



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT & LAND COURT

ELC CASE NO 199 OF 2014

HABIBA W. RAMADHAN & 7 OTHERS PLAINTIFFS/RESPONDENTS

=VERSUS=

MARY NJERI GITIBA.....DEFENDANT/RESPONDENT

KIBUNGEI ARAP KOGOPROPOSED INTERESTED PARTY/APPLICANT

RULING

The matter for determination is the Notice of Motion dated **7th September 2016**, brought under **Order 1 Rule 10** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all enabling provisions of law. The application is brought by one **Kibungei Arap Kogo**, seeking for the following orders:-

- 1. The applicant herein Kibungei Arap Kogo be joined in this suit as an interested party in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit.**
- 2. That this application be heard on a priority basis given the Court's orders on 10th April 2015, is affecting the progress of ELC No.410 of 2007 Nairobi where the subject matter is the same.**
- 3. That the costs of this application be provided for.**

The application is based on the annexed affidavit of **Kibungei Arap Kogo** who averred that on **24th August 2011**, he filed a suit **No. 1441 of 2001** against the Defendant. The case no. was later changed to **ELC No. 410 of 2007** as per annexure "**KAK 1**". Further that **ELC 410 of 2007, Nairobi** was last in Court on **26th July 2016**, for pre-trial conference where the Court confirmed the matter ready for hearing and parties were allowed to take a hearing date.

He also averred that some of the plaintiffs in **ELC No. 199 of 2014** were his witnesses in **ELC No. 410 of 2007**, as per annexure "**KAK 2**". It was his contention that he learnt of this suit **ELC 199 of 2014**, through his tenants who informed him that they had collectively sued the Defendant, **Mary Gitiba**, herein that she be restrained from evicting them from plot **No. 225** which is now known as **LR No. 25180**. Further that his tenants had then informed him that the Court ruled on **10th April 2015**, that the Plaintiffs should not be evicted from the suit premises as per annexure "**KAK 3**".

It was his contention that the Defendant had never been a landlord in his premises. Any payment to

the said account would lead to money going to wrong person as he had an arrangement with tenants on how to go about the rent waiting the hearing and determination of **ELC No. 410 of 2007**. He alleged that he intended to apply for review of order issued on **10th April 2015**, once he is enjoined as an interested party as the same had far reaching consequences on **ELC No. 410 of 2007**, and that he could only apply for review or order made on **10th April 2015**, if he was joined as an interested party in this suit. That he also intended to apply for consolidation of this suit together with **ELC No. 410 of 2004**, as the same involve the same subject matter and any order in one matter affects the other.

The deponent contended that on **23rd December 1997**, he was issued with allotment letter by Department of Lands, City Council of Nairobi for **plot No. 225** as per annexure "**KAK 5**". He further deposed that sometimes after he was issued with allotment letter he was summoned by their assistant chief who informed him that the Defendant claimed she was the owner of the house and she wanted him to start paying rent to her.

He also contended that the Defendant had been harassing his tenants since she fraudulently acquired the said allotment letter. It was his further contention that **Plot No. 206** and **plot No. 225** refer to one and the same plot. Therefore it will be in the interest of justice that he be enjoined in this suit as an interested party to enable the Court to effectively and completely adjudicate upon and settle all questions involved in this suit. Further that it is in the interest of justice that the orders sought herein should be granted.

The application was served on the Defendant on **22nd September 2016**, as evident from the Return of Service filed in Court on **12th October 2016**, and sworn by **Dickson Wambua Makau** a process server. On **12th October 2016**, when the matter came up for hearing of the instant Notice of Motion, the Court noted that the Plaintiffs had not been served and **Mr Kinyanjui** for the Defendant was present but had not filed a Replying Affidavit in reply to the Notice of Motion. The court granted the Defendant leave of 7 days to file Replying Affidavit and the matter was slated for hearing on **7th November 2016**.

Further the court directed that the Plaintiffs be served with a tabulation of rent arrears for each one of them as directed by the court on **10th April 2015**. On **7th November 2016**, the matter was not cause listed and the court granted another hearing date of **22nd November 2016**.

Further on **22nd November 2016**, **Mr Kinuthia**, for the proposed interested party and **Mr Kariuki** for the Plaintiffs were present in court but **Mr Kinyanjui** for the Defendant was absent. There was an affidavit of service filed on **22nd November 2016**, sworn by **Dickson Wambua Makau** a process server showing that a hearing Notice was served on the Law Firm of **J.Harrison Kinyanjui & Co.** for the Defendant on **17th November 2016**. The Defendant had also not filed her Replying Affidavit in opposition to the Notice of Motion. The Court being satisfied that the Defendant's advocate was served with a hearing notice for **22nd November 2016**, and the fact that the plaintiffs were not opposed to the application directed that applicant to file brief written submissions.

