



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 20 OF 2019

SARAH JEPWAMBOK.....PLAINTIFF

-VERSUS-

KIBIWOTT CHEPKUTO.....DEFENDANT

-AND-

GEOFFREY KIPROTICH CHEMWENO.....INTERESTED PARTY

RULING

[1] The Notice of Motion dated **13 November 2020** seeks the joinder of the interested party, **Geoffrey Chemweno**, to this suit. He filed his application under **Article 40(1), (2) and (3)** and **Article 259(1) and (2)** of the **Constitution**; **Section 1A, 1B, 3, 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; **Section 13(7)(b) and (h)** of the **Environment and Land Court Act, No. 19 of 2011**, **Sections 71 and 73 of the Land Registration Act**; **Order 1 Rules 8 and Order 51 Rules 1 and 10** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] the Court be pleased to grant leave to the proposed interested parties to be enjoined, pending the hearing and determination of the application *inter partes*;

[c] the Court do make a declaration that the enjoined interested parties, **Geoffrey Kiprotich Chemweno** and **Maria Chepchumba**, are the legal and *bona fide* owners of the land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha., having lawfully purchased the same for value from the Defendant.

[d] the Court do issue a prerogative order mandating the Uasin Gishu County Land Registrar to register the interested parties as the legal owners of the said property, land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha., and issue the interested parties, **Geoffrey Kiprotich Chemweno** and **Maria Chepchumba Limo** with the title deed for the said land.

[e] the costs of the application be provided for.

[2] The application was premised on the grounds that the interested parties have a legal interest in the part of the subject matter herein as the bona fide legal owners of **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha., which they purchased from the defendant for value. It is therefore their contention that that portion does not form part of the matrimonial property in dispute between the parties; and ought therefore to be separated from the larger portion of the land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/25**, measuring approximately 10.66 Ha.

[3] It was further averred that the defendant has no objection to the interested parties' claim; that he had obtained consent for the subdivision on **7 May 2019**; and that it is necessary to obtain prerogative orders mandating the Uasin Gishu County Land Registrar to receive the conveyance and register the proposed interested parties as the owners of the land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha.; and that no prejudice will be suffered by either the plaintiff or the defendant should the orders sought be granted.

[4] The application was supported by the affidavit of the applicant, **Geoffrey Chemweno**, sworn on **10 November 2020**, in which he averred that he bought a portion of land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha from the

defendant on **29 May 2017** and has been in occupation of it to date; and that when he went to collect his title deed, he was informed that a Conservatory Order had been placed over the said parcel of land by the plaintiff. He explained that the portion he bought was curved out of the larger piece of land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/25**, in respect of which the plaintiff had placed a caution; which caution was lifted vide an order dated **24 January 2018** by the Environment and Land Court in **Eldoret ELC Miscellaneous Application No. 25 of 2017**. It was therefore the averment of Mr. Chemweno that he is entitled to the orders sought to secure his interests against the plaintiff's claim.

[5] The plaintiff opposed the application vide her Replying Affidavit sworn on **10 March 2021**. She averred that the prayers sought in the said application cannot be granted at the interlocutory state. She took the position that the land sale transaction between the defendant and the applicant is null and void for want of spousal consent. The plaintiff further averred that, having contributed financially towards the purchase of the parcel of land number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/25**, she ought to have been involved at every stage of the sale. She also pointed out that there is no registered parcel of land known as **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163**.

[6] Pursuant to the orders given herein on **16 March 2021**, the application was canvassed by way of written submissions. Thus, the applicant's written submissions were filed herein on **20 March 2021** by **Ms. Kirwa**. She proposed two issues for determination; namely, whether the plaintiff has met the threshold for the issuance of an order of injunction; and whether the orders sought herein can be granted. She relied on **Giella vs. Cassman Brown & Company Ltd** [1973] EA 358 for the applicable three-point test of *prima facie* case, irreparable harm and balance of convenience. She further submitted that the applicant has made out a *prima facie* case to back up his claim to ownership of **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha., which he purchased from the defendant.

