



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC CASE NO. 51 OF 2017

(Formerly Nakuru ELC CASE No. 133 of 2015)

SAMMY KANYI KAREITHI.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA1ST DEFENDANT

MUGA AUCTIONEERS & GENERAL MERCHANTS ...2ND DEFENDANT

KENYA LIVESTOCK FINANCE TRUST.....3RD DEFENDANT

ROSS XAVIER WHITHEY.....APPLICANT

RULING

A. THE APPLICANT'S APPLICATION

1. By a notice of motion dated 30th August, 2019 brought under the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 1 Rule 10(2) and Order 51 Rules 1 and 10 of the Civil Procedure Rules 2010, (the Rules)** Ross Xavier Whitley (*the Applicant*) sought to be joined as a 4th Defendant in the suit. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on 30th August, 2019.

2. The Applicant contended that he was a person directly affected by the suit whose presence was necessary to enable the court to effectually and completely adjudicate upon the issues in controversy in the suit. He contended that he was a bonafide purchaser of *L.R.No. Naromoru Block 1 Ragati/391 (the suit property)* vide a public auction conducted by the 2nd Defendant on 17th April, 2015 on the instructions of the 1st Defendant. He, therefore, contended that he had a stake in the suit property which is the subject matter of the suit and that his presence was necessary for the effectual and complete adjudication of the matters in controversy.

B. THE PLAINTIFF'S RESPONSE

3. The Plaintiff filed a replying affidavit sworn on 21st September, 2020 by George Wanderi Karanja as an attorney and agent of the Plaintiff in opposition to the said application. It was contended that the Applicant had no interest whatsoever in the suit property by virtue of the conditions of sale. It was further contended that the said auction sale was never completed due to an interim injunction which was granted by the court hence the Applicant had no vested interest in the suit property.

4. The Plaintiff further contended that there was undue delay on the part of the Applicant in seeking joinder hence he was disentitled to the order sought. The rest of the grounds raised by the Plaintiff essentially challenged the legality and propriety of the public auction which go into the merits of the main suit which is still pending hearing and determination.

C. THE DEFENDANTS' RESPONSE

5.. The Advocates for the 1st and 2nd Defendants informed the court that they were not opposed to the application for joinder hence they did not wish to file any response to the application. The 3rd Defendant did not file any response to the application.

D. DIRECTIONS ON SUBMISSIONS

6. When the matter was mentioned for directions on 1st July, 2020 it was directed that the said application shall be canvassed through written

submissions. The parties were granted 14 days within which to file and exchange their respective submissions thereon. However, the record shows that the Applicant and the Plaintiff filed their submissions on 18th February, 2021 whereas the Applicant filed supplementary submissions on 8th March, 2021 in reply to the Plaintiff's submissions.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Applicant's notice of motion dated 30th August, 2019, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Applicant has made out a case for joinder as a Defendant in the suit.*

(b) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATION

(a) Whether the Applicant has made out a case for joinder as a Defendant in the suit

8.. The court has considered the material and submissions on record on this issue. Whereas the Applicant contended that he had a stake in the suit property hence a necessary party to the suit, the Plaintiff contended that he was not a necessary party and that he had no stake or interest in the suit to protect.

9. The application is essentially based upon **Order 1 Rule 10(2) of the Rules** which 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."

10. In **Pravin Bowry v John Ward and Another [2015] eKLR** the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the Ugandan case of **Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)** where the court stated as follows:

"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 because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all 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 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)

11. The court of Appeal in the said case also referred to its earlier decision in **Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR** on the interpretation of **Order 1 of the Rules**. The court observed as follows:

"Again the power given under the Rules is discretionary which discretion must 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."

12. There is no doubt from the material on record that the Applicant attended the public auction which the Plaintiff has impugned in this suit and put a bid for the suit property. There is also no doubt from the material on record that the Applicant was declared the successful bidder as evident from the copy of the memorandum of sale dated 17th April, 2015. It is evident that the Plaintiff has challenged the legality of the said auction and termed it fraudulent and illegal. Among the reliefs sought in the plaint dated 5th May, 2015 is a declaration that the auction of the suit property by the 2nd Defendant was null and void and an order nullifying any transfer of the suit property to the purchaser.

