



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

CONSTITUTIONAL PETITION NO. 8 OF 2020

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF ARTICLES 3(1), 19(1), 21(1), 28, 29, 40 & 43 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICES AND PROCEDURE
RULES) RULES 1, 2, 3, 4, 10, 11, 20, 21, 33**

AND

IN THE MATTER OF SECTION 18, 37, 38 & 43 LIMITATION OF ACT

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF ABUSE, THREAT TO ABUSE AND INFRINGEMENT OF
THE PETITIONERS HUMAN AND FUNDAMENTAL CONSTITUTIONAL RIGHTS**

AND

IN THE MATTER OF A PORTION OF TITLE NO. KIPLOMBE/KIPLOMBE

BLOCK 11 (FORMERLY KNOWN AS LAND L.R. No. 9723 (IR 15449) SERGOIT RIVER FARM

BETWEEN

ERICK KIBIWOTT TARUS & 51 OTHERS.....PETITIONERS/ RESPONDENT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

ESTATE OF ESMAIL NURANI.....4TH RESPONDENT

ESTATE OF NYONGIO KIMITEI..PROPOSED RESPONDENT/ APPLICANT

RULING

This ruling is in respect of an application dated 16th November, 2020 by the Proposed 5th Respondent seeking for the following orders:

- a) THAT the Applicant be enjoined in this Petition as a Respondent (5th Respondent);
- b) THAT leave be granted to the Applicant (proposed 5th Respondent) to file its Response or a Reply to the Petition herein; and
- c) THAT costs of this Application be in the cause.

This application is not opposed by the 1st to 4th respondents but the same is opposed by the petitioners vide a Replying Affidavit sworn by **ERICK KIBIWOTT TARUS** on 4th February, 2021. The applicant did not file submissions and relied on the supporting affidavit by the applicant.

The Petitioners filed submissions dated 9th February, 2021 to the Application dated 16th November, 2020 but extensively addressed the merits of the main Petition and not the application for joinder.

ANALYSIS AND DETERMINATION

The issue for determination in an application for joinder is as per Order 1 Rule 10 (2) of the Civil Procedure Rules, 2012 which gives the court power to enjoin a party whose presence before the Court may be necessary to enable the Court to effectually and completely adjudicate upon and settle the questions in the suit.

Such applicant must demonstrate that he/she has an identifiable interest in the subject matter of the litigation and such presence is necessary to aid the court in determining the issues in the case.

It is on record that the suit land **L.R No. 9723 (IR NO. 15449) SERGOIT RIVER FARM** which is said to belong to the Estate of the late Nyongio Kimitei and the Administrator of the said Estate seeks to have the Estate enjoined to the Petition noting that the outcome of the Petition shall affect the Estate.

It is not disputed that the Applicant has interest in **L.R No. 9723 (IR NO. 15449)** and it would be in the interest of justice to enjoin such a party. 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 of 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 effectually 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 word, 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 as was observed in the case of **CIVICON LIMITED V. KIVUWATT LIMITED & 2 OTHERS [2015] eKLR** 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.”

Further in the Supreme Court case of **PETER GICHUKI KING'ARA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS (2014) eKLR** made the following observation as regards the exercise of judicial discretion:

“Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically.”

The court can order joinder of a party on its own motion or vide an application by a party if it is of the view that such a party is a necessary party who can help the court in effectually determining a matter in issue.

Having found that the proposed respondent has an identifiable stake in this petition as an administrator of the Estate of the Late Nyongio Kimitei, I hereby allow the application for joinder as prayed and order that the 5th respondent do file a reply to the petition within 30 days. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE