



NO.146

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L CASE NO.1 OF 2012(O.S)

B O O.....1ST APPLICANT

N M O.....2ND APPLICANT

VERSUS

O M K.....RESPONDENT

AND

D E O.....INTERESTED PARTY

RULING

1. The Applicants moved this court by way of Originating Summons dated 5th January, 2012 seeking an order that the Respondent be compelled to sub-divide the parcels of land known as LR. Nos. Gesima Settlement Scheme/[particulars withheld] and South Mugirango/ Bogetenga/ [particulars withheld] (hereinafter referred to as “**the Respondent’s properties**”) among his three (3) wives namely, B O O, M M O, and E M O.

The Applicant’s application which was brought under sections 28, 30 and 98 of the Registered Land Act, Cap. 300 Law of Kenya(now repealed) and Article 159 of the Constitution was brought on the ground that the Applicants who are the Respondent’s wife and son respectively have been rendered destitute by the Applicant’s unequal manner of distribution of his properties among the members of his larger family of three (3) wives and several children. The Applicants claimed that even the property that the Respondent had allocated to the Applicants in the course of the said unequal distribution exercise has been taken away from them and is now occupied and being used by the Respondents other two (2) wives, E M O and M M O. The Applicants contended that the Respondent’s said two (2) wives and their children have amalgamated with their own shares the share of the Respondent’s property that the Respondent had given to the 1st Applicant as the second wife of the Respondent and converted the same to their own use. In this suit therefore, the Applicants are seeking equal and fair distribution of the Respondent’s properties.

2. In his response to the originating summons, the Respondent termed the Applicant’s suit as scandalous, frivolous and vexatious. The Respondent contended that the 1st Applicant was not his wife as he had divorced her in 1969. The 1st Applicant therefore has no basis for lodging the

present claim against him. With regard, the 2nd Applicant's claim, the Respondent contended that the 2nd Applicant has no right to lay a claim over his property when he is still alive. He contended that as the registered proprietor of the Respondent's properties, the law allows him to deal with the said properties in any manner deemed fit at his own discretion.

3. On 3rd June, 2012, the interested party herein D E O filed an application by way of chamber summons of the same date brought under order 1 Rule 1, 3,10 and 14 seeking an order that he be joined in these proceedings as an interested party. The interested party's application was brought on the ground that he is a necessary party to these proceedings as the subject matter of this suit concern land owned by the Respondent who is also his father and that the orders sought by the Applicants if granted would affect the entire family of the Respondent including him. The interested party contended that his joinder into this suit would enable the court to fully and finally adjudicate upon the issues which have been raised by the Applicants. The interested party's application was opposed by the Applicants and the Respondent. The Applicants contended that the interested party is a stranger to these proceedings which concern land which is registered in the name of the Respondent and with respect to which the Applicants are only seeking equal and fair distribution. The Applicants contended that the interested party stands to suffer no prejudice if the orders sought are not granted as he is not the registered proprietor of the Respondent's properties and that the Applicants are seeking equal and fair distribution of the Respondent's property to all concerned.

On his part, the Respondent contended that the interested party has no interest in the properties in dispute in this suit and as such he has no business joining the suit. The Respondent contended that the interested party is a busy body whose joinder into this suit would confuse, delay and defeat the expeditious hearing and disposal of this suit.