[7] Counsel faulted the plaintiff for failing to disclose to the Court that the Caution she had placed against the property known as **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/25**, had been lifted by the Environment and Land Court vide **E&L Miscellaneous Application No. 25 of 2017**; or that the said parcel of land had been subdivided and 13 new numbers registered on **12 July 2018** including parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163**. She consequently posited that the assertions that the plaintiff had contributed towards the purchase of **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/25** and therefore ought to have been informed of the land sale agreement beforehand are issues that should have been raised before the **ELC**.

[8] **Ms. Kirwa** further submitted that the plaintiff is guilty of material non-disclosure in her failure to disclose that the defendant had already gifted her with land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/161** measuring approximately 3 acres; and therefore that irreparable harm will befall the applicant unless the orders sought are granted. She further urged the Court to find that the balance of convenience is in favour of the applicant who has been in occupation of **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** since **2017**.

[9] **Mr. Martim** for the plaintiff relied on his written submissions dated **26 April 2021**. He made reference to **Order 1 Rule 10(2)** of the **Civil Procedure Rules** and fashioned his submissions after the prerequisites laid down therein, namely:

[a] that an applicant for joinder must be a necessary and proper party;

[b] That the ultimate order or decree cannot be enforced without his presence in the matter;

[c] That his presence is necessary to enable the court to completely adjudicate upon and settle all questions involved in the suit.

[10] It was accordingly the submission of **Mr. Martim** that, since the dispute is over matrimonial property, the applicant is not a necessary party. He added that the applicant's claim to ownership of **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** is an entirely different matter, to be ventilated before the **ELC**, if need be. He relied on **Amon vs. Raphael Tuck & Sons Ltd** [1956] 1 ALLER 273 cited in **Pizza Harvest Limited vs. Felix Midigo** [2013] eKLR; and **SKOV Estate Limited & 5 Others vs. Agricultural Development Corporation & Another** [2015] eKLR, in urging the Court to find that the applicant is not a necessary party to this suit.

[11] On whether the applicant should be declared a *bona fide* owner of the suit land, it was the submission of **Mr. Martim** that, first and foremost, the transaction in respect of which the declaratory orders are sought is null and void *ab initio* for lack of spousal consent for purposes of **Section 28** of the **Land Registration Act, No. 3 of 2012**. He relied on **Kazdo Mkutano vs. Mkutano Mwamboie Kadoshu & 2 Others** [2016] eKLR and **Marigat Group Ranch & 3 Others vs. Wesley Chepkoimet & 19 Others** [2014] eKLR. The second argument against the proposed joinder is that an interested party is not strictly speaking a plaintiff or defendant; and therefore that the applicant ought to have sought joinder either as a plaintiff or defendant to be able to seek substantive relief in this suit. Counsel urged for caution in the handling of applications of this nature to ward off persons out to agitate their own personal rights while disguised under the cloak of interested parties. He accordingly prayed for the dismissal of this suit.

[12] I have given careful consideration to the application, the supporting and replying affidavits, as well as the submissions made before the Court. I agree entirely with the submissions of **Mr. Martim** that the application as well as the applicant's written submissions are somewhat convoluted; and therefore betraying a lack of the needed grasp of the issues at hand for purposes of proper articulation. For instance, although there is only one applicant, **Geoffrey Chemweno**, he is referred to in the heading as proposed interested parties/applicants. Moreover, at paragraph (c) and (d) of the grounds raised in support of the application, reference is made to two interested parties, namely **Geoffrey Kiprotich Chemweno** and **Maria Chepchumba Limo**, without any justification for the addition of **Maria Chepchumba Limo**. The Supporting Affidavit is specific to **Geoffrey Chemweno** as the avowed owner of **Plateau/Chepkongony Block 6 (Rotuga) 163**. Not a single reference has been made therein of **Maria Chepchumba Limo** or her nexus with the aforementioned piece of land.

[13] Secondly, although the application is for joinder of an interested party, in her written submissions, **Ms. Kirwa** opted instead to demonstrate a case for the issuance of the remedy of temporary injunction at pages 2 to 8 thereof. She even ventured, at paragraph 19 of her written submissions, to argue in favour of the setting aside of the conservatory orders issued herein on **30 September 2020** in a tone that smacked of arguments on appeal. By so doing, counsel deviated from the main subject of the instant application and ultimately failed to

address the subject of joinder of an interested party.

