



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 5 OF 2019

MARTIN WANYONYI NJABIKHA

ANTHONY NYONGESA NJAVIKHA

(Suing as the legal representatives of the

Estate of the late HEZEKIEL NJABIKHA

alias EZEKIEL NJABIKHA KISEMBE

alias EZEKIEL NJABIKHA).....PLAINTIFFS

VERSUS

JULIUS NAMASWA NJABIKHA.....1ST DEFENDANT

THE CHURCH OF JESUS CHRIST

OF LATTER-DAY SAINTS – KENYA

REGISTERED TRUSTEES.....2ND DEFENDANT

CHURCH OF JESUS CHRIST OF

LATTER-DAY SAINTS IN KENYA.....3RD DEFENDANT

LAND REGISTRAR BUNGOMA.....4TH DEFENDANT

RULING

By a plaint filed herein on 12th March 2019 the plaintiffs, suing as the legal representatives of the Estate of the late **HEZEKIEL NJABIKHA ALIAS EZEKIEL NJABIKHA KISEMBE ALIAS EZEKIEL NJABIKHA** (the deceased), sought several orders against the defendants with respect to the land parcel **NO NDIVISI/MAKUSELWA/527** which has since been sub – divided into parcels **NO NDIVISI/MAKUSELWA/2087, 2088 and 2089** and transferred to the 2nd and 3rd defendants. It is their case that the said sub – division and transfer was fraudulently done by the 1st defendant who is their brother in collusion with the 2nd, 3rd and 4th defendants even before succession had been done with respect to the Estate of the deceased who was the original owner of the land parcel **NO NDIVISI/MAKUSELWA/527**. In the plaint, the 2nd defendant is described as **THE REGISTERED TRUSTEES OF THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS IN KENYA**.

The 2nd and 3rd defendants have filed their joint defence denying the allegations of fraud and adding that they acted in good faith and are bona fide purchasers. The 4th defendant has also filed a defence denying the allegations of fraud. The 1st defendant is yet to enter appearance or file his pleadings. The plaintiffs filed a reply to the 2nd and 3rd defendants’ defence denying that the transaction was in good faith.

By a Chamber Summons dated 13th March 2020 and filed herein on 18th June 2020, the 2nd and 3rd defendants citing the provisions of

Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 1 Rules 3, 10(2), 10(4) and 25 of the Civil Procedure Rules seek the following orders: -

1: That the 2nd defendant herein be substituted as a party to these proceedings by THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES.

2: That in the alternative to prayer 1 above, THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS - KENYA REGISTERED TRUSTEES be added as a party to these proceedings.

3: That the plaint be accordingly amended to reflect THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES as a party to these proceedings and amended copies of summons and the amended plaint be served upon the CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES and the other defendants.

4: That costs of this application be in the cause.

The gravamen of the application is that **THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS KENYA REGISTERED TRUSTEES** and not **THE REGISTERED TRUSTEES OF THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS IN KENYA**, and who have been sued as the 2nd defendant herein, are the registered proprietors of the land parcel **NO NDIVISI/MAKUSELWA/2088** and which is among the subject matter in this case. It is therefore necessary that the said **THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES** are enjoined in these proceedings. That efforts to have the plaintiffs amend their plaint voluntarily have failed despite their initial acknowledgement of that omission and their indication that they would do so. The application is supported by the affidavit of **HESBON USI** the secretary and Trustee of **THE CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES** who are the proposed 2nd defendant herein and annexed thereto is a copy of the Certificate of Lease in respect of the land parcel **NO NDIVISI/MAKUSELWA /2088** showing that the said land has since 22nd August 2011 been registered in their names.

When the application was placed before me on 29th June 2020, I directed that it be canvassed by way of written submissions and the Respondents do file their responses within 14 days. The matter was to be mentioned before the Deputy Registrar on 29th July 2020 to confirm compliance. The record shows that as at the time of this ruling neither **MS MUMALASI** Counsel for the plaintiffs nor **MS WERE** Counsel for the 4th defendant had filed any submissions. **MS MUMALASI** is recorded as having stated that she would not be opposing the application while **MS WERE** asked that the file be placed before the Judge. Only the Applicants advocates **KAPLAN & STRATTON ADVOCATES** filed their submissions. The application is therefore not opposed.

I have considered the application, un – opposed as it is, together with the submissions and annexures. It is not in dispute that among the issues that will come up during the trial is the ownership of the land parcel **NO NDIVISI/ MAKUSELWA/2088** which, as per the copy of the Certificate of Lease annexed to the affidavit of **HESBON USI** is currently registered in the names of **CHURCH OF CHRIST OF LATTER – DAY SAINTS KENYA REGISTERED TRUSTEES**. It is not registered in the names of the 2nd defendants. And although one may be tempted to ignore this anomaly as simply a matter of semantics, I am of the view that in a situation such as this where a final Judgment may necessitate the change of ownership of the title in respect of the land parcel **NO NDIVISI/ MAKUSELWA/2088**, it is important that the 2nd defendant be described and identified in the names appearing in that title. That will ensure that should the Land Registrar be directed by a decree of this Court to effect any changes in the register, there will be no confusion as to the identity of the parties.

Order 1 Rule 10(2) of the Civil Procedure Rules 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.” Emphasis added

There can be no doubt that as the registered proprietor of the land parcel **NO NDIVISI/MAKUSELWA/2088** and which is among the subjects of this dispute, the **CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA, REGISTERED TRUSTEES** is a necessary party to be enjoined in these proceedings so that all the issues regarding the ownership of the land parcel **NO NDIVISI/MAKUSELWA/2088** can be **“effectually and completely”** adjudicated upon and settled. Failure to do so may very well result in a violation of the registered proprietor’s rights to property as protected under **Article 40(1) of the Constitution** and without granting it an opportunity to be heard. Justice cannot properly be served in this case if the legal owner of the property is not enjoined in proceedings where such property is the subject of the litigation. Indeed, it is also in the interests of the plaintiff to implead the proper party so that any subsequent Judgment that they may obtain with respect to the subject matter is not rendered hollow. Ordinarily, it is not the business of the Court to choose for the plaintiff which person to sue. That ought to be the prerogative of the plaintiff. However, in situations such as the one obtaining herein, the law donates to the Court the power to intervene and ensure that the trial is not rendered an academic exercise. It is clear to me that the plaintiff herein appreciates the importance of bringing the right party on board and that explains why they did not file any response to the application which is well merited in the circumstances.

Order 1 Rule 10(4) of the Civil Procedure Rules goes on to add as follows: -

“Where a defendant is added or substituted, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.”

I shall make appropriate directions shortly.

Ultimately therefore and having considered the application dated 13th March 2020 and filed herein on 18th June 2020, I allow it and make the following orders: -

1. The 2nd defendant herein be substituted as a party in these proceedings by the CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES.

2. The plaint shall be accordingly amended to reflect the CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES as the 2nd defendant.

3. The amended plaint and summons be filed and served upon the CHURCH OF JESUS CHRIST OF LATTER – DAY SAINTS – KENYA REGISTERED TRUSTEES as well as the other defendants within 15 days from the date of this ruling and the defendants be at liberty to file and serve their amended defences within 15 days of service.

4. There shall be a pre – trial thereafter on 4th November 2020 before the Deputy Registrar to confirm compliance with order 11 Civil Procedure and fix a hearing date.

5. No orders as to costs.

Boaz N. Olao.

J U D G E

30th September 2020.

Ruling dated, delivered and signed at **BUNGOMA** this 30th day of September 2020. The same is delivered by way of electronic mail with notice to the parties in keeping with the guidelines following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

30th September 2020.