



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 31 OF 2020

POKA GROUP RANCH COMMUNITY BASED ORGANIZATION....1ST PLAINTIFF

POKA GROUP RANCH.....2ND PLAINTIFF

JEREMIAH LEMAKO.....3RD PLAINTIFF

HARRISON TAGO.....4TH PLAINTIFF

(Both suing on their personal capacity and as representatives of

POKA GROUP RANCH community based organization and POKA GROUP RANCH)

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....1ST DEFENDANT

DAVID OLE SANKORI.....2ND DEFENDANT

GIKENA INVESTMENT LIMITED.....3RD DEFENDANT

ESTHER NDARU MUKURIA (Sued on her own behalf and on behalf of the

estate of WALTER BERNARD MUKUNDI MUKURIA – Deceased)...4TH DEFENDANT

SAMUEL MWANGLI.....5TH DEFENDANT

BOUYANCY HOLDINGS LTD.....6TH DEFENDANT

LAND REGISTRAR (KAJIADO).....7TH DEFENDANT

THE HON. ATTORNEY GENERAL.....8TH DEFENDANT

RULING

What is before Court for determination is the 4th Defendant’s Notice of Motion Application dated 19th August, 2020. The Application is brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10 (2) including Order 51 Rule 1 of the Civil Procedure Rules. The 4th Defendant seeks for the following orders:

1. This Honourable Court be pleased to issue Orders striking out / discharging the 4th Defendant from these proceedings in her personal capacity.
2. This Honourable Court be hereby pleased to issue Orders striking out/ discharging the 4th Defendant from these proceedings in her capacity as Administratrix of the Estate of the late Walter Bernard Mukundi Mukuria (Deceased).
3. Costs be hereby awarded to the 4th Defendant in her personal capacity.

4. Costs be hereby awarded to the 4th Defendant in her capacity as Administratrix of the estate of the late Walter Bernard Mukundi Mukuria (Deceased).

The application is premised on the grounds on the face of it and the supporting affidavit of ESTHER NDARU MUKURIA where she deposes that neither her late husband's estate nor herself in her personal capacity are registered proprietors of LR No. Kajiado/ Kaputiei South/ 888 or Directors/ Shareholders of the 3rd Defendant. She insists her late husband and herself are strangers to the issues in dispute herein. She contends that there is no sustainable cause of action or claim against her late husband's estate or herself in her personal capacity concerning LR No. Kajiado/ Kaputiei South/ 888. She reiterates that it is manifestly clear that the Plaintiffs have erroneously, recklessly and unfairly enjoined both herself and her late husband's estate in this matter. She avers that this renders the present proceedings against both her late husband's estate and herself, a grave abuse of the court process as the nature of the prayers sought by the Plaintiffs against them in the highlighted capacities are untenable and cannot be duly enforced.

The Plaintiffs opposed the application and filed a replying affidavit sworn by JEREMIAH LEMAKO, the Chairman of the 1st and 2nd Plaintiffs where he deposes that in 1964, they set aside Kajiado/ Kaputiei South/ 23 measuring 2148 acres to act as a holding ground for livestock and was to be used for the development of livestock among members of the Plaintiffs. Further, the holding ground was to be run by the Ministry of Livestock and was registered in the name of the defunct Ol kejuado County Council (Now Kajiado County Government) to hold in trust for the Plaintiffs. He claims they conducted a search and discovered that fraudulent transactions and dealings had been undertaken on Kajiado/ Kaputiei South/ 23 by the 1st Defendant. Further, the original title Kajiado/ Kaputiei South/ 23 has since been subdivided into Kajado/ Kaputiei South/ 46 and 47 respectively, while Kajiado/ Kaputiei South/ 47 was further subdivided into 887, 888 including 889. He avers that Kajiado/ Kaputiei South/ 888 was on 23rd August, 1995 illegally transferred to Hon. Sankori and one Mr. Walter Bernard Mukundi. Further, the said parcel has since been transferred to the 3rd and 4th Defendants. He reiterates that the 4th Defendant produced Grant of Letters of Administration Intestate in Nairobi High Court Succession Cause No. 184 of 2008 (In the matter of the estate of Walter Bernard Mukundi Mukuria – Deceased). Further, the 4th Defendant admits the deceased who was proprietor of the suit land was her husband and the same was transferred to her upon undertaking the aforementioned succession proceedings. He insists the 4th Defendant is the current proprietor of Kajiado/ Kaputiei South/ 888 and she is attempting to conceal important facts including documents by failing to produce the Certificate of Confirmation of Grant and its schedule which confirm the said parcel was distributed to her as the administrator as well as beneficiary of the deceased estate. He states that the 4th Defendant has not challenged the authenticity/ validity of the Green Card produced by the Plaintiffs. Further, the 3rd Defendant is not a natural person and cannot therefore be said to have been a beneficiary of the estate of Walter Bernard Mukundi Mukuria (deceased) and any transfer to it by the 4th Defendant was pegged on a certain consideration. He further insists that 4th Defendant has been properly enjoined as a party to this suit.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 19th August, 2020 including the rivaling affidavits and submissions, the only issue for determination is whether the 4th Defendant should be struck out of this suit and her costs borne by the Plaintiffs.

