



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 196 OF 2017

VERONICAH KIMOI KIMITEI.....PLAINTIFF

VERSUS

FRANCIS KOSGEI ARGUT.....DEFENDANT

RULING

This ruling is in respect of an application dated 17th September 2019 by the defendant applicant seeking for the following orders:-

- a) That the court orders the plaintiff to surrender original letter of allotment and lease to the Director of Criminal Investigation for authentication.
- b) The court issues directions on whether Musa Mulwo (beneficial owner) should be included as a party in the suit.
- c) That in the alternative upon giving her testimony the court gives the original letter of allotment and lease the Director of Criminal Investigation for authentication.

The applicant argued that there are two sets of allotment letters over the suit property and that it would require take the directorate of Criminal Investigation 7 days to authenticate the said documents if the application is allowed.

The applicant further stated that he is the legal administrator of the deceased's estate and that he surrendered his documents to the police for authentication but the plaintiff has refused to surrender the same on the ground that she will use the said documents during the hearing of this case.

It was the applicant's argument that the burden of proof in fraud cases is high and the said burden will only be established if the documents held by the plaintiff are authenticated. That the plaintiff testified on oath that she had sold the property to one Musa Mulwo who is not a party to these proceedings yet he claims to have purchaser's interest on the suit property.

Lastly, the defendant/applicant urged the court to invoke article 159 of the Constitution and Section 3A of the Civil Procedure Act and allow the application since it is in the best interest of justice.

Counsel for the plaintiff/respondent opposed the application and stated that the court has no jurisdiction to entertain the motion under any of the stated provisions as Order 8 rule 2 relates to amendment of pleadings, order 52 rule 6 relates to enlargement of time, order 51 rule 1 cannot confer jurisdiction where no jurisdiction exists and 79G and 95 of the Civil Procedure Rules are of no relevance as no appeal exists to be admitted.

Counsel further submitted that the court has no jurisdiction to give directions as to the joinder of Musa Mulwo where no cause of action has been established against him and that the proceedings of Kabarnet Miscellaneous Application No. 33 of 2019 has not been annexed to guide the court to the outcome and whether the court directed the defendant to file the present application.

It was counsel's submission that the court has no criminal jurisdiction and the matter being raised by the defendant is not within its competence. That the applicant must satisfy the court as to the necessity of the presence of Musa Mulwo in order for the suit to be effectively adjudicated upon.

Counsel also submitted that the dispute is about the ownership of land parcel number Kabarnet Township/177 and the defendant has not demonstrated the necessity to have Musa Mulwo in court as a party in order to solve the issue of ownership. Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The application is twofold where the defendant applicant wants the court to compel the plaintiff to surrender here allotment letter for verification and authentication by the Directorate of Criminal investigation and the court to issue directions whether one Musa Mulwo should be added as an interested party. This is a part heard matter where pre trials had been done and directions given as to how the matter would proceed. Parties had already exchanged their documents which they wished to rely on. The plaintiff has already testified. The issue for determination is as to whether the court can grant the orders sought by the defendant to subject the plaintiff's allotment letter to verification by the DCI and whether Musa Mulwo can be added as an interested party.

On the first issue on verification of the allotment letter of the plaintiff, if the same had not been verified through the process of the defendant filing a complaint with the relevant authorities to investigate fraud then, he cannot use the court to make such orders.

Allotment letters are issued by the Commissioners of Lands(as the office then was) and if there is any query as to the authenticity of an allotment letter then the defendant can ask for summons to issue to the issuing authority to come to court with the file to authenticate the same. This is still an avenue which is still open. On that note I find that this limb of the application has no merit and therefore fails.

On the second issue on whether Musa Mulwo should be enjoined as an interested party, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”

Legal Notice No 117 of 2013 further provides that, a person with leave of the Court may make an oral or written application to be joined as an interested party or the Court, on its own motion, may also join an interested party to the proceedings before it.

From the application, the applicant has not established that the said Musa Mulwo has a stake in the suit and whether enjoining him will enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added the expeditious adjudication of the case.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

“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 states that that the court can, upon satisfying itself that the person whose presence before the court may be necessary in order to enable or assist it effectually and completely determine all questions involved in a dispute, add such person as a party. The rules do not define who this person whose presence before the court is necessary is.

In the case of **Judicial Service Commission – Vs – Speaker of the National Assembly & Another (2013) eKLR**, the court defined an interested party as:

From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He 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.”

I find that the applicant has not shown that the proposed interested party has an identifiable state in the suit. The applicant's application is dismissed with costs to the plaintiff/respondent.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE