REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL SUIT NO. 52 OF 2007

YONAH NAMACHEMO WAFULA.....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL W. WANYONYI.....1ST DEFENDANT/RESPONDENT

RESAH SIFUMA..... 2ND DEFENDANT/RESPONDENT

DAVID MACHIMBO WALUKHU.....3RD DEFENDANT/RESPONDENT

AND

CHRISTINE NAFULA ODEKE.....1ST INTERESTED PARTY/APPLICANT

EMMANUEL MUTIBOKO.....2ND INTERESTED PARTY/APPLICANT

ABRAHAM KUNGURU.....3RD INTERESTED PARTY/APPLICANT

MIRIAM NAMARONE.....4TH INTERESTED PARTY/APPLICANT

ANGELA WAFULA.....5TH INTERESTED PARTY/APPLICANT

DANIEL WAFUA MWATUTO..... 6TH INTERESTED PARTY/APPLICANT

AND

RODHA NASIMIYU MASINDE.....APPLICANT

R U L I N G

This ruling is in respect to the following two applications:-

1. The application dated 18th December 2017 by the six intended interested parties seeking to be enjoined in these proceedings.

2. The application by RODHA NASIMIYU MASINDE dated 18th April 2019 seeking to be substituted as a defendant in place of the 1st defendant who was her husband and is now deceased.

1. **APPLICATION DATED 18TH DECEMBER 2017**.

The Applicants in this application are:-

1. CHRISTINE NAFULA ODEKE - 1ST APPLICANT

2. EMMANUEL MUTIBOKO - 2ND APPLICANT

3. ABRAHAM KINGURU - 3RD APPLICANT

4. MIRIAM NAMARONE - 4TH APPLICANT

5. ANGELA WAFULA - 5TH APPLICANT

6. DANIEL WAFULA MWATUTO - 6TH APPLICANT

Their application which is premised under the provisions of **Sections 1A, 3** and **3A of the Civil Procedure Act** and **Order 1 Rule 14** and **Order 51 of the Civil Procedure Rules** seeks the main prayer that they be enjoined as interested parties in this suit. The application is based on the grounds set out therein and is supported by the affidavit of **CHRISTINE NAFULA ODEKE** the 1st Applicant herein. The gravamen of the application is that the subject matter of this suit which is land parcel **NO NDIVISI/KHALUMULI/804** (the suit land) was part of the Estate of the late **HENRY WAFULA KUNGURU** who was the father of the 2nd to 6th Applicants and husband to the 1st Applicant. That the plaintiff, 1st defendant (now deceased) and the Applicants are therefore entitled to benefit from the suit land which is therefore held in trust for the family of the late **HENRY WAFULA KUNGURU** yet the plaintiff and the deceased 1st defendant have sold it to the 2nd and 3rd defendants who are now threatening to evict the Applicants from the suit land which is their only source of livelihood.

The plaintiff does not oppose that application.

The 2nd and 3rd defendants oppose the application and have filed Replying Affidavits.

In the Replying Affidavit dated 2nd August 2018, the 2nd defendant **RESAH SIFUNA** depones, inter alia, that the application dated 18th December 2017 is a delaying tactic intended to delay the quick disposal of this suit and that the deceased 1st defendant was the only beneficiary to the suit land and it does not belong to the family having been transferred to the plaintiff and the deceased 1st defendant by one **GEORGE LEONARD JAMES OPIYO** who had purchased it from one **WAFULA KUNGURU**. That the 2nd defendant thereafter purchased the suit land from the deceased 1st defendant and the plaintiff was a witness to that transaction after which 2nd defendant took possession.

On his part, the 3rd defendant **DAVID MACHIMBO WALUKHU** deponed in his Replying Affidavit dated 23rd August 2018 that this application is a collusion between the plaintiff and the Applicants to defeat his claim. That he is an innocent purchaser of title **NO NDIVISI/KHALUMULI/2819** from one **JUMA WANYONYI KIMINGICHI.** That the plaintiff and the deceased 1st defendant were the only sons of **HENRY WAFULA KUNGURU** and the Applicants do not exist and only the plaintiff occupies the suit land.

I have considered the application and rival affidavits.

Although the Applicants cite the provisions of **Order 1 Rule 14 of the Civil Procedure Rules** as the basis of this application, the relevant provision is **Order 1 Rule 10(2) of the Civil Procedure Rules** which provides that:-

> ***"That 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."*** Emphasis added.

It is clear from the above that for one to be enjoined as an interested party, he must demonstrate that he has an interest in the subject matter of the dispute and that his presence is necessary to enable the Court to ***effectually and completely adjudicate upon and settle all the questions involve in the suit***. Put another way, if the intended interested party is shut out of the case, the Court will be deprived of relevant evidence that could have otherwise assisted and guided it is arriving at a just conclusion of the dispute before it. The power to enjoin other parties to a suit is discretionary and that is why the Rules allow the Court to do so even on it's own motion. In **CIVICON LTD .V. KIVUWATT LTD & OTHERS 2015 eKLR** the Court of Appeal 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 necessary and proper party and should be enjoined."***

The Supreme Court of Kenya in the case of **FRANCIS KARIOKI MURUATETU & ANOTHER .V. REPULBIC & OTHERS S.C PETITION NO. 15 OF 2015 (2016 eKLR)** set at the following principals to guide a Court considering an application to enjoin an interested party in proceedings before it:-

> **(a) The prejudice to be suffered by the intended interested party in case of non – joinder must be demonstrated to the satisfaction of the Court.**
>
> **(b) The Applicant must set out it's case and/or submissions which he intends to make before the Court.**

Although the Supreme Court was considering **Rule 25 of the Court's Rules** and **Section 23 of the Supreme Court Act**, I am satisfied that the same principles can guide a Court considering an application under **Order 1 Rule 10(2) of the Civil Procedure Rules.**

Guided by the above, have the Applicants demonstrated that they have an identifiable interest in the suit land or that their presence is necessary to enable this Court ***"effectually and completely to adjudicate upon and settle all questions involved in the suit."?*** It must be remembered that the interested party's interest need not necessarily be one that will succeed. The Applicants' interest in the suit land is that it belonged to the late **HENRY WAFULA KUNGURU** who was the husband to the 1st Applicant and father to the 2nd to 6th Applicants. The 2nd and 3rd defendants have disputed that assertion stating that the suit land belonged to the plaintiff and deceased 1st defendant who were the only sons of the late **HENRY NAFULA KUNGURU**. However, in support of their application, the Applicants have annexed a letter dated 31st October 2005 from the **DISTRICT OFFICER WEBUYE DIVISION** addressed to the **DISTRICT COMMISSIONER BUNGOMA** in which the Applicants, in addition to others, are named as the "***rightful heirs***" to the Estate of the late **HENRY WAFULA KUNGURU**. In the circumstances, there is no doubt in my mind that the Applicants have demonstrated that they have an identifiable stake in the suit land.

The Applicants' Chamber Summons dated 18th December 2017 is well merited. I allow it.

2. APPLICATION DATED 18TH APRIL 2019.

The applicant in this application is one **RODHA NASIMIYU MASINDE** who is the widow of the 1st defendant (deceased). The application is premised under the provisions of Article 159 of the Constitution and seeks the main prayer that she be substituted in place of her deceased husband the 1st defendant.

The gravamen of the application is that this suit touches on land parcel **NO NDIVISI/KHALUMULI/804** (now sub – divided into 2686, 2687, 2818 and 2819) which was sold and sub – divided by the deceased who passed away on 16th July 2013. That the Applicant thereafter filed **SUCCESSION CAUSE NO 165 OF 2018** for purposes of proceeding with this suit and a grant was issued on 3rd July 2018 and therefore the Estate of the deceased should not be condemned un–heard.

The application is opposed by the 2nd defendant **RESAH SIFUMA** who in her Replying Affidavit dated 6th May 2019 describes it as a delaying tactic intended to forestall the quick disposal of this suit and also as being res – judicata.

I have considered the application and rival affidavits.

The 2nd defendant's assertion that this application is res – judicata is well founded.

By this Court's ruling dated 22nd November 2018, I dismissed a similar application filed by the plaintiff seeking to substitute the same **RODHA NASIMIYU MASINDE** in place of the 1st defendant. There was no appeal filed against that ruling and this application seeking the same orders is clearly an abuse of the process of this Court apart from also being res – judicata.

The doctrine of res – judicata is provided for in **Section 7 of the Civil Procedure Act** as follows:-

> ***7: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."***

The doctrine of res – judicata applies not only to final decisions of the Court but also to applications – **KANORERO RIVER FARM & OTHERS .V. NATIONAL BANK OF KENYA LTD 1986 KLR** which was cited with approval by the Supreme Court of Kenya in **GEORGE KIHARA MBUYU .V. MARGARET NJERI MBIYU & OTHERS 2018 eKLR**. Further, in **UHURU HIGHWAY DEVELOPMENT LTD .V. CENTRAL BANK OF KENYA CIVIL APPEAL NO 36 OF 1996**, (1996 eKLR) the Court of Appeal held that:-

> ***" ……. There must be an end to applications of similar nature that is to say further, wider principles of res – judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."***

The only difference between this application and the one that I dismissed in my ruling dated 28th November 2018 is that this application has been filed by **RODHA NASIMIYU MASINDE** herself while the previous application had been filed on her behalf by the plaintiff. Both seek to achieve the same objective. This application is clearly res – judicata.

This application is also an abuse of the process of the Court and **Section 3A of the Civil Procedure Rules** empowers this Court to make any orders as may be necessary to prevent an abuse of it's processes. In **BULLEN, LEAK AND JACOBS PRECEDENTS OF PLEADINGS 12TH EDICTION PGE 148**, the authors define the term abuse of process thus:-

> ***"The term 'abuse of the process of the Court' is a term of great significance. It connotes that the process of the Court must be carried out properly, honestly and in good faith, and it means that the Court will not allow it's functions as a Court of Law to be***

misused but will in a proper case, prevent it's machinery from being used as a means of vexation or oppression in the process of litigation."

To file a multiplicity of applications over the same issue is clearly an abuse of the Court process. Certainly, it does not promote the just, expeditious, proportionate and affordable resolution of disputes which is the overriding objective of the Civil Procedure Act and Rules. Therefore, apart from being res – judicata, the application by **RODHA NASIMIYU MASINDE** dated 18th April 2019 is also an abuse of the Court process which this Court, as empowered by the provisions of **Order 2 Rule 15(1) (d) of the Civil Procedure Rules**, may order to be struck out.

Ultimately therefor, and having considered the two applications dated 18th December 2017 and 18th April 2019, I make the following orders:-

1. The interested parties' application dated 18th December 2017 seeking to be enjoined in these proceedings is allowed. They shall file and serve their pleadings, affidavits and any other documents within 21 days from the date of this ruling.

2. Costs of the application shall be in the cause.

3. The application by RODHA NASIMIYU MASINDE dated 18th April 2019 seeking to substitute the 1st defendant is struck out with costs to the 2nd and 3rd defendants.

Boaz N. Olao.

J U D G E

11th July 2019.

Ruling dated, delivered and signed in Open Court this 11th day of July 2019 at Bungoma.

Mr Wamalwa for Ms Mumalasi for plaintiff present

Mr Onyando for 2nd defendant present

Mr Sifuma for 3rd defendant present

Mr Wamalwa S for Mr Juma for Interested Party present

1st Interested Party present

Applicant present

2nd Interested Party present

Plaintiff present

Gladys – Court Assistant

Boaz N. Olao.

J U D G E

11th July 2019.