The same was fixed for mention on **29th November 2016**, to confirm filing of the written submissions. From the affidavit of service filed in court on **28th November 2016**, sworn by **Dickson Wambua Makau**, it was clear that the written submissions and mention Notice for **29th November 2016**, were served on the Defendant's advocate on **23rd November 2016**. The application is therefore not opposed and it is evident that the Defendant and plaintiffs advocates were aware of the Court's appearance date.

The Court will now have to determine the matter on the available pleadings from the proposed interested party and the written submissions filed in court on **23rd November 2016**.

The application herein is brought under **Order 1 Rule 10(2)** of the Civil Procedure Rules which provides that:-

“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”.

Further it is brought under **Section 3A** of the **Civil Procedure Act** which donates the inherent power to this Court to make such orders as may be necessary for the ends of justice and prevent abuse of the Court process.

The principles to be considered in deciding whether or not to add or enoin a party to a suit are well settled. In the case of **Benjamin Kipkulei tai Vs Kenya Commercial Bank, Kisumu High Court, Civil case no. 87 of 2003**, the Court held that;-

“ The test to be applied in an application to join a party to a suit of a plaintiff or defendant is whether the relief claimed by the Plaintiff in the suit will directly affect the intervenor (applicants) in the enjoiment of his right. The intervener must show that he has a direct and legal interest in the relief the Plaintiff is seeking and person is legally interested in a relied if he can show that the result of the suit will affect him legally by curtailing his rights thereby making him a necessary party to the suit”.

Further in the case of **Housing Finance Company of Kenya Ltd Vs Faith Kimelia and another, Civil Appeal No. 214 of 1996**, the Court held that;-

“Order 1 Rule 10 of the Civil Procedure Rules provide for the addition of a party to a suit so that his presence before the Court may enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit to enable the Court to determine the real matters in dispute”.

From the provisions of **Order 1 Rule 10(2)** and the above decided cases, it is clear that party can be added to a suit on either application by any party or the courts own motion if the presence of the said party is necessary in aiding the court to effectually and completely settle an issue in dispute and if the said party is bound by the result of the action and the question to be settled must be question which cannot be effectively and completely settled unless the said party is a party to the dispute.

The question that the court would determine is whether the applicant herein meets the above criteria.

The applicant has sought to be enjoined as an interested party. The interested party is defined by **Rule 2** of the **“The Constitution of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules 2013** as :-

“Interested party means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation”

The applicant herein **Kibungei Arap Kogo** has alleged that he is the legal owner of the suit property in dispute herein. Further that he has sued the Defendant herein in **ELC No. 410 of 2007** which is pending before Court. That the suit property in dispute in **ELC No. 410 of 2007** is **LR No. 25180** which is the same suit property in dispute in this suit. Therefore the applicant has an identifiable stake or legal interest in this proceeding and the proceedings may have a direct impact on **ELC No. 410 of 2007**.

The Court has indeed considered the pleadings in this matter and noted Plaintiffs herein have mentioned the applicant in their pleadings and that the Defendant has attached a copy of her Grant which is for **LR No. 25180** and that is the subject matter in **ELC 410 of 2007** between the applicant and the

Defendant herein. The applicant herein has an identifiable stake in this suit and therefore qualifies as an interested party.

The Court having found that the applicant herein qualifies to be an interested party, is he merited to be enjoined in the suit herein?.

As already observed by the Court, under **Order 1 Rule 10(2)** the Court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. However, the said discretion must be exercised judiciously.

The interested party herein has averred that he is the legitimate owner of the suit property in dispute and that the Plaintiff herein are his tenants and that this matter cannot effectively and completely be decided in his absence. The Court has noted that in the pleadings filed by the Plaintiffs herein, they mentioned one **Kibungei Arap Kogo** who is the applicant herein.

There are questions to be determined whether **plot No. 206** is the same as **LR No. 25180**. These are issues which will have to be determined by calling of evidence. The Court will also have to determine the ownership of the suit property. Since there is another **ELC No. 410 of 2007** involving the Defendant herein and the applicant over the alleged suit property, the Court finds that the applicant herein is a necessary party whose presence may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved and in disputes in this suit herein.

From the foregoing, the Court finds that the applicant's Chamber Summons application dated **7th September 2016**, is merited. The same is allowed entirely in terms of **prayer no. 3** with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered this **20th** day *of January, 2017*

L.GACHERU

JUDGE

In the presence of ;-

Mr Kariuki for the Plaintiffs/Respondent

Mr Abidha holding brief for Mr Kinyanjui for the Defendant/Respondent

Mr Kinuthia for the Interested Party/Applicant

Court Clerk: Hilda

Court: Ruling read in open Court in the presence of the above stated advocates.

L.GACHERU

JUDGE