



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ENVIRONMENT LAND CASE NO. 112 OF 2009**

**HERSI FUGICHA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ABDI HOKILE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**JILO HERSI.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**SADIA SORA DIBAH.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**-V-**

**BISHAR MUSA.....DEFENDANT/RESPONDENT**

**SADIA ALI HUKA.....INTERESTED PARTY/APPLICANT**

**RULING**

1. Before me is a Notice of Motion Application filed in court on 18<sup>th</sup> December 2018 and brought pursuant to the provisions of Order 45 Rules 1 & 5 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3, 3A, 63 (e) and 80 of the Civil Procedure Act, CAP 21 of the Laws of Kenya, Article 50 (1) of the Constitution of Kenya 2010 and all other enabling provisions of the Law. Therein, the Interested Party inter alia seeks an order that she be added as a 2<sup>nd</sup> defendant to the suit as she is an interested party. That, upon granting the said order, the court be pleased to make an order requiring the plaintiffs to amend their plaint to include the Interested Party as a 2<sup>nd</sup> defendant and serve a copy of the amended plaint and summons upon the Interested Party to enable her file a suitable defence.

2. The Interested Party further seeks review/setting aside of the judgment and decree herein made on 28<sup>th</sup> September 2017, to vacate or discharge any subsequent or consequential orders issued there from and make an order that the suit be heard *de novo*.

3. The gist of the application is that the Interested Party is the owner of that plot referenced as UNS COMMERCIAL PLOT NO. D. ISIOLO TOWN which was allocated to her in 1997, for which she was issued with a letter of allocation dated 22<sup>nd</sup> June 1998. Pursuant to a suit filed by the plaintiffs against the defendant, the plaintiffs intentionally misrepresented facts of ownership of the suit land, to the effect that the land belonged to the defendant whereas the same was registered in the name of the Interested Party and that subsequent to these misrepresentations, the plaintiffs obtained a decree which affected the ownership rights of the Interested Party in respect to the suit property.

4. The Interested Party further avers that she was not a party to the suit or proceedings herein, yet she was the owner of the property being claimed by the plaintiffs and the person sued as the defendant herein does not own the plot.

5. The application was opposed via a replying affidavit dated 24<sup>th</sup> January 2019, by the 1<sup>st</sup> plaintiff Hersi Fungicha who deposed inter alia that the applicant herein, Saida Ali Huka is the wife to the defendant a fact which she failed to disclose and that she was all along aware of this case, yet she never brought any application to be enjoined as an Interested Party to this suit to agitate her interests. Further, it is averred that the applicant was not a party to this suit and as such, she could not seek to set aside a judgment where she was a stranger and that it was only the defendant who could seek to set aside the judgment and not the applicant. Further, it is contended that the court cannot issue an injunction in a finalized case and to a stranger to the suit.

6. Defendant has also filed a replying affidavit on 25.2.2019 where he avers that even in his pleadings he never claimed ownership of the suit land. He is certainly on the side of the interested party.

7. In her submissions, the applicant reiterated what she had stated in her supporting affidavit.

8. On the other hand, it was submitted for the plaintiffs that the Interested Party is a wife to the defendant and that it beats logic how a suit can proceed in court without her knowledge. It is further submitted that the Interested Party had no capacity to bring this application. Consequently, the plaintiff urged the court to dismiss the Interested Party's application with costs to the plaintiffs.

9. I have carefully considered the instant application and the rival submissions of the parties. The Interested Party is essentially seeking inter alia to be enjoined in the suit, and for the Judgment entered herein to be set aside so that she can participate in the prosecution of the matter.

10. 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.”***

10. The court has a duty to define the parameters of involvement of an interested party in a suit. This was so held in the case of **Joseph Leboo & 2 others versus Director Kenya Forest Services & another ELC No. 273/12 Eldoret** where it was stated that;

***“There had to be a clear demonstration that the suit affected the person directly. If the test was too liberal, then the courts would be inundated by numerous applications for joinder. .... An applicant had to demonstrate a direct interest in the subject matter or show that the questions in the suit could not be determined adequately without his input, even where he was not strictly plaintiff or defendant ..... Since there were no defined rules as to how involved in the litigation an interested party could be, it fell upon the discretion of the court to define the parameters of involvement of the interested party. This depended on the circumstances of each case.....”***

11. In the present case, the applicant has stated that she is the owner of the suit land known as UNS, COMMERCIAL PLOT.NO.D ISIOLO, which was allocated to her in 1997 by the defunct county council of Isiolo. In response to this issue, the plaintiffs/respondents aver that applicant's allotment document could be referring to a different plot and not that of the plaintiffs. They also state that applicant is the wife of defendant and therefore she was aware of the suit against the defendant.

12. In paragraph 6 and 7 of the applicants supporting affidavit, she has given an account of how on 29.11.2018, the plaintiffs in the company of police descended on her land attempting to forcibly evict her. When she made inquiries, she learnt that the invasion was courtesy of the Judgment delivered on 28.9.2017 in this suit. The plaintiffs have not denied the averments contained in paragraph 6 and 7 of the applicant's affidavit. The respondents cannot therefore claim that applicants plot could be different from the one they are claiming.

13. On the issue that applicant is the wife of defendant and she was therefore aware of the suit, I find that this was not sufficient reason to omit the applicant as a party to the suit. I have keenly looked at the documents relied on by the plaintiffs during the trial (Exhibit 1-5), none of them indicate that defendant was the owner of or was a claimant to the suit land. In his defence statement, defendant had also stated that he was not the owner of adjacent plots.

14. From the foregoing analysis, I do find that applicant has demonstrated that she has a direct interest in the subject matter, the only hitch being that Judgment has already been delivered.

15. In the case of ***J.M.K V M.W.M & Another [2015] eKLR*** relied on by the Interested Party herein, (Court of Appeal Mombasa), the appellant who was not a party in the industrial cause no.268 of 2013 had sought to have the Judgment of the industrial court set aside to enable the appellant to defend the suit. The court in allowing the appeal emphasized the importance of observing the rules of natural justice and in particular, hearing a person who is likely to be adversely affected by a decision.

16. Article 50 (1) of the constitution provides that;

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.***

17. In the case of ***Njonjo Njubi vs. Njubi Karungari, Thika ELC no.232 of 2017, formerly Milimani ELC 341 of 2011 and formerly Nairobi H.C.C no. 5530 of 1990***, the court stated that;

***“This court is now enjoined to do substantial justice to the parties; it must disregard technical procedure and aim at the settling the root of the dispute. That is the spirit and letter of article 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the court. The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.***

18. This is a situation where plaintiff has gained leverage over the applicant simply because he (plaintiff) appears to have sued the wrong party. It is therefore necessary to put the parties in a level playing ground. In the circumstances, I find it

necessary to allow the application on the following terms;

- 1) **An order is hereby issued for stay of execution/decree of the Judgment delivered on 28.9.2017 and all subsequent or consequential orders.**
- 2) **An order is hereby issued setting aside the Judgment delivered on 28.9.2017, the decree thereof and all consequential orders.**
- 3) **An order is hereby issued declaring the applicant as a necessary party in these proceedings.**
- 4) **The plaintiff is hereby ordered to amend his pleadings to bring forth the applicant as the 2<sup>nd</sup> defendant and to serve her with the plaint and summons to enter appearance.**
- 5) **The applicant is directed to file her defence within 14 days from date of service of the amended plaint.**
- 6) **The costs of this application shall abide those in the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 15<sup>TH</sup> MAY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Kimaita for interested party and holding brief for Kaumbi for defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**