



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELCC No. 238 OF 2017**

**MOHAMMEDJAFFER MOHAMMEDHUSEIN NANJI.....1<sup>ST</sup> PLAINTIFF**

**RAMZAN MOHAMMEDHUSEIN NANJI.....2<sup>ND</sup> PLAINTIFF**

**GULAM ABBAS MOHAMMEDHUSEIN NANJI.....3<sup>RD</sup> PLAINTIFF**

**(Suing as the Trustees of MOHAMMEDHUSEIN MULLA NANJI TRUST)**

**VERSUS**

**FARMLINE COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOHN MICHAEL NJENGA MUTHUTHO .....2<sup>ND</sup> DEFENDANT**

**ALI KARIUKI (Suing as the Trustee of**

**GILGIL ISLAMIC ASSOCIATION GROUP) .....INTENDED 4<sup>TH</sup> PLAINTIFF**

**RULING**

1. This ruling is in respect of Notice of Motion dated 28<sup>th</sup> May 2019, filed by Ali Kariuki who has styled himself in the application as the “intended 4<sup>th</sup> plaintiff”. The application seeks the following orders:

1. *Spent.*

2. *THAT this honourable court be pleased to enjoin the intended fourth plaintiff as the fourth plaintiff in these proceedings and subsequent to his enjoinder, he be granted leave to file the necessary applications/pleadings as and when necessary.*

3. *THAT this case and Nakuru ELC Case No. 287 of 2018 be consolidated for purposes of being heard and determined together and the hearing shall be on the basis of the pleadings already filed in the two suits subject to any subsequent amendments.*

4. *THAT Nakuru ELC Case No. 287 of 2018 file be the lead file for purposes of filing any further pleadings and recording of proceedings.*

5. *THAT this honourable court be pleased to make any further orders and relief as it may deem fit and just in the circumstances.*

2. The application is supported by an affidavit sworn by Ali Kariuki the applicant who deposed that he is a trustee of the Gilgil Islamic Association Group. That the subject properties in this matter were bought through donations on behalf of the Nakuru Muslim community for the poor African Muslims whose fate he deposed had been completely ignored by the parties herein. He further deposed that he instituted ELC No. 287 of 2018 against both the plaintiffs and the defendants seeking for a permanent injunction restraining them from disposing and/or selling the parcel of Land known as Kiambogo/Kiambogo Block 2/13, 527 & 528 pending arbitration on the issue of mosques sold on the subject parcels of land. He also deposed that ELC Case No. 287 of 2018 should be consolidated with the present matter and be deemed as the lead file so that the legality of the sale is determined before any other issue. He added that the plaintiffs in this matter were trustees of the suit properties and therefore it is necessary for him to be enjoined in the suit.

3. The plaintiffs opposed the application through grounds of opposition dated 7<sup>th</sup> June 2019 and a replying affidavit sworn by the 2<sup>nd</sup> plaintiff. He deposed that the plaintiffs are trustees of the Mohammedhusein Mulla Nanji Trust established under the Trust Deed dated 25<sup>th</sup> February 1989 and are the registered owners of various properties that include land parcel No. Kiambogo/Kiambogo Block 2/13,

Kiambogo/Kiambogo Block 2/527 and Kiambogo/Kiambogo Block 2/528. That the trust operated a primary and secondary school on land parcel numbers Kiambogo/Kiambogo Block 2/527 and Kiambogo/Kiambogo Block 2/528 after obtaining funds from trustees and private donors. He further deposed that the Trusted Society of Human Rights Alliance in Nakuru ELC Petition No. 35 of 2016 challenged the legal capacity of the trust and the trustees to lease or sell the suit properties and their petition was dismissed for lack of merit.

4. The 2<sup>nd</sup> plaintiff also deposed that the applicant has no legal interest in the suit properties as they are private properties owned by the trust and that he has been advised by his advocates on record that for the applicant to be enjoined as a party, he must have a common cause of action against the defendant and must be represented by the same advocate which is not the case in the present matter. That he has also been advised by his advocates on record that the application for consolidation lacks merit as the issues of fact and law for determination in the two suits are different among other reasons.

5. The application was canvassed through written submissions. The applicant argued that his cause of action concerns the other parties in the suit thereby entitling him to unite that cause of action against the other parties in this suit and that they will not suffer any prejudice if the two suits are consolidated. He argued further that the same issues of fact and law run through the two suits and that the intended consolidation will save judicial time, costs and effort. He relied on Order 1 Rule 6, Order 1 Rule 9, Order 3 Rule 5 and Order 31 Rule 2 of the Civil Procedure Rules and the case of **Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 Others [2018] eKLR.**

6. The plaintiffs/respondents in their submissions argued that there is no basis for the joinder of the applicant as the 4<sup>th</sup> plaintiff in this suit and relied on Order 1 Rule 1 of the Civil Procedure Rules and the case of **Laisa Mpyoe & 2 others v Kajiado Central Milk Project “The Board” and 5 Others [2012] eKLR.** They argued further that the applicant is not a necessary party to these proceedings as the present suit revolves around a contract between the trust and the 1<sup>st</sup> defendant based on a sale agreement dated 16<sup>th</sup> September 2015 and which the applicant was not a party to. They also submitted that there is no basis for consolidation and that such a consolidation will cause a disadvantage to the plaintiffs and will cause a delay in the hearing and determination of this suit. They relied on the cases of **Benson G Mutahi v Raphael Gichovi Munene Kabutu & 4 Others [2014] eKLR** and **Nyati Security Guards & Services Limited vs Municipal Council of Mombasa [2004] eKLR** among other cases. They concluded their submissions by arguing that the application is an abuse of court process and should be dismissed with costs.

