



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 771 OF 2016

MAESTRO CONNECTIONS HEALTH SYSTEMS LIMITED.....PLAINTIFF

VERSUS

RILEY SERVICES.....1ST DEFENDANT

UNITED STATES INTERNATIONAL UNIVERSITY.....2ND DEFENDANT

DPS INTERNATIONAL LIMITED.....3RD DEFENDANT

NDUNGU NJORGE & KWACH ADVOCATES.....4TH DEFENDANT

NDUNGU PAUL NDERITU.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

DIRECTOR OF SURVEY.....7TH DEFENDANT

AND

ELC SUIT NO. 840 OF 2016

UNITED STATES INTERNATIONAL UNIVERSITY.....PLAINTIFF

VERSUS

MAESTRO CONNECTIONS HEALTH SYSTEMS

LIMITED.....1ST DEFENDANT

H. E. DANIEL TOROITICH ARAP MOI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....5TH DEFENDANT

AND

ELC SUIT NO. 1040 OF 2016

MUTHAIGA LUXURY HOMES LIMITED.....PLAINTIFF

VERSUS

UNITED STATES INTERNATIONAL UNIVERSITY.....1ST DEFENDANT

MAESTRO CONNECTIONS HEALTH SYSTEMS

LIMITED.....2ND DEFENDANT

H. E. DANIEL TOROITICH ARAP MOI.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

DIRECTOR OF SURVEY.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

The three (3) cases whose particulars are set out above are related in that they concern the same subject matter. ELC No. 771/2016 and ELC No. 840/2016 were consolidated on 2nd August, 2016 with ELC No. 840/2016 as the lead file. On 5th October, 2016, the court ordered that ELC No. 1040/2016 which was filed last be heard together with ELC No. 771/2016 and ELC No. 840/2016. What is now before the court are two (2) applications which were filed in ELC No. 771/2016 and ELC No. 1040/2016 and whose proceedings were taken in ELC No. 840/2016.

The two (2) applications were brought by Maestro Connections Health Systems Limited which is the plaintiff in ELC No. 771/2016, the 1st defendant in ELC No. 840/2016 and the 2nd defendant in ELC No. 1040/2016. Due to the convoluted nature of the pleadings, I would for ease of reference refer to the parties with their names rather than the way they have been described in the pleadings. Maestro Connections Health Systems Limited's (hereafter referred only as "Maestro") application in ELC No. 771/2016 was brought by way of Notice of Motion dated 28/1/2019. In the application Maestro sought the following main orders:

1. That pending the inter partes hearing of the suit the court be pleased to grant leave for the amended plaint to be further amended, filed and served within 24 hours.
2. That summons on the further amended plaint be processed on an urgent and priority basis by the court registry.

The application was brought on the grounds set out on the face thereof and on the affidavit of Dr. George Kiongera. The application was brought on the grounds that the 2nd defendant in ELC No. 840/2016, His Excellency Daniel Toroitich Arap Moi (hereinafter referred to only as "Arap Moi") filed a further amended counter-claim in that case dated 11th January, 2019 and that due to the matters raised in the said further amended counter-claim, it was necessary for Maestro to further amend its plaint in ELC No. 771/2016. Maestro contended that in his said further amended counter-claim Arap Moi denied that he sold L.R No. 12422/19 (I.R No. 36415) situated at Muthaiga North, Nairobi ("the suit property") to Maestro. Maestro averred that in view of the denial by Arap Moi of his involvement in the transaction between him and Maestro, it was necessary to join him and the firm of Triple OKLaw Advocates who acted for him in the transaction as parties to ELC No. 771/2016. Maestro annexed to the affidavit of Dr. George Kiongera filed in support of the application a draft further amended plaint in which Arap Moi and the firm of Triple OKLaw Advocates were added to ELC No. 771/2016 as 8th and 9th defendants respectively. The reliefs sought in the amended plaint were also amended in the draft to introduce claims against Arap Moi and the firm of Triple OKLaw Advocates.

Maestro's application in ELC No. 1040/2016 was also brought by way of Notice of Motion dated 28th January, 2019 which was amended on 8th February, 2019. In its amended Notice of Motion dated 8th February, 2019 Maestro which is the 2nd defendant in that suit sought the following main orders:

1. That the application be deemed as properly filed.
2. That pending the hearing of the suit the court be pleased to grant leave for the counter-claim dated 13th January, 2017 to be amended, filed and served within 24 hours.
3. That summons on the amended counter-claim be processed on an urgent basis by the registry.

Maestro's application in ELC No. 1040/2016 was also brought on the grounds set out on the face thereof and on the affidavit of Dr. George Kiongera. The application was brought on the same grounds as the application in ELC No. 771/2016 namely, that the filing of the further amended counter-claim by Arap Moi in ELC No. 840/2016 had made it necessary for Maestro to amend its counter-claim in ELC No. 1040/2016 so as to join Triple OKLaw Advocates as a party thereto. In its draft amended counter-claim which was annexed to the affidavit of George Kiongera filed in support of the original application, Maestro added Triple OKLaw Advocates as the 7th defendant in the counter-claim. The reliefs sought were also amended to include a claim against Triple OKLaw Advocates.

Arap Moi and Triple OKLaw Advocates filed grounds of opposition in response to the two (2) applications. The other parties in the three (3) cases neither filed grounds of opposition nor replying affidavits. Arap Moi contended that the joinder sought by Maestro in ELC No. 771/2016 would introduce totally incompatible allegations which would delay or embarrass the trial. He contended further that the proposed

joinder was intended to confuse issues in the suit by introducing unnecessary parties thereto. Arap Moi contended that there was neither privity of contract between Maestro and Triple OKLaw Advocates sought to be joined in the suit nor any independent cause of action or relief established by Maestro against the firm. With regard to the application filed in ELC No. 1040/2016, Arap Moi contended that the firm of Triple OKLaw Advocates sought to be joined in the suit acted for a disclosed principal. He reiterated that there was neither privity of contract between Maestro and Triple OKLaw Advocates nor any cause of action established by Maestro against the firm.

In its grounds of opposition, Triple OKLaw contended that the applications by Mestro were frivolous, misconceived and bad in law. It contended further that the proposed further amended plaint in ELC No. 771/2016 did not disclose any reasonable cause of action against it. Triple OKLaw contended further that its joinder in ELC No. 771/2016 was untenable as the same would be contrary to the established legal principle that an agent cannot be sued where there is a disclosed principal. It contended further that Maestro had neither pleaded nor particularised allegations of fraud against it.

The two (2) applications were heard together. Mr. Okatch and Mr. Kanjama appeared for the applicant, Maestro. Submitting on the application filed in ELC No. 771/2016, Mr. Okatch averred that the application sought the joinder of Arap Moi and Triple OKLaw Advocates to the suit. He submitted that Maestro's application was triggered by Arap Moi's amended counterclaim filed on 17/1/2019 in ELC 840/2016 without leave of the court. He submitted that there were some aspects of that amended counter-claim that necessitated the joinder of Arap Moi and Triple OKLaw Advocates to ELC No. 771/2016. He submitted that Maestro had pleaded in its plaint in ELC No. 771/2016 that the suit property was sold to it by Arap Moi and Maestro had filed in court all the relevant supporting documents including the agreement for sale and the instrument of transfer of the property to Maestro. He submitted that the said documents were signed by Arap Moi whose signature in the same were attested by Jinaro Kibet advocate in the firm of Triple OKLaw Advocates. Mr. Okatch submitted that Jinaro Kibet issued a certificate to the effect that he had witnessed Arap Moi signing the instrument of transfer through which the suit property was transferred to Maestro. He submitted that the firm of Triple OKLaw Advocates acted for Arap Moi in the transaction and received the entire purchase price on his behalf. Mr. Okatch submitted that it was on the basis of the instrument of transfer that was signed by Arap Moi and witnessed by Jinaro Kibet of Triple OKLaw Advocates that Maestro was registered as the owner of the suit property.

Mr. Okatch submitted that when preparing the pleadings in ELC 771/2016, Maestro did not expect Arap Moi and Triple OKLaw Advocates to deny the facts set out above and this explains why Maestro did not find it necessary to join them as parties to ELC No. 771/2016. Mr. Okatch referred the court to the amended defence and counter-claim dated 13th June, 2017 filed by Arap Moi on 13th June, 2017 in ELC No. 840/2016. Mr. Okatch submitted that in paragraph 2 B of the said defence and counter-claim, Arap Moi claimed that he had been in possession of the suit property. He submitted that this averment was contrary to the Maestro's position in that it was Maestro which had been in possession of the suit property. Mr. Okatch also referred the court to paragraphs 9 and 21 of the said defence and counter-claim by Arap Moi in which Arap Moi had contended that he was the legal and beneficial owner of the suit property and that any other person such as Maestro which was claiming the property was an interloper and/or a pretender. He submitted that among the prayers sought by Arap Moi in his counter-claim was a declaration that he was the lawful owner and proprietor of the suit property. Mr. Okatch submitted that Maestro runs the risk of being deprived of the remedy that it is entitled to if Arap Moi and Triple OKLaw Advocates were not joined as parties to ELC No. 771/2016. In support of this contention, Mr. Okatch referred the court to paragraphs 4C and 8B of Arap Moi's defence and counter-claim in which Arap Moi averred that it was necessary to join a number of parties to ELC No. 840/2016 including the law firm of Ndungu Njoroge and Kwach Advocates failure to which the plaintiff in that suit risked being deprived of the remedy of compensation that it had sought in its amended plaint.

