REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 129 OF 2016

EPHRAIM GODEKA LUGALIA....PLAINTIFF/2ND INTERESTED PARTY

VERSUS

JOHNSTONE ONYINO.....1ST DEFENDANT/RESPONDENT

SAMSON LUGALIA.....2ND DEFENDANT/RESPONDENT

STEPHEN BANANG'A.....3RD DEFENDANT/RESPONDENT

EUNICE ANDEYO.....4TH DEFENDANT/RESPONDENT

PHOEBE VUGUTSA.....5THDEFENDANT/RESPONDENT

MARY AYIERA.....6TH DEFENDANT/RESPONDENT

AND

BENARD ASKARI GODEKA.....1ST INTERESTED PARTY/APPLICANT

RULING

1. By a Notice of Preliminary Objection dated **9/12/2020,** the Defendants jointly raised two issues against in respect to the Application dated **6/11/2020.** The Application was filed on **9/11/2020** by one **Benard Askari Godeka**. It seeks, among others, an order that the said **Bernard Askari Godeka** be enjoined as an Interested Party in this suit. The Application is still pending hearing and determination before this Honourable Court. But before it could be fixed for hearing, the Defendants/Respondents raised the Preliminary Objection.

2. The Objectors' contention is that (sic) "The Interested party/ Respondent failed to follow the provisions of **Order 1 Rule 10 (2)** of the **Civil Procedure Rules 2010"** and that the "Interested party/1st Applicant/Respondent lacks the locus in this suit."

3. On the **27/9/2021** this court gave directions requiring the parties to dispose the Preliminary Objection by way of written submissions. The parties filed their submissions. In support of the Objection, the Defendants filed theirs dated **6/4/21** on **27/9/2021**. Also, in response, the proposed Interested Party filed his dated **01/10/2021** on **04/10/2021**.

4. The defendants' first limb of Objection is that the proposed Interested Party's Application failed to follow the provisions of **Order 1 Rule 10** of the **CPR.** The second limb is that the proposed Interested party lacks locus standi in this suit. It is important to note from the outset that there is no Interested Party in this suit yet. The Applicant who moved the Court by way of the Application dated **6/11/2020** has not been joined herein as an Interested Party: he may be said, at this stage, to be a proposed Interested Party. Counsel should be aware of the steps involved in situations where persons wish to be enjoined in suits as Interested Parties.

5. I have stated as I have done in the previous paragraph because I have noted with concern the lackadaisical way or casual manner in which counsel in the present suit, drew their pleadings and even submissions. For instance, counsel for the Applicant in the said Application dated **6/11/2020**, refers to his client as the 1st Interested Party. By necessary implication the Court expected a 2nd Interested Party to be brought in. There was none and/or if there was, then there is no prayer for such. When there is a first thing or person there should be a second and/or third, and so on. Also, on the Notice of Appointment dated 6th November, 2020, the Advocate for proposed Interested Party indicated that the Applicant, one Benard Askari Godeka has appointed their firm to act for him in the above (*sic*) matter. The Notice does not state who the Applicant is in this suit as at the time of the Appointment. It should have referred to him as a proposed Interested Party.

6. At the same time, by counsel indicating in the Notice that his law firm represents the said Applicant, Benard Askari Godeka, in the "above matter", one wonders what that is supposed to mean yet counsel is supposed to represent the client "in this matter." The reference presupposes another matter altogether. Even so, the Notice should have first or somewhere described the Applicant as "the Proposed Interested Party". The Applicant has not been joined in the proceedings. Therefore, the reference in the Notice is wrong.

7. Additionally, in the submissions filed on **4/10/2021,** counsel for the Applicant submits at the first line that he makes the submissions on behalf of both his client and one Ephrahim Godeka Lugalia. This is completely strange because nowhere in the entire file is there a document filed by the Applicant's firm of lawyers/ attorneys counsel to the effect that the firm of Advocates has been appointed to act on behalf of Ephraim Godeka Lugalia. Does counsel represent both parties? Can counsel represent both the Plaintiff and interested party (when and if the latter is enjoined in the suit)? Moreover, how on earth does the counsel purport, in drawing the heading of the Application dated **6/11/2020** purport to propose to make the Plaintiff who is already a party in the suit a second Interested Party? And where and why does the whole process which was began by the Applicant in the said Application get changed to the point where in the submissions filed the heading of the document (references of the parties) now get to miss the references "**2nd Applicant/Respondent"** for Ephraim Godeka Lugalia and "**1st Applicant/Respondent**" for Benard Askari Godeka? These errors, advertent or inadvertent, may not only give rise to confusion in the court proceedings but are likely to and do paint a wrong picture about the legal training in our jurisdiction. I do not want to say here what can befall counsel in case such an error costs a client a matter and a suit on malpractice is filed against him. Counsel can do better! Consistency, focus and clarity of mind is important in client representation.

8. So much having been said about the paucity pleadings and documents drawn professionally, this Court wishes to discuss the issues relating to the Preliminary Objection raised.

9. I have considered the Preliminary Objection raised herein. I have also read and analyzed the submissions be both counsel, on the matter before me. On the one hand, the Defendants submit that an interested party has to first seek to be enjoined in a suit before he can seek costs, directions and orders. It is their contention that the interested party should have first sought to be enjoined as a party in the suit before he could even refer himself as an interested party and to seek leave to file the application dated **6/11/2020.** To that extent I agree. A stranger cannot benefit from the spoils of the those who belong.

10. They submit further that the Applicant did not comply with **Order 1 rule 10(2)** of the Civil Procedure Rules. They reproduced the relevant rule verbatim before submitting on it. They then submitted that the Applicant lacked locus standi to swear the Affidavit in opposition to the Application dated **12/11/2020** since he had not been allowed to be enjoined as an Interested Party hence the Affidavit was sworn by a stranger**.** The Defendants rely on the cases of **JMK & MWM & Another (2015) eKLR** and **Central Kenya Ltd -v- Trust Bank & 4 Others, CA No. 222 of 1998** in support of their arguments.

11. The Applicant, on the other hand, submitted that he brought his Application in the right manner and that the Objection only questioned manner in which the suit land was being surveyed and subdivided. He further stated that his interest had been mentioned in the judgment of the Court and that the Preliminary Objection was only brought after filing another application (undisclosed).

12. Moreover, to him, a judge should not entertain a preliminary objection where he has allowed an application wholly or in part. Again, he argued that a preliminary objection should not be based on facts and arguments. He then relied on **Articles 159(2)(d)** and **51(1)** of the **Constitution** to buttress his argument that technicalities should not be used to benefit the Defendants. He did not rely on any authority to support his submissions.

ISSUES, ANALYSIS AND DETERMINATION

13. From the above, the following issues lie for determination:

a. Does the Preliminary Objection herein meet the threshold of one?

b. Whether the Application dated 6/11/2020 contravene the provisions of Order 1 Rule 10 (2) of the CPR 2010 and

c. Whether the Applicant lacks locus standi

d. Who should bear the costs of the Objection?

14. Regarding the first issue, I begin to discuss it by defining a Preliminary Objection. I will not invent the wheel. I can only echo the words of the learned judges in the seminal case of ***Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696***. In it they defined what constitutes a preliminary objection as follows:

> **"A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration… a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."**

It cannot be put clearer than that a preliminary objection is a point of law which is either pleaded or arises out of a necessary implication. Anything factual or a cocktail of facts and the law will not constitute one. Do the two limbs in this matter fall in that category? I think so. If I was to summarize their mind, I think the Defendants want to argue that the Applicant has not followed what the law provides in **Order 1 Rule 10** of the Civil Procedure Rules and that he lacks locus standi in the suit. Those are legal points.

15. That notwithstanding, the two limbs have a problem. They are not specific or precise as required by law. The Court of Appeal has held, in ***Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR*** that: "We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue …. *We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned*." What their Lordships are stating in their decision is that one must state with precision the point of law he or she is raising against another so that both the court and that other party are aware of the match before him or her.

