



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 42 OF 2019

ALBERT NGANGA KITHUA.....PLAINTIFF

VERSUS

AMBROSE NJIRU NTHIGA.....1ST DEFENDANT

SOSPETER MURIUKI IRERI.....2ND DEFENDANT

JOSEPH MURIITHI NYAGA.....3RD DEFENDANT

ISAAC MUCIOKI KANGL.....4TH DEFENDANT

CHARLES IRERI KATHAGU.....5TH DEFENDANT

ROBERT NGUNDI NGARI.....6TH DEFENDANT

EDWARD K. MBOGO.....7TH DEFENDANT

BENJAMIN MACHAKI KANYENJI.....8TH DEFENDANT

GENESIO NJAGI MUGO.....9TH DEFENDANT

SILAS NJERU KATHAGU.....10TH DEFENDANT

COUNTY GOVERNMENT OF EMBU.....11TH DEFENDANT

MURIITHI MICHAEL NJUE.....12TH DEFENDANT

PETER NJIRU MUGEKI.....13TH DEFENDANT

ROBERT MBOGO NJUKI.....14TH DEFENDANT

GENESIO NJAGI MUGO.....15TH DEFENDANT

LOISE NGUNYI NJUE.....16TH DEFENDANT

PETER IRERI NYAGA.....17TH DEFENDANT

BETH MUTHONI IRORI.....18TH DEFENDANT

IRENE IRIMA MWANIKI.....19TH DEFENDANT

JEREPHASIO KITHU MUGO.....20TH DEFENDANT

STEPHEN MURAGE GICHIRA.....	21 ST DEFENDANT
NICHOLAS MBUI MUTURI.....	22 ND DEFENDANT
MARK NJERU MURIUKI <i>sued on his own behalf as well as the</i>	
<i>Next friend to</i> ALEX KINYUA NJERU (JUNIOR).....	23 RD DEFENDANT
BENJAMIN NYAGA MURIUKI.....	24 TH DEFENDANT
PETER NYAGA MUGO.....	25 TH DEFENDANT
MARY GIKUU IRORI.....	26 TH DEFENDANT
MARIAM NYAKINYUA SALIM.....	27 TH DEFENDANT
WINFRED JANEWANJIRA MBITL.....	28 TH DEFENDANT
NGUKU MWANDIKE.....	29 TH DEFENDANT
ANTHONY NJIRU NJERU.....	30 TH DEFENDANT
JAMES NYAGA NGARI.....	31 ST DEFENDANT
JAMES NDWIGA MURIUKI.....	32 ND DEFENDANT
BERNARD KARIUKI MUNYI.....	33 RD DEFENDANT
JOSEPH NGARI MUTURI.....	34 TH DEFENDANT
MURIUKI NDINDIRU.....	35 TH DEFENDANT
LINCOLN NGARI NDINDIRU.....	36 TH DEFENDANT
NJIRU NTHIGA.....	37 TH DEFENDANT
SILAS NJIRU NYAGA.....	38 TH DEFENDANT
BENJAMIN NYAGA IRERI.....	39 TH DEFENDANT
CHARLES NJIRU MUCUNDE.....	40 TH DEFENDANT
JONATHAN NJUKI IRERI.....	41 ST DEFENDANT
PETERSON KARIUKI MUNYI.....	42 ND DEFENDANT
SISCO NYAGA MUNYI.....	43 RD DEFENDANT
JOSHUA MUGO KINGANGI.....	44 TH DEFENDANT
MICHAEL NYAGA IRORI.....	45 TH DEFENDANT
BERNARD MUCINDOA.....	46 TH DEFENDANT
ROBERT NJIRU KITHINJI.....	47 TH DEFENDANT
RICHARD WACHIRA MUGO.....	48 TH DEFENDANT
ANTHONY MURIUKI NDIL.....	49 TH DEFENDANT

JAMES MURIITHI NDII.....	50 TH DEFENDANT
JULIANA IROBO.....	51 ST DEFENDANT
PETER MURIITHI MURIUKI.....	52 ND DEFENDANT
MOSES MUNYI NJUKI.....	53 RD DEFENDANT
THE LAND ADJUDICATION OFFICER MBEERE.....	54 TH DEFENDANT
THE DISTRICT SURVEYOR MBEERE.....	55 TH DEFENDANT
THE LAND REGISTRAR MBEERE.....	56 TH DEFENDANT
THE ATTORNEY GENERAL.....	57 TH DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 31st October 2019 expressed to be brought under **Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21)** and **Order 10 (2), Order 5 Rule 15 (1) & 5 of the Civil Procedure Rules, 2010**, the 13th Defendant, Peter Njiru Mugeki, sought the following orders:

a. That this honourable court be pleased to order that the name of the 13th Respondent herein be struck out and that land Parcel No. Mbeere/Kirima/4151 be removed from the proceedings herein.

b. That in the alternative and without prejudice, the court do order a separate trial between the 13th Defendant/Respondent and the Plaintiff to the exclusion of other parties in respect to land Parcel Mbeere/Kirima/4151.

c. That the costs of the application be borne by the Plaintiff/Respondent.

