



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAROK**

**ELC CASE NO. 245 OF 2017**

**ENDONYO KETE KUTO GROUP RANCH.....PLAINTIFF/RESPONDENT**

**–VERSUS–**

**MURI KEVIN OLOLMAINTANYA & 428 OTHERS.....DEFENDANTS/RESPONDENTS**

**KAMONGO FARMERS COOPERATIVE SOCIETY.....1<sup>ST</sup> APPLICANT**

**CHAMOON KONINI OLE MAPELU.....2<sup>ND</sup> APPLICANT**

**RULING**

1. There are two (2) applications before the court for determination. The first one is the Notice of Motion dated 22<sup>nd</sup> March, 2021 by Chamoon Konini Ole Mapelu expressed to be brought under **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and **Sections 1A, 1B and 3A of Civil Procedure Act**, wherein the Applicant seeks the following orders from the court:

*i) Spent;*

*ii) That this Honourable Court be pleased to enjoin the Applicant/Intended Interested Party, as Interested Party in this suit; and*

*iii) That costs be provided for.*

2. The grounds upon which the application is founded on are set out on the face of the motion and in the Supporting Affidavit of Chamoon Ole Mapelu, sworn on 9<sup>th</sup> April, 2021. In a nutshell, the Applicant contended that he is one of the original members of Endonyo Kete Kuto who he stated were the owners of Plot No CisMara/Ololulunga/132. It was the Applicants' case that originally, they were nineteen (19) members of Endonyo Kete Kuto, however, he averred that most of the aforesaid members are now deceased and that only four of them are still alive. The nineteen (19) members were said to be from the Maasai and Ogiek communities with the Applicant stating that he is from the latter community.

3. According to the Applicant, during subdivision of Cis Mara/Ololulunga/132, the members resolved that the same be subdivided into two (2) equal portions, one portion for the Maasai community and the other for the Ogiek community. The said Cis Mara/Ololulunga/132 is said to have been subdivided accordingly resulting in Cis Mara/Ololulunga/2662 which went to Dorobo–Endonyo Kete Kuto (Ogiek Group), and Cis Mara/Ololulunga/2663 which went to Leperes–Endonyo Kete Kuto (Maasai Group).

4. The Applicant further deposed that Dorobo–Endonyo Kete Kuto which he is a member of further subdivided its portion resulting in Cis Mara/Ololulunga/3814 and 3817, which the Applicant stated belonged to the original ten (10) members. It was the Applicant's case that he owned a portion of land from each of the aforementioned parcels being Cis Mara/Ololulunga/3814 and 3817.

5. It was also the Applicants case that they have not processed title deeds for Cis Mara/Ololulunga/3814 and 3817 for the reason that there is in place an injunction order restricting dealings in those parcels which they deposed that they learnt through this court's ruling dated 5<sup>th</sup> October, 2012. According to the Applicants, they recently learnt through the Narok Land Registrar who shared with them the aforesaid ruling of the court that the case is still pending in court. It was the Applicants' case that they have not been served with anything in the case in spite of them being Interested Parties by virtue of being beneficiaries of the parcels of land subject of the restraining orders from the court.

6. In the circumstances, the Applicants prayed to be allowed to join the suit as an Interested Party in order to safeguard their interest over Cis Mara/Ololulunga/3814 and 3817. The Applicants thus contended that it is in the interest of justice that they be joined as Interested Parties in the proceedings to enable them ventilate their claim.

7. The second application is equally a Notice of Motion which is dated 6<sup>th</sup> April, 2021 wherein the Applicant, Chemokter Gaa Co. Ltd, is also seeking identical orders as the one sought in the first application dated 22<sup>nd</sup> March, 2021. In support of the application, William C. Kenduiwo, swore an affidavit on 9<sup>th</sup> April, 2021 wherein he deposed that the Applicant is a registered company incorporated in Kenya under certificate of registration dated 10<sup>th</sup> April, 2015. The Applicant deposed that it has one hundred seventy (170) members whom it said have been residing within its parcel of land even before the subdivision of Cis Mara/Ololulunga/132.