16. In **Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR**, the same Court stated as follows:

> **"We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush."**

17. See also the holding in **SUSAN WAIRIMU NDIANGUI V PAULINE W. THUO & ANOTHER [2005] eKLR** where Musinga J as he then was held that "*a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.*"

18. With regard to the issues raised, the first limb of the Preliminary Objection herein is to the effect that the Respondent "**failed to follow Order 1 Rule 10 of the Civil Procedure Rules**." One may ask: how does the Rule provide? With due respect the Rule provides, in the four (4) sub-rules thereto, for so many issues that a party is required to observe that it will be difficult for one to pinpoint out which specific one the Applicant in this case failed to observe. If one took up the Preliminary Objection as it is, it is extremely vague. In regard to the second limb, the objection is that the Applicant lacks locus standi in this suit. What exactly did the Respondent mean by this? How does he lack it or on which point? Counsel ought to have been precise here. These two points of law are vague and on that account I would dismiss them with costs. However, there is more to say.

19. Assuming, as comes out in the submissions by the Defendants, that they sought to particularize their attack on the Applicant's move by urging the Court to consider that he did not follow the provisions of **Order 1 rule 10 (2)** of the **Civil Procedure Rules**, this Court has to examine the sub-rule. It provides as follows:

> **"(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."**

20. Order 1 Rule 10 deals with "substitution and addition of parties" to a suit generally. The sub-rule, **Order 1 Rule 10 (2)**, is specific that a party may be enjoined as a party to the suit on the courts' own motion or by an application made by the party so praying to be enjoined, provided that the presence of the party will assist the court adjudicate the matters before it without causing miscarriage of justice. I agree with the submissions by counsel for the Respondents that a proposed interested party (NOT AN INTERESTED PARTY as submitted) in any suit must first seek to be enjoined in a suit before he seeks any costs, directions or orders. But that is in so far as the submission relates to enjoinment of a proposed interested party. It is different from addition or substitution of a party, as envisaged in **Order 1 rule 10(2)** which was submitted on. There is a wide difference between addition or substitution, and joinder of an interested party in a suit.

21. Did the Applicant seek to be added or substituted as a party in the suit? Certainly not. Excusing the format errors pointed earlier in this ruling, he (the Applicant) sought leave to be enjoined as an interested party. The merits of the Application are yet to be determined so as to know whether or not he can be enjoined. The question that this court settles next is, in which manner does an application for enjoinder take?

22. Order 51 Rule 1 of the **Civil Procedure Rules** states as follows:

> **"*All* applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."**

23. I have perused the Application dated **6/11/2020.** The same is brought by way of a Notice of Motion under **Article 50 (1)** and **159 (2) (d)** of the **Constitution, Sections 1A & B, 3A** and **63 (e)** of the **CPA, Order 40 Rules 1,2,3,** and **4** of the **ELC Act** and all other provisions of the law. But as to whether **Article 159(2)(d)** of the Constitution should come to the aid of the Applicant, as submitted by the Applicant, that should be an issue for determination when the merits of the Application are discussed. I wish to point out at this stage it appears the counsel for the Applicant strayed to the field of submitting partly on the merits of the Application rather than the Preliminary Objection, as shall be explained at the tail end of this ruling. Perhaps because Preliminary Objection was vague!

24. In the Notice of Motion, the Applicant prays to be enjoined as an interested party to the suit, which is proper in my considered view. The submissions on the Preliminary Objection are that the Application dated **6/11/2020** did not conform with the provisions of **Order 1 Rule 10 (2).** In their submission they give the reason for holding such a view that it is because the Applicant failed to first make an application to be enjoined as a party before seeking for orders and directions from court. The Respondents further contend that the Applicant failed to seek leave from the court to make the Application. In advancing his argument, Counsel for the relied in the case of **J.K.M -v- MWM & Another (2015) eKLR.** However, this Court does not agree with them on the relevance of the case. I first start by distinguishing it. The circumstances

in the case were different from those in the present one. Whereas the authority relied on related to an application made for joinder of a party before the suit had not been determined, in the present suit, the application has been brought by a proposed intended interested party when the matter had already been heard and determined. Even so, I disagree with counsel who raised the Objection that the applicant ought to have sought leave to file the application dated **6/11/2020.** One should not read some prayers in isolation of others. **Prayer two (2)** of the said Application is couched in clear words to the effect that he seeks to be enjoined in this suit as an interested Party. In essence, the application dated **6/11/2020** is one seeking leave for enjoinment as such. That prayer can only be determined on merits.

25. In my considered view, **Order 1 Rule 10 (2)** applies to joinder of a party as a plaintiff or defendant but not an Interested Party.