B. THE 13TH DEFENDANT'S CASE

2. The said application was based upon the grounds set out on the face of the motion and supported by the 13th Defendant's affidavit sworn on 31st October 2019. The gist of the application was that the 13th Defendant's *Title No. Mbeere/Kirima/4151* ("parcel 4151") was not, and had never formed, part of *Title No. Mbeere/Kirima/1605* ("parcel 1605") which the Plaintiff was claiming in the suit. The Plaintiff, therefore, contended that there was no issue or dispute between the Plaintiff and him to be determined hence he was not a necessary party to the instant suit.

C. THE PLAINTIFF'S RESPONSE

3. The Plaintiff filed a replying affidavit sworn on 13th November 2019 in opposition to the said application on several grounds. First, it was contended that granting the orders sought would be tantamount to determining the suit against the 13th Defendant without a hearing on the merits. Second, that the 13th Defendant had not presented any evidence to demonstrate his allegation that parcel 4151 was never part of parcel 1605. Third, that it would be a waste of judicial time and resources to have a separate trial for the claim against the 13th Defendant. Finally, it was contended that the application was vexatious and abuse of the court process.

D. THE 13TH DEFENDANT'S SUBMISSIONS

4. The said application was prosecuted orally by Ms. Rose Migwi Advocate for the 13th Defendant on 4th February 2020. She prosecuted the application on the basis of the grounds set out in the notice of motion and the contents of the supporting affidavit. It was submitted that there was no nexus between parcel 1605 which the Plaintiff was claiming in the suit and parcel 4151. She, therefore, urged the court to have the 13th Defendant's name struck out of the proceedings or in the alternative for a separate trial to be ordered with respect to the 13th Defendant only.

E. THE PLAINTIFF'S SUBMISSIONS

5. The Plaintiff's advocate, Ms. Rose Njeru, opposed the said application orally on the basis of the contents of the replying affidavit sworn by the Plaintiff on 13th November 2018. It was submitted that it would be prejudicial to the Plaintiff for the court to allow the application since it would have the effect of determining the rights of the parties before trial. She submitted that, in any event, the 13th Defendant had not demonstrated that parcel 4151 was not part of parcel 1605. She urged the court to dismiss the said application so as to grant the Plaintiff a chance to prove the fraud alleged against the Defendants at the trial.

F. THE REST OF THE DEFENDANTS

6. The rest of the Defendants did not file any responses to the said application and neither did they tender any submissions at the hearing.

G. THE ISSUES FOR DETERMINATION

7. The court has considered the 13th Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the oral submissions of the parties. The court is of the opinion that the main question for determination herein is whether there is any nexus between parcels 1605 and 4151 and consequently whether the 13th Defendant is a necessary party to the suit.

H. ANALYSIS AND DETERMINATION

8. The 13th Defendant considered that he had been improperly joined in the suit since he contended that he had nothing to do with parcel 1605 which the Plaintiff is litigating about. He contended that his parcel No. 4151 was not and had never been part of parcel 1605 hence the Plaintiff had no legitimate claim against him. So, what is the evidence tendered by the 13th Defendant to demonstrate his allegation? The notice of motion dated 31st October 2019 is supported by a bare affidavit without any exhibits or annexures thereto. The 13th Defendant, therefore, chose to rely on his word only.

9. The court has perused the documents filed by the Plaintiff both in support of the suit and those filed in support of his application for interim orders dated 23rd September 2019. The court is unable to find any documents which give a complete history of parcel 1605 and its sub-divisions. The court has noted that the parties did not exhibit a copy of the land register for parcel 1605. The various certificates of official search on record do not show the history of those parcels and the chain of sub-division. They only indicate the current registered proprietors and the existing encumbrances against the titles.

10. The court is thus of the opinion that the 13th Defendant has failed to demonstrate that there is no nexus between parcel 1605 and parcel 4151. It may have assisted the court to ascertain the history of parcel 4151 if the 13th Defendant had provided a complete record of its history either through survey records or the land registers. The burden of proof in that respect squarely rested upon the 13th Defendant as provided for under **Section 107** of the **Evidence Act (Cap. 80)**. The said section stipulates that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

I. CONCLUSION AND DISPOSAL ORDER

11. The upshot of the foregoing is that the court finds and holds that the 13th Defendant has failed to discharge his burden of proof with respect to the orders sought. Accordingly, the court finds no merit in the notice of motion dated 31st October 2019 hence the same is hereby dismissed in its entirety with costs to the Plaintiff.

12. It is so decided.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **28TH DAY** of **MAY 2020**. Ruling delivered via zoom platform in the presence of Ms. Rose Njeru for the Plaintiff, Ms. Mutegi holding brief for Ms. Kithaka for 4th, 5th, 6th, 7th, 8th, 10th & 12th Defendants; Ms. Migwi for the 13th – 53rd Defendants and in the absence of the rest of the parties.

Y.M. ANGIMA

JUDGE

28.05.2020