The 4th Defendant in her submissions reiterated her claim and insists she is not properly enjoined in this suit. She has relied on the cases of **Anderson Mole Munyaya & 3 Others V Morris Sulubu Hare (2017) eKLR** and **Beatrice Tilitei & Another Vs William Kibet Chiboi (2017) eKLR** to buttress her averments. She further submits that failure by the Plaintiffs to enjoin Cikewa Investments Limited goes to the heart of the Plaintiffs' suit.

The Plaintiffs in their submissions relied on the averments in the replying affidavit and contended that the 4th Defendant is properly enjoined as a party to this suit. They made reference to the Green Card where the 4th Defendant was registered as the owner of suit land by virtue of proceedings in Nairobi High Court Succession Cause No. 184 of 2008 (In the matter of the estate of Walter Bernard Mukundi Mukuria – deceased). They insist the 4th Defendant was registered as the administrator of her late husband's estate, the same capacity in which the current proceedings have been instituted against her. Further, she has failed to explain how she ceased being the registered proprietor of land parcel number Kajiado/ Kaputiei South/ 888. To buttress their averments, they have relied on the cases of **Le Vogue Hair & Beauty Studios Limited V Deposit Protection Fund Board (As Liquidator of Prudential Building Society Limited) & 2 Others (2017) eKLR** and **Andy Forwarder Service Limited & Another Vs PriceWaterHouseCoopers Limited & Another (2012) eKLR**.

Order 1 Rule 10 (2) of the Civil Procedure Rules stipulates as follows: '**(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.'**

Further, Order 1 rule 3 of the **Civil Procedure Rules** which provides that:

“All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.”

While Order 24, rule 4 (1) & (2) of the Civil Procedure Rules stipulates that:

‘(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving

defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.’

In this instance the 4th Defendant contends that she is not properly enjoined in this suit and hence her name should be struck off. The 4th Defendant furnished court with a Grant of Letters of Administration Intestate from proceedings in Nairobi High Court Succession Cause No. 184 of 2008 (In the matter of the estate of Walter Bernard Mukundi Mukuria – deceased). On perusal of the Green Card for Kajiado/ Kapatiei South/ 888 which was annexed to the replying affidavit, it confirms the said parcel of land was a resultant subdivision of KAJIADO/KAPUTIEI SOUTH/47. I note at entry No. 2, the deceased was registered as the proprietor of the said land on 23rd August, 1995. Further, at entry No. 4, the 4th Defendant Esther Ndaru Mukuria was registered as owner of the said land by virtue of Nairobi High Court Succession Cause No. 184 of 2008 on 13th August, 2015 while Entry No. 5 thereafter indicates the land was then registered in the name of Cikewa Investments Limited on 13th August, 2015. It is not clear how the transfer was effected from the 4th Defendant to the said company within one day. In the case of **Pravin Bowry v John Ward & another [2015] eKLR** the Court of Appeal while dealing with an issue of joinder stated that: ‘ **Indeed the court itself may add such a party to the suit so that such addition will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The Supreme Court in Uganda in considering a provision similar to Order 1 rule 10 of the Civil Procedure Rules in the case of Deported Asians Property Custodian Board v. Jaffer Brothers Limited (1999) I EA 55 (SCU) had this to say: “A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis by underline).**’

Further in the case of **Civicon Limited v. Kivuwatt Limited & 2 others [2015] eKLR** the Court of Appeal stated that: ‘ **The Court made reference to the Supreme Court of Uganda case of Deported Asians Property Custodian Board vs Jaffer Brothers Limited (1999) I EA 55 (SCU) in which it was held that, “A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis provided).**

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 I 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.’

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the two decisions, since the fulcrum of the dispute herein revolves around land parcel number Kajiado/ Kapatiei South/ 23 with its resultant subdivisions, I opine that any party who was registered as its proprietor at any given time is a necessary party in the proceedings to determine how the said land was disposed of. It is my considered view that though the 4th Defendant claims there is no cause of action against her, her presence is necessary to enable *this court effectually and completely adjudicate upon and settle all the questions involved in the ownership of land parcel number Kajiado/ Kapatiei South/ 888*. In the circumstances, I find that the 4th Defendant is indeed a necessary party to this suit and will decline to strike her off.

It is against the foregoing that I find the application dated the 19th August, 2020 unmerited and will dismiss it with costs to the Plaintiff.

Dated Signed and Delivered Virtually at Kajiado this 19th Day of May, 2021.

CHRISTINE OCHIENG

JUDGE