



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**ELC NO. 8 OF 2019**

**STEPHEN MBURU NDUNGU & 50 OTHERS.....PLAINTIFFS**

**VS**

**NELSON NDUNGU & 4 OTHERS.....DEFENDANTS**

**FRANCIS KAMAU MUGO & 69 OTHERS.....DEFENDANTS**

**RULING**

1. The Applicants moved the Court vide an application dated 24/3/2021 expressed under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10, Order 8 Rule 3 and Order 5 Rule 17 of the Civil Procedure Rules seeking orders that; -

- a) That, the Plaintiffs/Applicants be given leave to amend the plaint as per the annexed copy of the draft plaint.
- b) That, the Plaintiffs/Applicants be given leave to advertise in a National Circulating Newspaper the existence of suit so that any interested party and/or purchaser of the subject property be at liberty to apply to join as party.
- c) That, costs of this application be provided for.

2. The application is based on the grounds that it is in the interest of justice to enjoin Punda Milia Co-operative Society as a Defendant; that the Applicants are aware that some third parties had purchased plots and subdivided out of the subject suit and may not be aware of the existence of the instant suit and therefore it is only fair and just that they be notified of this suit so that their interest and rights can be considered during the hearing and determination of this suit. The Application is supported by the Affidavit of Stephen Ndungu Mburu sworn on behalf of the rest of the Plaintiffs. He reiterated the above grounds and urged the Court to allow the application and annexed a copy of the draft amended Plaint as annexure SNM.

3. The application is partially opposed by counsel for the 1<sup>st</sup> – 4<sup>th</sup> Defendants and wholly by the counsel of rest of the Defendants. However, none of the Defendants filed any Replying Affidavits. Notably there is an undated Defence Affidavit (*sic*) sworn by Francis Kamau Mugo filed on 7/6/2021 on behalf of shareholders of Punda Milia Farmers Co-op Society and holders of Mogera shares.

4. The application was argued orally on 9/6/2021 and further on 14/6/2021.

5. On behalf of the Applicants, Learned Counsel Mr. Macharia argued that there are some third parties who purchased plots from the subject property and may not be aware of the current suit. That it is fair and just to allow the application so that their interests are taken care of during the hearing and determination of the suit. That there was also need to advertise in a major daily paper the existence of the instant suit so that any interested party may join. He added that the Defendants will not suffer any prejudice if the application is allowed. He cited the case of **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018]** on the general rule that on grant of leave to amend plaint the Court held that leave should be freely allowed if no injustice is visited on the other party.

6. Learned Counsel Ms. Kimani for 1-5<sup>th</sup> Defendants did not oppose the prayer for joinder of Punda Milia Co-op Society. She however objected to the prayer for advertisement on ground that new parties were already enjoined vide this Court's order of 25/5/2021 and thus was not aware of the parties sought to be enjoined by way of advertisement.

7. Mr. Kamau opposed the application and argued that advertising the suit will call for imaginary members who do not have any interest in the suit. He maintained that the joinder of Punda Milia Co-op Society is unwarranted since the officials are already parties of the suit and termed the application as a delaying tactic.

8. In my view the issues for determination are; -

- a) Whether the Punda Milia Co-operative Society can be enjoined in the suit?
- b) Whether leave can be granted to advertise this suit?
- c) Who will bear the costs for the application?

9. Order 1 Rule 10 (2) of the Civil Procedure Rules (CPR) provides that; -

“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’s or Defendant’s be struck out, and that the name of any person who ought to have been joined, whether as Plaintiffs or Defendants, 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. This order requires the Court to evaluate the importance of such a party to be enjoined in a suit and their relevance to the just determination of the suit.

11. Additionally, Order 1 Rule 3 of the Civil Procedure Rules provides;

Who may be joined as Defendants [Order 1, Rule 3.]

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.

12. The Applicants argued that Punda Milia Co-operative Society is the registered proprietor of the land and the issue of the subject land will be effectively addressed if it is enjoined. The 5<sup>th</sup> Respondent on behalf of 66 others opposed the joinder for reason that the Society’s officials were already before Court. In the case of **Andy Forwarders Service Limited & Another vs Price Waterhouse Coopers Limited & Another [2012] eKLR**, the Court observed that a person may be joined not because there is a cause of action against him but because that person’s presence is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the matter. I do not see any prejudice that will be occasioned if joinder of Punda Milia co-operative society is allowed.

13. The Applicants crave this Court’s order to advertise this suit in a National Circulating Newspaper because some third parties purchased the subdivided plots of the subject property and may not be aware of the pendency of this suit. In opposition, the Respondents argued that such advertisement is not necessary as it will hamper the expedient disposal of the matter. It was also contended that there was no money to finance the advertisement.

14. The prayer was made pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act also known as Oxygen Principles which provide that the overriding objective of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of cases.

15. I have perused the pleadings in this suit and in the main the Applicants are seeking to recover a common property which was designated as a public dam and which in their own words is now under threat of being alienated by the Defendants to their detriment. It is their case that they have knowledge that some third parties have purchased the plots out of the common facility and may not be aware of the instant suit. In other words that those parties might be affected by the orders in this suit.

16. A suit belongs to a party and a party sues another whom he knows or believes that his remedy flows from. The crux of the Plaintiff’s case is that the Defendants being the officials of the company are threatening their land. They seek to recover the same. Therefore their remedy will lie with the Defendants. The problem with this application in my view is that this suit intends to protect private rights and not public rights. The advertisement seeks to invite all and sundry into the case with the danger of convoluting the matter further. It is difficult to determine whether those parties the subject of the advert will be necessary parties to the suit in view of the remedies being sought by the Plaintiffs. The Court has taken cognizance of 66 new parties who have been enjoined already.

17. Once the identities of the parties are known the Plaintiff still has the liberty to seek leave for joinder on proof that they are necessary parties or will be affected by any orders of this Court.

18. For the above reasons the application partially succeeds to the extent that the plaint be amended to include Punda Milia Co-operative Society Limited.

19. I make no orders as to costs.

**20. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 30<sup>TH</sup> DAY OF JUNE 2021**

**J. G. KEMEI**

**JUDGE**

**Delivered in the presence of:**

Macharia HB for Jesse Kariuki for the 1<sup>st</sup> -51<sup>st</sup> Plaintiffs

Wangai HB for Ms Ngugi for the 1<sup>st</sup> -4<sup>th</sup> Defendants

Court Assistant: Alex