



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 129 OF 2017**

**(FORMERLY HCC 12 OF 2016)**

**HENRY MUGO NJERU.....PLAINTIFF**

**VERSUS**

**NJERU NJAGI.....DEFENDANT**

**AND**

**NJUE MUNYI KIVUANA.....1<sup>ST</sup> PROPOSED INTERESTED PARTY**

**EDITH MUTHONI NYAGA.....2<sup>ND</sup> PROPOSED INTERESTED PARTY**

**EDITH CIAMBUNGUU.....3<sup>RD</sup> PROPOSED INTERESTED PARTY**

**RULING**

1. By a notice of motion dated 18<sup>th</sup> February 2019 the Defendant, Njeru Njagi, sought the following orders:

- a) *That the 3 proposed Plaintiffs be joined to these proceedings as Plaintiffs respectively.*
- b) *That the costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by the Defendant on 18<sup>th</sup> February 2019. It was contended that the intended Plaintiffs should be joined in the suit to facilitate a conclusive determination of the case. It was further contended that the intended Plaintiffs were the legal representatives of Munyu Kivuana, Joseph Nyaga and Njue Mukunguu (hereinafter *the deceased*) respectively, who are all deceased.

3. The Defendant's case was that the Plaintiff in the suit was merely a front or proxy of the proposed Plaintiffs hence the land dispute cannot be conclusively determined in their absence since the deceased were all parties to prior proceedings before the defunct Land Disputes Tribunal and the High Court. It was, therefore, the Defendant's desire to have the land dispute determined conclusively in the presence of all concerned parties.

4. The Plaintiff filed a replying affidavit sworn on 26<sup>th</sup> March 2019 in opposition to the said application. It was contended that the said application was misconceived and an abuse of the court process. It was contended that the intended Plaintiffs should not be dragged into the proceedings since they had the option of making their own application to be joined. The Plaintiff further contended that he had no relationship with the proposed Plaintiffs hence they should not be forced upon him as co-Plaintiffs. He, therefore, asked the court to dismiss the said application with costs.

5. When the said application was listed for hearing on 14<sup>th</sup> May 2019 the Defendant prosecuted it orally on the basis of the grounds set out in his notice of motion and the supporting affidavit and urged the court to allow it. The Plaintiff's advocate opposed the same on the basis of the replying affidavit sworn by the Plaintiff on 26<sup>th</sup> March 2019 and urged the court to dismiss it.

6. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the respective oral submissions of the parties. The court is aware that an application for joinder or addition of parties is governed by the provisions of

**Order I of the Civil Procedure Rules, 2010** (hereafter *the Rules*).

7. The relevant provisions of **Order 1 Rule 10** of the Rules stipulate as follows:

**“10 (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.”**

8. The nature of the court’s discretion under **Order 1 Rule 10** of the Rules was considered by the Court of Appeal in the case of **JMK V MWM & MFS Mombasa Civil Appeal No. 15 of 2015 [2015] eKLR** where the court stated as follows:-

**“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.”**

9. It is thus clear that the court has a wide discretion in joining new parties to existing proceedings, either before, during and after trial. However, there is one insurmountable hurdle which the Defendant needs to overcome in order to succeed. **Order 1 Rule 10 (3)** of the Rules stipulates no parties with full capacity to sue or to be sued can be joined as Plaintiffs without their **written consent**.

10. The Defendant did not exhibit or file any written consents from the proposed Plaintiffs indicating their willingness to be joined as such. They should not be made to incur legal costs or other legal liability against their will. The court finds it strange that a Defendant is seeking to compel other persons to sue him as Plaintiffs. The court is of the opinion that the Defendant has no right to compel strangers to a suit to sue him or to select persons who would sue him as Plaintiffs. The court, therefore, agrees with the Plaintiff’s submission that the application for joinder is misconceived and does not lie in law.

11. The court is further of the opinion that the Defendant’s application does not lie for another reason. Whereas the Defendant desires to have the entire land dispute heard conclusively hence the need to involve the deceased and their alleged legal representatives, the Plaintiff’s suit is a claim for adverse possession only. It is a claim which is not so much concerned with how the Defendant came to be registered as proprietor of the suit property.

12. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investment Ltd & 4 Others [2004] 1 KLR 184** as follows;

**“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

13. It is thus apparent that different considerations apply in a claim for adverse possession. The court would not adjudicate on who is the rightful owner of the suit property but whether or not the registered proprietor has lost his right to recover the property on account of adverse possession. Thus, the presence of the deceased or their legal representatives would not be required for the Plaintiff to be able to prosecute his claim for adverse possession. Similarly, their presence would not be necessary for the purpose of assisting the Defendant to refute or resist the claim for adverse possession. The court is thus of the opinion that the presence of the proposed Plaintiffs is not necessary for the purpose of conclusively determining the matters in controversy in the instant suit for adverse possession.

14. The upshot of the foregoing is that the court finds no merit in the Defendant’s notice of motion dated 18<sup>th</sup> February 2019. Accordingly, the same is hereby dismissed with costs to the Plaintiff.

15. 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 for the Plaintiff and the Defendant present in person.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**03.10.19**