



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 64 OF 2011

BOAZ KIPCHUMBA KAINO.....PLAINTIFF

VERSUS

G.H. TANNA & SONS LTD.....DEFENDANT

AND

ABDU MUKHWANA,

FREDRICK SAMBULA,

WANJALA WESELA AND

ROBERT MAKONA.....APPLICANTS/PROPOSED PLAINTIFFS/INTERESTED PARTIES

RULING

1. This is a ruling on the application dated **29/4/2019** and filed in court on **30/4/2019**. That application has been brought by the applicants seeking the following orders:-

(a) That this court be pleased to enjoin ABDU MUKHWANA, FREDRICK SAMBULA, WANJALA WESELA and ROBERT MAKONA as Plaintiffs or Interested Party in the proceedings herein.

(b) That any other incidental relief that this court will be deemed fit to meet the ends of justice.

(c) That costs of this application be provided for.

2. The application is brought under **Section 1A and 1B** of the **Civil Procedure Act, Order 1 Rule 8(1) and 3, 12 and 14 of the Civil Procedure Rules 2010**.

3. The application is supported by the affidavit of **Wanjala Wesela** sworn on **24/9/2019** and the further affidavit dated **10/6/2019**.

4. The grounds upon which the application is premised are that the proposed plaintiff/interested party have letters of allotment in respect of parcels which were the subject matter herein; that the applicants are adversely affected by the judgment of the court delivered in their absence on **30/5/2017** and the defendant is using the said judgment to harass the applicants; that the plaintiff filed suit without involving the applicants claiming to be the allottee of the said parcels; that the proposed applicant's rights have been violated by virtue of exclusion from the proceedings and that none of the parties would be prejudiced if this application is allowed.

5. The affidavit and further affidavit of **Wanjala Wesela** sworn in support of the application largely reiterates the above grounds. The deponent maintains that the applicants were not aware of this suit until April, 2018 when they filed **Kitale ELC Pet. No. 4 of 2019** against the defendant, the Attorney General and other government agencies in which case a copy of judgment and decree in this matter was exhibited by the defendant in herein. They aver that the court ruled in favour of the defendant in this matter and ordered the cancellation of titles issued to the plaintiff and that the defendant is now using the judgment to deny the plaintiffs remedy in court. He further depones that the applicants were not aware of any claim over the said plots by the plaintiff herein and that cancellation of titles without according them a hearing is draconian for the reason that the applicants have occupied the suit property and developed the same since 1994. He maintains that unless the proceedings are reopened the applicants are bound to be condemned without being accorded a hearing. It is stated in the affidavit that the applicants intends to apply for a review of the judgment.

6. In response to the application, the replying affidavit sworn by **Paresh Gordhandas Tanna** the Director of the defendant on **20/5/2019** and a further affidavit dated **21/6/2019** were filed. In those affidavits he deposes that judgment was delivered in this matter on **30/7/2017** in which the suit was resolved by the court on the basis of titles issued to the suit properties and not letters of allotments and no appeal was preferred against the decision by the plaintiff or by any other person; that the titles cancelled did not belong to the applicants to warrant their being described as aggrieved parties; that there are no active proceedings in this matter and the court is *functus officio*; that fresh proceedings arose in the form of **Kitale CMC Land Case No. 75 of 2018** when the plaintiffs sued the defendant herein and defendant counterclaimed against them in that case claiming plots No. **Kitale Municipality block 4/439 and 440**; that the letters of allotment intimated are merely an offer whose conditions the applicants never complied with; that the judgment settled all issues touching on the suit property and any other issues can only be addressed in a fresh suit and a fresh cause of action and no other party may be enjoined after the judgment; that in any event the applicants filed **Kitale ELC Pet. No. 4 of 2019** claiming ownership of the suit land and they should pursue their claim therein and that the application is an abuse of process of the court.

7. In the further affidavit the deponent avers that the photographs exhibited by the applicants were not within **Kitale Municipality Block 4/364** which was the subject matter of this suit.

8. In the applicants' written submissions they cite **Order 1 rule 10 (2)** of the **Civil Procedure Rules** and maintain that the **Civil Procedure Act** is silent regarding the definition of an interested party. They resort to the Constitution for the definition of an interested party. They also cite the case of **Yusuf Abdi Dan & Another -vs- Hussein Ahmed Farah & 3 Others** and submit that they have demonstrated proprietary interests on the land parcel. They further highlight their occupation on the suit land which allegedly commenced in **1996** and maintain that they were in such occupation when **Kitale ELC No. 64 of 2011** was instituted and heard yet they were not enjoined in this suit as interested parties and they only came to know of it after the judgment when a copy thereof was exhibited in an affidavit in the lower court case alluded to hereinabove. The applicants make an unclear submissions that the plaintiff was not a genuine entity and was only a scheme calculated to benefit the defendant.

9. The defendant submitted that there is no suit pending and that joinder of the applicants will only cloud issues which have been determined by a competent court. The defendant compares the documents held by both parties and describes the documents relied on by the applicants as mere letters of allotment which do not possess as much impact as the title it holds. Further the defendant maintains that he does not claim any interest in the buildings in the photographs exhibited by the applicants as they are not within his plot and that the applicants are at liberty to file a fresh cause of action which they have done vide **Kitale ELC No. 75 of 2018** and **Kitale ELC Petition No. 4 of 2014**. The defendant cites **Nairobi Milimani HCCC No. 16 of 2006 Moses Wachira -vs- Niel Bruel & 3 Others** and urges this court to dismiss the application.

