



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 56 OF 2016

DAVID KIPTEIMET KIPNGENY.....PLAINTIFF

VERSUS

JOSEPH WAMUKOTA.....1ST DEFENDANT

SIMON WAMALWA.....2ND DEFENDANT

WILSON WAMUKOTA.....3RD DEFENDANT

JUMA.....4TH DEFENDANT

AND

PHILIP OYUGI OCHOLA.....APPLICANT

RULING

1. The application dated **30/7/2019** which was filed in court on the same date has been brought by the applicant seeking the following orders:
 - (1) That **PHILIP OYUGI OCHOLA** be enjoined to these proceedings as the 5th defendant
 - (2) That the intended 5th defendant be given such time as the court would order within which to file his defence and compliance documents.
 - (3) That upon granting prayer No. 2 herein, the plaintiff be granted leave to amend the plaint.
 - (4) That the costs be in the cause.
2. The applicant has brought the application under **Order 1 Rule 10(2) and Order 51 Rule 1 of the Civil Procedure Rules**.
3. The grounds on which the said application is made are that the intended 5th defendant/applicant herein has been in occupation of the suit land parcel No. **Trans-Nzoia/Chepchoina Twiga/101** for many years; that prior to the institution of **Kitale Chief Magistrate's Criminal Case No. 2123 of 2005** wherein the intended 5th defendant's wife was prosecuted as the third accused person the 5th intended defendant and his family was already living and know no other home apart from the suit land and that it is fair and prudent that the intended 5th defendant be enjoined in the suit for purposes of defending his acquired interest in the suit land.
4. The application is supported an affidavit of the applicant sworn on **30/7/2019** which reiterates the above grounds.
5. The 1st plaintiff/respondent filed a replying affidavit on **24/9/2019** in which he responded to the application as follows: that this suit having been pending since 2016 such an application as the interested parties should not be entertained at this juncture; that it is not true that the applicant has been in occupation of the suit land parcel for nearly 20 years; that following the purchase of the land in 1986 he reported some trespassers among them the applicant's wife, to the police in February, 2001 and they were charged with the offence of forcible detainer but were later released under **87 (a)** of the Criminal Procedure Code when the case was withdrawn; that later on they refused to vacate the land despite his entreaties; that no document has been filed showing the applicant's interest in the land and that if the application is allowed the plaintiff will be prejudiced.
6. The applicant filed submissions on **24/10/2019** while the plaintiffs had filed his earlier on **28/10/2019**. I have considered the application,

the response and the submissions.

7. In his submission the applicant cited **Andy Forward Service Ltd & Ano. -vs- Pricewater House Coopers Ltd & Ano. [2012] eKLR** and **Central Kenya Ltd -vs- Trust Bank Ltd [2000] 2 EA 365**.

8. In their response the respondents cited **Kenya Medical Laboratory Technician & Technologists Board & 6 Others -vs- Attorney General & 4 Others [2017] eKLR** and **Rubina Ahmed & 3 Others -vs- Guardian Bank Ltd [2019] eKLR**.

9. In the instant application the main issue that arises for determination is whether the applicant should be made the 5th defendant in this suit. The application is brought under **Order 1 rule 10 (2)** of the Civil Procedure Rules which provides 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, 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.”

10. It is clear from the provisions set out above that the court’s discretion on the joinder of any party either as plaintiff and defendant or striking out of any party is very wide. The only ground that the court requires to take into consideration is whether the presence of that person sought to be joined as party is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

11. For now all that the applicant has to his credit is a copy of the proceedings in **Kitale CM Criminal Case No. 2123 of 2005**. No other document is exhibited. The applicant’s assertion is that he has been living with his family on the suit land for 20 years. No other evidence corroborates this claim. It is not admitted by the respondents who asserts that they will be prejudiced by the joinder of the applicant at this stage.

12. In this case the plaintiffs have sued four persons alleging that they have trespassed on their land and cultivated it. They also allege that the trespassers have erected structures on their farm without their consent and denied them the user of the land. They do not expressly admit that the applicant is in possession of the suit land or any part thereof. Though the statement by the 1st plaintiff is that “*it is not true that the applicant has been in occupation of the suit land parcel No. Trans-Nzoia/Chepchoina Twiga/101 for nearly 20 years.*” That statement can be interpreted in different ways. It was upon the applicant to clarify through a further affidavit and further annexures that he was indeed in occupation of the suit land. Without that kind of evidence the application by the proposed 5th defendant is just but a gamble. Without sufficient evidence this court is not convinced that the presence of the applicant in this proceedings is such as will “*enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit*” as required by **Order 1 rule 10 (2)** of the Civil Procedure Rules. When an applicant approaches the court he must leave the court with no element of doubt as to what he is saying and that he has proof to support his claim. In this case the mere arraignment in court in **2005** of one **Lilian Angeshi Oyugi** who is said to be the applicant’s wife is not conclusive truth that he has been or, if he ever was, is still in occupation of the land.

13. Consequently I find the application dated **30/7/2019** has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 27th day of November, 2019.

MWANGI NJOROGE

JUDGE

27/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Wanjala holding brief for Kiarie for Applicant

N/A for the Respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