Mr. Kanjama who appeared with Mr. Okatch dealt with the legal aspects of the applications. He submitted that the court had power under section 100 of the Civil Procedure Act, Chapter 21 Laws of Kenya to allow amendment of pleadings at any time so that real issues and questions arising in a suit can be determined. Mr. Kanjama submitted that under Order 10 rule 2 of the Civil Procedure Rules, the court may at any stage of the proceedings order the joinder of any party to a suit either as a defendant or a plaintiff. He submitted that the court can allow the joinder even on its own motion. Mr. Kanjama also referred the court to order 8 rule 3(1) of the Civil Procedure Rules which also gives the court power to allow parties to amend their pleadings. He submitted that the foregoing rules are founded on Article 159 of the Constitution which enjoins the court to focus on the merits of disputes rather than procedural technicalities. He submitted that the court had power to make the orders sought. With reference to the objection by Arap Moi to the application based on incompatibility, Mr. Kanjama submitted that Arap Moi was already a party in ELC No. 771/2016 and that the law firm of Tripple OKLaw acted for Arap Moi in the sale of the suit property to Maestro. He submitted that in his counter-claim, Arap Moi had disowned all the parties who claimed to have purchased the suit property including Maestro. Mr. Kanjama submitted that there was a question to be tried by the court as to whether there was a genuine transaction between Maestro and Arap Moi. He submitted that to enable the court to determine the issue, the law firm which acted for Arap Moi in the transaction must be made a party to the suit. He submitted that the said law firm acted as an agent of Arap Moi and since Arap Moi had disowned Maestro, it was necessary that both Arap Moi and the law firm be joined as parties to the suit. Mr. Kanjama submitted that if Arap Moi and the firm of Triple OKLaw Advocates had admitted the transaction, it would not have become necessary to join them in the suit. He submitted that if the court finds the transaction between Maestro and Arap Moi to be invalid, the court would have to make an order for damages against the parties to the suit including Arap Moi and Triple OKLaw Advocates. In support of his submissions Mr. Kanjama cited the case of Civicon Ltd v Kivuwatt Ltd. & 2 others [2015] eKLR where the court stated that:

“Under order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them..... For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on an application order for the joinder of a party where the party is a person who ought to have been joined as a party or;

(a) whose presence before the court is necessary, to ensure that all matters in dispute in the case or matter may be effectually and completely determined and adjudicated upon.

(b) the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

Mr. Kanjama referred also to pages 7 and 8 of the same authority and submitted that a person can be joined as a defendant even without his consent and that the court has a very wide discretion while deciding whether to add a party to a suit. With regard to the contention by Triple OKLaw Advocates that they were agents of a disclosed principal, Mr. Kanjama submitted that if the court determines that they were not acting as such agents fraud against Maestro would be apparent. He urged the court to allow the application.

Mr. Ashitva appeared for United States International University (hereinafter referred to as "USIU"). USIU is the 2nd defendant in ELC No. 771/2016, the plaintiff in ELC No. 840/2016, and the 1st defendant in ELC No. 1040/2016. Mr. Ashitva had earlier told the court that USIU did not intend to oppose the applications by Maestro. He made a brief comment on the objections raised to the said applications by Arap Moi and Triple OKLaw Advocates and the submissions by Maestro and left the matter to the court.

Mr. Ngatia S.C. appeared for Arap Moi. In opposition to the two applications, he submitted that the three cases before the court, namely, ELC No. 771/2016, ELC No. 840/2016 and ELC No. 1040/2016 were distinct. He submitted that in the first transaction which was the subject of ELC No. 840/2016, it was alleged that Arap Moi was the owner of L. R. No. 12422/18 ("Plot No. 12422/18") and L.R No. 12422/19 ("the suit property") in the year 1988 and that he consolidated the two parcels of land and sold the same in the same year to DPS International Limited (hereinafter referred to only as "DPS") which is the 3rd defendant in ELC No. 771/2016. He submitted that in that first transaction, it was alleged that a senior advocate Mr. Paul Ndung'u witnessed the execution of the transfer in favour of DPS. He submitted that Arap Moi had denied having dealt with Mr. Ndung'u and a contest ensued whether Mr. Paul Ndung'u should have been made a party to the suit. Mr. Ngatia submitted that in that contest, the court ruled that it was sufficient if Mr. Paul Ndung'u became a witness in the case.

Mr. Ngatia submitted that in the second transaction which was the subject of ELC No. 1040/2016, it was alleged that the plaintiff in that case Muthaiga Luxury Homes Ltd. purchased the suit property from Arap Moi in 2012. He submitted that in view of the allegations in ELC No. 1040/2016, there was a supposition that there was no consolidation of L.R No. 12422/18 ("Plot No. 12422/18") and L.R No. 12422/19 ("the suit property") in 1988 as was alleged in the first transaction which was the subject of ELC No. 840/2016. He submitted that in the transactions giving rise to ELC No. 840/2016 and ELC No. 1040/2016 the law firm of Triple OKLaw Advocates was not involved and in case they were involved, they did not act for Arap Moi.

Mr. Ngatia submitted that the third transaction was the subject of ELC No. 771/2016. He submitted that in this case it was alleged that Maestro purchased the suit property from Arap Moi in 2016. Mr. Ngatia submitted that it was in the foregoing context that the two (2) applications by Maestro should be understood and considered.

