



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 34 OF 2018

LUCY WAMBUI MURIITHI.....1ST PLAINTIFF

MARGARET WACHUKA MURIITHI.....2ND PLAINTIFF

LOISE WANJIRA MURIITHI.....3RD PLAINTIFF

VERSUS

DORCASE MUTHONI KARANI.....1ST DEFENDANT

JOHN KIBUI KARANI.....2ND DEFENDANT

JAMES PETER KARANI.....3RD DEFENDANT

PAUL MBOGO KARANI.....4TH DEFENDANT

CHARLES MWANGI MUGAMBI.....5TH DEFENDANT

PETER NJOGU KABUI.....6TH DEFENDANT

RULING

What is before me is the Notice of Motion application dated 19th November 2015 brought under *Order 1 Rule 3, 11 & 14 CPR, Section 1A & 3A CPA*. The applicants are seeking the following orders:

- 1. THAT JOHNSON WACHIRA KIBUI be enjoined in this suit as the co-defendant and a third party.**
- 2. THAT the Court be pleased to issue such other orders writs or directions as it may deem fit and just to grant.**
- 3. THAT a third party Notice do issue to JOHNSON WACHIRA KIBUI.**
- 4. THAT costs be in cause.**

The application is supported by an affidavit of DORCAS MUTHONI KARANI sworn the same day. According to the applicants, Jackson Wachira Kibui was the administrator of the Estate of RUBUI KABAGI and that it will be necessary for him to be enjoined to this suit as a party to enable him clarify some issues regarding the Estate of the deceased. The applicants contend that the plaintiff will not be prejudiced if the application is allowed.

The application is opposed by Johnson Wachira Kibui who is sought to be enjoined as a party to this suit. The plaintiff also filed grounds of objection to the said application.

APPLICANTS CASE

The applicants stated that Johnson Wachira Kibui who is sought to be enjoined as a defendant and a third party was the administrator of the Estate of the late Rubui Kabagi and that the said Johnson Wachira Kibui sold part of the parcel of land to the plaintiffs herein. The

applicants have annexed a copy of the certificate of confirmation of grant, a judgment in ELC No. 9 of 2012 (Kerugoya) and a judgment in Misc Succession Cause No. 8 of 2005 (Embu). Based on his role as an administrator, the applicants contend that the said Johnson Wachira Kibui is man of interest who will assist the Court clarify some issues regarding the Estate of the said Rubui Kabagi (deceased).

THE INTENDED/PROPOSED INTERESTED PARTY'S CASE

Mr. Johnson Wachira Kibui who is sought to be enjoined as a co-defendant/interested party filed a replying affidavit opposing the application stating that there is no issue between him and the defendants that is to be considered as the succession matters connected thereto were duly litigated upon and finalized.

He stated that if indeed there were any issues between him and the defendants, the same were resolved in ELC No. 9 of 2012. He stated that the application lacks merit and an abuse of the Court process and should be dismissed with costs.

PLAINTIFFS CASE

The plaintiff through the firm of Maina Kagio & Co. Advocates filed grounds of objection in opposition to the application.

ANALYSIS AND DECISION

I have considered the affidavit evidence and the submissions by the parties. There are two issues arising in this application. First is the issuance of a third party Notice. The legal foundation on third party Notice is to be found under **Order 1 Rule 15 of the Civil Procedure Rules, 2010** which provides thus:

“1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party):-

a. That he is entitled to contribution or indemnity;

b. That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within 14 days after the close of pleadings for leave of the Court to issue notice (hereinafter called a third party Notice) to that effect, and such leave shall be applied for by summons in Chambers ex-parte supported by affidavit”.

It is trite that in order to join as a third party, the subject matter between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same.

Before a Court decides whether to grant an application for a third party Notice, it is important to show that any question or issue relating to or connected with the same subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them.

The defendants who are applicants in this application have not given a causal link between the plaintiff' claim and the defendant and the defendant and the proposed third party. From the affidavit in support of this application, the applicants have stated that it would be prudent to enjoin the proposed third party to enable him clarify some issues of the Estate of Rubui Kabagi. Those issues have not been disclosed to enable this Court determine whether the applicant has satisfied the threshold for the grant of the orders sought.

Secondly, the applicants are seeking to have the said Johnson Wachira Kibui enjoined as a co-defendant. The law on joinder of parties is governed by **Order 1 of the Civil Procedure Rules**. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise. The Court may even add a party to the suit on its own motion where such a party is necessary for the determination of the real issue in controversy or whose presence is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. However, joinder of parties may be refused where such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will occasion unnecessary delay or costs to the parties. Put it differently, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or relief. The determining factor for joinder of parties in my view is that an applicant must establish a common question of fact or law between the existing and the intended parties.

The power to exercise discretion on joinder or misjoinder of a party to a suit was articulated by the Supreme Court in the case of **Francis Kariuki Muruatetu Ltd & another Vs Republic & 5 others** in **Petition No. 15/2016 of (2016) e K.L.R** where the Court identified the following elements to be considered in granting the application to include the following:

1. The personal interest or stake that the party has in the matter must be clearly identifiable and must be proximate enough, stand, apart from anything that is merely peripheral.

2. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and something remote.

3. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court

I agree with the decision of the Superior Court which is also binding on me. The applicants in this case have not clearly set out any identifiable interest of the person proposed to be enjoined and the existing cause of action. In my view, the application dated 19th November 2015 lacks merit and the same is dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of September, 2019.

E.C. CHERONO

ELC JUDGE

20TH SEPTEMBER, 2019

In the presence of:

1. Mr. Maina Kagio for Plaintiffs/Respondents
2. Defendants/Applicants/Advocate – absent
3. Mbogo Court clerk – present