



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.582 OF 2017

ROSE NASAMBU WANYONYI.....1<sup>ST</sup> PLAINTIFF/ RESPONDENT

MAHIRA HOUSING COMPANY LTD..... 2<sup>ND</sup> PLAINTIFF/ RESPONDENT

-VERSUS-

HARUN NYAGA.....DEFENDANT/APPLICANT

AND

JOHN MBICI NJAU.....INTENDED 1<sup>ST</sup> DEFENDANT

THIKA LAND REGISTRAR.....INTENDED 1<sup>ST</sup> DEFENDANT

ATTORNEY GENERAL.....INTENDED 1<sup>ST</sup> DEFENDANT

RULING

The Defendant/Applicant *Harun Nyaga* has brought this *Notice of Motion* application dated 22<sup>nd</sup> December 2017, under *Sections 1A, 1B of the Civil Procedure Act, Order 1 Rule 10* and *Order 51 Rule 1* of the *Civil Procedure Rules* and all other enabling provisions of law and has sought for the following orders:-

- a. That this Honourable Court be pleased to enjoin John Mbici Njau, Thika Land Registrar and the Attorney General to be enjoined as a 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively in this matter.
- b. That upon granting prayer (a) above this Honourable Court be pleased to grant the enjoined parties 14 days leave to unconditional defend or file their response herein.
- c. That cost of this application be in the course.

The said application is premised upon the grounds stated of the face of the application and on the *Supporting Affidavit* of *Harun Nyaga*. These grounds are:-

1. That the Intended 2<sup>nd</sup> Defendant John Mbici Njau was the registered owner of land parcel Ruiru Kiu Block 10 (Mahira)65 and he acquired the title deed.
2. That the Intended 2<sup>nd</sup> Defendant later on sold the suit land to the 1<sup>st</sup> Plaintiff who has since obtained a title deed to the land Ruiru Kiu Block 10(Mahira)65.
3. That for the real issues in controversy which is ownership to the suit to be adjudicated upon logical conclusion on merits its imperative to allow the enjoinder to the suit.
4. That the Applicant would like to counterclaim that the title to the suit property be cancelled and transferred to him hence necessitating that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants be enjoined in this suit as well.

**5. That no prejudice will be occasioned on any party if the orders sought are granted.**

In his *Supporting Affidavit*, **Harun Nyaga** averred that the 2<sup>nd</sup> Defendant **John Mbici Njau** was allegedly the earlier registered owner of the suit property **Ruiru Kiu Block 10(Mahira)65** and had acquired a title to the same. That the said **John Mbici Njau** later sold the suit property to the 1<sup>st</sup> Plaintiff herein who has since obtained a title deed. He contended that the acquisition and registration of the suit land in the name of **John Mbici Njau**, was fraudulent, illegal and therefore the subsequent transfer thereof to the 1<sup>st</sup> Plaintiff is of no consequence and therefore it is null and void. He further contended that for the issue in controversy which is ownership of the suit property to be adjudicated upon to a logical conclusion on merit, it is imperative to allow the joinder of the Intended Defendants to this suit.

Further, that since he intends to counter-claim and seek annulment of the Plaintiffs' title or the earlier title holder **John Mbici Njau**, then it is necessary to include all the parties sought in the application. He urged the court to allow the application.

The Plaintiffs objected to this *Notice of Motion* application by filing a *Notice of Preliminary Objection* on points of law wherein they sought for striking out of the entire application on the following grounds:-

- a. That the 1<sup>st</sup> Defendant/Applicant herein has moved to court vide a Notice of Motion under Section 1A, 1B of the Civil Procedure, Order 1 Rule 10, Order 5 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking orders to enjoin the Intended 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Parties as Defendants in this suit which process and procedure was unknown in law and was contrary to the Rules of Civil Procedure Act and the ruled hereunder.**
- b. That the law requires that in the circumstances of a Defendant wishing to enjoin parties to the suit, that such a Defendant first seeks the leave of court within 14 days after close of pleadings to serve a 3<sup>rd</sup> party notice to the Intended party. This is clearly covered and provided under Order 1 Rule 15(c) of the Civil Procedure Act. This was however not followed by the Applicant, hence this application is baseless, bad in law, fatally defective and totally incompetent.**
- c. That the application is absolutely unprocedural and ought to be struck out in limine.**
- d. That the application is misconceived, clearly misguided, lacks merit, incurably defective, an abuse of due process of the court and ought to be dismissed with costs.**

The application was canvassed by way of written submissions and the **Law Firm of Kanyi Kiruchi & Co. Advocates** for the Defendant/

Application filed their written submissions on **15<sup>th</sup> March 2018** and urged the Court to allow the instant application since the Intended Defendants are all necessary parties. The Applicant relied on the case of **Edward Wandia Kunyaga...Vs...Naomi Muthoni Mwangi (2014) eKLR**, where the Court allowed joinder of necessary parties to assist the court effectively determine the dispute.

