



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 64 OF 2015

LABAN MASINJILA

HARRIET MASINJILA.....PLAINTIFFS

VERSUS

JOSHUA ADIDALA MASINJILA

DANIEL MWISUNJI MASINJILA

ZABLON ANYULA WILIMISI.....DEFENDANTS/RESPONDENTS

JOSEPH MAKARIOS MASINJILA.....APPLICANT

RULING

This application is dated 13th June 2019 and is brought under order 51 Rule 1 of the Civil Procedure Rules 2010, section 3A of the Civil Procedure Act seeking the following orders:-

1. That this honourable court be pleased to enjoin the applicant, Joseph Makarios Masinjila, as the 3rd plaintiff in this case.
2. That the applicant be granted leave to file plaint to this suit in the usual way.
3. That the draft plaint to be deemed properly filed and served.
4. That this honourable court be pleased to make any such other orders as it may deem just and expedient in the circumstances.
5. That the costs of this application be in the cause.

The applicant submitted that he is the representative of the estate of Barnabas Ambutsi Masinjila. (Annexed and marked JMM1 is a copy of the grant of letters of administration interstate). That the High Court of Kakamega sitting at Kakamega in Kakamega High Court Civil Case No. 25 of 1995 (O.S) and No. 5 of 1998 (consolidated) Clement Masinjila, Laban Masinjila and Barnabas Masinjila versus Joshua Andala Masinjila gave a decree on 4th April, 2005 in which it declared that the 1st defendant held the title to all that parcel of land known as Isukha/Shirere/574 in trust for himself, the late Barnabas Ambutsi Masinjila and one Laban Masinjila in equal shares. The court ordered the 1st defendant to transfer to Barnabas Ambutsi Masinjila (deceased), the said Laban Masinjila and the late Clement Masinjila their respective shares of the said land after survey. (Annexed hereto and marked JMM2 are copies of judgment and decree demonstrating as such). That he delayed in filing this suit due to Citation Case No. 9 of 2007. (Annexed hereto and marked JMM4 is a copy of the Citation Case No. 9 of 2007). That the said Citation has since been ruled in his favour. That the Estate of Barnabas Ambutsi Masinjila (deceased) which he represents has an interest in this matter. (Annexed and marked JMM5 is a copy of the consent order dated 11th November, 2013 demonstrating as such).

The respondent submitted that, the application is fatally defective in that it is seeking to obtain orders against the 1st and 2nd respondents who are long deceased, and are not duly substituted in these proceedings. That the 1st respondent/defendant who is alleged to have fraudulently transferred the subject parcel of land to him is not a party thereof, and that, he has not been substituted in this matter either. That he was never a party to the proceedings that were taken in Kakamega High Court Civil Case No. 25 of 1998 (O.S) and any orders made therein would not affect him. That no reason is given why a judgment would have been made in the Kakamega High Court Case No. 25 of 1998 (OS) on 24th October, 2001 when the late Barnabas Masinjila, whose estate the applicant purports to represent and execution thereof is not effected during the lifetime of Joshua Masinjila, the 1st respondent/defendant hereof until this suit was filed in the year 2015. That if the applicant is seeking to be made a plaintiff in a suit filed in the year 2015 in respect of which the cause of action is a decision made on 24th

October, 2001, then the applicant is seeking to sneak a suit in court that is time barred by statute in that it is well over twelve years since the decision was made. That the annexure J.M.M.1 (letters of grant of administration intestate) does not accord the applicant sufficient capacity to bring up this application in the first place.

This court has carefully considered the application and the submissions therein. The application is supported by the affidavit of Joseph Makarios Masinjila and on the following grounds; that the applicant is a personal representative of the late Barnabas Ambutsi Masinjila (deceased). That the late Barnabas Ambutsi Masinjila was a plaintiff in Kakamega High Court Civil Case No. 25 of 1995 (O.S) and No. 5 of 1998 (consolidated); Clement Masinjila, Laban Masinjila and Barnabas Masinjila versus Joshua Andala Masinjila. The High Court gave a decree on the 4th April, 2005 in Kakamega High court Civil Case No. 5 of 1998 (consolidated); Clement Masinjila, Laban Masinjila and Barnabas Masinjila versus Joshua Andala Masinjila which it ordered that the 1st defendant to transfer to Barnabas Ambutsi Masinjila (deceased), the said Laban Masinjila and one Clement Masinjila (deceased) their respective shares of the said land. That the estate of Barnabas Ambutsi Masinjila (deceased) has interest in this suit. That the applicant failed to file this suit in good time reason being that he was waiting for the outcome of citation case No. 9 of 2007 which is now determined in the applicant's favour.

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 moto*, 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. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others, CA NO. 222 OF 1998*, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. 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 even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. I see no prejudice that would be suffered if the applicant is enjoined as a party at this stage in order to execute the judgement. I find this application has merit and I grant the following orders;

1. That this honourable court be pleased to enjoin the applicant, Joseph Makarios Masinjila, as the 3rd plaintiff in this case.
2. That the applicant be granted leave to file plaint to this suit in the usual way.
3. That the draft plaint to be deemed properly filed and served.
4. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE