



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 70 OF 2017

(FORMERLY ELC NO. 14 OF 2016, EMBU)

TEBERE CONCRETE COMPANY LIMITED.....PLAINTIFF

VERSUS

DICKSON MACHARIA GICHUHI.....1ST DEFENDANT

MOSES NDUNG’U MUNGAI.....APPLICANT

RULING

The application before me is the Notice of Motion dated 18th March, 2019 brought under *Article 40 of the Constitution of Kenya, Section 63 (c) and (e) and Order 1 Rule 1 and 3, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Act* and Rules made thereunder and *Sections 24, 25 and 26 of the Land Registration Act*. The application seeks the following orders:-

(a) Spent.

(b) That the Applicant Moses Ndung’u Mungai be enjoined in this case as the 2nd Defendant in the Plaintiff’s claim and the Plaintiff in the intended counter-claim.

(c) That upon the 2nd Defendant/counterclaimant being enjoined in this case this application be heard inter-parties for further orders.

(d) That the Plaintiff/Respondent, that is the defendant in the counter-claim through its Directors, its management, employees, servants, agents or anybody acting on the instructions of, on behalf of or at the behest of the plaintiff be restrained from continuing to carry out excavations and/or mining of stones or quarrying activities perpetrating acts of wastage and degradation or in any other manner utilizing the 2nd defendant/counterclaimant/applicant’s lands parcel number MBEERE/WACHORO/1617 or interfering with the 2nd defendant’s occupation possession, access, use and exercise of his proprietary rights, over the said land pending the hearing and determination of this case.

(e) That costs be provided for.

The application is premised on grounds shown on the face of the application and the affidavit of the applicant sworn the same date. The supporting affidavit is further supported by numerous annexures including a copy of the title deed for the suit property L.R. No. MBEERE/WACHORO/1617 registered in the name of the Applicant. The Applicant also filed a supplementary affidavit sworn on 4th March, 2020 in further support of the application.

The said application is opposed by the Plaintiff/Respondent through its General Manager one Kavita Shah vide a replying affidavit sworn on 5th February, 2020. The replying affidavit is further supported by numerous annexures.

APPLICANT’S CASE

The Applicant deponed that he is the proprietor of land parcel number MBEERE/WACHORO/1617 which is the subject matter of this case and that as a registered proprietor, he should be enjoined in this case. The Applicant also contends that since the subject matter of this case belongs to him, the case should not proceed without his participation. He stated that he bought the land from Dickson Macharia Gichuhi, the 1st defendant herein sometime in the year 2015 and attached a sale agreement and copy of the title deed.

The Applicant deponed that after he bought the suit land, he issued a notice to the plaintiff on 13th October, 2015 through his advocates asking him to vacate his land to enable him access and take possession of the same. He stated that in a letter dated 19th October, 2015, the plaintiff replied to his demand letter and stated she was the lawful owner of the land after she purchased the same for value and that she even took possession of same.

RESPONDENT'S CASE

The Respondent who is also the plaintiff in this case through her general manager Kavita Shah filed a replying affidavit denying that the applicant is the registered proprietor of land parcel No. MBEERE/WACHORO/1617. To the contrary, the Respondent stated that the suit property belongs to her. She also deponed that the applicant's purported title to the suit property was obtained illegally irregularly and in contravention of the orders of this Honourable Court. The Respondent also stated that the Notice of Motion is dated 18.3.2019 but the truth of the matter is that the same was filed more than 3 months later meaning that the same is not urgent and brought in bad faith.

The Respondent further stated that the Applicant has not invoked the court properly under *Order 1 Rule 10* and that an application brought under *Order 1 Rule 25* is by way of Chambers Summons and not a Notice of Motion. The Respondent also deponed and stated that the Applicant is raising new and distinct issues as well as new grounds of defence within the meaning of *Order 7 Rule 16 CPR* which are not fit to be ventilated in the present proceedings and should instead be raised in a separate suit which could be heard together but not consolidated with the present suit. She deponed that the Applicant cannot be added to the present suit as proposed nor can he proceed with a counterclaim in the present suit; as the mandatory provisions of *Order 3 Rule 3, Order 7 Rule 3, 5, 6, 7 and 8* have not been satisfied and that the defendant had listed the Applicant as a witness meaning that his input into these proceedings can be called for through witness testimony rather than as a co-defendant.

The Respondent also deponed that the Applicant did file a separate suit against the plaintiff seeking the same orders as the present application in ELC Case No. 14 of 2019 (CM's Court Embu).

ANALYSIS AND DECISION

I have considered the Notice of Motion dated 18th March, 2019 the supporting affidavit and the annexures thereto. I have also considered the replying affidavit of Kavita Shah, General Manager of the plaintiff's company and the annexures thereto. I have equally considered the submissions by counsels appearing for both the Plaintiff and the Applicant.

Order 1 Rule 10 (2) CPR provides as follows:-

“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 import of the law as provided herein above is that a party or even the court on its own motion may order for the joinder of a party who is deemed necessary for effectually and completely determining the issues in controversy in a suit.

The Applicant in this suit has attached a copy of a title being MBEERE/WACHORO/1617 which is the subject of this suit. The title indicates that he is the registered proprietor of the suit land which is the subject of the dispute before court. I find that the he is a person of interest necessary to effectually and completely determine the issues in dispute. The Plaintiff/Respondent in their replying affidavit are insinuating that the Applicant's title was obtained fraudulently illegally and un-procedurally. Those are issues that should be brought out in the pleadings once the Applicant is admitted as a party in this suit.

The Court of Appeal in the case of ***Pravin Bowry Vs John Ward & Another (2015) e KLR*** considered the test for joinder in an application and adopted with approval the holding by the Uganda Supreme Court in the case of ***Deported Asians property Custodian Board Vs Jaffer Brothers Ltd. EA 55 (SCU)*** where it was held

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause of matter.

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in the suit.

Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desired to set up unless that person is joined in it, or unless the order to be made is to bind that person”. (Emphasis underline).

Again the same Court in the case of *Civicon Limited Vs Kivuwatt Limited & 2 Others (2015) e KLR* on the same issue of joinder stated as follows:

“Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings.

Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined.

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party, in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial”.

I agree with the decisions by the superior Courts which are also binding on me. I am satisfied that the Applicant has demonstrated sufficient interest in the suit property and reasonable apprehension of being affected by execution should the plaintiff succeed in the orders sought in the plaint.

Having held that the Applicant is a person of interest in these proceedings, it follows that the application dated 18th March, 2019 succeeds and the same is hereby allowed as follows:-

- (1) The Applicant Moses Ndung’u Mungai be and is hereby enjoined in this suit as the 2nd defendant.***
- (2) The Applicant to file and serve his pleadings to the plaintiff’s suit within 10 days from today’s date.***
- (3) The pleadings thereafter opens and either of the parties are at liberty to file their pleadings in accordance with the law.***
- (4) The costs of this application shall be in the cause.***

READ DELIVERED AND SIGNED in the open Court at Kerugoya this 19th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Okwaro for the Applicant
2. Mr. Muchangi holding brief for Mwamuye for Respondent
3. Mr. Muriithi for the Defendant
4. Mbogo – Court clerk.