He submitted that in ELC No. 1040/2016, Maestro had sought to join the law firm of Triple OKLaw Advocates (hereinafter referred to only as "Triple OKLaw") as a party to the suit although the said firm was not involved at all in the transaction that gave rise to the suit. He submitted that if the court was to allow the application, the court would have permitted Maestro to argue its entire case in ELC No. 771/2016 in ELC No. 1040/2016.

With regard to the application filed in ELC No. 771/2016, Mr. Ngatia submitted that Maestro had sought to join Triple OKLaw in the suit on the basis that the firm made representations to Maestro. He submitted that the firm of Triple OKLaw had a retainer with Arap Moi to carry out specific transaction and if the firm acted outside the retainer, that should be a subject of another case. He submitted that although the court has a discretion to allow joinder of a party as a defendant to a suit, a party to be joined must be a necessary party to the suit. He submitted that the court had an occasion to deal with the issue as to who is a necessary party in an earlier application. He submitted that for a person to be joined in a suit as a defendant there must be a genuine claim against him. He submitted that a feigned claim is not sufficient to warrant a joinder. He submitted that the claim must have some proximity or nexus to the dispute the subject of the suit.

Mr. Ngatia submitted further that the transaction giving rise to ELC No. 1040/2016 allegedly between Arap Moi and the plaintiff in that case, Muthaiga Luxury Homes Ltd. (hereinafter referred to only as "Muthaiga Homes") took place in 2012. He submitted that Maestro had sought to join Triple OKLaw as 7th defendant in its counter-claim in that suit and had contended that Triple OKLaw had acted for Arap Moi in the transaction that took place between Arap Moi and Maestro in 2016. Mr. Ngatia referred the court to paragraph 13.1.3 of the proposed amended counter-claim by Maestro. He submitted that by including the alleged transaction between it and Arap Moi of 2016 in ELC No. 1040/2016, Maestro was trying to import its claim in ELC No.771/2016 into ELC No. 1040/2016. He submitted that Triple OKLaw did not act for any of the parties in the transaction that gave rise to ELC No. 1040/2016. Mr. Ngatia submitted that Maestro could not be allowed to import into ELC No. 1040/2016 its case in ELC No. 771/2016. Mr. Ngatia submitted further that in its proposed amended counter-claim, Maestro had sought damages against among others Arap Moi. Mr. Ngatia submitted that Maestro could not be allowed to introduce by way of a counter-claim a claim that it had already brought by way of a substantive suit which suit was before the court. He submitted that in ELC No. 1040/2016, Arap Moi was defending a suit that had been brought against him by Muthaiga Homes. He submitted that if the amendment was allowed, Arap Moi would at the same time be defending himself against the reliefs sought against him by Maestro by way of counter-claim which were inconsistent with the reliefs sought by Muthaiga Homes in the main suit.

Mr. Ngatia submitted that this state of affairs would put Arap Moi in a very awkward position. He submitted that since the firm of Triple OKLaw did not play any role in the 2012 transaction that gave rise to ELC No. 1040/2016, it was not a necessary party in the case. He submitted that the said firm could not even be a witnesses in the case. He urged the court not to allow the application brought in by Maestro in ELC No. 1040/2016. He submitted that if Maestros' application was allowed, the trial of ELC No. 1040/2016 would become impossible.

With regard to the application brought in ELC No. 771/2016, Mr. Ngatia submitted further that Maestro had sought to join Arap Moi together with his lawyers Triple OKLaw as parties to the suit. He submitted that the joinder of Triple OKLaw in the suit was sought on the basis that it had acted for Arap Moi in the 2016 transaction. Mr. Ngatia pointed out that paragraph 6 of the draft further amended plaint sought to be filed in ELC No. 771/2016 is word for word with paragraph 13 of the proposed amended counter-claim in ELC No. 1040/2016. Mr. Ngatia submitted that the reliefs sought in the draft further amended plaint are also the same as those sought in the proposed amended counter-claim in ELC No. 1040/2016. Mr. Ngatia submitted further that what Maestro was trying to do was to cast its net wide by repeating its case in ELC No. 1040/2016 in ELC No. 771/2016. He submitted that if this was allowed, Maestro would have an opportunity to argue its case twice. Mr. Ngatia cited the case of Amon v Raphael Tuck & Sons Ltd [1956] 1 All E.R 273 and submitted that Triple OKLaw was not a necessary in ELC No. 771/2016. In that case the court stated at pages 287 and 288 that:

“The person to be joined in a suit must be someone whose presence is necessary as a party... The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled must be a question in the action which cannot be effectually and completely settled unless he is a party.”

Mr. Ngatia submitted that there is a distinction between a necessary witness and a necessary party and that the case against Triple OKLaw makes it a necessary witness rather than a necessary party. He submitted that in the case of Paul Ndung’u advocate who was also to be joined in the suit as a party, the court had held that he was a necessary witness and not a party to the suit.

