



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ENVIRONMENT AND LAND APPEAL NUMBER 36 OF 2021

CHARLES OJWANG OTAKO.....APPELLANT

VERSUS

GEOFFREY OWUOR OCHIENG.....RESPONDENT

TURPHENA OKOTH OTAKO.....PROPOSED INTERESTED PARTY

RULING

Introduction

1. By a plaint dated 5/10/2015, the respondent who is the registered owner of **EAST UGENYA/JERA/662 [suit property]** filed suit against the appellant for trespass and sought orders of eviction and permanent injunction. The defendant filed a defence and counterclaim dated 12/11/2015 in which he contended that he was the rightful owner of the suit property. After hearing the parties including the proposed interested party who the appellant's witness, the court by its judgment dated 4/07/2019 entered judgement for the respondent.

2. Aggrieved and dissatisfied by the judgment of the court, the appellant filed an appeal. However, before the appeal could be heard and determined, the proposed interested party filed a motion dated 26/11/2020 seeking joinder as an interested party. The motion is the subject of this ruling.

Proposed interested party's case

3. The motion is brought within the provisions of **Sections 1, 1A, 3, 3A** of the **Civil Procedure Act** and **Order 45** and **51 of the Civil Procedure Rules**. The motion is supported by grounds on the face of the motion and the supporting affidavit of the proposed interested party. Her main ground is that she has a stake in the appeal.

Appellant's case

4. The appellant did not file pleadings or submissions on the motion.

The respondent's case

5. The respondent filed a replying affidavit dated 12/10/2021. He averred that the case before the trial court was between him and the appellant and that the proposed interested party was privy to the case and even testified as a witness. He contended that the proposed interested party has filed a suit against him in **Siaya PM ELC No. 27 of 2020** and has even filed objection proceedings in **Kisumu HC Succession Cause No. 746 of 2010**. The two cases are yet to be heard and determined. He asserted that the motion amounted to forum shopping, made in bad faith and an abuse of the court process.

Proposed interested party's submissions

6. The proposed interested party filed written submissions dated 23/11/2021. She contended that the decree affected her because she was the appellant's step mother and she was in occupation of the suit property and that she would be highly prejudiced if she is not joined as a party. She submitted that she was entitled to a fair hearing and on this, she relied on **Article 50** of the **Constitution**. She contended that her participation in the proceedings would enable the court to justly adjudicate the case and defend her interests. She placed reliance on several authorities including; **Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 others [2015] eKLR** and **Raila Amolo Odinga & another vs Independent Electoral and Boundaries Commission & 2 others** and **Michael Wainaina (as amicus curiae) [2017] e KLR**.

Respondent's submissions

7. The respondent filed written submissions dated 6/12/2021. He averred that the proposed interested party will not be prejudiced by the appeal because the two cases that she had filed against him were a proper avenue for her to ventilate her issues. He contended that the joinder application was improper because it was filed at an appellate stage.

Analysis and Determination

8. I have carefully considered the proposed interested party's motion; the respondent's replying affidavit and parties' written submissions and authorities cited and the main issue falling for determination is whether the proposed interested party should join the appeal.

9. Before considering the merits of the motion, I wish to point one anomaly, **Order 45** of the **Civil Procedure Rules** which is one of the provisions of law relied upon by the proposed interested party deals with reviews and not on applications such as this. The proper provision is **Order 1 Rule 10 (2)** of the **Civil Procedure Rules**. This oversight is however curable by **Article 159** of the **Constitution** which provides that courts shall undertake substantive justice without undue regard to procedural technicalities. Having addressed this issue, I will proceed to analyse the legal and jurisprudential framework on the issue.

10. **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** provides that the court may at any stage of the proceedings, order 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 adjudicate upon and settle all questions involved in the suit, be added. In my view, the wording of this rule seems to imply that it applies to a court of the first instance as opposed to an appeal.

11. On evaluation of the motion, the main reason the proposed interested party wants to be joined as an interested party is because she has resided on the suit property from the 1970s and has an alleged legal interest in it.

12. From the motion, it is evident that the proposed interested party intends to introduce a new cause of action of trust at the appellate stage which was not the substratum of the pleadings in the lower court. It is the considered view of this court that it be highly prejudicial to the respondent to join the proposed interested party to the proceedings at this stage.

13. The proposed interested party participated in the proceedings in the lower court as a witness and she had an opportunity in the first instance to apply for joinder for purposes of advancing her case which she did not. Further, she has already instituted legal proceedings against the respondent in other suits. The Supreme Court of Kenya in the case **Communications Commission of Kenya & 4 others v Royal media Services Limited & 7 others [2014] e KLR** when faced with a similar issue held thus;

“the applicant was neither a party at the High Court nor at the Court of Appeal. It is, therefore, not evident from the record that the applicant has a legitimate stake, or interest in the matter ...we note that the proper forum of first instance ...is the High Court, and not this Court”

14. This court therefore finds that the proposed interested party's motion is without merit and I make the following disposal orders;

a) The Notice of Motion dated 26/11/2020 is hereby dismissed.

b) Costs to the respondent.

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY 2022.

In the presence of:

M/s Nabi holding brief for Mr. Magada for the respondent.

M/S Aron holding brief for M/S Oluoch for the proposed interested party.

Court Assistant: Ishmael

HON. A. Y. KOROSS

JUDGE

10/2/2022