



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 138 OF 2015

CLEOPHAS NGEYWA.....PLAINTIFF

VERSUS

DINAH NAFULA SEME.....DEFENDANT

AND

JANE NEKESA WANYAMA.....PROPOSED INTERESTED PARTY

RULING

1. The application dated **21/11/2019** and filed in court on **22/11/2019** has been brought by the proposed interested party. It seeks the following orders verbatim:-

- (1) That pending the hearing and determination of this application, and further orders of this court, the applicants be granted temporary stay of proceedings together with orders issued pursuant thereto pending hearing and determination of this application interpartes.**
- (2) That the proposed interested parties herein be granted leave to enjoin in this suit, tender evidence and participate in the proceedings herein.**
- (3) Any other relief as the court may deem fit and just to grant in the circumstances of this application.**
- (4) That the costs of this application be provided for.**

2. The applicant has brought the application under **Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3 and 3A Civil Procedure Act.**

3. The application is supported by an affidavit of the applicant dated **22/11/2019** and her further affidavit dated **6/3/2020**. The grounds on which the said application is made are that the plaintiff herein filed a suit against the defendants which proceeded for full hearing and at the conclusion of the hearing the court gave directions that mention for submissions be scheduled for **25/11/2019**; that the applicant had possession and occupation of a portion of the suit property for many years and had developed it with semi-permanent structures and she stands to be evicted from the suit parcels of land unless this court grants a stay of proceedings and hears the application heard before judgment date is given; that the applicant will be condemned unheard in contravention of the principles of natural justice and thus suffer irreparable loss since she has a stake in the suit property as a beneficial owner; that the applicant should be enjoined in this suit as interested party; and that the court has wide and unfettered discretion to allow the instant application in the interests of justice and fairness.

4. The defendant filed grounds of opposition on **13/12/2019** and her replying affidavit sworn on **21/1/2020** in opposition to the application. The defendant's submissions were filed on **29/6/2020**. I have perused the court record and found no submissions filed on behalf of plaintiff and the interested party.

5. This court has considered the application the response and the submissions filed. The main issue that arises in the application is whether the applicant should be made an interested party in this suit.

6. In the supporting affidavit the defendant claims to be the estranged wife to the plaintiff and that she came to know of this litigation only recently when she was informed about it by her estranged husband's cousin. Thereafter she went to the court and confirmed the existence of this suit. She admits that there was an agreement between the plaintiff and the defendant and that she witnessed the same. She blames the defendant, claiming that the defendant tricked her into receiving **Kshs. 193,000/=** long after the breach of her contract with her estranged husband. She asserts that when she learnt the alleged trickery she refunded the sums paid by the defendant. The applicant has attached copies

of deposit slips showing that she paid money into the defendant's Kenya Commercial Bank Ltd account. She seems to be in possession of the suit land since the defendant does not deny the same.

7. The court here must balance between the rights of the plaintiff and the defendant on the one hand both of whom have concluded their respective cases and filed submissions and who only await judgment and the rights of the applicant who claims that she has rights in the suit land as a beneficial owner, and who may be condemned unheard if the application is not granted.

8. The main concern of the defendant is that the present application is a ploy by the plaintiff to bring to court the evidence which he was unable to bring during through his wife the hearing of his case. She alleges, albeit without providing evidence, that the interested party has been sitting in court during the proceedings in this case. She states that had the applicant wanted to participate in this case she would have come in as a witness; however this court's question is: how could she do that when according to her she and the plaintiff were already estranged and she did not know of the existence of this case? She avers that the documents the applicant purports to want to produce are not in the plaintiff's list of documents but this court has no evidence from the defendant save her word to prove that the applicant is holding the plaintiff's brief. While this court is unable to trace the applicant's application to the plaintiff's effort, to undo damage to his case, the defendant appears to rejoice in the fact that documents brought by the applicant to court have confirmed that the defendant fully paid the purchase price just as the defendant had testified. However, she takes exception with the applicant's delay in refunding the money that she had received stating, that she refunded it after a total of 3 years, which include 2 years which lapsed after the commencement of this suit.

9. The **Order 1 Rule 10 of Civil Procedure Rules** allow the court to enjoin or order the joinder of any party to a suit in the proceedings if they are deemed to be a necessary party.

10. In this case is the applicant a necessary party? Are the documents that she has presented in her affidavit admissible in evidence perchance she is made an interested party? Will there be prejudice occasioned to the existing parties if she is made a party at this stage when those parties have already filed submissions on the suit and only await judgment? Where does the balance of convenience lie in this very delicate situation? These are the issues this court has to determine.

11. The first observation of this court is that none of the parties disputes that the applicant is in possession of the suit land. Therefore if she is also the wife to the plaintiff a decision against the plaintiff in the suit would imply that she would finally have to vacate the land in favour of the defendant. It is the case therefore that she would be affected by any decision made in the matter. This court has noted that she has not sought to be enjoined as a *defendant* but as an *interested party*. She has also not sought to file any pleadings into this suit, or proposed any drafts thereof. The question arises as to the true value of joining her in these proceedings at this stage while she does not intend to file any pleadings such as a defence in the matter. The suit would therefore remain a dispute between the plaintiff and the defendant perchance she was enjoined as an interested party. It is at this point that this court must state that her application is defective for failure to propose pleadings. However that observation does not bar her from being called as a witness in the matter. If she does not intend to file any pleadings, she would be no more than a mere witness if the application was granted despite its defects.