Mr. Ngatia, submitted that the transaction between Maestro and Arap Moi was a contractual one in which both parties were represented by advocates. He submitted that it would be strange if Arap Moi was to seek to join into the suit advocates who acted for Maestro. He submitted that if there is a breach of contract, the breach only affects the contracting parties. In support of this submission, Mr. Ngatia cited Halsbury’s Laws of England, 3rd Edition, Volume 8 paragraph 110 where the authors stated that:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

Mr. Ngatia also cited Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR and submitted that the joinder of a party presupposes a genuine liability on the part of one or both of the proposed defendants. He submitted that there was no genuine liability to warrant the joinder in ELC No. 771/2016 of Arap Moi and his advocates in the transaction relating to the suit property. He submitted a contract concerns only the parties thereto and that the issues arising in ELC No. 771/2016 could be resolved without involving Triple OKLaw in the suit. He submitted that it would be unfair to sue both Triple OKLaw and Arap Moi over the transaction and that a fair trial would not be possible in the circumstances.

Mr. Ngatia submitted that Arap Moi could be joined in ELC No. 771/2016 for the purposes of seeking a refund of the purchase price. He submitted however that that was an issue between the parties which could be determined without involving Triple OKLaw which could be called as a witness. In conclusion, Mr. Ngatia urged the court to refuse the application filed in ELC No. 1040/2016. For the application filed in ELC No. 771/2016, he urged the court to reject the joinder of the firm of Triple OKLaw. As for the joinder of Arap Moi, he submitted that if Maestro was inclined to do so, he could be joined for the alternative claim.

Mr. Kamau for the 6th and 7th defendants in ELC No. 771/2016 and the 4th, 5th and 6th defendants in ELC No. 1040/2016 supported the application in ELC No. 771/2016 but only with regard to the joinder of Arap Moi to the suit. He submitted that the joinder of Triple OKLaw to ELC No. 771/2016 should be rejected because Maestro had not indicated that there existed any privity of contract between the law firm and Maestro.

With regard to the application in ELC No. 1040/2016, Mr. Kamau urged the court to reject the application in its entirety. He submitted that the proposed amendment was intended to distort the pleadings in ELC No. 1040/2016. He supported Mr. Ngatia’s submissions that the amendment was intended to import the case in ELC No. 771/2016 into ELC No. 1040/2016. He submitted that there was no nexus in the claim raised in ELC No. 1040/2016 and that in ELC No. 771/2016 which Maestro wanted to import into it. Mr. Kamau submitted that Triple OKLaw could be a proper party in ELC No. 1040/2016 but not a necessary party. He submitted that the firm of Triple OKLaw had not claimed any of the parcels of land in dispute. In conclusion, he urged the court to reject the application in ELC No. 1040/2016. With regard to the application in ELC No. 771/2016, he urged the court not to allow the joinder of the firm of Triple OKLaw as a defendant in the suit.

Mr. Ohaga for Triple OKLaw adopted the submissions by Mr. Ngatia S. C. and Mr. Kamau on the two applications. With regard to the application in ELC No. 771/2016 he submitted that the only ground upon which the joinder of Triple OKLaw in the suit was sought was that the firm had acted for Arap Moi and received money on his behalf. Mr. Ohaga submitted that Maestro had not demonstrated that it had any grievance or cause of action against Triple OKLaw. He submitted that there was no sound basis upon which the law firm could be joined as a defendant in the suit.

Mr. Ohaga admitted that Triple OKLaw acted for Arap Moi and received the purchase price on his behalf. He submitted that the said purchase price was received on the basis of a contract that Maestro had entered into with Arap Moi and that the law firm had no interest of whatsoever nature in the transaction. He submitted that the communication between Triple OKLaw and Arap Moi was privileged and that there was nothing placed before the court that could lift that privilege. He submitted that although feeble attempts had been made to plead fraud, no particulars of such fraud had been provided against Triple OKLaw. He submitted that the cloak of privilege remained intact. Mr. Ohaga submitted further that where there is a disclosed principal, an action does not lie against an agent save where the agent acted contrary to instructions. He submitted that there was no such allegation in the application before the court. He urged the court to find that there was no material on the basis of which the court could make an order for the joinder sought and to dismiss the application.

With regard to the application in ELC No. 1040/2016, he submitted that Triple OKLaw had no connection whatsoever with the transaction that gave rise to that suit. He submitted that the application in that suit was an attempt to import the cause of action in ELC No. 771/2016 into ELC No. 1040/2016. He submitted that since the law firm did not act in the transaction which is the subject of ELC No. 1040/2016, there was no cause of action against it. Mr. Ohaga submitted that the application had no basis and amounted to an abuse of the process of the court. He urged the court to dismiss the application with costs.

In his submission in reply, Mr. Okatch submitted that there were contradictions in the submissions that had been made by the respondents in relation to the application filed in ELC No. 771/2016. He submitted that the application in that case was prompted by the amended defence and counter claim that was filed by Arap Moi in which Arap Moi denied the transaction through which Maestro acquired its title to the suit property. Mr. Okatch submitted that in his submission, Mr. Ngatia did not say that Arap Moi recognised the transaction. He submitted that the much Mr. Ngatia went in that direction was to state that Arap Moi had a retainer with the firm of Triple OKLaw. Mr. Okatch submitted

that on the other hand, Mr. Ohaga admitted in his submission that Triple OKLaw acted for Arap Moi. He submitted that the transaction the subject of ELC No. 771/2016 was under criminal investigation and that fraud was at the center of the inquiry.

