



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO. 52 OF 2018**

**CHARLES LEKERIYO.....PLAINTIFF**

**-VERSUS-**

**TELKOM KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**SAFARICOM PUBLIC LIMITED COMPANY..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**A. THE 1<sup>ST</sup> DEFENDANT'S APPLICATION**

1. By a chamber summons dated 17<sup>th</sup> February, 2021 based upon **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 1 rules 3, 10 (2) and 14, and Order 8 rule 3 of the Civil Procedure Rules 2010**(*the Rules*) the 1<sup>st</sup> Defendant sought the following orders:-

*(a) That the honourable court be pleased to grant leave to the 1<sup>st</sup> Defendant to join the County Government of Samburu and the Chief Land Registrar Samburu as 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the suit.*

*(b) That upon joinder of the intended Defendants, the honourable court be pleased to order that the plaint be amended and amended summons be issued to the Defendants as 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.*

*(c) That costs of the application be provided for.*

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Nelson Mogaka on 9<sup>th</sup> February, 2021 and the exhibits thereto. It was contended that the intended Defendants were necessary parties to the suit to facilitate proper and effectual determination of the dispute. It was contended that the 1<sup>st</sup> Defendant had legally bought Plot No. 12 Poro B measuring 1.08 acres which was supposed to be excised from *Title No. Samburu/Poro B/160* by defunct County Council of Samburu upon completion of the land adjudication process.

3. It was further contended that the intended 3<sup>rd</sup> and 4<sup>th</sup> Defendants were involved in the process and that it was apparent that the 1<sup>st</sup> Defendant's portion of land was incorporated into *Title No. Samburu/Poro B/160* measuring 8 acres and wholly registered in the name of Michael Letowini. It was thus contended that the 1<sup>st</sup> Defendant's counterclaim and prayers sought therein made the intended 3<sup>rd</sup> and 4<sup>th</sup> Defendants necessary parties for the purpose of effectually settling all the issues in controversy once for all. The court was consequently urged to allow the application.

4. The Plaintiff filed a replying affidavit sworn on 9<sup>th</sup> April, 2021 in opposition to the application. It was contended that the suit property was previously part of land belonging to Siambu Group Ranch and not trust land hence it could not be allocated by the defunct County Council of Samburu. It was further contended that the said group ranch sub-divided and distributed its land to its members way back in 1986 hence the 1<sup>st</sup> Defendant had no plausible interest in the suit property. The Plaintiff was further of the view that any input required from the Chief Land Registrar could be obtained through witness summons rather than joining the Registrar as a party.

**C. THE 1<sup>ST</sup> DEFENDANT'S REJOINDER**

8. The 1<sup>st</sup> Defendant filed a further affidavit sworn by Nelson Mogaka on 7<sup>th</sup> June, 2021 in which it was contended that the group ranch land was a communal reserve under **Section 58** of the **Crownlands Ordinance** hence trust land within the meaning of **Section 114 (1)(b)** of the

repealed **Constitution of Kenya** as read with **Section 13 (1)** of the repealed **Trust Land Act**. It was further contended that the defunct County Council of Samburu could lawfully set apart a portion of trust land for public purposes and for use by a public body for the benefit of local residents.

#### **D. DIRECTIONS ON SUBMISSIONS**

9. When the said application was listed for *inter partes* hearing on 26<sup>th</sup> April, 2021 it was directed that it shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their submissions. The record shows that the 1<sup>st</sup> Defendant filed its written submissions on 7<sup>th</sup> June, 2021 but there is no evidence on record of the rest of the parties having filed any submissions. The 2<sup>nd</sup> Defendant's advocate had indicated to the court that he was not opposed to the application hence he did not wish to participate in the application.

#### **E. THE ISSUES FOR DETERMINATION**

10. The court has perused the 1<sup>st</sup> Defendant's chamber summons dated 17<sup>th</sup> February, 2021, the Plaintiffs replying affidavit in opposition thereto, the 1<sup>st</sup> Defendant's further affidavit as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the 1<sup>st</sup> Defendant has made out a case for joinder of the intended 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the suit.*

(b) *Whether the plaint should be amended and amended summons issued to the new intended Defendants.*

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

#### **F. ANALYSIS AND DETERMINATION**

##### **(a) Whether the 1<sup>st</sup> Defendant has made out a case for joinder of the Intended 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

11. The court has considered the material and submissions on record on this issue. By a plaint dated 12<sup>th</sup> September, 2018 the Plaintiff pleaded that he was the registered proprietor of Title No. Samburu Polo B/160 (*the suit property*) and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had trespassed on a portion thereof by installing telecommunication equipment and constructing an access road thereon without his consent or authority. The Plaintiff consequently sought various reliefs against the Defendants including *mesne* profits, general damages for trespass and costs of the suit.

12. By its defence and counterclaim dated 18<sup>th</sup> December, 2018 the 1<sup>st</sup> Defendant denied the Plaintiff's claim its entirety. It denied being a trespasser thereon and pleaded that it had lawfully acquired for valuable consideration a portion of 1.08 acres out of the suit property in 1985 from the defunct County Council of Samburu through the defunct Kenya Posts and Telecommunications Corporation. It was further pleaded that the 1<sup>st</sup> Defendant took possession of the said portion of land in 1985 and commenced construction of a radio repeater station and an access road. In the alternative, it was pleaded that the 1<sup>st</sup> Defendant had been in open, continuous and uninterrupted possession of the suit property for a period in excess of 33 years and had consequently acquired adverse possession of the portion of 1.08 acres the subject of the suit.