4. I have considered the interested party's application together with the affidavit filed in support thereto. I have also considered the Applicant's replying affidavit and the Respondent's grounds of opposition. Finally, I have considered the submissions that were made before me by the parties on 18th June, 2013 and the authorities cited. What I need to decide in this application is whether the presence of the interested party in these proceedings would be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in this suit or to determine the real matter in dispute between the parties.
5. The issues arising for determination in this suit are;
 - a. **Whether the Applicants are entitled to have the Respondent's properties which are registered in the Respondent's name distributed to them during the lifetime of the Respondent.**
 - b. **Whether the 1st Applicant is a lawful wife of the Respondent.**
 - c. **Whether the Respondent had already distributed his properties among his wives.**
 - d. **If the answer to (c) is in the affirmative, whether the said distribution was undertaken fairly and equitably.**
 - e. **If the answer to (d) is in the negative whether the court can intervene and order the Respondent to undertake the process of distributing his properties a fresh and to direct the manner in which such distribution should be carried out.**
6. The Applicants' complainant in this suit is that sometimes in December, 2009, the Respondent with the assistance of clan elders distributed the Respondent's properties among his three houses represented by his three wives aforesaid. The house of the first wife got the largest share followed by the house of the second wife and lastly the house of the 3rd wife who got the least share. The Applicants claim that after each house was allocated its own share of the Respondent's properties as aforesaid, the 2nd Applicant who is the Respondent's son from the second house moved into the Respondent's properties that had been allocated to her mother so that he may put up a house thereon but he was chased away by his brothers from the other houses. After that incident, the Respondent decided to do the distribution of the Respondent's properties afresh whereby the share

of the Respondent's properties that had earlier been allocated to the 1st Applicant was taken away and re-allocated to the Respondent's first and third houses. The interested party is the son of the Respondent's first wife M M O. The interested party's mother is deceased and whatever was allocated to her house by the Respondent as claimed by the Applicants, was meant for her children who include the interested party. The applicants' complaint as I have set out above concerns the manner in which the Respondent is alleged to have distributed the Respondent's properties. Their complaint is that the Respondent's properties that had already been allocated to them by the Respondent was taken away and re-allocated to the first and third houses. The first house is where the interested party is coming from. The Applicants want the court to nullify the re-allocation that was done by the Respondent of the Respondent's properties so that the process may be carried out a fresh fairly and equitably. If the court was to grant the Applicant's wish, it will mean that some of the Respondent's properties which had been allocated to the first and third houses would be taken away and re-allocated to the Applicants. This obviously will prejudice the first and third houses. A court of law is not supposed to condemn people without hearing them. In the circumstances, it would only be fair and just that the interested party who represents the Respondent's first house which is likely to be affected by any adverse order that may be made in this suit should be allowed to come into the suit so that he may be heard in the matter. There is no doubt that the presence of the interested party in this suit would enable the court to completely adjudicate upon and settle all the questions in this suit. According to **Mulla Code of Civil Procedure Volume II, 15th edition** that was cited by the interested party's advocate, the authors quoted at page 1015 the decision of Patna High Court on the meaning of "**Settle all questions involved in the suit**" which was held to mean "**all questions relating to the subject matter of the suit arising not only between the parties to the suit but also third parties whose presence is necessary or proper for an effective and final adjudication**". The interested party has been described by the Respondent and the Applicants as a stranger and a busy body who has no business getting involved in this suit which concerns only the Applicants and the Respondent. There is no doubt from what I have narrated above that the reliefs sought in this suit if granted would affect the interested party. That means that if the interested party is not given an opportunity to be heard in this suit, the court would have left some issues undetermined as between the interested party, the Applicants and the Respondent which may need to be determined in another forum. Public policy frowns at multiplicity of suits. The provisions of the Civil Procedure Rules dealing with joinder of parties into a suit was meant in my view to enable all persons who are interested in a particular subject matter of litigation to join in so that they may all be heard for the court to conclusively and finally determine all the issues that arise not only as between the original parties but also as between the original parties and additional parties on that subject matter.

7. Due to the foregoing, I am satisfied that the interested party's application dated 3rd June, 2013 has merit. The same is hereby allowed in terms of prayer (c) thereof save that the interested party is granted leave to join this suit as 2nd Respondent. In order to save on time that has been lost due to the present application, I make further order that, the interested party shall file his replying affidavit to the Applicants' originating summons within 21 days from the date hereof. The Applicants and the Respondents shall be at liberty to file further affidavits in response to the interested party's affidavit within 21 days from the date of service of the interested party's affidavit. This matter shall thereafter be set down for hearing at the registry.

Dated, signed and delivered at Kisii this 8th day of November, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Applicants present in person.

Mr. Nyamwange holding brief for Oguttu for the Respondent

No appearance for the interested party

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.