13. The court is satisfied on the basis of the material on record that the reliefs sought in the suit would adversely affect the Applicant if granted. The Applicant as purchaser may have acquired either a vested or contingent interest in the suit property by virtue of the public auction. If the legal relations have to be altered as a result of the suit, then it would follow that the Applicant would be a necessary party to the action.

14. The court is of the opinion that the Applicant was all along a necessary party to the suit and the Plaintiff ought to have joined him as such from the outset. The Plaintiff must have known of the public auction hence the reason why he filed the suit to challenge it by seeking orders nullifying the same. It was thus the duty of the Plaintiff to have joined the Applicant if he wanted him to be legally bound by the outcome of the suit.

15. The Plaintiff contended that the Applicant had delayed for so long before making the application for joinder. This is a strange objection coming from the Plaintiff. First, the court is empowered to join a party to a suit at *any stage* of the proceedings with or without an application by any party. Second, the material on record shows that the Plaintiff has been less than diligent in the prosecution of the suit since it was filed in 2015. In fact, the record shows that the Plaintiff was granted a *last adjournment* on 3rd April, 2019. So the situation appears to akin to that of the pot calling the kettle black.

16. Be that as it may, mere delay in filing an application for joinder is not fatal. The pending suit is yet to be heard and the Plaintiff has not demonstrated what prejudice he has suffered by the late filing of the application. In the case of **Central Kenya Limited v Trust Bank Limited and 5 Others [2000] eKLR**, the High Court had declined to grant leave to the Appellant to amend its plaint and to join additional Defendants to the suit. In allowing the appeal, the Court of Appeal held that mere delay was not sufficient ground for declining leave unless such delay was the kind which could prejudice the adverse party beyond compensation in costs.

17. In the case of **JMK v MWM and MFS [2015] eKLR** the Court of Appeal considered the scope of **Order 1 Rule 10** of the **Rules** as follows:

“We would, however, agree with the respondent that Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sakar’s Code (supra) quoting as authority, decisions of Indian courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal in Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules in TANG GAS DISTRIBUTORS LTD V SAID & OTHERS [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying;

that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage”

18. The Plaintiff’s advocates also raised an interesting objection to the application for joinder. It was submitted that the application was incurably bad in law because the Applicant had not annexed a draft statement of defence to the application for joinder. The Plaintiff relied upon the case of **Thomas Odhiambo Okello v Peter Wanyama [2019] eKLR** and that of **Ecobank Kenya Ltd v Minolta Limited and 2 Others [2018] eKLR** in support of that submission. The court is of the opinion that the Plaintiff’s submission in that regard is totally misconceived. The cited authorities simply relate to applications to set aside default judgments. One of the requirements to be demonstrated by the Defendant in such circumstances in order to justify a setting aside is that he has a defence on the merits. The said authorities are totally irrelevant to the instant application for joinder of the Applicant as a Defendant.

(b) Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since the suit is yet to be heard the court is of the opinion that costs should be in the cause.

G. CONCLUSION AND DISPOSAL

20. The upshot of the foregoing is that the court finds merit in the Applicant’s application for joinder as a party to the suit. Accordingly, the court makes the following orders for disposal of the application:

(a) The notice of motion dated 30th August, 2019 be and is hereby allowed in terms of Order No. 2 thereof.

(b) The Applicant shall be at liberty to file any pleadings or affidavits in the matter within 14 days from the date hereof.

(c) Costs of the application shall be in the cause.

21. It is so ordered.

RULING DATED and SIGNED in Chambers at Nyeri and DELIVERED via Microsoft Teams Platform this 5th day of May, 2021.

In the presence of:

Ms Mwangi holding brief for Mr. Mureithi for the 3rd Defendant

No appearance for the plaintiff

No appearance for the 1st and 2nd Defendants

No appearance for the Applicant

Court assistant - Wario

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Y. M. ANGIMA

JUDGE

05.05.2021