The **Law Firm of Arusei & Co. Advocates** for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Respondents filed their submissions on **23<sup>rd</sup> April 2018** and urged the Court to allow the *Notice of Preliminary Objection* and further strike out the instant *Notice of Motion* application as the Intended Defendants were not necessary parties and Plaintiffs have no claim over them. The Plaintiffs relied on the case of **Benjamin Leonard Macfoy and United Africa Co. Ltd, App. No.67 of 1960**, where the Court held that:-

**“.....If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this Judgment collapse is the statement of claim was a nullity.....”**

Further the Plaintiffs/Respondents relied on the case of **Mika Chepkaitany...Vs...Kimoi Loiro(2017)eKLR**, where the Court held:-

**“.....the Plaintiff has no claim against the Applicant and there would be reason to impose him on the Plaintiff. Such an imposition could be prejudicial if ultimately the Applicant seeks costs of the suit against the Plaintiff. I see no reason to make such an imposition in the circumstances.....”**

This Court has carefully read the rival written submissions and also considered the pleadings in general. The Court has also considered the relevant provisions of law specifically **Order 1 Rule 10(2)**, which provides:-

**“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.”**

Further, the Court has taken into account the provisions of **Sections 1A & 1B** of the **Civil Procedure Act** which enjoins the court to take into account the overriding objective of the said Act which is to among other facilitate the **just, proportionate** and **affordable** resolution of civil disputes before the court.

From the above provisions of **Order 1 Rule 10(2)**, it is evident that the court has discretion to allow joinder of any party to the suit either on its own motion or upon an application if it considers such a party to be necessary party for effective and complete adjudication of any dispute or issues before the said court.

As usual, the said discretion must be exercised judicially and upon the circumstances of each case. It is therefore evident that determining whether a party should be enjoined or not, the court should consider the following factors:-

- a. He must be a necessary party.
- b. He must be a proper party.
- c. In the case of the Defendant, there must be a relief flowing from the Defendant to the Plaintiff.
- d. The ultimate order or decree cannot be enforced without his presence in the matter.
- e. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. See the case of Kingori...Vs...Chege & 3 Others (2002) eKLR.

The Defendant/Applicant has averred that he intends to file his Defence and Counter-claim and avers that **John Mbici Njau** who allegedly sold the suit property to the 1<sup>st</sup> Plaintiff had acquired the title to the said property fraudulently and that his acquisition of the same should be annulled. That he also intends to counter-claim for annulment of the 1<sup>st</sup> Plaintiff's certificate of title and thus joinder of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein. The Plaintiffs have averred that the Defendant used the cunning procedure in the seeking to enjoin the three Defendants. It was the contention of the Plaintiffs that the Applicant ought to have used the provisions of **Order 1 Rule 15** by applying for leave to bring 3<sup>rd</sup> party proceedings. That instead the Defendant/Applicant used the provisions of **Order 10 Rule 10(2)** which is a wrong procedure.

The Court has considered the **Preliminary Objection** as raised by the Plaintiffs/Respondents and concurs with the Applicant's submissions that he is not seeking any indemnity from the Intended Defendants and therefore he could not have come to court via **Order 1 Rule 15** but through the other relevant provisions of law.

The Court finds that the Plaintiffs' **Notice of Preliminary Objection** is not merited and the same is dismissed entirely.

Having dismissed the Plaintiffs' **Notice of Preliminary Objection** the next issue is whether the instant **Notice of Motion** is merited.

It is trite that courts have discretion to enjoin parties which are necessary for effective and complete determination of disputes. It is not in doubt that the 1<sup>st</sup> Plaintiff alleged that she bought the suit property from **John Mbici Njau** on **29<sup>th</sup> February 2013** as is evident from the **Sale Agreement** annexed to the Plaint. It is also evident that the Defendant herein has alleged that he intends to counter-claim that the said **John Mbici Njau** acquired the title to the suit property fraudulently and that the said acquisition and subsequent sale should be annulled.

If the above allegations are made against **John Mbici Njau**, then it is prudent to enjoin him so that no orders can be issued against him without having been given an opportunity to present his side of evidence.

Further a claim of fraudulent would necessitate the **Land Registrar Thika**, to give his side of evidence of how the said title was acquired – whether fraudulently or legally and of course the Attorney General represents the Government in Civil disputes against Government bodies and it is prudent to enjoin the Attorney General.

The Court finds that the parties sought to be enjoined are necessary parties herein and their presence in the suit is important and necessary for effective and complete adjudication of the dispute before this Court.

Having now carefully considered the **Notice of Motion** application dated **22<sup>nd</sup> December 2017**, by the Defendant/Applicant the Court finds it merited and it is allowed entirely with costs being in the cause.

It is so ordered.

**Dated, Signed and Delivered at Thika this 22<sup>nd</sup> day of May 2019.**

**L. GACHERU**

**JUDGE**

**22/5/2019**

In the presence of

Mr. Tumu holding brief for Mr. Arusei for the Plaintiffs/Respondents

Mr. Kanyi for the Defendant/Applicant

Lucy - Court Assistant

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**22/5/2019**