



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 32 OF 2018 (O.S)**

**SOFIA MUCIKU JOTHAM (Suing as the Legal Representative of the Estate of  
JOTHAM GIKUNJU KARU).....PLAINTIFF**

**VERSUS**

**LUCY WARUGURU (Sued as the Legal  
Representative of the estate of JUDY KORI NYAGA).....DEFENDANT**

**AND**

**MARY WANJIKU ELISHA.....APPLICANT**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> July 2019 and supported by the affidavit of even date, the Applicant approached the court seeking the following orders:

- a. That the Honorable Court be pleased to order that the Applicant herein be enjoined in this suit as a 2<sup>nd</sup> Defendant;*
- b. That the Honourable court be pleased to order for the amendment of the originating summons to include the 2<sup>nd</sup> Defendant as a party to the suit and do allow the 2<sup>nd</sup> Defendant to file a replying affidavit to the originating summons;*
- c. That the costs of the application be provided for.*

2. The Applicant's application is grounded on the following premises:

- i. That the Plaintiff/Respondent claims through originating summons to be declared to have acquired title to land parcel Baragwi/Raimu/1532 by way of adverse possession;
- ii. That land parcel Baragwi/Raimu/1532 is registered in the name of Judy Kori Nyaga (deceased);
- iii. That land parcel no. Baragwi/Raimu/1532 was sold to the Applicant herein by one of the beneficiaries of the estate of the deceased, one Benson Muchiri Nyaga in the year 2012;
- iv. That at the time of the sale, there was no party in occupation;
- v. That there is a Succession Cause pending at the High court, being Succession Cause No. 214 of 2013, in which the Applicant and Respondent are protestors;
- vi. That it would be in the interest of justice that the court allows the applicant to be enjoined in the suit as a defendant to enable all the issues to be litigated at once;
- vii. That it is in the interest of justice that this application is heard and determined.

3. The application is opposed. Vide a replying affidavit filed on 8<sup>th</sup> August 2019, the Plaintiff/Respondent avers that her deceased husband had, sometimes in May 1994 entered into a sale agreement with Judy Kori Nyaga (deceased) for the sale of 2 acres out of land parcel no Baragwi/Raimu/749. That her deceased husband settled the purchase price in full. That the Applicant on the other hand alleges to have bought land from one of the beneficiaries of the estate of Judy Kori Nyaga, one Benson Nyaga. That the alleged sale was concluded prior to the issuance of the certificate of confirmation of grant in contravention to *Section 82 (b) (ii) of the Law of Succession Act*. That the alleged sale therefore constituted an illegality. That the Plaintiff has been living on the Suit Land since 1994 and that therefore the Applicant's joinder is not necessary in the circumstances.

4. By consent, the Parties agreed to canvass the application by way of written submissions. The Applicant filed her submissions on 7<sup>th</sup> May 2020. She submits that she concluded a sale agreement on 29<sup>th</sup> February 2012 for the sale of Baragwi/Raimu/1532 from Benson Muchira Nyaga. That Clause 1 of the said sale agreement stated that the transfer of land would be effected upon the conclusion of Succession Cause No. 330 'A' of 2010, now Kerugoya High Court Succession Cause Number 214 of 2013. She submits that the succession cause is still pending as the grant is yet to be confirmed. That the Plaintiff/Respondent's move to court seeking adverse possession over the Suit Land conflicts with her right to possession of the land upon the conclusion of the case. It is her submission that her joinder will enable the court to effectually and completely adjudicate upon all questions involved in the suit. Reliance is placed on *Order 1 Rule 10(2) of the Civil Procedure Rules, 2010*. She further avers that she is a necessary party to the proceedings and cites the decision in *Kiarie Waweru Kiarie Vs Moses Kanyira & 2 Others [2018] e KLR*.