7. The defendants did not file any response or submissions but associated themselves with the plaintiffs’ submissions.

8. I have considered the application, the affidavits, grounds of opposition and the parties’ submissions.

9. The question of whether or not to allow an application for joinder as an additional plaintiff is a discretionary one. Such discretion must be exercised judiciously. In that regard, **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** provides as follows:

*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.*

10. The Court of Appeal had occasion to consider what the court should take into account while determining for an application for joinder in the case of **Pravin Bowry –vs- John Ward & Another [2015] eKLR.** The court adopted the decision of the Ugandan Supreme Court in the case of **Deported Asians Property Custodian Board –vs- Jaffer Brothers Ltd [1999] 1 E.A 55 (SCU)** where the court stated:

*... 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 to 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. ...*

11. Mutungi J in the case of **Shirvling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 others [2018] eKLR** held that:

*... If a party is joined as a plaintiff, such a party of necessity must be seeking some form of relief from the defendant or some of the defendants .... In other words, the plaintiff in the suit and/or a defendant in the counterclaim in the suit must have sought orders which if granted would directly affect the interest of the applicant on the party sought to be enjoined by an already existing party. The applicant must therefore demonstrate he has an interest in the subject matter of the suit and/or he stands to be affected by any orders that may be made in the suit regarding the subject matter. Alternatively, the applicant must show he is a necessary party and his presence in the suit is necessary to enable the court to effectually and completely adjudicate and settle all the issues in the suit. ...*

12. The applicant states that he has his own suit, ELC No. 287 of 2018, against both the plaintiffs and the defendants herein. Thus, the issue of joining so as to avoid a multiplicity of suits does not arise: his suit already exists. While I am aware that he has proposed that it be consolidated with this suit, he has not indicated any intention to withdraw it if an order for consolidation is not made. Further, since he already has his suit, he cannot claim that his non-joinder in this case will deprive him of an opportunity to be heard. He already has a vehicle through which to agitate his case.

13. The plaintiffs herein have opposed the applicant's plea to join as an additional plaintiff. That is an important detail. The existing plaintiffs have conceptualised and framed their cause of action. They have reduced it to the plaint that they have placed before the court. They have, as is indeed their right, chosen their legal representation. Now along comes the applicant. He has his own advocate and his own cause of action. Joining him to this case will potentially result in a situation where conduct of the plaintiffs' case is muddled and frustrated owing to applicant's and the existing plaintiffs' different interests and approaches in the matter. See Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa [2004] eKLR. I am not persuaded that the applicant has shown sufficient reason to be enjoined as the fourth plaintiff in this matter. On the contrary, joining him as sought will likely stifle progress in this matter.

14. Regarding whether Nakuru ELC Case No. 287 of 2018 should be consolidated with this suit, the applicant contends that he filed Nakuru ELC Case No. 287 of 2018 between himself as the plaintiff and the plaintiffs and defendants in this suit as the defendants. He further contends that in the said case he is seeking for a permanent injunction restraining the parties, their servants and/or agents from disposing and/or selling the parcel known as Kiambogo/Kiambogo Block 2/13, 527 & 528 pending arbitration on the issue of mosques sold on the subject parcels of land. He has not annexed the plaint in Nakuru ELC Case no. 287 of 2018 thereby depriving this court the opportunity to compare the pleadings so as to consider whether common questions of law or fact arise in both suits and whether the rights or relief claimed in the two cases are in respect of the same transactions.

15. Even going by the applicant's own account in the present application, his position is that in ELC No. 287 of 2018 he is seeking a permanent injunction to restrain the plaintiffs herein from disposing and/or selling the suit properties herein pending arbitration on an issue of mosques on the properties. It will be noted that he filed his said case in 2018 yet this case has been pending since 8<sup>th</sup> June 2017. A reading of the plaint herein shows that this suit revolves around rights and obligations arising from around a sale agreement dated 16<sup>th</sup> September 2015 between the plaintiffs herein and the 1<sup>st</sup> defendant herein. The applicant does not claim to be a party to the said contract. I do not see any commonality or similarity in the matters in issue in the two suits. I cannot, in those circumstances, order consolidation.

16. In view of the foregoing discourse, I find no merit in Notice of Motion dated 28<sup>th</sup> May 2019. I dismiss the application with costs to the plaintiffs and the defendants.

**Dated, signed and delivered at Nakuru this 11<sup>th</sup> day of May 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the applicant

Mr Tugee for the plaintiff

Mr Busiega for the defendants

Court Assistants: B. Jelimo & J. Lotkomoi