12. Be that as it may, this court has no reason to allow an application for joinder that would have only the effect besides naming the applicant as an "*interested party*," of only calling the applicant as a witness in this case. On the other hand this court has noted that the applicant is in possession of some evidence may assist this court to arrive at a fair and just determination of this case.

13. This is a court of justice and it appeals to it that she be called, subject to the provisions of the **Evidence Act** and the **Civil Procedure Act** as a witness at the instance of the court.

14. This court appreciates that with regard to the civil jurisdiction, our justice system is adversarial and parties put their case forward to the best of their ability by calling evidence of the witnesses they deem relevant to their case and that in order to maintain its neutrality the court is not expected to descend into the arena of conflict.

15. The current application however is an example of an instance where an applicant has deemed herself as liable to be affected by any adjudication in favour of the defendant in the suit. She has not sought any order that she be allowed to file any pleadings and her application is therefore fatally defective and this court can not speculate that she may later want to do so after joinder if it is allowed.

16. If the instant application is disallowed without any other supplemental orders whatever evidence she possesses would be completely excluded. The evidence of payment and refund of part of consideration to her is important in the determination of this suit hence the importance of summoning her as a witness at the court's instance.

17. In comparison with the **Criminal Procedure Act**, this court finds the **Civil Procedure Act** and **Rules** quite disadvantaged in matters of court summoning a witness *suo motu*.

18. **Section 150** of the **Criminal Procedure Act** states as follows:

"150. Power to summon witnesses, or examine person present.

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as

a witness.”

19. It appears that under the **Criminal Procedure Act** the court may therefore summon any person as a witness *suo motu*.

20. However, the **Civil Procedure Act** and **Rules** do not provide for the summoning of a witness at the instance of the court. Instead the **Civil Procedure Rules** have the following provision at **Order 18 rule 10**:

“10. Court may recall and examine witness [Order 18, rule 10].

The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”

21. Is it the proper interpretation of **Order 18 Rule 10** then that the civil courts are barred from summoning any witness who has not been invited by any of the parties to give evidence? I hardly think so. The overriding objective of the **Civil Procedure Rules** is to be found in the provisions of Sections **1A & 1B** of the **Civil Procedure Act**. In **Samuel Mbugua Githere v Kimungu [1984] eKLR** Hancox, JA stated as follows:

“...the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress, and that the court should not be so far bound and tied by the rules, which are intended as general rules of procedures, as to be compelled to do that which will cause injustice in a particular case.”

22. In effect, the provisions of **Article 159(1) (d)** of the Constitution of **Kenya 2010** provide that justice shall not be sacrificed at the altar of technicalities of procedure.

23. In the light of the foregoing provisions of the statute, case law and the constitution it would be therefore unjust to exclude the applicant who has expressed her desire, from testifying in the matter.

24. Given that the statement that she is wife to the plaintiff has not been controverted by any of the parties, it behoves the court to consider the admissibility of her evidence if the allegation is true. Generally the evidence of a spouse is admissible but the provisions of the **Evidence Act** rule out compulsion in certain instances. **Section 130** of the **Evidence Act** states as follows:

“130. Communications during marriage

(1) No person shall be compelled to disclose any communication made to him or her during marriage, by the other spouse; nor shall a person be permitted to disclose such communication without the consent of the person who made it, or of his or her representative in interest, except in suits between the parties to the marriage or in any of the cases referred to in paragraphs (a), (b) and (c) of section 127(3) of this Act.

(2) In this section “marriage” means a marriage, whether or not monogamous, which is by law binding during the lifetime of the parties thereto unless dissolved according to law, and includes a marriage under native or tribal custom.”

25. Compulsion to divulge such communications that may have occurred within the applicant’s marriage with the plaintiff is not likely in the current scenario as it is the applicant who has approached the court of her own accord, wishing to be heard. Her testimony would be purely voluntary. In the event that any matters arise which require the consent of the plaintiff to testify about which he has withheld, or to which he objects, he being a party may raise the issue with the court to be dealt with as may be appropriate at the hearing.

26. In view of the foregoing, it can be said with confidence that save for a little more delay in the conclusion of this suit and some moderate amount of costs, this court finds no serious prejudice likely to be occasioned to the plaintiff and the defendant if the applicant is allowed to testify at the court’s instance.

27. Consequently the application dated the **2/11/2020** has no merit and it is hereby dismissed. In lieu of the orders the application sought, this court hereby orders that the hearing of the matter be reopened solely for the taking of the applicant’s evidence. The applicant shall attend court to testify in this matter on what she knows concerning the agreement between the plaintiff and the defendant and any other relevant matter and both the plaintiff and the defendant shall be at liberty to cross examine her. The applicant shall file her **witness statement, list of documents** and **bundle of documents** in this matter and serve them upon the plaintiff and the defendant within **four (4) days** of this order. The applicant shall bear the costs of her application.

28. This suit shall be mentioned on the **31/7/2020** via teleconference for the fixing the hearing date.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 27th day of July, 2010.

MWANGI NJOROGE

JUDGE, ELC, KITALE.