



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC SUIT NO. 76 OF 2015

ISAAC MWANGI WAINAINA PLAINTIFF

VERSUS

WILLY KIBERENGE & 19 OTHERS..... 1ST to 20TH DEFENDANTS

BARNABAS ARAP KIPRONO 21ST DEFENDANT

AND

JOSEPH KIPRONO

BIRGEN.....PROPOSED 22ND DEFENDANT/APPLICANT

RULING

[NOTICE OF MOTION UNDER CERTIFICATE OR URGENCY DATED THE 25TH OCTOBER, 2021]

1. The applicant moved the court through the application under certificate of urgency dated the 25th October 2021 seeking for the following prayers;

- a. Spent.
- b. Spent.
- c. *“That the court be pleased to order that Joseph Kiprono Birgen be enjoined in these proceedings as the 22nd defendant.*
- d. *That the court be pleased to set aside all proceedings and thus order that the matter herein do commence denovo.*
- e. *That the applicant be allowed to file and serve his defence and counterclaim as per the annexed draft defence and counterclaim be deemed as filed and served.*
- f. *That costs be provided for.”*

The application is based on the nine (9) grounds on its face marked (a) to (i), and supported by the affidavit sworn by Joseph Kiprono Birgen on the 25th October, 2021. It is the applicant’s case that he purchased 1.6 acres portion of land from **David Njogu Wainaina** in 2000 and settled on it. That he has developed the portion and has since acquired title over it under adverse possession. That when this suit was filed in 2015 against the 1st to 20th defendants, the plaintiff omitted the applicant’s **name, “ but inadvertently indicated my name as Kiprono Kibore”**. That he works with the KDF and was not aware of the proceedings until recently when he came back. That as the dispute between the plaintiff and the defendants is similar to his interests over the suit land, and the orders sought if granted would adversely affect him, there is need to have him joined as a defendant. That the application has been filed promptly and in good faith.

2. The application is opposed by the 21st defendant through the replying affidavit he swore on the 3rd November, 2021. It is his case that the application is frivolous, an abuse of the court process, has no merit and should be dismissed *in limine*. That the applicant has at paragraph 6 of his supporting affidavit acknowledged that he is a party in the proceedings under the misspelt name of Kiprono Kibore. That as that person who appears as the 14th defendant, was among the defendants who signed the filed document that authorised Wilson K. Chebii, Leah C. Birgen and Willy Kiberenge to execute the suit documents on their behalf, and appointed Ms Bundotich Korir & Company Advocates to represent them in the suit, the application should be dismissed with costs.

3. The application is also opposed by the plaintiff through his replying affidavit sworn on the 2nd November, 2021. It is his case that the application lacks merit and is an abuse of the court process. That the applicant has admitted to having been sued in the name of Kiprono Kibore, and as claims to have been on the suit land since 2000, then he chose not to participate in the proceedings on his own volition. That the applicant has not demonstrated his interests on the suit land through documentary evidence, and only alleges to have bought a portion from one David Njogu Wainaina. That the application and its timing is only meant to further delay the finalization of this suit that commenced in 2015, and allow the defendants to continue utilizing the suit land to his detriment.

4. That following directions issued by the court on the 28th October 2021, the learned counsel for the 21st defendant, plaintiff and the applicant filed their written submissions dated the 3rd November 2021, 12th November 2021 and 26th November 2021 respectively. The issues for the court's determinations are as follows;

a. Whether the applicant is already a party in the proceeding; or

b. Whether the applicant is a necessary party to be joined in this proceeding for the issues arising herein to be decided with finality.

c. Who pays the costs of the application?

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the written submissions by the learned counsel, the superior courts decisions cited thereon and come to the following findings;

a. That this suit was commenced by the plaintiff against the initial 20 defendants through the plaint dated and filed on the 16th March, 2015. The 14th defendant on the plaint is indicated as **KIPRONO KIBORE**. That defendants entered appearance through the memorandum of appearance dated the 13th April 2015, through M/s Bundotich Korir & Company Advocates. The memo on the first line reads **"Enter appearance for WILLY KIBERENGE & 19 OTHERS the DEFENDANTS HEREIN..."**. The said twenty defendants filed their statement of defence and counterclaim dated the 18th May 2012, through their counsel on record. That the 21st defendant joined this proceeding through the consolidation of **Eldoret ELC No. 305 of 2016** in which he was the plaintiff, to this suit vide the court order of 14th November, 2016.

b. That though the applicant did not include the provisions of the law under which the application is brought at the heading, his counsel has submitted that it is based on **Order 1 Rule 10(2) of the Civil Procedure Rules** that provides that;

"10. (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."

