



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 47 OF 2019

ERICA ANN THOMAS.....PLAINTIFF

VERSUS

JOEL NGALA JILANI.....1ST DEFENDANT

MATSANGONI LIMITED.....PROPOSED 2ND DEFENDANT

RULING

This ruling is in respect of an application dated 18th March 2021 by the proposed 2nd Defendant seeking for the following orders:

- 1. This Honourable Court be pleased to order that Matsangoni Limited to be joined as the 2nd defendant in this suit and the plaint in this suit and all pleadings be amended to include the 2nd defendant.***
- 2. That the costs of this application be in the cause.***

Counsel agreed to canvas the application vide written submissions which were duly filed.

PROPOSED 2ND DEFENDANT RESPONDENT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application and the supporting affidavit of Dustan Ingoyi Majanja who stated that by a transfer dated 29th March 2019, the 1st defendant and one Josephine Munyazi Jilani transferred the suit plot number KILIFI/MADETENI/450 to the proposed 2nd Defendant for a valuable consideration of KShs. 19,274,190/=. That the proposed 2nd defendant purchased the suit property without notice of any existing problem and that the outcome of this suit shall directly affect the proposed 2nd defendant.

Counsel further submitted that the applicant has annexed a copy of the agreement, a copy of the title and search certificate to show that the proposed 2nd defendant has an interest in the suit property and that in the event the suit is determined in its absence the proposed 2nd defendant would be exposed to great prejudice.

Counsel relied on Order 1 Rule 10 (2) of the Civil Procedure Rules which provides thus:

“ 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 the name of any party improperly joined whether as plaintiff or defendant, be struck out, and that the name of any person who 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.”

Counsel also cited the case of JMK -V- MWM & ANOTHER (2015) eKLR where the court stated as follows

“The section should be interpreted liberally and widely and should not be restricted merely to parties involved in the suit but all persons necessary for complete adjudication should be made parties.”

Further in the case of Civil Case No. 18 of 2013 Brek Sulum Hemed v Constituency Development Fund Board & another [2017] eKLR Mureithi J held as follows:

“The provisions of rule 10 order 1 will apply to require that their involvement to be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit. As interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit.”

Counsel also relied on the case of **Nairobi High Court Commercial & Admiralty No 517 of 2014 Lucy Nungari Ngigi & Others –V- National Bank of Kenya Limited & Another** where the court held as follows:

“Invariably, the determination of the real issues in controversy between the plaintiff and the intended plaintiffs on the one hand, and the defendants on the other hand, will need all concerned parties to be before the court. This course not only prevents duplication of efforts but also allows the court to determine the relief in the entire transaction and all common issues of fact and law which arise among the parties.”

Counsel therefore urged the court to allow the application as prayed as the proposed 2nd defendant is a necessary party that will help the court to effectually deal with the issues in respect of the suit land.

PLAINTIFF/RESPONDENT’ S SUBMISSIONS

Counsel for the respondent opposed the application and relied on the replying affidavit which outlined the facts of the case. Counsel further submitted that joining the proposed 2nd defendant to this suit will not assist the court in determining the issues in the main suit.

Counsel further relied on the provisions of Order 1 rule 10 (2) of the Civil Procedure Rules which has been cited above on joinder of parties to a suit. That the issues to be determined by the court precedes the institution of the suit and that the applicant is a late comer who will not add any value or insight to enable the court determine the issues between the plaintiff and the defendant.

Counsel listed the following issues to be determined in the main suit to show that the applicant may not add value to the determination of the suit:

- a) Whether the plaintiff lawfully acquired ownership of the suit property***
- b) Whether the plaintiff acquired the suit property for valuable consideration and paid the purchase price thereof.***
- c) Whether the title acquired by the defendant was lawfully acquired***
- d) Whether the rights of the first registered owner can be defeated by a title acquired second in line.***

Counsel also submitted that the proposed 2nd defendant’s title if any, was illegally acquired and that the 2nd defendant will only be a bystander in the suit and cited the case of **Alice Chemutai Too v Nickson Kipkirui Korir and 2 others [2015] eKLR**, and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

In an application for joinder of parties, the court is guided by the principles laid down in the case of **Civicon Limited v Kivuwatt Limited and 2 others [2015] eKLR** where 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 16th 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.”

Similarly, in the case of **Pizza Harvest Limited v Felix Midigo [2012] eKLR** the court 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.

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...”

The plaintiff filed a plaint where it stated that the Plaintiff’s husband entered into an agreement for sale with Kelvin Mwamuye Jilani (deceased) for the purchase of the suit property and at that time the suit property had no title and the said Kevin sold it as the administrator of one Rodgers Mwadonga Mwamuye.

It is on record that the said Kelvin delivered to the plaintiff a registered title in the plaintiff’s name but later the plaintiff conducted a search in August 2018, and discovered that the suit land was registered in Kelvin’s name.

Counsel for the respondent submitted on the issue of fraud and relied on the provisions of Section 26 of the Land Registration Act on indefeasibility of title. The applicant prays that he be joined in the suit to challenge the plaintiff’s title as a person who has a stake in the suit land and that any decision or order of the court in respect of the suit land will directly affect him.

The case of **Rajab Ahmed Karume v Chief Registrar & 3 others; Nairobi ELC 816 of 2012 as consolidated with ELC 47 of 2010, [2019] eKLR** where Obaga J reiterated the tests for joinder as follows:

“10. Though the Civil Procedure Act does not expressly provide for joinder of Interested Parties, the Courts have routinely allowed parties into proceedings but based on certain criteria. In the case of Trusted Society of Human Rights Alliance Vs Mumo Matemu & 5 Others [2014]eKLR the Supreme Court held as follows:-

“...an Interested Party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

The applicant is not a busybody who wants to join the case for nought. The applicant has established that its interest will not be well articulated unless it appears in the proceedings. Such appearance will not prejudice or delay the finalization of this suit.

In the case of **Meme v. Republic, [2004] 1 EA 124**, the High Court observed that a party could be joined 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.**

I have considered the application, the submissions by counsel and find that the application has merit and is therefore allowed as prayed. The applicant to file and serve any documents if need be within the next 14 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF OCTOBER, 2021.

.....

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.