8. It was the Applicant's case that it purchased land measuring four hundred forty-five (445) acres from Cis Mara/Ololulunga/132 vide a sale agreement dated 2<sup>nd</sup> June, 1991 where full consideration was paid and they were shown the ground by the vendors and beacons were planted thereon. The Applicant further deposed that Cis Mara/Ololulunga/132 was subdivided resulting in Cis Mara/Ololulunga/2662 and 2663. Cis Mara/Ololulunga/2662 was said to have been further subdivided resulting into Cis Mara/Ololulunga/3816, 3817 and 3818.

9. According to the Applicant, Cis Mara/Ololulunga/3816 was subsequently transferred to it and a title deed was issued in its favour in the year 1996. In the year 2015, the Applicant averred that it engaged a surveyor to carry out subdivision of Cis Mara/Ololulunga/3816 into individual members' portions vide a written mutual agreement dated 17<sup>th</sup> March, 2015. The Applicant thus stated that Cis Mara/Ololulunga/3816 has been fully subdivided into individual portions, however, the mutation and registration of new numbers was said to be still pending in spite having been fully paid for.

10. It was also the Applicant's case that they recently learnt through the Narok Land Registrar who shared with them the aforesaid ruling of the court that the case is still pending in court, and that they have not been served with anything in the case in spite them being Interested Parties by virtue of being beneficiaries of the parcels of land subject of the restraining orders from the court.

11. In the circumstances, the Applicant prayed to be allowed to join the suit as an Interested Party in order to safeguard their interest over Cis Mara/Ololulunga/3816. The Applicants thus contended that it is in the interest of justice that they be joined as Interested Parties in the proceedings to enable them ventilate their claim.

12. The Plaintiff/Respondent opposed the application through a Replying Affidavit sworn on 26<sup>th</sup> June, 2021 by Nanai Ole Leperes who deposed that he was aware that Applicant, Chamoan Konini Ole Mapelu and three other had sued the Plaintiff over suit properties Cis Mara/Ololulunga/3814 and 3817 in ELC Cause No 428 of 2017, which suit he deposed was dismissed with costs to the Defendants on 20<sup>th</sup> February, 2021. The Plaintiff/Respondent therefore contended that the application suffers from non-disclosure and should thus be dismissed with costs.

13. It was contended that the Applicants are not proper persons before the court since their inclusion is meant to revive the suit that was already dismissed. The Plaintiff/Respondent further deposed that the absence of the Applicants in the case will not render the court handicapped in one way or another. According to the Plaintiff/Respondent, the Applicants had their day in court through ELC 428 of 2017 which opportunity they squandered, as such, the Plaintiff/Respondent urged that they should not be allowed to have another day in court as that will occasion great prejudice to the Plaintiff/Respondent.

14. Further, the Plaintiff/Respondent contended that the application is meant to delay the finalization of the case, and that there will be no prejudice or clear lacunae in the proceedings if the Applicants are not included in the proceedings. It was also the Plaintiff/Respondent's case that the proceedings can be properly conducted without the Applicants inclusion. Further, it was contended that the application is not supported by grounds which would justify joinder of the Applicants as Interested Parties, and that there is no reason or any sufficient cause which the court can exercise its discretion in favour of the Applicants.

15. The Plaintiff/Respondent also filed Grounds of Opposition dated 5<sup>th</sup> May, 2021 in opposition to the application dated 6<sup>th</sup> April, 2021 wherein it contended that the presence of the 2<sup>nd</sup> Applicant was not a necessary for the court to effectually and completely determine the issues in question since its interest is only superficial. According to the Plaintiff/Respondent, the application is only meant to delay the finalization of the case as the threshold for joinder had not been met.

16. It was also pleaded by the Plaintiff/Respondent that it has the liberty to choose the party to sue as Defendants, which right it exercised in suing the Defendant in this case. Further, the Plaintiff/Respondent deposed that there is no prejudice that would be occasioned if the Applicant is not joined in the proceedings. The Plaintiff/Respondent thus maintained that the application is not supported by grounds which would justify joinder of the Applicant.

