



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 41'A' OF 2012

KANGO ENTERPRISES LIMITED..... 1ST PLAINTIFF

-VERSUS-

JOHN FRASER UNSWORTH.....1ST DEFENDANT

GAIL UNSWORTH (*sued as the Administrator of the Estate of John*

***Fraser Unsworth*)..... 2ND DEFENDANT**

FREDERICK KAZUNGU.....3RD DEFENDANT

THE ATTORNEY GENERAL..... 4TH DEFENDANT

THE COMMISSIONER OF LANDS..... 5TH DEFENDANT

THE CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

1. By the Chamber Summons application dated and filed herein on 4th November 2020, Grace Mgoi Mushimba (*the Applicant*) prays for an order that she be enjoined in the suit herein as the 7th Defendant in her capacity as the Administrator *ad litem* of the Estate of Morris Ngole Machache.

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds:

(i) *That at all material times, the late Morris Ngole Machache was the registered proprietor of freehold interest in Parcel No. 327 situated in Chembe/Kibabamshe Registration Section;*

(ii) *That the deceased's customary land rights to the suit property having been established through the land adjudication process, the suit property was adjudicated in favour of the deceased on 7th September, 1977.*

(iii) *That upon payment of the requisite fees the deceased was registered as the proprietor of the suit property on 12th January, 1984 and is entitled to the full protection of the law;*

(iv) *That the deceased's registration was a first registration under the Registered Land Act, Cap 300 (now repealed) and he holds a valid certificate of title in respect of the suit property which can only be challenged upon application of the due process;*

(v) *That once the deceased became the registered proprietor of the suit property, the same ceased to be available to the Government of Kenya for alienation and the same could not be subjected to allocation, adjudication or disposition;*

(vi) *That to-date, the deceased has not been given any notice of a defect to his title by the 4th, 5th and 6th Defendants;*

(vii) *That the circular No. 1139336/55 issued by the then Commissioner of Lands and Gazette Notice No. 2505 of 30th May, 1986 were all held to be unconstitutional and illegal;*

(viii) That in circumstances unbeknown to the deceased and his estate, Roving Investments (A) Limited with the collusion of 5th and 6th Defendants' officers corruptly, illegally, unprocedurally, by mistake and without any colour of right obtained a title deed in its favour on 18th February, 1999. Subsequently on 6th May, 1999, the said Roving Investment (A) Limited transferred the title to the Plaintiff which again allegedly transferred the same to the 1st Defendant herein on 19th October, 2007.

(ix) That in order to determine the real issues in controversy herein, it is only fair and in the interest of justice that the orders sought be allowed.

3. Gail Unsworth (the 2nd Defendant) sued in her capacity as the Administrator of the estate of John Fraser Unsworth (the 1st Defendant) is opposed to the application. In her Replying Affidavit filed herein on 29th January, 2021, the 2nd Defendant avers that the Applicant/intended 7th Defendant has not disclosed sufficient interest and relationship with the subject matter herein to warrant the orders sought.

4. The 2nd Defendant avers that arising from the grounds cited in the application, the Applicant ought to institute separate proceedings against the 4th, 5th, 6th Defendants as well as the National Land Commission for compensation instead of joining the present suit.

5. Though they did file Grounds of Opposition to the application on 3rd February, 2021, Kango Enterprises Limited (the Plaintiff) later on 4th March, 2021 told the court that they had no issue with the application.

6. I have carefully considered the application by the intended 7th Defendant and the response thereto by the 2nd Defendant. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. **Order 1 Rule 2 of the civil Procedure Rules, 2010** provides as follows:

“(2) The court may at any stage of the proceedings either upon or without the application of either party, and on such terms an 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.”

8. As was stated by **Gikonyo J in Zephir Holdings Limited -vs- Mimosa Plantations Limited and 2 Others (2014) eKLR:**

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order *suo moto* for a party to be impleaded whose presence may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit ...”

9. In the matter before me, the Applicant contends that her husband, the late Morris Ngole Machache was the registered proprietor of a freehold interest in land parcel No. 327 situated in Chembe/Kibabamshe Registration Section. In support of that contention, the Applicant has annexed a certificate of title issued in the name of the said Morris Ngole Machache for Title Number Chembe/Kibabamshe/327 on 12th January, 1984.

10. From the annexed Limited Grant *ad litem* issued to the Applicant on 28th October, 2020 in Malindi HC P&A cause No. E3 of 2020, it is apparent that the said Morris Ngole Machache passed away on 21st October, 2014 at Shimo La Tewa. It is the Applicant's case that in circumstances unknown to her deceased husband and the dependents of the estate, a company by the name Roving Investments (A) Limited was on 18th February, 1999 issued with another title deed for the same suit property before the same was first transferred to the Plaintiff and subsequently the 1st and 2nd Defendant herein.

11. Looking at the totality of the circumstances herein, I am persuaded that the Applicant has demonstrated that she has an interest in the subject matter of this suit and/or that she is liable to be affected by any order that this court may make in respect of the suit property at the conclusion of the trial. As it were, joinder should be permitted to all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise.

12. In the premise herein, it is the Applicant's case that her deceased husband was the first registered proprietor of the suit property in the year 1984 and it is unclear to them how a new title deed came to be issued to other parties in the year 1999. In my mind, I think it would be proper for the court to interrogate in one suit the circumstances under which the new title was issued for the same piece of land.

13. Accordingly I find merit in the Chamber Summons application dated 4th November, 2020 and allow the same with no order as to costs.

14. Having been enjoined as the 7th Defendant, the Applicant is hereby granted 21 days within which to file and serve a Statement of Defence or claim, witness statements and list of documents, if any, upon other parties herein. The rest of the parties shall be at liberty to file any necessary responses within 14 days of service.

15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 2ND DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

In the presence of:

Mr. Binyenya for the Applicant

No appearance for Rachier for the Plaintiffs

No appearance for IAJ Partners for the 1st, 2nd and 3rd Defendants

No appearance for Ms Lutta for the 4th, 5th and 6th Defendants

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J. O. OLOLA

JUDGE