The Plaintiff/Respondent filed her submissions on 21<sup>st</sup> May 2012. Citing the decision in *Shirvling Supermarket Limited Vs Jimmy Ondicho Nyabuti & 2 Others [2018] e KLR*, it is her submission that a party seeking joinder must have an identifiable interest in the proceedings and must demonstrate that their presence is necessary for the effective adjudication of the matter at hand. It is her contention that the Applicant has failed to satisfy these conditions and further that she has no claim whatsoever against the Applicant. She concludes by finding that the Applicant would only be necessary in the proceedings as a witness for the Defendant.

5. The court has considered the Parties' rival affidavits and submissions. Both parties have correctly traced the legal foundation for joinder of parties to *Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010*. The provision is reproduced verbatim hereunder:

*"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".*

The provision above highlights the fact that the question of joinder of parties is one upon which the court is allowed to exercise its discretion. The discretion ought however, to be applied to ends that make the adjudication of the matter at hand effective and all encompassing.

The court in *Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited & another [2014] e KLR* further amplified the principles that ought to guide a court faced with an application for joinder of parties. It pronounced itself thus:

*"Order 1 Rule 10 (2) states 'the Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added'".*

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. *He must be a necessary party.*
2. *He must be a proper party.*
3. *In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.*
4. *The ultimate order or decree cannot be enforced without his presence in the matter.*
5. *His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit."*

In *Meme Vs Republic, [2004] 1 EA 124*, the High Court observed that a party could be enjoined in a matter for the reasons that:-

- (i) *Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;*
- (ii) *Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*
- (iii) *Joinder to prevent a likely course of proliferated litigation.*

We ask ourselves the following questions:

- a) What is the intended party's stake and relevance in the proceedings and
- b) Will the intended interested party suffer any prejudice if denied joinder.?"

It is the Applicant's case that she purchased the suit land from one of the beneficiaries of the estate of the deceased vide a sale agreement dated 29<sup>th</sup> February 2012. That the sale agreement provides that the transfer will be effected upon the conclusion of Succession Cause No. 330 'A' of 2010, now Kerugoya High Court Succession Cause Number 214 of 2013. Under the sale agreement, the Applicant was to make, and did make a deposit of Four Hundred Thousand Ksh. 400,000 to Benson Muchira Nyaga, the beneficiary of the deceased's estate, with the balance of Six Hundred Thousand (Ks. 600,000) to be paid after transfer. Although a grant of letters of administration intestate were issued on 23<sup>rd</sup> June 2011, the Applicant admits that the grant is yet to be confirmed.

**Section 55 of the Law of Succession Act, Cap 160** prohibits the distribution of the capital assets of a deceased person prior to the confirmation of grant. The section is reproduced hereunder:

*"55. No distribution of capital before confirmation of grant*

*(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in Section 71.'*

The import of the section was unpacked in the case of **Re Estate of Paul M'Maria (Deceased) [2017] e KLR** as follows:-

*"The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law."*

From the foregoing, the transaction upon which the Applicant bases her relevance to the ongoing proceedings and upon which she seeks joinder is steeped in illegality. The transaction being in direct contravention of the cited **Section 55** and constituting the offence of intermeddling under **Section 45 of the Law of Succession Act, Cap 160**, presents a faulty foundation in respect of which the court's discretion cannot be exercised.

The court associates itself with the dictum of **Lord Denning** in **McFoy Vs United Africa Co. Ltd (1961) 3 All ER 1169** to the effect that:

*"..... If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay here. It will collapse."*

The upshot of the foregoing analysis is that the Applicant is not a proper party for joinder in the present case, being that her relevance is mounted upon a transaction that is incurably bad in law. Consequently, the application dated 24<sup>th</sup> July 2019 is dismissed with costs. It is so ordered.

**Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 16<sup>th</sup> day of July, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. Ms Ndungu holding brief for Ms Ann Thungu for Plaintiff
2. Mr. Asiiimwe holding brief for Magee for 1<sup>st</sup> Defendant
3. Ms Wanjiru Waweru holding brief for Mr. Kibanya for 3<sup>rd</sup> Defendant
4. Kabuta – Court Assistant.