



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC.APPL. NO. 13 OF 2019

BEATRICE AKELO MBOYA.....1ST APPLICANT

ROBERT PKEW ALEUTUM.....2ND APPLICANT

RAEL CHEPKEMOI KASIWA.....3RD APPLICANT

VERSUS

JOSHUA MBOYA.....RESPONDENT

RULING

1. This is a ruling on a Preliminary Objection dated **12/6/2019** and filed on **14/6/2019** in this matter.
2. The Originating Summons dated **9/5/2019** was filed in court on the same date. It was brought by the applicants who seek the following orders:-

(a) That this court be pleased to order that the caution registered against Title No. Trans-Nzoia/Kipsoen/432 be removed forthwith.

(b) That the respondent be ordered to pay costs of this application in any event.

3. The Originating Summons is brought under **Sections 73 (1)** of the **Land Registration Act 2012** and **Order 37 Rule 3** of the **Civil Procedure Rules**. The application is supported by sworn affidavits of 1st and 2nd applicants both dated **8/5/2019**. The respondent filed his response vide replying affidavit sworn on **12/6/2019** and notice of preliminary objection of the same date. The 1st applicant filed further affidavit on **18/7/2019**.

4. The applicants filed written submissions on the respondent's preliminary objection on **18/7/2019**. The respondent written submissions was filed on **23/7/2019**.

5. The preliminary objection raised by the respondent reads as follows:

“That the applicants’ claim (O.S) has not been filed in procedural way (sic) by virtue of Order 1 rule 13 and 2 Cap 21 (sic) of the Civil Procedure Rules, the 3rd applicant (sic) has not authorized any other applicant to appear plead or act in writing”

6. A preliminary objection is an objection on a point of law or which arises from the pleadings. It must be capable of disposing the entire matter before court. The respondents’ preliminary objection is based on **Order 1 rule 13 (1)** that order states as follows:-

“1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear plead or act for such other in any proceedings, and in like manner where there are more defendants than one, any one or more of them may be authorized by any other of them to appear plead or act for such other in any proceeding.

2. The authority shall be in writing signed by the party giving it and shall be filed in the case.”

7. The respondent appears aggrieved by the want of such authorization in this matter. He submits that only two applicants swore an affidavit and the third applicant never swore any affidavit or authorized any other applicant in writing. He thus prays that the applicants had not

approached court in the proper manner.

8. However I have examined the supporting affidavit filed on 9/5/2019 by the 1st and the 2nd applicants respectively. Whereas the 1st applicant appears to be swearing on her own behalf, the 2nd applicant has indicated that he has sworn the affidavit on his own behalf and on behalf of his co-purchaser who is the 3rd applicant.

9. I have perused the agreement exhibited as “**BAM3**” and noted that the 2nd and 3rd applicants are parties thereto. These proceedings have been commenced by way of an Originating Summons and not a plaint as envisaged by **Order 1 rule 3**.

10. In my view **Order 1 rule 13** does not cover the Originating Summons. The Originating Summons are normally supported or opposed by the respective affidavits of the parties. In such proceedings, parties are entitled to swear affidavit on behalf of other parties.

11. I do not find any good reason why I should hold otherwise in this case, bearing in mind that both the 2nd and 3rd applicants appear to be named as co-purchasers in the agreement. I therefore dismiss the respondent’s preliminary objection. There shall be no orders as to costs.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Wanjala holding brief for Mengich for Plaintiff

Joshua Mboya (defendant) present

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019