



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

ELC NO. 4 OF 2019

DUBEY MOHAMED GODAD.....PLAINTIFF/RESPONDENT

VERSUS

MOHAMED OMAR AHMED.....1ST DEFENDANT/APPLICANT

AHMED G. GABOW.....2ND DEFENDANT/APPLICANT

KUSOW HASSAN KHALIB.....3RD DEFENDANT/APPLICANT

IBRAHIM MOHAMED ABDULLAHI....4TH DEFENDANT/APPLICANT

NOOR KASAY.....5TH DEFENDANT/APPLICANT

ADEN MOHAMED MOHAMUD.....6TH DEFENDANT/APPLICANT

RULING

The application coming up for hearing is the Notice of Motion dated 19th May, 2021 brought under Order 1 Rule 10(1) (2) and (4), Rule 3 and Order 51 Rules (1) (30 and (4) of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. The Applicants/Defendants are seeking for the following orders.

1. That the names of Mohamed Omar Ahmed, Ahmed G. Gabow, Kusow Hassan Khalib, Noor Kasay and Aden Mohamed Mohamud, the 1st, 2nd, 3rd 5th and 6th Defendants be struck out and the name of Nasib Farm Limited be added as a Defendant.
2. That upon grant of prayer1, the Plaintiff be granted leave to amend the plaint and issued with summons as may be necessary for service upon the new Defendant or as the court thinks fit.
3. That any such orders as this Honourable court may deem fit and just to issue in the circumstances.
4. That the costs of this application be in the cause.

GROUND UPON WHICH THE APPLICATION IS PREMISED

- a. The intending party to be joined, Nasib Farm is a proper party.
- b. The intending party to be joined is a necessary party.
- c. The presence of the intending party to be joined is necessary to enable the court to effectively and completely adjudicate upon and settle all questions in the suit.
- d. The relief sought by the Plaintiff arises out of the same property or same series of act alleged by the Plaintiff.
- e. The ultimate order or decree cannot be enforced without its presence in the matter.
- f. This Honourable court has discretion and power to order the joinder of the intending party.

g. The suit herein has not been heard and the application is therefore within timelines by law allowed.

h. Allowing the application would avoid multiplicity of suits and would be in line with overriding objective of this Honourable Court.

i. That it is in the interest of justice to allow the application as prayed.

APPLICANTS SUMMARY OF FACTS

The Applicant filed a supporting affidavit where de deposed as follows;

1. That I am a male adult of sound mind, the 4th Defendant/Applicant herein and have the authority of the other Defendants/Applicants herein and therefore competent to swear this affidavit on my behalf and on their behalf.

2. That the Plaintiff brought this suit vide a plaint dated 29th April 2019 against myself as the 4th Defendant and my co-Applicants as the 1st, 2nd, 3rd, 5th and 6th Defendants.

3. That I and my co-Defendants jointly engaged M/s Nyancheka & Associates our Advocates on record who entered appearance on 22nd May, 2019 and filed our statement of defence on 6th June, 2019.

4. That, in our defence we have all averred at paragraph 9 that we are members of a duly registered farm known as Nasib Farm consisting of other members other than ourselves, all who have parcels of land allocated to us by our farmers.

5. That we further pleaded in the same paragraph that our land is already surveyed and besides issued with a letter of allotment all requisite documents for issuance of a title have been accomplished including a PDP, and Deed Plan from the Director of Survey.

6. That in this suit, the Plaintiff is alleging that we have encroached into her farm known as ALMUKARIM FARM, an allegation we have denied and pleaded and averred that Nasib Farm is a farm owned by members of Nasib Farmers Group inclusive the Defendants herein and that the same is separated with the Plaintiff's Farm by a farm known as Sulder Farm Women Group which I represent in this proceeding.

7. That I am aware that by the consent of parties, this Honourable Court granted orders for each party to nominate a surveyor to visit the ground and file report in court. In compliance thereof, the Plaintiff nominated Goodwill Kabaji Surveyor Tana North, Tana River County while on our part as Defendant we nominated Dulluh John Komora, County Surveyor Tana River and that both surveyors filed a joint surveyor's report dated 3rd September, 2019 delineating the three (3) farms on the ground namely; NASIB FARM L.R 32234, ALMUKARIM FARM TRD/232/2004/40 and SULDER FARM WOMEN GROUP TRD/232/2009/75. (Annexed hereto and marked exhibit "IMA-1" is a true copy of the said joint surveyor's report)

8. That I am informed by our Advocate Mr. Alfred Nyancheka that this matter is pending pre-trial directions before the hearing of the main suit commences.

