



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 127 OF 2017

ELIZABETH NABANGALA WEKESA.....PLAINTIFF

VERSUS

ERICK OMWAMBA.....ST DEFENDANT

CHARLES KOMBO.....^{2ND} DEFENDANT

GLADYS NAFULA KOMBO.....^{3RD} DEFENDANT

THE COUNTY LAND REGISTRAR

TRANS NZOIA COUNTY.....^{4TH} DEFENDANT

AND

ESTHER MOMANYI OMWAMBA *alias*

ESTHER MONYANGI KABA.....APPLICANT

RULING

(On Application for joinder of Advocate as Interested Party)

The Application

1. The Applicant moved this Court by a Notice of Motion dated 26/07/2021, praying for an order that she be enjoined as an Interested Party to the suit. She brought the Motion under Sections 3, 3A and 63E of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Motion sought the following specific Orders:

(a) That this honourable Court be pleased to enjoin the Applicant herein as an interested party in this suit.

(b) That costs be provided for.

2. The Application was grounded on a number of simple straight forward points stated on its first page and the Supporting Affidavit of the Applicant sworn on 27/07/2021. In brief the Applicant stated that in 2007 there was filed in the lower court **Kitale CMC Land Case No. 79 of 2007** over the same subject matter. It ended in her favour. She also stated that she is the wife of the **1st** Defendant and justice demanded that the court joins her to this suit in order for her to aid it to arriving at a just conclusion. In her affidavit she deponed further that the Plaintiff had encroached onto her parcel of land which she bought from the Plaintiff's husband and that when the dispute was handled by the Central Division Land Disputes Tribunal, it found in her favour. Its decision was adopted as a judgment of the Court in the said **Kitale CMC Land Case** and an order of eviction issued. Thus, in this matter the Plaintiff selectively sued her husband and not her so as to avoid the truth being brought out. Lastly, she deponed that she ought to be enjoined so as to bring these issues before the Court for a just decision to be made.

3. The Plaintiff opposed the Application strongly. She did this through grounds of opposition which I would say that they too were short and straight forward. They were that the Application was baseless, fatally defective and an abuse of the process of the Court and was improperly before it. She emphasized that the Applicant had not shown proof that she is the wife of the **1st** Defendant.

Submissions

4. When the Application came up for hearing this Court directed the parties file their submissions on it. They did: the Applicant filed the first set dated **18/10/2021** on **19/10/2021** and the second one dated **6/11/2021** on **8/11/2021** while the Plaintiff filed hers dated **12/10/2021** on **25/10/2021**.

5. The Applicant repeated three main issues as brought out in the grounds and affidavit in support of the Application. They were that suit number **Kitale CMC Land Case No. 79 of 2007** in which the Court adopted the decision of the Central Division Land Disputes Tribunal involved the same subject parcel of land in this current suit, that the Applicant is a wife of the **1st** Defendant and it would be inconceivable for someone to allege being another's wife from the blues, that she had a stake in the outcome of the case, and that if the Court were not to join her in this suit and find the defendants trespassers she would be liable for eviction from land she legally acquired and which the Court found to be so. Her learned counsel in reply to submissions by the Plaintiff stated that **Order 1 Rule 10** does not apply; that the proof of whether or not the Applicant is a wife of the **1st** Defendant can only be at the hearing of the suit and that the authority the Plaintiff relied on was distinguishable from the facts of this case. Learned counsel cited the case of **Trusted Society of Human Rights Alliance v. Mumo Matemo and 5 others [2014] eKLR**.

6. The Plaintiff/Respondent submitted that the Application offends **Order 1 Rule 10** of the **Civil Procedure Rules**, and that the said Rule provides only for addition or substitution of a party and not joinder as an Interested Party. He cited the ruling in **Michael Francis Chemonges Kitiyo & another v Stephen Lowasikou Moi and 2 Others, Kitale ELC 184 of 2016** where the learned judge found that for one to be enjoined in a suit he has to establish his interest in it. He stated that since the Applicant had not attached any evidence to show that she was the wife of the **1st** Defendant she failed to prove her prayers. Lastly, he submitted that the Application was fatally defective and an abuse of the process of the Court but he did not explain how that would be said to be the case.