With regard to ELC No. 1040/2016, he submitted that the suit was filed much later and that Maestro was joined as 2nd defendant. He submitted that Maestro did not join itself in that case. He submitted that the allegations made against Maestro in that suit were serious. He submitted that reliefs had also been sought against Maestro in the suit. He submitted that a direct attack had been mounted against the title held by Maestro in respect of the suit property. He submitted that the plaintiff in ELC No. 1040/2016 had sought a declaration that it was the owner of the suit property and had prayed for the eviction of Maestro from the property. He submitted that the joinder of Arap Moi and Triple OKLaw to the suit would enable Maestro to know who took its money. Mr. Okatch submitted that Maestro had sought reliefs against Triple OK Law and that the firm should be given opportunity to defend itself. He submitted that all the parties should be brought before the court so that they may assist the court in determining all the issues which have arisen. He urged the court to allow the two applications as prayed.

I have considered the two applications and the affidavits filed in support thereof. I have also considered the responses to the applications by the advocates for Arap Moi and Triple OKLaw. Finally, I have considered the submissions by the respective advocates for the parties who participated in the hearing of the two applications and the authorities which were cited in support of the same. What I need to determine is whether I should grant leave to Maestro to amend its plaint in ELC No. 771/2016 to join Arap Moi and Triple OKLaw as parties to the suit and also to amend its counterclaim in ELC No. 1040/2016 for the same purpose.

Maestro filed ELC No. 771/2016 on 8/7/2016. As initially filed, the suit was only brought against one defendant, Riley Services Limited. In its plaint dated 5/7/ 2016, Maestro averred that it was the registered owner of L.R No. 12422/19 (I.R 36415) (“the suit property”) and that Riley Services Limited had illegally entered onto the suit property and had continued with its trespass thereon despite notice of intention to sue having been served upon it. Maestro sought injunction to restrain Riley Services Limited from continuing with trespass on the suit property. Riley Services Limited filed a statement of defence on 22/7/2016 in which it denied Maestro’s claim and contended that it had been engaged by United States International University (“USIU”) who were the owners of the suit property to guard the same.

On or about 20/7/2016, USIU filed ELC No. 840/2016 against Maestro. USIU amended ELC No. 840/2016 on 29/7/2016 and added Arap Moi, Chief Land Registrar and the Attorney General to the suit as 2nd, 3rd and 4th defendants respectively. In its amended plaint in ELC No. 840/2016, USIU averred that it was the registered owner of L.R. No. 12597/2 (I.R No. 106361) (“Plot No. 12597/2”) which was a portion of L.R NO. 12597 which in turn resulted from the consolidation of L.R. No. 12422/18 and L.R NO. 12422/19 (“the suit property”).

USIU averred that L.R No. 12422/18 and LR No. 12422/19 (“the suit property”) were both owned by Arap Moi who consolidated the same to give rise to L.R No. 12597 which he sold on or about 1988 to DPS International Ltd (DPS). USIU averred that on or about 26/2/1990, DPS sold and transferred L.R No. 12597 together with another parcel of land to ICEA Lion Life Assurance Company Limited (ICEA) who in turn sold L.R No. 12597 together with the said other parcel of land to USIU on or about 5/5/1999. USIU averred that on or about 24/1/2001, it subdivided L.R No. 12597 into two portions namely L.R No. 12597/1 and 12597/2 (“Plot No. 12597/2”) and sold L.R No. 12597/1 while retaining LR. No. 12597/2 in its name. USIU averred that Maestro had claimed to own USIU’s parcel of land, L.R NO. 12597/2 which Maestro claimed to be L.R No. 12422/19 (“the suit property”) which it allegedly purchased from Arap Moi. USIU averred that L.R No. 12422/19 (“the suit property”) which Maestro claimed to own was non-existent the same having been consolidated with L.R No. 12422/18 in 1984 to give rise to L.R No. 12597. USIU claimed that Maestro had moved into its parcel of land, L.R No. 12597/2 and had commenced development thereon. USIU sought among other reliefs, an injunction to restrain Maestro from interfering with the said parcel of land and the cancellation of Maestro’s title over L.R No. 12422/19 (“the suit property”).

Maestro amended its plaint in ELC No. 771/2016 on 26/9/2016 and added USIU, DPS, Ndungu Njoroge & Kwach Advocates, Ndungu Paul Nderitu, the Chief Land Registrar and Director of Surveys as 2nd to 7th defendants respectively. In the amended plaint, Maestro reiterated that it was the registered owner of the suit property, L.R No. 12422/19 having purchased the same from Arap Moi and that the title held by USIU in respect of LR No. 12597/2 was fraudulent.