[14] Thirdly, counsel for the applicant attempted to make a case for the issuance of final orders at this interlocutory stage before the adduction of evidence. Thus, in paragraph (c) and (d) of the Notice of Motion dated **13 November 2020**, the applicant prayed that:

[c] the Court do make a declaration that the enjoined interest parties, **Geoffrey Kiprotich Chemweno** and **Maria Chepchumba**, are the legal and *bona fide* owners of the land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha., having lawfully purchased the same for value from the Defendant.

[d] the Court do issue a prerogative order mandating the Uasin Gishu County Land Registrar to register the interested parties as the legal owners of the said property, land parcel number **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)/163** measuring 1.01 Ha., and issue the interested parties, **Geoffrey Kiprotich Chemweno** and **Maria Chepchumba Limo** with the title deed for the said land.

[15] It is therefore of paramount importance that the forgoing anomalies be raised so as to refine the real issues in contest in this application; and in particular, circumscribe the applicant's interest in this suit, if any; bearing in mind that it is a dispute over matrimonial property. The Supreme Court provided the rationale for such circumspection in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others** [2014] eKLR when it held that:

"a suit in court is a solemn process, owned solely by the parties. This is why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined to a suit as an interested party, this new party cannot be heard to seek to strike out the suit on the grounds of defective pleadings."

[16] Consequently, for purposes of the instant application, I will confine myself to the single issue, namely, whether sufficient cause has been shown for the joinder of the applicant, **Geoffrey Kiprotich Chemweno**, as an interested party to this suit. The procedural provision upon which the application was hinged is **Order 1 Rule 8** of the **Civil Procedure Rules**. It provides that:

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

[17] There is no indication that this is a representative suit for purposes of **Order 1 Rule 8** aforesaid. Indeed, as has been pointed out hereinabove, it is a dispute between husband and wife over what the plaintiff alleges to be matrimonial property; and hence, the approach by the applicant under **Rule 8 of Order 1, Civil Procedure Rules**, appears to be misguided. I therefore share the sentiments of **Hon. Muriithi, J.** in **Brek Sulum Hemed vs. Constituency Development Fund Board & Another** [2014] eKLR, that:

"To be sure there is no procedure under the Civil Procedure Act and Rules for the joinder of interested parties and the practice of application for [by] interested parties must have been developed by necessary implication..."

[18] Accordingly, guidance has often been sought from the wording of **Order 1 Rule 10(1)** of the **Civil Procedure Rules**, which requires that such a person be a necessary party, or one whose presence is necessary for the effectual determination of the dispute. Hence, in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others** (supra), the Supreme Court adopted the definition of 'interested party' as given in **Black's Law Dictionary**, namely, that such a party must have **"...a recognizable stake (and therefore standing) in a matter."** The Supreme Court proceeded to hold thus at paragraph 18 of its ruling:

"... an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

[19] Moreover, as pointed out in **Judicial Service Commission vs. Speaker of the National Assembly** (supra), unlike an *amicus curiae*, an interested party **"...may not be wholly indifferent to the outcome of the proceedings in question... he may not be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."**

[20] With the foregoing in mind, I have given consideration to the application dated **13 November 2020**. There is no gainsaying that the subject property, namely, **Plateau/Chepkongony Block 6 (Rotuga) 25** is the mother title for the applicant's **Plateau/Chepkongony Block 6 (Rotuga) 163**. The applicant annexed to his supporting affidavit a copy of the Sale Agreement entered into between him and the defendant on **29 May 2017**; which agreement confirms that the title was then known as **Plateau/Chepkongony Block 6 (Rotuga) 25**. He likewise exhibited copies of the Letter of Consent, Transfer, Mutation Form and Certificate of Search to demonstrate that the subdivision was effected and the purchased portion duly registered in the applicant's name. As to whether or not spousal consent was obtained is an issue that must await the final determination of the dispute.

[21] In the premises, I am satisfied that the applicant has demonstrated that he has an identifiable stake in the subject matter of this dispute; and that his participation will be necessary for the effectual determination of the suit. Accordingly, his prayer to be enjoined as an interested party is hereby allowed with an order that each party to the application shall bear own costs in any event.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 8TH DAY OF JUNE, 2021

OLGA SEWE

JUDGE