



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 24 OF 2014**

**BENDELE GACHIRI KAMAU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GITHINJI KARUKU NGONDI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JAMES MUNENE GITHINJI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AND**

**GRACE MARY**

**MUTHONI KARIUKI.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

The applicant has moved this Court vide a Notice of Motion dated 12<sup>th</sup> June 2019 seeking to be enjoined as the 3<sup>rd</sup> defendant in this suit. In her affidavit sworn the same date, the applicant/interested party stated that the 2<sup>nd</sup> defendant is her husband and that the 1<sup>st</sup> defendant is her father-in-law. She further deponed that they got married with the 2<sup>nd</sup> defendant in 1990 or thereabout and that their marriage was blessed with three (3) issues namely; Margaret Wambeere, Lenah Wangechi and Solomon Githinji.

The applicant also deponed that the 2<sup>nd</sup> defendant is the registered owner of all that parcel of land known and referred to as NGARIAMA/LOWER/NGARIAMA/819 having been given by the 1<sup>st</sup> defendant who held the same in trust for him and his family. She stated that some time in 2017 or thereabout, the 2<sup>nd</sup> defendant disappeared after he was found to be a contemnor and a warrant issued against him. It was then that she made the first application to be enjoined as an interested party which application was allowed on 7<sup>th</sup> March 2018.

The applicant states that unless she is poised at a vantage position to participate fully in this matter, her interest and those of her children may not be presented to the Court on the suit property together with her children and may finally be rendered destitute. That application is opposed by the plaintiff who filed grounds of opposition dated 2<sup>nd</sup> July 2019.

**DISPOSITION**

I have considered the affidavit evidence in support of the Notice of Motion dated 12<sup>th</sup> June 2019. I have also considered the rival submissions contained in the grounds of opposition by the plaintiff/respondent. The applicant was enjoined in this suit as an interested party vide a ruling on 8<sup>th</sup> September 2017. The application has been brought under Order **1 Rule 10 Civil Procedure Rules**. That provision of the law reads as follows:

***10 (1) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks fit.***

***(2) 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 .....***”.

This Court in its ruling delivered on 8<sup>th</sup> September 2017, Justice B.N. Olao (as he then was) at page 6 observed as follows:

**“..... He says he has been in adverse possession since 1984. However, from the applicant’s affidavit, she and her family have set up their matrimonial home on the suit land. The applicant is in effect contesting the plaintiff’s occupation of the suit land. That of course will be determined by the trial Court. In the absence of the 2<sup>nd</sup> defendant, the evidence of the applicant will be important in determining whether in fact the plaintiff is in exclusive occupation and possession of the suit land which is a key element in a claim for adverse possession. I do not therefore think that the applicant’s interest in this suit can be regarded as merely cursory .....**

**It is however clear to me that there can be no justification in shutting out the applicant from this suit since her presence is necessary to enable this Court adjudicate over this matter”.**

When the Court observed that the applicant’s presence was necessary in the determination of this suit, she was ordered to file and serve her pleadings within 15 days of that ruling. Since this Court has already made a determination that the applicant is a necessary party in the determination of the issues in dispute especially when the 2<sup>nd</sup> defendant has gone missing in action, it may be necessary to bring the applicant on board as a defendant and file pleadings as contemplated in the **Civil Procedure Act** and the rules made thereunder. An interested party is not contemplated to file pleadings when the same is not provided for under **the Civil Procedure Act** which is the guiding statute. As my brother Justice B.N. Olao observed in his ruling of 8<sup>th</sup> September 2017, I return with the same verdict that the applicant is a person of **“interest”** in this suit and the applicant ought to be allowed as defendant instead of interested party in order to enable the Court to determine the real issues in controversy effectually and effectively.

In the upshot, I allow the application dated 12<sup>th</sup> June 2019 in the following terms:

- (1) Grace Mary Muthoni Kariuki be and is hereby enjoined in this suit as the 3<sup>rd</sup> defendant and not as an interested party.**
- (2) The 3<sup>rd</sup> defendant, Grace Mary Muthoni Kariuki to file and serve her pleadings to the plaintiff’s claim within 14 days from today.**
- (3) The plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are at liberty to amend, file and serve their pleadings within 14 days from the date of service.**
- (4) The costs of this application to abide the event.**

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 25<sup>th</sup> day of October, 2019.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**25<sup>TH</sup> OCTOBER, 2019**

In the presence of:

1. Mr. Ombachi holding brief for C.S. Macharia for Defendants
2. Plaintiff/Advocate – absent