On 26/8/2016, Muthaiga Homes filed ELC No. 1040/2016 against USIU, Maestro, Arap Moi, Chief Land Registrar, Director of Surveys and Attorney General. In its plaint dated 26/8/2016, Muthaiga Homes averred that it was the registered owner of the suit property which it purchased from Arap Moi on 23/2/2012. Muthaiga Homes averred that it learnt from press reports that both USIU and Maestro had laid a claim to the suit property. Muthaiga Homes averred that the titles held by USIU and Maestro in respect of the suit property were fraudulent and illegal and sought; a declaration that it was the lawful owner of the suit property, an order cancelling the titles held by USIU and Maestro and an order for their eviction from the suit property.

Arap Moi filed amended defence and counter-claim in ELC No. 840/2016 on 13/6/2017. Arap Moi’s counter-claim was against USIU, Maestro, Chief Land Registrar, Attorney General and ICEA. In his defence to the claim by USIU, Arap Moi maintained that he was the registered owner of L.R No. 12422/18 and L.R. No. 12422/19 (“the suit property”) and that he was in possession of the two parcels of land. Arap Moi contended that he had never dealt with the two parcels of land since he acquired the same in 1982. Arap Moi termed the alleged transfer of L.R No. 12422/18 and L.R No. 12422/19 (“suit property”) to USIU as invalid. In his counter-claim, he reiterated the contents of his defence and contended that he remained the rightful and the only registered owner of L.R No. 12422/18 and L.R No. 12422/19 (“suit property”). Arap Moi averred that he had not transferred the two parcels of land to any person since 1982 when he purchased the same. Arap Moi contended that he was the legal and beneficial owner of the suit property to the exclusion of all those who had claimed ownership of the same. Among the reliefs that he sought in the counter-claim was a declaration that he was the lawful owner and proprietor of the two parcels of land.

On 17/1/2019, Arap Moi once again filed a further amended defence and counter-claim in ELC No. 840/2016 in which he denied that he sold L.R No. 12422/19 (“the suit property”) to Maestro. According to Maestro, the two applications for amendment made in ELC No. 771/2016 and ELC No. 1040/2016 were necessitated by the position that was taken by Arap Moi in his further amended defence and counter-claim in ELC No. 840/2016. Maestro argued that since Arap Moi had denied ever selling the suit property to it, it was necessary for it to join him as a defendant in ELC No. 771/2016 so that the issue as to whether or not he had sold the property to it could be determined. Maestro also sought to join the firm of Triple OKLaw in the suit as a defendant. Maestro contended that since Arap Moi had denied selling the suit property to

any person since he acquired the same in 1982, the said firm of Triple OKLaw which acted for him in the transaction between him and Maestro had some explanation to give.

Maestro contended that with Arap Moi having denied the transaction, an issue had arisen as to whom Triple OKLaw was representing in the transaction and on whose behalf it received the purchase price paid by Maestro. Maestro contended that should the court come to the conclusion that Arap Moi did not sell the suit property to Maestro as he had claimed, it will be entitled to damages in the form of a refund of the purchase price in respect of which it will hold the firm of Triple OKLaw liable.

With regard to the amendment sought in ELC No. 1040/2016, I did not understand at all Maestro's justification for the intended joinder of Triple OKLaw in the suit. As rightly pointed out by the advocates for Arap Moi, Triple OKLaw and the state counsel, Mr. Kamau, Maestro's case is well set out in ELC No. 771/2016. It is in the transaction which is the subject of ELC No. 771/2016 that the firm of Triple OKLaw acted for Arap Moi. In ELC No. 1040/2016 both Maestro and Arap Moi are facing a claim relating to an alleged transaction between Arap Moi and Muthaiga Homes which took place in 2012 in which the firm of Triple OKLaw was not involved. I am in agreement with the submissions by the advocates for Arap Moi and Triple OKLaw that if Maestro is allowed to amend its counter-claim in the manner sought, it would have been granted a licence to bring his entire case in ELC No.771/2016 into ELC No. 1040/2016 which would be prejudicial to the other parties in that case as it will be conducting its case twice against them.

The law on amendment of pleadings is now settled. In the case of Central Kenya Ltd. v Trust Bank Ltd. [2002] 2 E. A 365 (CAK) it was held that:

“The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided;

(i) there had been no undue delay;

(ii) no new or inconsistent cause of action was introduced.

(iii) no vested interest or accrued legal right was affected; and

(iv) the amendment could be allowed without injustice to the other side.

Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice of injustice to the other party that could not be properly compensated in costs.”

In the case of Amon v Raphael Tuck & Sons Ltd. (supra) that was cited by the advocates for Arap Moi and Triple OKLaw, it was held that the test whether the court had jurisdiction to add as a defendant a person whom the plaintiff did not wish to sue was whether the order for which the plaintiff was asking in the action might directly affect him by curtailing the enjoyment of his legal rights and that the only reason which might render the presence of a party before the court to be necessary to enable the court to adjudicate completely was that he should be bound by the result of the proceedings.

