcefully putting up temporary and semi-permanent structures and generally trying to waste the suit properties. That the actions of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs prompted the 2<sup>nd</sup> defendant to approach the court seeking orders of injunction against the plaintiffs and/or their proxies or squatters from entering and/or attempting to illegally use the suit properties. That through the help of the Directorate of Criminal Investigations and the police, the 2<sup>nd</sup> defendant has been keeping the illegal squatters from invading the suit properties and who have been playing hide and seek with the security forces by sometimes entering the parcel of land at night and constructing illegal structures thereon in contravention of the court orders. That the 1<sup>st</sup> to 3<sup>rd</sup> defendants have not been residing on the suit properties as alleged and that no eviction has been carried out against them save for those who have invaded the suit properties and have been kept away by the security forces and the police to help enforce this court's orders. The 2<sup>nd</sup> defendant's director has stated that she is a stranger to the intended 4<sup>th</sup> plaintiff and that the photographs annexed by the plaintiffs in support of their application are not from the suit properties. That the suit properties being subdivisions referred to hereinabove belong to the 2<sup>nd</sup> defendant who is the registered owner and proprietor of the parcels of land. That the 2<sup>nd</sup> defendant has not parted with possession of the suit properties and/or sold any portion thereof to third parties. That no hotel has been constructed on the suit properties as alleged by the said intended 4<sup>th</sup> plaintiff as no approved plans and/or architectural drawings have been shown. It is the 2<sup>nd</sup> defendant's contention that the application as presented before court is misplaced, an omnibus and is intended to further delay the hearing of the suit. That the intended 4<sup>th</sup> plaintiff has no cause of action against the 2<sup>nd</sup> defendant and can at best pursue James Kiage Orwaru who allegedly sold to him a plot measuring 100 feet by 100 feet on 8<sup>th</sup> August, 2019, not the 2<sup>nd</sup> defendant herein. That the application has no merit and the same should be declined since the same does not fall within Order 1 Rule 10 of the Civil Procedure Rules. That the amendments that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs propose to make have not been exhibited to show whether it relates to parties herein. The 2<sup>nd</sup> defendant drew to the attention of the court the existence of ELC Case No. 165 of 2019 **Etoke John Akaran & 5 Others -v- Ellen Properties & 4 Others** which is pending before the court and involves the same properties. Copies of the pleadings in that case have been annexed.

5. I have considered the application and the submissions made. The main prayers sought in the application are for leave to enjoin Junac Solutions Limited as the 4<sup>th</sup> plaintiff in these proceedings and for the plaintiffs to be allowed to amend their pleadings. The plaintiffs are also seeking on order to set aside the orders of court issued on 6<sup>th</sup> March 2020. The provisions of Order 1 Rule 10 under which the application is brought provides as follows:

**“ 10. (1) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted 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 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.**

**(14) Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.”**

6. It is clear from the above provisions of law that the court has discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court may be necessary, to enable the court effectually and completely adjudicate upon and settle all questions involved in the said suit. The question herein is whether the proposed party ought to be enjoined as a plaintiff.

7. In this case, it is the applicants argument that Junac Solutions Limited are directly affected by the matter in this suit and will be affected by the judgment to be issued herein. It is stated that the proposed 4<sup>th</sup> plaintiff's property was destroyed by the defendants using the police. In the affidavit in support of the application herein, the deponent, Benson Asangai Onjole has described himself as a director of Junac Solutions Limited. That the company purchased part of the suit land on 8<sup>th</sup> February 2019 from one James Kiage Orwaru and that said company was running a carwash and hotel business on the suit premises. I note however, that the agreement for sale annexed to the said affidavit is between Benson A. Onjole and James Kiage Orwaru. There is no agreement in the name of Junac Solutions Limited. Indeed there is no single document in the name of Junac Solutions Limited that has been exhibited. Furthermore, there is no authority from the said company authorizing Benson Asangai Onjole. If indeed there is any cause of action arising from the alleged agreement dated 8<sup>th</sup> February 2019, the same can only be enforced between the parties thereto. None of the defendants was a party to the said agreement, including the said Junac Solutions Ltd. In my view, the joinder of Junac Solutions Ltd who has not itself even sought to be joined will embarrass and delay the finalization of this suit. The proposed 4<sup>th</sup> plaintiff in my view is not a necessary party to be enjoined in the suit.

8. The other issue for determination is whether the court should set aside the orders issued on 6<sup>th</sup> March 2020 in favour of the defendants. The plaintiff argues that the said orders were obtained fraudulently and through non-disclosure of material facts. I have looked at the affidavit in support of the application and the pleadings herein. The applicants admit that the suit property is registered in the name of the 2<sup>nd</sup> defendant. It is therefore superfluous to again allege that there was fraud and material non-disclosure. Moreover, the allegations of fraud, and misrepresentation have not been sufficiently proved to warrant the setting aside of the orders issued by the court on 6<sup>th</sup> March, 2020. In my view, no new and important matter or evidence has been produced to warrant the review or setting aside of the said orders.

9. The upshot is that the notice of motion dated 5<sup>th</sup> June 2020 lacks merit and is hereby dismissed with costs to the 2<sup>nd</sup> defendant.

10. It is so ordered

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**