17. The court was therefore urged to dismiss both applications with costs.

18. In their submissions dated 21<sup>st</sup> June, 2021 and filed on 5<sup>th</sup> July, 2021, the Applicants submitted that they had demonstrated sufficient reasons for them to be joined as Interested Parties in the proceedings. It was the Applicants' submission that they have an interest over the parcel of lands forming the subject matter of the suit before the court by virtue of them claiming to be the owners of the parcels of land, hence, it was their submission that they ought to be joined in the proceedings to enable them ventilate their issues before the court.

19. In urging the court to allow their applications, the Applicants reiterated the grounds relied on their applications submitting that in light of their interest, the eventual decision of this court will affect them. They therefore urged the court to allow their applications.

20. To buttress their submissions, the Applicants relied on the case of **Moses Wachira vs Niels Bruel & 2 Others [2015]eKLR**.

21. Whilst the Defendants informed the court that they were not opposed to the applications, the Plaintiff/Respondent opted not to file written

submissions, thus, placing reliance on its Replying Affidavit sworn on 26<sup>th</sup> June, 2021 and the Grounds of Opposition dated 5<sup>th</sup> May, 2021.

22. Having considered the two applications before the court and the material in support thereof including the submissions as well as the Plaintiff/Respondent's response thereto, the following substantive issues arise for determination by the court:

- i) **Whether the Applicants should be joined in this suit as Interested Parties; and**
- ii) **Whether the applications are merited under the circumstances.**

23. **Order 1 Rule 10(2)** of the **Civil Procedure Rules, 2010** makes provision for joinder of parties to a suit. It provides as follows:

**“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”**

24. On the test for application for joinder, in **Shirvling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 others [2018]eKLR** it was held as follows:-

**“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”**

25. In answer to the first issue, the same will turn on whether the Applicants' 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. In a nutshell, the Applicants' case for joinder in these proceedings is that they have an interest over the parcel of lands forming the subject matter of the suit before the court by virtue of them claiming to be the owners of the parcels of land, hence, it was their contention that they ought to be joined in the proceedings to enable them ventilate their issues before the court.

26. On the other hand, the Plaintiff/Respondent opposed the application contending that that the presence of the Applicants was not necessary for the court to effectually and completely determine the issues in question since their interest is only superficial. According to the Plaintiff/Respondent, the applications are only meant to delay the finalization of the case as the threshold for joinder had not been met.

27. In addressing the issue at hand, the Court of Appeal decision in **Civicon Limited v Kivuwatt Limited & 2 others [2015]eKLR** is of particular relevance. In that case, the court held that:

**“From the forgoing 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 is 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 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.”**

28. On its part, the High Court in **Andy Forwarders Services Limited & another v Price - Waterhouse Coopers limited & another [2012]eKLR** held that:

**“A person may be joined in a suit not because there is a cause of action against him, but because that person's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter”**

29. From the record, it is apparent to the court that the Applicants are indeed claiming to have a direct interest over the parcel of lands forming the subject matter of the suit before the court. In light of this, I am of the view that joinder of the Applicants will assist the court to completely settle all the questions involved in the proceedings, and that the same will also prevent a proliferated litigation. I, therefore, find that the presence of the Applicants in this proceedings to be necessary for the determination of the real questions in controversy in the suit. In arriving at this determination, I am of the opinion that by joining the Applicants to this proceedings, there is no prejudice that will be suffered by the other parties in the case since they will all have an opportunity to respond to the Applicants' case and evidence at the trial.

30. In light of the foregoing, and having carefully considered the material on record, I find that there are just reasons for allowing the applications before the court. Accordingly, it is my finding that the two applications are merited under the circumstances, and I therefore allow the same. For avoidance of doubt, the two applicants herein shall join the suit as defendants. Accordingly, parties are at liberty to amend their pleadings. Costs of the two applications shall abide the outcome of the substantive suit.

**SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021.**

**MBOGO C.G,**

**JUDGE**

**8/12/2021**

**In the presence of:**

**CA: T.Chuma**