Upon careful analysis of the material before me, I am satisfied that a case has been made out for the leave sought in ELC No. 771/2016. As I have mentioned earlier in this ruling, ELC No. 840/2016 was consolidated with ELC No. 771/2016 and the two cases shall be heard together. It was not contested by Arap Moi that in ELC No. 840/2016 he had disowned the alleged transaction between him and Maestro in respect of the suit property. Arap moi stated in his amended defence and counter-claim in that case that he had not sold the said property to any person since 1982 when he acquired the same. Arap Moi termed those claiming the suit property such as Maestro pretenders and/or interlopers. In his submission, Mr. Ngatia S.C. who appeared for Arap Moi did not deny that Arap Moi had disowned the transaction through which Maestro was said to have acquired title to the suit property. In his submission, Mr. Ohaga submitted that Triple OKLaw acted for Arap Moi in the transaction between him and Maestro. He did not however comment on Arap Moi's denial of the transaction. He claimed that although Triple OKLaw acted in the transaction, the communication between it and Arap Moi regarding the transaction was privileged. I am satisfied that there are issues to be determined by the court as between Arap Moi and Maestro as to whether or not they entered into the contentious agreement for sale, whether he transferred the property to Maestro and whether he received the purchase price. Now that Arap Moi has denied the transaction, an issue has also arisen as to whether the firm of Triple OKLaw which is alleged to have acted for him in the transaction actually had instructions from him and whether the money paid to the said firm was received on his behalf. Furthermore, if the court was to agree with Arap Moi that he was not a party to the contentious transaction, an issue would arise as to who should refund the purchase price that was paid by Maestro for the suit property. It is only the firm of Triple OKLaw which knows to whom the purchase price was paid and from whom it should be recovered. I am satisfied from the foregoing that the presence of Arap Moi and Triple OKLaw as defendants in ELC No. 771/2016 is necessary to enable the court to determine all the issues that I have flagged out above.

Mr. Ngatia had argued strongly and at length against the joinder of Triple OKLaw in the suit. He had reminded the court that the court had earlier refused the joinder of the firm of Ndungu Njoroge & Kwach Advocates in ELC No. 840/2016. I am not in agreement with that contention. My ruling dated 2/6/2017 speaks for itself. The following is what I said in part regarding the joinder of the firm of Ndungu Njoroge & Kwach Advocates and Paul Ndiritu Advocate in that suit in which they had been sued as 6th and 7th defendants respectively:

“The advocates for the 1st and 2nd defendants argued at length to persuade the court that the 6th and 7th defendants are necessary parties to these proceedings and that their presence before the court would assist the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Order 1 rule 10(2) and the case of Central Kenya Ltd. vs. Trust Bank Ltd. (Supra) were cited in support of the said submissions. I wish to state that I am not considering an application under Order 1 Rule 10 of the Civil Procedure Rules. The little I say on it the better as I do not wish to prejudice any application that may be brought under that order which I will consider on its own merit. The much I would wish to say is that if I allow the plaintiff to withdraw its claim

against the 6th and 7th defendants, I would in no way be saying that the court on its own motion or on application by a party cannot order that the 6th and 7th defendants be added once again to the suit.”

I am not persuaded by Arap Moi and Triple OKLaw that the amendment sought in ELC No. 771/2016 would prejudice them or that it would cause injustice to them. To the contrary, I am satisfied that the joinder of Arap Moi and Triple OKLaw in the suit would enable the court to conclusively determine all the issues arising in that suit and that it will avoid multiplicity of suits. The application by Maestro in ELC No. 771/2016 is for granting.

With regard to the application in ELC No. 1040/2016, I am not persuaded that Triple OKLaw is a necessary party in that suit and that its presence would enable the court to determine the issues that have arisen between the plaintiffs and the defendants in that suit. As I have stated earlier, the case that Maestro wishes to introduce by the proposed amendment in ELC No. 1040/2016 is its case in ELC No. 771/2016. I am in agreement with Arap Moi and Triple OKLaw that the intended amendment would unnecessarily complicate the trial in ELC No. 1040/2016. Due to the foregoing, I would decline the application in ELC No. 1040/2016.

The upshot of the foregoing is that the Notice of Motion dated 28th January, 2019 in ELC No. 771/2016 is allowed in terms of prayers 4 and 5 thereof. On the other hand, the amended Notice of Motion dated 8th February, 2019 in ELC No. 1040/2016 is dismissed. The costs of the applications shall be in the cause in the respective cases. It is so ordered.

Delivered and Dated at Nairobi this 20th day of June 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Okatch and Ms. Owano for Maestro

Ms. Nyagah h/b for Mr. Ngatia S.C for Arap Moi

Mr. Kiche for Triple OKLaw

Mr. Thiga h/b for Mr. Ashitiva for USIU

Mr. Kamau for the A.G

Ms. Obwangi h/b for Mr. Fraser S.C for the ICEA

Mr. Thiga for Balozi

Mr. Githara for Muthaiga Homes

Mr. Owang h/b for Katwa for Omwanza Ombati

Mr. Elkington for Andrew Sunkuli

Catherine Nyokabi-Court Assistant