



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 111 OF 2019

SOSIANI BUILDERS ..... PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR..... 1ST DEFENDANT

THE COUNTY LAND REGISTRAR UASIN GISHU COUNTY.....2ND DEFENDANT

DIRECTOR OF CRIMINAL INVESTIGATIONS .....3RD DEFENDANT

THE ATTORNEY GENERAL..... 4TH DEFENDANT

CHARTER HOUSE INVESTMENT LTD.....PROPOSED 5TH DEFENDANT

RULING

This ruling is in respect of an application dated 9th October 2020 by the proposed 5th defendant seeking for the following orders:

- a. THAT this Honourable Court be pleased and do grant leave for CHARTER HOUSE INVESTMENT LTD to be enjoined as a 5th Defendant in this suit;
b. THAT upon leave being granted as sought in prayer (a) herein, CHARTER HOUSE INVESTMENT LTD be at liberty to enter appearance and to file any necessary response and/ or documents in this suit; and
c. THAT the Plaintiff dated 27th September, 2019 be amended to include CHARTER HOUSE INVESTMENT LTD as the 5th Defendant.

The applicant filed a supporting affidavit in respect of the application which application was opposed vide a replying affidavit by MAHENDRA G. PATEL dated 3rd February, 2021.

APPLICANT'S SUBMISSIONS

Counsel for the applicant submitted that the proposed 5th defendant has a verifiable interest in the suit as the suit property Eldoret Municipality Block 12/144 is part of a larger Eldoret Municipality Block 12/424. That the suit property was erroneously allocated to one Mr John C Songok who sold it to the plaintiff Sosiani Builders Ltd who then traded as Baraka Land Company.

Mr Ogada submitted that the title is tainted with illegality as the sale was done while there was an existing order of injunction by the court and that plaintiff presented an order purported to be authentic from the court to the land Registrar indicating that the matter had been finalized hence the registration,

It was counsel's further submission that the Land Registrar cancelled the title upon realizing the mistake, consolidated the suit parcels of land and entered a restriction pursuant to section 76 of the Land Registration Act.

Counsel therefore prayed that the application be allowed as there are pending suits where all these issues can be canvassed.

## **RESPONDENT'S SUBMISSIONS**

Counsel gave a genesis of this suit which is to challenge of the restriction on land parcel known as Eldoret Municipality Block 12/144 which the plaintiff claims to have been irregularly registered by the 2<sup>nd</sup> Defendant upon instructions of the 3<sup>rd</sup> Defendant herein.

It has been averred that the 3<sup>rd</sup> Defendant preferred charges against 3 suspects who were acquitted on 8<sup>th</sup> September, 2018 hence the restriction ought to be lifted. That the instant suit seeks to examine the propriety of the aforesaid restriction and to seek the removal of the same while the intended 5<sup>th</sup> Defendant/Applicant claims to have ownership interests in the suit property which issue is the subject of the other civil suits mentioned in the intended 5<sup>th</sup> Defendant/Applicant's Supporting Affidavit.

Counsel in response to the submissions by counsel for the applicant stated that the plaintiff has never traded as Baraka Land Ltd. Further that there was an attempt by the applicant to amalgamate block 12/144 and 12/143 and 218 fraudulently and that the same were never cancelled as alleged.

Mr Songok also submitted that it is true that ELC No 927 of 2012, 304 of 2014 and 225 of 2016 were consolidated and the same is coming up for hearing in April 2021. He further stated that the instant suit is challenging the restriction lodged on the suit land without notice and not ownership.

It was counsel's submission that when they wrote to the Registrar they indicated that there were investigations that were ongoing in respect of the suit parcels of land. That the proposed 5<sup>th</sup> defendant's claim is on ownership and the current suit is on removal of restriction.

Counsel submitted that the intended 5<sup>th</sup> Defendant/Applicant was not involved in the registration of a restriction on the suit property therefore his presence in this claim is unwarranted and unnecessary as the intended 5<sup>th</sup> Defendant/Applicant is not in a position to offer any response on issues of law concerning the function of the 3<sup>rd</sup> Defendant as to when and how to place a restriction over the suit property herein.

Mr Songok further submitted that a party cannot be compelled to sue a party that they do not seek a remedy from and urged the court to dismiss the application with costs to the plaintiff.

## **ANALYSIS AND DETERMINATION**

The issue for determination is whether the 5<sup>th</sup> defendant has met the threshold for joinder as a party to this suit.

Under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules a party may seek joinder either as a plaintiff or defendant. Order 1 Rule 10 (2) provides as follows:

“10 (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 adjudicate upon and settle all questions involved in the suit, be added.”

The Plaintiff filed a Plaint dated 27<sup>th</sup> September, 2019 seeking for the following prayers as against the 1<sup>st</sup> to 4<sup>th</sup> Defendants:

- a. A declaratory order declaring that the restriction imposed on the parcel ELDORET MUNICIPALITY BLOCK 12/ 144 is oppressive, unjustified and unlawful;
- b. An order directing the County Land Registrar, Uasin Gishu County to remove the restriction imposed on 5<sup>th</sup> June, 2012 over the said parcel;
- c. An order of permanent injunction as per paragraph 13;
- d. General damages occasioned by the restriction;
- e. Costs of this suit and interest at the courts rates

The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter of the litigation. Secondly, the applicant must show that he/she is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

Is the presence of the proposed 5<sup>th</sup> Defendant/ Applicant necessary to effectually and completely adjudicate upon and settle the question as to whether the decision to put a restriction on the suit land herein was properly arrived at and whether the said restriction should continue being in force even after the criminal case that necessitated its registration has since been determined with an acquittal of the accused persons therein?

It should be noted that there are other cases which have been acknowledged by both counsel which deals with the ownership of the suit lands.

Would the addition or joinder of the proposed 5<sup>th</sup> defendant help this court to determine whether to remove the restriction or not?

The answer to the two questions are in the affirmative as the cases that have been cited as consolidated deal with the same subject matter which is in respect of ownership. If the court orders for the removal of the restriction, then what happens to the issue of ownership that is pending before the court. Would the removal of the restriction affect the substratum of the cases that are pending on the issue of ownership? This is not to say that the court is already dealing with the main suit.

Even though this case is on the legality of the restriction placed on the suit land, ultimately the issue that the restriction was to safeguard is the ownership of the land. This makes the proposed 5<sup>th</sup> defendant a necessary party in this suit.

In the case of **LUCY NUNGARI NGIGI & 128 OTHERS V NATIONAL BANK OF KENYA LIMITED & ANOTHER [2015] eKLR** the Court stated as follows when considering whether to grant leave to enjoin a party:

Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

Applications for joinder are discretionary and the court after consideration of the facts can either allow or dismiss the application. In the case of **Civicon Limited –vs- Kivuwatt Limited & 2 Others [2015] eKLR** where the court while observing that exercise of discretion is called for in applications for joinder stated as follows:-

“Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined.

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party, in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

I have considered the application, the submissions by counsel, relevant authorities and come to the conclusion that the application has merit and is therefore allowed as prayed. Applicant to file necessary papers within 14 days.

**DATED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF MARCH, 2021**

**M. A. ODENY**

**JUDGE**