



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 79 of 2017

EVANS NAKHABALA WEKESA.....PLAINTIFF/RESPONDENT

VS

KENYA AFRICAN NATIONAL UNION.....DEFENDANT/RESPONDENT

THE GENERAL OF THE SALVATION ARMY.. INTERESTED PARTY/APPLICANT

(REGISTERED TRUSTEES)

### RULING

1. The Applicant sought orders of joinder into the suit on the 15/5/2016 vide a notice of motion of even date. The application is grounded on the facts on the face of the application and the supporting affidavit of Lieutenant Colonel John Kumar Dasari who is the Applicant's Secretary of Business Administration in the Kenya East Territory.
2. According to the supporting affidavit, the Applicant was the registered owner of the suit land from 1<sup>st</sup> July 1964 to 9<sup>th</sup> March 2012. The Applicant entered into a land exchange agreement dated the 9/3/12 with the Plaintiff where it traded the MURANGA MUNICIPALITY BLOCK3/12 (suit land) in exchange of PLOT NO. UNS /G then owned by the Plaintiff. It is the Applicant's case that the Plaintiff failed to honour its part of the exchange agreement by transferring UNS/G to the Applicant. The Applicant further deponed that the Plaintiff and or the Defendant have erected and other structures on the suit premises. That during the tenure of ownership by the Applicant the Defendant occupied the suit land as a licensee. The Applicant has annexed a bundle of documents which have been marked as JKD 1-7 which include a copy of the land exchange agreement that was executed by parties and further documents to have the land transferred to the Plaintiff. That it is necessary that he be enjoined as a party since its presence will enable the Court effectually and completely adjudicate and settle all questions.
3. The Plaintiff /respondent opposed the application vide a replying affidavit filed on the 24/8/16 where he deponed that there was an exchange agreement dated the 9/3/2012 between the Applicant and himself, which exchange was fully complied with. That he has been in possession of the suit land ever since the exchange.
4. The Respondent contends that the application is self-defeating and that litigation must come to an end. That the application is an abuse of Court process and the Court cannot give judgement in vain without being enforced judiciously. It has also been said that the Applicant aims at denying him the fruits of judgement.
5. The Defendant/Respondent did not file any response to the application for joinder.
6. The Plaintiff submitted that the Applicant has considerable stake in the matter by virtue that it is the owner of the suit premises the same having been fraudulently transferred by the Plaintiff to himself after the collapse of the land exchange agreement. That the interested part has erected a church on the suit land. That allowing joinder by the Applicant will enable the Court to reach a just and fair outcome of the case. That no prejudice will be suffered by any party.
7. In opposing the application, the Plaintiff/Respondent submitted and stated that the Applicant has no valid claim over the suit land. He concedes that he entered into a land exchange agreement with the Applicant dated the 9/3/12. The properties subject of the said exchange are the suit land and UNSURVEYED PLOT NO. G in Muranga Township. That it was part of the terms of the exchange agreement that the parties will obtain the necessary clearance certificates as well as the consent to transfer. That the Applicant has admitted that the exchange failed for want of consideration which means that the exchange was nullity ab initio and the Applicant has no valid claim over the suit land. That the application has been overtaken by events so much so that the suit land is now in the hands of a third party namely Five Emukei Transporters Limited. The Plaintiff also admitted that the land exchange agreement has never been honoured by the parties who have taken no legal steps to enforce compliance.

8. **Black's Law Dictionary 9<sup>th</sup> Edition at page 1232** defines an interested party as;

“a party who has a recognizable stake (and therefore standing) in a matter”.

9. 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”.

From the above rule joinder may be done in two ways; when he ought to have been joined and is not joined, that is when he is a necessary party and secondly when without his presence the questions in the suit cannot be completely decided.

10. In the case of **Francis Kariuki Muruatetu & Anor. Vs Republic & 5 Others (2016) eKLR** the Court held that an Applicant must demonstrate the personal interest that he has in the matter by laying sufficient grounds before the Court; the prejudice he would suffer if he is not enjoined as interested party; set out the case that he intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy. In my own words, a party must disclose a cause of action which is either not before the Court or if it is before the Court, the nature of it is such that it cannot be effectually and completely determined by the Court without the party being heard.

11. In Kenya, Courts have taken a liberal application to joinder of parties. In the case of **Kingori vs. Chege (2002) 2 KLR 243, Warsame J** had this to say;

“ In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however the Court must guard against the frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before Court for determination”.

12. In determining whether or not a person is indispensable or a necessary party, the Court must carefully examine the facts of the case, the relief sought and the nature and extent of the absent parties interest in the controversy raised in the suit.

13. In the instant case the issues between the Plaintiff and the Defendants is that of trespass/ownership of MURANGA MUNICIPALITY BLOCK3/12. The Applicant is pursuing a right arising from breach of the land exchange agreement dated the 9/3/12 wherein in exchange of the Suitland it was to get UNSURVEYED LAND G from the Plaintiff. It is on record that the Plaintiff held an allotment letter dated the 9/12/1997. The said exchange agreement is not disputed by the Plaintiff save that the consents and approvals were not obtained by the parties and that the agreement was not honoured by both parties who have not taken steps to enforce compliance. The complaint of the Applicant therefore is that the Plaintiff did not transfer the unsurveyed plot to it in pursuance of the land exchange agreement. I have perused the said agreement and note that it does not provide for completion period by the parties. No documents have been placed before the Court to show that the Plaintiff has declined to transfer the unsurveyed plot to the Applicant, even if there were such documents or evidence the Applicant's case would still be a different case from the suit herein. In any event the land exchange agreement provided for reliefs in the event of breach by either party. The Interested Party retains the liberty to proceed as it desires against the Plaintiff.

14. The upshot is that the Applicant has not met the threshold set in the **Francis Kariuki Muruatetu (supra)**. The Court cannot determine that the Applicant is a necessary party in this case.

15. In the end the application is dismissed with costs to the Applicant.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17<sup>TH</sup> DAY OF JANUARY 2019**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff present in person/Advocate is absent.

Defendant/Respondent: Absent

Ms Salim HB for Simiyu for the Intended party/Applicant:

Irene and Njeri, Court Assist