



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 33 OF 2013**

**WACHIRA KINGURU.....PLAINTIFF**

**VERSUS**

**KARIUKI NGUNDO.....1<sup>ST</sup> DEFENDANT**

**STEPHEN MBAU WARUI.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, KERUGOYA LANDS OFFICE**

**THROUGH THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**AND**

**PHILLIP MUCHUNGU.....1<sup>ST</sup> INTERESTED PARTY**

**JOSEPH GITAU KIBUCHI.....2<sup>ND</sup> INTERESTED PARTY**

**GABRIEL MUCHOKI KIBUCHI.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

The interested parties have moved this Court vide a Notice of Motion dated 17<sup>th</sup> July 2017 seeking the following orders:

- (i) That this Honourable Court be pleased to strike out the Reply to defence filed herein by the plaintiff on 23<sup>rd</sup> June 2017.***
- (ii) That the plaintiff be ordered to comply with the orders made by the Court on 19<sup>th</sup> May 2017 regarding amendment of pleadings.***
- (iii) That the interested parties be referred to in the suit as 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and parties amend their pleadings accordingly.***
- (iv) That costs in the suit and of this application be borne by the plaintiff.***

The application is premised on grounds shown on the face of the said application supported by the affidavit of John Khayega Chivae.

That application is opposed by a replying affidavit sworn by the plaintiff Wachira Kinguru on 27<sup>th</sup> February 2018 and grounds of opposition dated 22<sup>nd</sup> March 2018. The application being between the plaintiff and the interested parties, the respondents did not file any response.

**INTERESTED PARTIES/APPLICANTS SUBMISSIONS**

The counsel for the interested parties submitted that the plaintiff/respondent through his Reply to interested parties Defence and counter-claim has raised totally new issues of fraud which the rules does not contemplate them to respond and therefore prejudicial to them in a substantial way. The interested parties further submitted that the plaintiffs ought to have amended the plaint so as to make the pleadings substantively and accord the interested parties an opportunity to respond to these allegation or to incorporate them in their defence to counter-claim. In conclusion, the interested parties sought to be referred as defendants and not interested parties and that the plaintiff will not be prejudiced.

## PLAINTIFF'S/RESPONDENT'S SUBMISSIONS

The plaintiff through his counsel submitted that the application by the interested parties goes against the orders that allowed the interested parties to be enjoined to this suit. The plaintiff submitted that by the time the third parties were enjoined as third parties, the case had been concluded and consent order entered. He submitted that since the interested parties were allowed to be enjoined after the close of pleadings, he had to respond the new issues raised by the interested parties through his reply to defence and counter-claim.

## ANALYSIS AND DETERMINATION

I have considered the application, the rival affidavits and the submissions by counsel. When this Court ordered the interested parties to be enjoined as parties in this suit, they were ordered to file and serve their pleadings with corresponding leave to the other parties to amend their pleadings within 15 days of service upon them. The applicants were enjoined in this suit as interested parties and ordered to file their pleadings. The Civil Procedure Act and the rules made thereunder did not contemplate the filing of pleadings by an entity known as an interested party (ies) such as the applicants herein. However, since this Court ordered the interested parties to be enjoined and to file their pleadings, the plaintiff had to respond to those allegations raised by the interested parties in a way that would address the new issues not contemplated in the Act and the rules made thereunder. When this Court granted leave to the parties to amend their pleadings within 15 days from 19<sup>th</sup> May 2017, it did not direct them the manner and extent in which those amendments were to be carried out. The applicant/interested parties cannot therefore be right to accuse the plaintiff/respondent of violating the same.

I also hasten to add that the applicants were enjoined as interested parties and cannot now seek to be enjoined as different entities. This suit was instituted by the plaintiff as against the defendants and can either succeed or fail depending on whether there is a cause of action as against the defendants or not. Since the interested parties invited themselves to this suit and made certain allegations, the plaintiff had a right to respond to those allegations in his pleadings as he did.

In *Everlyn Kili Mbulu Vs Lereslan B Lesiyamp & another (2004) e K.L.R*, the Court held as follows:

***“In Herbert Vs Vanshan (1972) 3 All E.R 122, at 122 GOH J. held that:***

***“Anything is legitimate which adds to, qualifies, or explains the allegations of the defence, unless it is shown to be wholly irrelevant. When the rules were prepared, the view was taken that after defence, new matter should generally be introduced by way of amendment and that is, in my opinion, the more consistence course. To my mind, the said reply to defence would appear to do no more than to add to, qualify or explain the allegations in the defence. I do not think that the plaintiff can be faulted for doing so. Indeed, I think that it was incumbent upon the plaintiff to respond in the manner in which she did. I think that the provisions of Order VI Rule 6A (3) are very instructive in that regard”.***

I agree with the decision of the Court. The reply to the defence at paragraph 5 wherein he claims that the defendants have never utilized the land is in response to the interested parties defence paragraph 6 where they averred that the defendants are in possession of the property and have substantially invested in it.

The reply to defence at paragraph 7 is in response to the interested parties defence paragraph 6 where they state that the plaintiff could not have just stopped utilizing the land and kept quiet. The reply to defence at paragraph 8 gives particulars of fraud which was in essence the subject matter of the suit. In my view, the reply to defence by the plaintiff only explain the allegations raised by the interested parties defence and does not raise new facts. It is my view that the plaintiff's reply to the interested parties defence was proper and did not deviate from the directions given by this Honourable Court in its orders issued on 19<sup>th</sup> May 2017.

In the upshot, I find the application dated 17<sup>th</sup> May 2017 lacking merit and the same is hereby dismissed with costs.

*READ, DELIVERED and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of October, 2019.*

**E.C. CHERONO**

**ELC JUDGE**

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

*In the presence of:*

- 1. Mr. Ndirangu holding brief for Kimwere*
- 2. Mr. Asimwe holding brief for Magee*
- 3. Wachira – Court clerk*