7. I have analyzed the authority of **Kitale ELC No. 184 of 2016**. I find that my brother judge disallowed the Application because it had glaring inconsistencies and omissions in respect of the applicant's documents, and that by the time of the Application the land had changed hands by way of allocation to other persons. I have also studied the annexures to the Application, particularly **EMO 1, EMO 2** and **EMO 3**. **EMO 1** was the decision of a tribunal known as Central Division Land Disputes Tribunal. Its number was **049 of 2007**. The heading does not state the area which the Tribunal was in charge of but at the bottom end of **page 4** of the decision it shows that it was of Trans Nzoia District. The parties in the dispute were **Esther Monyangi Omwamba**, the Applicant herein but Complainant then, and **Elizabeth Nabangala** the Plaintiff herein but Objector then and **Levy Odero** as another Objector then. **EMO 2** is a copy of Kitale **CMC Land Case No. 79 of 2007** which adopted the decision of the tribunal and **EMO 3** is a copy of an eviction order given on **13/2/2008** emanating from the decree of the Court in the said **EMO 2**. It was directed at the District Officer, Central Division Kitale directing him to remove the objectors and their families from the **0.3** and half of a point acres and put the Claimant in possession.

Determination

8. I have carefully considered the Application. I have taken into account all the issues raised in the Application and Supporting Affidavit and the grounds of opposition in respect of the Application. I have deeply and carefully applied my mind to submissions by both counsel and the law, being both statutory and case law. The issues for determination are:

(a) *Whether the Applicant has fulfilled the requirements of joinder in order to be enjoined in this matter.*

(b) *Who bears the costs of this application?*

9. I now make an analysis of the issues.

(a) *Whether the Applicant has fulfilled the requirements of joinder in order to be enjoined in this matter*

10. The starting point in determining this Application is for the Court to satisfy itself that the suit herein is still pending before it. This is because, there is no doubt anymore that if a party wishes to be joined in a matter he or she must move the Court during the pendency of the proceedings in that matter. I draw guidance from the case of **FLORENCE NAFULA AYODI & 5 OTHERS V JONATHAN AYODI LIGURE V JOHN TABALYA MUKITE & ANOTHER; BENSON GIRENGE KIDIAVAI & 67 OTHERS (APPLICANTS/INTENDED INTERESTED PARTIES) [2021] eKLR**. In the case, this Court held that where a party wishes to be enjoined to a matter, the proceedings in it must be either be at "the nascent or other stages but must be alive." Similarly, in **Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties) [2021] eKLR**, Lady Justice Mbugua J stated, "A party claiming to be enjoined in proceedings must have an interest in the pending litigation..." In the instant case, although this is an old matter, being a **2017** one, it has not been heard in any way. Thus, it can be said to be in the 'youthful' stage: the main point is that it is still alive. As to why an old matter such as this has not taken off for hearing is an issue to be looked at separately.

11. In regard to whether or not the Application was brought under the right provisions and whether **Order 1 Rule 10** applies, it would do well to first to look at what the provisions that have been cited import. The Applicant was brought the Application under **Sections 3, 3A** and **63E** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. **Section 3** of the Act takes care of situation where the Court can exercise special jurisdiction. **Section 3A** refers to where the Court has inherent powers to make any orders as to meet the ends of justice. **Section 63E** is in relation to situations where the Court may make interlocutory orders as they appear just and convenient in order to prevent defeat of the ends of justice. **Order 51 Rule 1** of the **Civil Procedure Rules** relate to where applications are to be heard in open Court unless the Court otherwise directs. **Order 1 Rule 10** provides for substitution and addition of parties to suits generally.

12. From the above summary, it is clear that the Applicant did not cite the proper provisions under which the Application should have been brought. Submissions were made by counsel for the Respondent that the instant Application cannot be allowed because it offends **Order 1 Rule 10** of the **Civil Procedure Rules**. It was not clarified by counsel even in submissions how the Application offends that Rule. In my

view, the error of failure to cite or citing a wrong provision of the law in the heading of the Application is not fatal to the Application. That is a technicality and the Applicant sought to approach it by citing **Sections 3 and 3A** of the **Civil Procedure Act** when she did not find a provision expressly stating “interested party”. It is my view that these are technicalities that can be cured by applying **Article 159(2)(d)** of the **2010 Constitution**. The Article provides that “[In] exercising judicial authority, the courts and tribunals shall be guided by the following principles - justice shall be administered without undue regard to procedural technicalities.”