The above provision clearly shows the court's discretion to allow the joinder of a necessary party to a proceeding may be exercised at any stage. The court's discretion, as is the dictate of the law, must however be exercised judiciously. See the decision cited in the applicant's learned counsel's submissions, in the case of **Pravin Bowry v John Ward & Another [2015] eKLR**, where the Court of Appeal referred to the case of **Civicon Ltd v Kivu watt Ltd & 2 Others [2015] eKLR** in which the court stated as follows on the rules on joinder of parties;

".. the power given under the rules is discretionary which discretion must of necessity be exercised judiciously. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined."

c. The Learned Counsel for the Plaintiff has in their submissions referred the court to pages 330 to 332 of Halsbury's Law of England, 4th Edition, Vol.37 on the threshold to be met in application for stay of proceedings which reads thus;

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue .."

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases ..

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

That in the case of **Kenya Wildlife Service v James Mutembei [2019] eKLR**, the court said the following about stay of proceedings;

".. Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent ..."

d. That in setting aside proceedings, the court must remind itself of its obligation under **Article 159 (2) b of the Constitution 2010** to ensure justice is not delayed. Equally, the court must remember its duty and the overriding objectives enshrined in **sections 1A, and 1B of the Civil Procedure Act Chapter 21 of Laws of Kenya**. The Learned Counsel for the 21st Defendant has in their submissions, referred the court to the case of **John Gakure & 148 Others v Pharmaceuticals Company Ltd & 7 Others C. A. Civil Application No. 299 of 2007**, where the court expressed itself as follows;

“Jurisdiction of the court has been enhanced and its latitude expanded in order for the court to drive the civil process and hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the court’s view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively including the granting of appropriate interim relief in deserving cases”.

That under **section 1A (3) of the Civil Procedure Act**, both the parties and advocates in civil proceedings are **“under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”**

e. That having considered the facts and the law applicable in the applicant’s motion, and noting that the Applicant is already a party in this proceeding as the 14th defendant, and has therefore participated in signing their respective pleadings through the persons authorised by the team, instructed counsel through whom the court processes have been filed and served, and the oral hearing up to the close of the 20 defendants’ case on the 31st May 2021, the court has no difficulty in coming to the only reasonable conclusion that the application is an abuse of the process of the court. That had the applicant desired to move the court to correct the name under which he had been sued and served to read Joseph Kiprono Birgen instead of Kiprono Kibore, he was under a duty to instruct their counsel at the earliest opportunity so as to avoid a situation like the current one where he now moves the court months after closing their case.

f. That the application has not specified in both the body of the notice of motion and supporting affidavit the parcel description or reference of the land from which he had allegedly bought the 1.6 acres from. He has also not attached any documentary evidence to back his claim on what he calls the suit land. That though prayer (5) suggested that a draft defence and counterclaim had been annexed, there is no corresponding deposition in the affidavit, and no copy was filed or annexed. That further, ground (a) of the motion and paragraph (2) of the supporting affidavit leaves no doubt that the applicant’s claim is against David Njogu Wainaina, from whom he allegedly bought some land in 2000. The said David Njogu Wainaina is not a party in this proceeding. That in view of the foregoing the court finds the applicant has failed to establish the existence of any interest over the suit land subject matter of this case, known in law or equity, upon which the prayer for setting aside of the proceeding to allow him file and serve a defence and counterclaim could be based.

g. That had the proceedings been stayed as sought by the applicant under prayer (2), the defence hearing of the 21st defendant would not have taken place, and that would have resulted to more delay of the main suit. At least now all parties have closed their cases and directions have been taken on filing and exchanging submissions.

h. That as the applicant has failed in his notice of motion, the plaintiff and 21st defendant who opposed the application by filing their responses, submissions and participating in its hearing are under **section 27 of the Civil Procedure Act** entitled to costs.

6. That in view of the findings above, the applicant’s notice of motion dated the 25th October, 2021 is without merit, and is dismissed with costs to the plaintiff and the 21st defendant.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 20TH DAY OF DECEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF: ABSENT

DEFENDANTS: ABSENT

APPLICANT: ABSENT

COUNSEL: MR. KORIR FOR 1ST TO 20TH DEFENDANTS AND APPLICANT AND MR. MENGICH FOR MATHAI FOR 21ST DEFENDANT.

ONIALA: COURT ASSISTANT