10. The applicants filed their submissions on **9/10/2019**. The defendants filed theirs on **7/10/2019**. I have considered the contents of the application and the response including the submissions.

Determination

Issues for determination

11. The issues that arise for determination in the instant application are as follows:

(a) Should the applicants be enjoined in the suit in which judgment has already been rendered?

(b) What orders should issue?

12. The applicants are aware that a judgment was delivered in this suit in **2017** but they maintain that they should be enjoined. It is the correct legal position espoused by **Order 1 rule 10 (2)** that a court may under certain circumstances enjoin a party at any stage of proceedings. The precise words of that provision are 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.”

13. In the case of **J M K v M W M & another [2015] eKLR MSA CIVIL APPEAL NO. 15 OF 2015 (MAKHANDIA, OUKO & M'INOTI, J.J.A.)** the court observed as follows:

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

14. The only factor 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.

15. In the instant application the burden lay on the applicants to demonstrate that their presence is necessary for the purpose of enabling the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

16. The proper construction of **Order 1 rule 10 (2)** is that there must be a suit in existence for the court to subsequently adjudicate on once the application for joinder is successful. In my view that means a suit that is not concluded, which is still active. Is there a suit in this case?

17. The respondent's answer is that this court, after pronouncing judgment in the matter became *functus officio*. In the case of **J M K -vs- M W M & another [2015] eKLR** the court observed 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. Sarkar’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 of 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 judgment 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.

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.”

18. In **Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another [2014] eKLR** the court, (Nyamweya J.,) held as follows;

“The provisions of Order 1 Rule 10 (2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.”(emphasis mine)

19. In the case of **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** the plaintiff filed an application after judgment seeking an order that an interested party be enjoined in the suit, for purposes of the Plaintiff's Application, filed on an earlier date seeking to nullify the transfer of the suit land which occurred during the pendency of the main suit between the Defendant and the said interested party.

20. In that case of **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** the court observed as follows:

“It is true, as argued by the Intended Interested Party's Advocate that it will not be procedural to join a party to a suit after Judgment has been delivered. Joinder of parties can only be allowed before the entry of Judgment.

However, the circumstances of this case are rather unique and before the court can determine whether the Application for joinder should be allowed or not, those circumstances should be examined and weighed against the applicable principles of the law.” (emphasis mine)

21. However the court later on in the same judgment in **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** stated as follows:

“It will be a mockery of justice for the court to subject the Plaintiff to another rigour of litigation as against the Intended Interested Party and prove fraud as against the said party.

Everyman, as quoted in the proceeding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. Therefore, purchase made of a property actually in litigation *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly be bound by the judgment or decree in the suit.

The Intended Interested Party's argument that the Plaintiff should file a distinct suit as against it flies in the face of the very mischief that the principle of *lis pendens* is supposed to address.”

22. In the **J M K -vs- M W M & Another [2015] eKLR** Case (supra) the Court of Appeal set aside an order of the Employment and Labour Relations Court dismissing an application filed after judgment seeking to enjoin the applicant as a party in the matter, and allowed

joinder. However the court in that case considered two factors:

- 1. The applicant's reputation was at stake in that the employment and labour relations court had found the applicant guilty of sexual harassment without granting the applicant an opportunity to be heard.**
- 2. The application had alongside the order of joinder sought the setting aside of the judgment.**

23. The court in **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** allowed the application for joinder after judgment. It is useful to note that by the time the application was made another application had been filed seeking substantive orders of cancellation of the transfer that had been effected *pendent lite*.

24. It can be observed from the case law quoted above that though it is not procedural to enjoin a party to a suit after judgment, joinder may be allowed in certain exceptional circumstances.

25. In two of the decisions cited above the applicants had shown the proper course of action they wished to take after joinder -in the **Carol Silcock Case**, an application for orders of cancellation of the interested party's title obtained *pendent lite* was already on the record by the time the application for joinder was argued. In the **JMK -vs- MWM** case the application for joinder had included an order setting aside the judgment of the court.

26. No setting aside or review order is sought in the instant application. The applicants only intimate that they intend to apply for a review of the judgment. At **paragraph 12** of their supporting affidavit they state as follows:

“That we intend to apply for a review of the judgment.”

27. However intent is different from concrete action. The reality is that there is no suit pending determination. Whether the applicants would file the application for review as intimated is the subject of speculation and there is no good reason advanced as to why such an application for orders was not filed in the court file by the time the instant application was filed, or why the same could not be sought concurrently in the same application.

28. In my view, there should be evidence of concrete action taken by the applicants which should point to a certain specific direction that the matter would take after the application for joinder after judgment is granted, otherwise the court may end up acting in vain in granting the orders sought. Courts should not act in vain.

29. This court declines to operate on the basis of speculation and assumption, and it finds that the application before it is devoid of any merit. I therefore decline to grant the application dated **24/4/2019** and I hereby strike it out with costs to the respondent.

Dated, signed and delivered at Kitale on this 14th day of November, 2019.

MWANGI NJOROGE

JUDGE

14/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo holding brief for Omboto for Applicant

Mr. Kraido holding brief for Onyancha for Respondent

COURT

Ruling delivered in open court at 2.50 p.m.

MWANGI NJOROGE

JUDGE

14/11/2019.