



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 55 OF 2017

CHRISTINE MUTILE MWANGI.....1ST PLAINTIFF

CRISSAM ACRES LIMITED.....2ND PLAINTIFF

VERSUS

RAFIKI MICROFINANCE BANK LIMITED.....DEFENDANT

STEVEN KATULA MWANGI.....PROPOSED INTERESTED PARTY

RULING

1. By a notice of motion dated 18th April 2019 brought under the provisions of **Sections 1A, 1B, 3 & 3A of the Civil Procedure Act (Cap. 21), Order 22 Rule 22 & 23, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling laws** the proposed Interested Party sought two main orders. First, he sought an order for his joinder as a Plaintiff or Interested Party. Second, he sought a “permanent” injunction restraining the Defendant from disposing of the suit property which was charged to it to secure repayment of a credit facility of Kshs.10 million.

2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by Steven Katula Mwangi, the proposed Interested Party. It was contended that his mother, the 1st Plaintiff herein, was registered as proprietor of the suit property merely as a trustee and that the Defendant was negligent in allowing her to charge it to secure repayment of a credit facility without a court order to that effect. He further contended that he was an innocent beneficiary of the estate of his late father and that he should not be made to suffer for mistakes of the bank and his mother.

3. The Defendant filed grounds of opposition dated 14th May 2019 and a replying affidavit sworn by Jane Warau on 14th May 2019 in opposition to the said application. The Defendant contended that the said application was misconceived, untenable and an abuse of the court process. It was further contended that the court had become ‘*functus officio*’ upon delivery of the ruling dated 31st January 2019 dismissing the 1st and 2nd Plaintiffs’ application for injunction. It was also contended that the instant application was *res judicata* by virtue of **Section 7 of the Civil Procedure Act (Cap. 21)**.

4. When the said application was listed for *inter partes* hearing on 15th May 2019, the advocates for the concerned parties agreed to canvass it through written submissions. The proposed Interested Party was granted 21 days to file his written submissions whereas the Defendant was given 21 days upon the lapse of that period to file its submissions. The record indicates that the Defendant filed its submissions on 27th June 2019 but there were no submissions on behalf of the proposed Interested Party by the time of preparation of the ruling.

5. The court has considered the notice of motion dated 18th April 2019, the Defendant’s grounds of opposition and replying affidavit in opposition thereto as well as the submissions on record. The court is aware that the provisions for joinder or addition of parties are to be found in **Order 1 Rule 10 of the Civil Procedure Rules**. The relevant provisions stipulate as follows:

“(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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.”

6. The nature of the court’s discretion under **Order 1 Rule 10** was considered by the Court of Appeal in the case of **JMK V MWM & MFS**

“We would, however, agree with the respondent that Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sakar’s Code (supra) quoting as authority, decisions of Indian courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal in Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules in *Tang Gas Distributors Ltd V Said & Others [2014] EA 448*, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgement where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

7. It is thus clear that the court has a very wide discretion in joining additional parties to existing proceedings either before, during or after trial of the action. There is no doubt that the main suit is yet to be heard. What the court previously dealt with was an interlocutory application for interim orders. Given that the proposed Interested Party intends to challenge the validity of the charge over the suit property as a beneficiary of the estate of his late father, the court is satisfied that he has sufficient interest in the suit to warrant being joined in the suit as either an Interested Party or co-Plaintiff. The court does not agree with the Defendant’s submission that he cannot be joined simply because he was not party to the suit at the commencement thereof.

8. The second aspect for consideration is whether the proposed Interested Party has made out a case for the grant of an interlocutory injunction. The court has considered the entire material on record in this matter. It is apparent that the 1st Plaintiff is the mother of the proposed Interested Party. She had previously filed a notice of motion dated 16th July 2017 seeking an interim injunction to prevent the Defendant from disposing of the suit property pursuant to its statutory power of sale.

9. In the earlier application, the 1st Plaintiff challenged the validity of the charge on the same grounds which the proposed Interested Party has raised in the instant application. It was contended by the 1st Plaintiff then, as it is contended by the Interested Party now, that the 1st Plaintiff was merely a trustee of the suit property and had no authority to charge it to the Defendant. The court fully considered that issue and by a ruling dated 31st January 2019 it dismissed the 1st Plaintiff’s application for injunction dated 16th July 2017.

10. There is no indication on record of any of the two Plaintiffs having appealed the order of 31st January 2019. So, it is open for the Interested Party to seek a similar injunction on the same grounds which the 1st Plaintiff had advanced earlier on? The court is of the view that although the doctrine of *functus officio* may not be strictly applicable, the instant application may be caught up by the doctrine issue estoppel. The issue of trust was canvassed and decided in the previous application for injunction. Although the same issue can be canvassed at the trial of the main suit, the court is of the opinion that it cannot be re-opened and re-litigated in a similar interlocutory application for injunction. The court is further of the opinion that the instant application for injunction is an abuse of the court process in so far as it seeks to reopen an issue previously decided in the same suit.

11. The upshot of the foregoing is that the court is satisfied that the proposed Interested Party has made out a case for joinder as a party. He is consequently joined as a 3rd Plaintiff in the suit. However, the court finds no merit in the application for injunction and the same is accordingly dismissed. The notice of motion dated 18th April 2019 is therefore allowed in terms of order No. 3 only. The prayer for injunction in terms of order No. 4 is hereby dismissed. Costs of the application shall be in the cause.

12. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 3RD DAY of OCTOBER 2019.

In the presence of Mr. Muraguri holding brief for Mr. Were for the Plaintiffs; Ms. Ikenye holding brief for Mr. Mwaura for the Defendant and Mr. Kioko holding brief for Mr. Mosongo for Interested Party.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

03.10.19