9. That as pleaded and averred to herein, at the time we were sued, we had completed the process of acquiring Title to Nasib Farm. I aver that we have subsequently acquired title to Nasib Farm.

10. That upon acquiring the said title, I, my co-Appellants and other members of Nasib Farm Group owning Nasib Farm constituted ourselves into a limited liability company known as Nasib Farm Limited and have since transferred our title from Nasib Farm to Nasib Farm Limited. I have annexed hereto and marked the following exhibits in that regard namely;

a. "IMA-2" is a true copy of certificate of incorporation Nasib Farm Limited.

b. "IMA-3" a true copy of an extract from the Registrar of Companies showing the names and details of Directors of Nasib Farm Limited.

c. "IMA-4" a true copy of the certificate of title for Nasib Farm L.R 32234.

d. "IMA-5" a true copy of transfer of lease of title for Nasib Farm L.R 32234.

11. That in light of the foregoing developments, I and other directors of Nasib Farm Ltd sought advice from our Advocate and consequently held a meeting and resolved that Nasib Farm Limited be substituted as a Defendant in place of all the Defendants with regard to L.R 32234 aforesaid.

12. That we further resolved that the aforesaid resolution does not affect my substitution as a Defendant in so far as I am being sued on behalf of Sulder Farm. Annexed hereto and marked exhibit "IMA-6" is a true copy of the said Company Resolution."

13. That in the premises, I verily believe that there exist sufficient grounds for substitution of the Defendants in this suit (other than myself with Nasib Farm Limited in that;

- a. The intending party to be joined, Nasib Farm Limited is a property party.
- b. The intending party to be joined is a necessary party.
- c. The presence of the intending party to be joined is necessary to enable the court to effectively and competently to adjudicate upon and settle all questions involved in the suit.
- d. The relief sought by the Plaintiff arises out of the same property or same series of act alleged by the Plaintiff.
- e. The ultimate order or decree cannot be enforced without its presence in the matter.
- f. This Honourable Court has discretion and power to order the joinder of the intending party.
- g. The suit herein has not been heard and the application is therefore within timelines by law allowed.
- h. Allowing the application would avoid multiplicity of suits and would be in line with overriding objective of this Honourable Court.
- i. That it is in the interest of justice to allow the application as prayed.

14. That I swear this affidavit in support of the Notice of Motion herein.

15. That what is deposed to herein is true and according to my knowledge save as to matters deposed to on information and belief sources whereof and grounds whereupon have been disclosed and given.

RESPONDENTS SUMMARY OF FACTS

The Respondent through his Advocates filed grounds of opposition in response to the said application dated 8th June, 2021 and averred as follows;

1. The application is an abuse of court process.
2. The names of the 1st, 2nd, 3rd, 5th, and 6th Defendants cannot be struck out from this suit because the plaint dated 29th April, 2019 and filed in court on the same date discloses a reasonable cause of action against each of the named Defendants.
3. The 1st, 2nd, 3rd, 5th, and 6th Defendants cannot choose for the Plaintiff which party to sue or add to this suit as Defendants.
4. Nasib Farm Limited which the Defendants seek to have substituted as the Defendant was not in existence at the time the cause of action in this case arose and when this suit was filed.
5. Nasib Farm Limited can only possibly, be joined to this suit either as an Interested Party or as the 7th Defendant but the name of any other Defendant sued herein cannot be struck out as sought by the Defendants in their application herein.

APPLICANTS' SUBMISSION

The Applicant was granted leave to file their submissions within 10 days from the date of service by the Respondent. However, there is not submissions filed by the time the court withdrew to render itself on the application.

