



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO.113 OF 2015

THOMAS MUMO MAINGEY (*Suing on his own behalf and on behalf of the*

FRANCISCANS OF OUR LADY OF GOOD COUNSELSISTERS REGISTERED TRUSTEES,

DAVID MASIKA, EVERGREEN CROPS LIMITED, WARIDI FARM LIMITED DANIEL

MUTISYA NDONYE AND VALLEY BROOK CAPITALLIMITED)..... PLAINTIFF

VERSUS

SARAH NYIVA HILLMAN.....1ST DEFENDANT

PAULINE KAMBUA MAINGEY2ND DEFENDANT

WILLIAM DAHER.....3RD DEFENDANT

DIRECTOR OF SURVEYS.....4TH DEFENDANT

AND THE SUBSEQUENT COUNTERCLAIM BETWEEN

SARAH NYIVA HILLMAN.....1ST COUNTERCLAIM PLAINTIFF

PAULINE KAMBUA MAINGEY.....2ND COUNTERCLAIM PLAINTIFF

WILLIAM DAHER3RD COUNTERCLAIM PLAINTIFF

VERSUS

THOMAS MUMO MAINGEY1ST COUNTERCLAIM DEFENDANT

THE FRANCISCANS OF OUR LADY OF GOOD COUNSEL SISTERS REGISTERED

TRUSTEES.....2ND COUNTERCLAIM DEFENDANT

DAVID MASIKA.....3RD COUNTERCLAIM DEFENDANT

EVERGREEN CROPS LIMITED.....4TH COUNTERCLAIM DEFENDANT

WARIDI FARM LIMITED.....5TH COUNTERCLAIM DEFENDANT

DANIEL MUTISYA NDONYE.....6TH COUNTERCLAIM DEFENDANT

VALLEY BROOK CAPITAL LTD.....7TH COUNTERCLAIM DEFENDANT

TUTUS MWIRIGI8TH COUNTERCLAIM DEFENDANT
SAFARICOM INVESTMENTS CO-OPERATIVE SOCIETY LTD.....9TH COUNTERCLAIM DEFENDANT
WHISTLING MORANS LTD.....10TH COUNTERCLAIM DEFENDANT
KENYA URBAN ROADS AUTHORITY.....11TH COUNTERCLAIM DEFENDANT

RULING

1. In the Notice of Motion dated 14th May, 2020, the 9th Counterclaim Defendant/Applicant has prayed for the following orders:

- a. That the suit by way of Counterclaim as against the 9th Counterclaim Defendant/Applicant be struck out as it discloses no reasonable nor sustainable cause of action.
- b. That in the alternative, the suit by way of Counterclaim as against the 9th Counterclaim Defendant/Applicant be struck out as it is fanciful, frivolous, vexatious and prejudicial to the 9th Counterclaim Defendant and a gross abuse of the court process.
- c. That the costs of this Application and the suit be awarded to the 9th Counterclaim Defendant/Applicant.
- d. That this Honourable Court do issue any such other and further relief as it may deem just and fair in the circumstances of this case.

2. The Application is supported by the Affidavit of the Manager-Legal Affairs of the Applicant who has deponed that the original action herein was commenced by way of a Plaint filed on 9th April, 2015; that the proceedings arose out of a conflict on the use of an access road dating back to the year 2006 between the Plaintiffs and the original Defendants and that the Applicant was not a party in the original claim.

3. The Applicant's Manager deponed that by an Amended Defence and Counter-claim dated 8th February, 2019, the Applicant was joined in these proceedings as a Defendant in the Counter-claim; that no leave was formally sought to join the Applicant in the proceedings and that the Applicant was not a property owner at all material times to this suit.

4. According to the Applicant's Manager, the Applicant was not a registered proprietor of L.R No. 1338/171 as at 5th September, 2017 when the 1st, 2nd and 3rd Counterclaim Plaintiffs' general damages and *mesne profits* crystallised; that since its acquisition, the Applicant's property has remained vacant and unoccupied and that the Applicant is a stranger to the Defendant's claim in the Counter-claim.

5. The Application was not opposed.

6. In the Application dated 18th May, 2018, the original Defendants sought for the leave of the court to amend the Defence and introduce a Counter-claim against the Plaintiffs and the Kenya Urban Roads Authority. The Application was based on the ground that the Defendants are the owners of land known as L.R. No. 1338/91, 92 and 93 and that other than the Plaintiffs having encroached on the land, the Kenya Urban Roads Authority was illegally grading and expanding a private road. The said Application was allowed by consent.

7. The Application by the Defendants did not mention the Applicant's land, or the joinder of the Applicant in the proceedings. It is trite that a party can only be joined in an existing suit with the leave of the court. Order 1 Rule 10 (2) of the Civil Procedure 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.”

8. To the extent that the Defendants did not seek the leave of the court to enjoin the Applicant in this suit, I find that the joinder of the Applicant as a 9th Defendant in the Counter-claim was unlawful. On that ground alone, I allow the Applicant's Application dated 14th May, 2019 as follows:

- a. The suit by way of Counter-claim as against the 9th Counter- claim Defendant/Applicant is struck out.
- b. The Original Defendants to pay the Applicant the costs of the Application.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6TH DAY OF NOVEMBER, 2020.

O. A. ANGOTE

JUDGE