13. However, the above view does not mean that the law does not provide for applications for joinder of interested parties in matters. **Order 1 Rule 10** of the **Civil Procedure Rules, 2010** as amended in **2020** which provides for Addition of “a necessary” party. It provides that “**The court may at any stage of the proceedings, either upon or without the application of either party,...order 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.**”

14. I can only refer the Applicant to the fact that there is a dearth of case law on the fact that an interested party can be joined to a suit, under the provisions of **Order 1 Rule 10** of the **Civil Procedure Rules**. Simply put, there are provisions of law over the issue before me. Suffice it to say that after the promulgation of the **2010 Constitution**, the procedure relating to it is firmly and clearly stipulated in the statutes and subsidiary legislation of the country. Its source is a special procedure in **Legal Notice No. 117** of **2013**. It was *Gazetted* on **28th June, 2013** as *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, (I refer to them as the *Mutunga Rules, 2013*).

15. In **Rule 2** of the Rules the definition of an Interested Party is given. The procedure on how that is to be done is provided for in **Rule 7**. Under **Sub-rule 1** of **Rule 7** it is provided that “*A person, with leave of the Court, may make an oral or written application to be joined as an interested party.*” In that respect it means a person moves the court. If he chooses to do so, he ought to seek leave of the Court first and once granted it, he will be enjoined. This is what the Applicant has done in the instant case.

16. The Supreme Court set out guidance on the requirements for successful application for joinder as an Interested Party. This was in the case of *Francis Kariuki Muruatetu & Another v Republic & 5 Others, Petition 15 as consolidated with 16 of 2013 [2016] eKLR*. In it the apex Court gave three principles to be followed. At **paragraph 37** the Court state that the Applicant(s) must show:

(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

(ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

17. I now need to consider whether or not the Applicant has met the above conditions. Does the Applicant have a direct interest or stake in the proceedings in the instant case? This Court thinks so. The Applicant has stated that she *Kitale CMC Case No. 79 of 2007* whose parties were basically the same as herein except the additional one involved the specific parcel of land over which the Plaintiff has sued the 1st Defendant among others. That demonstrates a direct link to the present case which then creates a direct interest by the applicant over the outcome of this case.

18. In the *Judicial Service Commission -vs-Speaker of the National Assembly & Another [2013] eKLR* the court stated that:

“...an interested party is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”

19. It is this Court’s view that the Applicant not just a stake but a serious one: having been declared by the subordinate Court the owner of the **0.3 acres** of land which is in issue herein a determination of the issues herein will directly impact on her rights over that parcel of land. She shall be directly affected by the expected decision of this Court.

20. The Respondent on the other hand sought to demonstrate that the Applicant is not the wife of the **1st** Defendant. What the Respondent did not consider is that the issues before this Court in the matter herein is not about whether or not the Applicant is the wife of the **1st** Defendant. In any event if that were to be an issue, then it could only be subject to proof at the hearing of the suit. If it turns out to be true that she is a wife of the **1st** Defendant, particularly since she alleges that she bought the land from the Plaintiff’s husband, then she will suffer prejudice if the orders sought are not granted.

21. Lastly, the court has to be satisfied whether or not the Applicant has set out his case and/or submissions she intends make before the Court and demonstrated that his case is not replica of what other parties have before the Court. I have looked at the documents attached to the Applicant’s Affidavit. They raise issues that are new but pertinent to the case herein. The issues are clearly set out.

22. I am satisfied that the proposed interested party has met the threshold set out in the *Muruatetu case* (Supra). For these reasons, I allow the Application in terms of prayer 1 at this stage. Thus, **I grant leave to the Applicant to be enjoined as Interested Parties in this suit**. I also direct that the Applicant files and serves not only a Notice of Appointment as an Interested Party within the next **ten (10)** days but also files and serves her pleadings within **twenty (20)** days of this order. All parties have leave to file any amended pleadings, lists of witnesses together with witness statements and lists of documents together with copies thereof. The parties to ensure all their documents are in an

indexed, paginated, cross-referenced document (trial bundle) to be exchanged before the mention date, any party having an objection to production of documents to observe **Rule 28(g)** of the **Mutunga Rules, 2013**. The suit shall be mentioned on **7th February, 2022** to conform compliance and fix a hearing date.

23. The costs of this Application shall be in the Cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF DECEMBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.