26. It is now well settled that an application for enjoinment by an interested party should be by way of formal application. This was held in the case of ***Francis Karioki Muruatetu & Another -v- Republic & 5 Others Petition 15*** *as* ***Consolidated*** *with* ***16 of 2013 (2016) EKLR.*** Tin the Application a proposed Interested Party sets out the interest he or she has in the matter in order for the Court to consider to have him enjoined. The interest can only be rightly considered by the Court when all material is placed before it. This is what the Applicant has done by filing the Application. Any other party feeling that the interest is not sufficient can oppose the Application. For that reason, the Applicant in the Application dated **6/11/2020** should have his day in court on merits over that Application.

27. Further, in my considered view, the Preliminary Objection dated **9/12/2020** is misconceived. I say so because the provisions under which it is brought do not fall within the purview of the Application dated **6/11/2020** fully. It is therefore misplaced for the Application does not seek to deal with the issue of joinder of the party as plaintiff or defendant but as an interested party. Moreover, once one is a party there cannot, in my view, be a procedure or step open to any other person or party to make him again an interested party, as the proposed interested party sought, by his Application (yet to be determined) to make the Plaintiff. His interests are captured in the issues being canvassed in the suit.

28. Regarding the issue of locus, I have this to say: that the proposed Interested Party has brought the said application seeking, among other prayers, to be enjoined as an Interested Party. The Respondents have raised an objection that he lacks locus standi in this suit. Their submission is that he lacks the locus to do so because he is a stranger to the matter. One wonders: how else does one who is neither a Plaintiff nor a Defendant or Petitioner nor Respondent join in a matter he is of the opinion that his interest lies and he will be left out if it was decided in his absence? With due respect this limb of Preliminary Objection is misplaced and warrants instant dismissal. The reason is that where a party forms an opinion that he has in interest in a matter that is before the Court, he is at liberty to move the Court to be enjoined as an interested party.

29. The Court shall, upon an Application of such nature being brought before it, consider whether or not it satisfies the criteria set out by the law for the grant of the prayers sought. One cannot be denied summarily the opportunity to be heard over such a request. However, that will not entitle the party to file documents in the matter as he pleases before he is granted leave of the court to be enjoined for such documents shall be strange 'creature' in the kingdom of the justice of the case.

30. In the present Preliminary Objection, it is quite clear that apart from that limb being vague, the counsel who made it did not himself understand it. In their submissions that urged the Court, in the second paragraph of the submissions dated 6th April, 2021, thus: "Your Lordship the Application dated 12th November, 2020 remains ***an opposed*** (*sic*) since it is the purported interested party who swore an Affidavit to reply to it yet he is not properly before this Honourable Court and therefore he lacks locus to defend/ reply to the application dated 12th November, 2020." This Court wonders loudly: what was counsel thinking about when he raised that limb of Preliminary Objection thereby yielding to the process of this bit of submission? Before the Court was the Application dated **6/11/2020**. To it counsel raises a Preliminary Objection about locus standi. He then proceeds to submit on a completely different Application. The Court is at a loss here! Is it lack of proper preparation for one's matter that causes this or a carefree attitude? I can only state that if the limb of the Preliminary Objection that was touted as the elephant in the room was a mere ant beneath a mountain, then I am afraid counsel need to do more in their law offices than just taking instructions and drawing papers for filing in court. They need to constantly apprise themselves of the law.

31. As I have said earlier, the Application dated **6/11/2020** raises issues which can only be interrogated by way of evidence by this Court. Thus, allowing the Preliminary Objection, which as I have pointed out is baseless, would occasion miscarriage of justice.

32. In conclusion, I find that the Preliminary Objection is **misplaced, devoid of merit, misleading, and an abuse of the courts' due process**. The application dated **6/11/2020** does not seek addition of the Applicant as a party. It does contain a prayer, among others, for him to be joined as an interested party, which procedure is not governed by **Order 1 Rule 10 (2)** of the **Civil Procedure Rues**. This process shall be explained further during the determination of the merits of the Application. The result, therefore, is that the Preliminary Objection dated **9/12/2020** is hereby dismissed with costs to the Applicant in the Application dated **6/11/2020**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 12TH DAY OF OCTOBER, 2021

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.