13. The principles to be considered in an application seeking joinder of a party as a necessary party were considered in the case of **Civicon Limited v Kivu Watt Limited and 2 Others [2015] eKLR**. In the said

case, the Court of Appeal held, *inter alia*, that:

**“From the foregoing the power of the court to add a party to a suit is wide and discretionary, the overriding consideration being whether he has interest in the suit. The question is whether the right of a person may be affected if he is not added as a party. Generally, in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and was not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.**

**Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. Mulla's of Civil Procedure 16<sup>th</sup> Edition Volume 2 goes on to state that,**

**“...What makes a person a necessary party is not that he has relevant evidence to give on some of the questions involved; and this would make him a necessary witness. The only reason which makes it necessary to make a person a party to an action is so that they should be bound by the result of the action and the question to be settled therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has to be drawn on a wider construction of the rule between the direct legal interest and the commercial interest.”**

14. Similarly, in the case of **Pizza Harvest Limited v Felix Midigo [2012] eKLR** Havelock J considered who is a necessary party as follows:

“...I have also been taken cognizance of the case of Amon v Raphael Tuck and Sons Limited (1956) 1 All ER 273 in which Devlin J held at page 286 -287:

**“What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.” (Emphasis added)**

15. The 1<sup>st</sup> Defendant relied upon, *inter alia*, **Order 1 rule 10(2)** which stipulates 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.”**

16. Whilst considering the provisions of **Order 1 of the Rules**, the Court of Appeal in the **Civicon Limited Case**(*supra*) held as follows:

**“ Having carefully considered the respective positions of the parties to this dispute, this is our view of the appeal. Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and make all such changes in respect of the parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matter in dispute...”**

17. The court is thus satisfied on the basis of the material on record that the County Government of Samburu is a necessary party to the suit and may thus be joined as a Defendant in the suit, although not as a 3<sup>rd</sup> Defendant in the suit but in the counterclaim. The court has noted that the Plaintiff has no claim or grievances against the intended 3<sup>rd</sup> Defendant and has not indicated any desire to seek any reliefs against it. The court takes the view that a Plaintiff has a right to choose his Defendants hence he should not be forced to sue a Defendant against his will. Accordingly, the court is inclined to allow the 1<sup>st</sup> Defendant to join the County Government of Samburu as a 2<sup>nd</sup> Defendant in the counterclaim only. The Plaintiff shall, of course, be the 1<sup>st</sup> Defendant in the counterclaim.

18. The court has considered the pleadings and material on record against the Chief Land Registrar. The court has noted that neither the Plaintiff nor the 1<sup>st</sup> Defendant has pleaded any illegality, fraud or impropriety against the Chief Land Registrar. The mere fact that the 1<sup>st</sup> Defendant has counterclaimed for adverse possession is not sufficient reason to join the Registrar as a Defendant in either the suit or counterclaim. The 1<sup>st</sup> Defendant can still validly prosecute his claim for adverse possession in the absence of the Registrar. Accordingly, the court finds that no legal basis has been laid for the joinder of the Registrar as a Defendant.

**(b) Whether the plaint should be amended and amended summons issued to the intended Defendants**

19. The court has considered the material and submissions on record on this issue. The court has already found and held that the Plaintiff has no claim against the County Government of Samburu. He has no desire to sue it. Consequently, he cannot be compelled to amend his plaint in order to sue the intended Defendant against his will. In the same vein, there would be no basis for “amended” summons to issue to the intended Defendant. Since the court is inclined to grant the 1<sup>st</sup> Defendant leave to join the County Government of Samburu as a Defendant in the counterclaim then the court is inclined to grant the 1<sup>st</sup> Defendant leave to amend its defence and counterclaim and join the said County Government as a Defendant. The court is further inclined to direct that fresh summons to enter appearance may issue against the County Government of Samburu should the 1<sup>st</sup> Defendant be prepared to pursue it.

**(c) Who shall bear costs of the application**

20. 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 v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since the court is dealing with an interlocutory application for joinder of parties and the suit is yet to be heard, the court is of the opinion that costs of the application should be in the cause.

**G. CONCLUSION AND DISPOSAL**

21. The upshot of the foregoing is that the court finds merit in some of the prayers sought in the 1<sup>st</sup> Defendant’s application. Accordingly, the 1<sup>st</sup> Defendant’s chamber summons dated 17<sup>th</sup> February, 2021 succeeds in part and is hereby allowed in the following terms only:

*(a) Leave be and is hereby granted to the 1<sup>st</sup> Defendant to join the County Government of Samburu as a Defendant in its counterclaim and the 1<sup>st</sup> Defendant shall be at liberty to amend its counterclaim accordingly.*

*(b) The 1<sup>st</sup> Defendant shall take out summons to enter appearance against the County Government of Samburu and serve the said Defendant within 21 days from the date hereof and file an affidavit of service.*

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

*(d) Leave to join the Chief Land Registrar as a Defendant in the suit is hereby declined.*

Orders accordingly.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 8TH DAY OF JULY 2021.**

In the presence of:

No appearance for the Plaintiff

Ms Faith Kyalo holding brief for Ms Weru for 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

.....

**Y. M. ANGIMA**

**ELC JUDGE**