RESPONDENT'S WRITTEN SUBMISSIONS

The Respondents through the firm of Amuga and Company Advocates submitted that the application herein is incompetent and allowing the same will mean that the Defendants and the entity known as Nasib Farm Limited, will have been allowed to choose for the Plaintiff who to sue in this case. He argued that that the law does not allow that kind of situation to prevail as that would lead to absurdity. He cited the case of **Joseph Leboo & 2 Others –Vs- Director Kenya Forest Services & Another (2012) eKLR.**

He further submitted that the above cited case applies squarely to the instant application and that the Defendants and Nasib Farm Limited are attempting to choose for the Plaintiff who to pursue here claim against. They argued that should not be allowed to happen because;

- a. The Plaintiff has made specific pleadings and allegations against the named Defendants, and not Nasib Farm Limited.
- b. Nasib Farm Limited which is sought to be brought into the suit herein as the only Defendant was not even in existence at the time the cause of action arose or at the time Plaintiff filed this suit.
- c. The wrongs the Plaintiff has alleged against the Defendants in this suit still subsist and the Plaintiff is entitled to pursue her claim against the named Defendants and not against any other person she has not sued.

The Plaintiff/Respondent also cited the case of **Joseph Njau –Vs- Robert Maina Chege & 3 Others (2002) eKLR**.

LEGAL ANALYSIS AND DECISION

I have considered the Notice of Motion dated 19th May, 2021 and the rival arguments and submissions. In the application under consideration, the Applicant is seeking to have the names of the 1st, 2nd, 3rd, 5th and 6th Defendants struck out as Defendants and the name of NASIB FARM LIMITED be added as a Defendant. Order 1 Rule 10 CPR provides for substitution and addition of parties. The law states as follows;

“Substitution and addition of parties

10(1)

Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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.”

This suit was instituted by the Plaintiff herein vide a plaint dated 29th April, 2019 and filed in court the same date. The suit is a claim by the Plaintiff and it is the Plaintiff to choose which party to sue or add and not the Defendants.

The decision by a party known as the Plaintiff or claimant to institute a case against another person known as Defendant is a deliberate choice and that choice needs to be respected. In the case of **Marigat Group Ranch & 3 Others –Vs- Wesley Chepkoiyet & 19 Others (2014) eKLR**, the court observed as follows;

“In this case, the plaintiffs have made a choice on whom to sue. They have chosen to sue the 20 persons named as defendants. They have sued them because they say that it is these 20 persons who are trespassers.....That is their view of the matter and I think that view needs to be respected.”

Again in the case of **Joseph Leboo & 2 Others –Vs- Director of Forest Services & Another (2013) eKLR** which was relied by Counsel for the Plaintiff/Respondent, the court held thus;

“I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacunae in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons.”

The Applicant in this case is one of the Defendants who is seeking to have an order striking out some of the Defendants and substituting with an entity known as Nasib Farm Limited. Looking at the pleadings in this suit, the Plaintiff's claim against the Defendants is one where he seeks judgement against the parties in their individual capacities as can be seen in paragraph 6 and 7 where she averred as follows;

“6 Over a period of time, the Defendants have been encroaching into and committing acts of trespass on the suit property without the Plaintiff's consent or the consent of Abdirahman Mohamed Godad and Yorol Ismail Hussein and without any colour of right whatsoever.

7. From the beginning of the year 2018, the Defendants escalated their acts of trespass over the suit property. The Plaintiff's attempts to get the Defendants to move out of her land through the assistance of the local chief, the police and other Government Officials have been unsuccessful and the Defendants have continued to remain on and to use part of the Plaintiffs' land unlawfully and illegally.”

The complaints by the Plaintiff against the Defendants in this case are actions which upon proof can only give rise to a judgement in personam and not in rem. They are actions in which the Defendants are alleged to have committed and not Nasib Farm Limited which is a legal entity. As observed by Justice Sila Munyao in the case of Joseph Leboo (above) courts need to be careful before making an order for a person to be joined as a Defendant as that power is a preserve of the Plaintiff who instituted the suit and who has the onus of proving his case and not the Defendant. I am satisfied that the application under consideration is not one of the deserving cases, where the court's discretion for granting the orders sought. Since the entity described as Nasib Farm limited is now registered as proprietor of the disputed land, it may be appropriate to enjoin her as an additional Defendant in this suit. Consequently, I hereby order that the said Nasib Farm Limited be enjoined

as the 7th Defendant in this suit. Costs shall be in the cause.

READ, DELIVERED virtually and SIGNED at GARISSA this 30th day of July, 2021

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Nyandieka
2. Amuga
3. Fardowsa; Court Assistant.