



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.266 OF 2015

SAMUEL MBURU GICHANGAPLAINTIFF

VERSUS

PETER NDUNGU KINUTHIA1ST DEFENDANT

WAIREGI NDUNGU.....2ND DEFENDANT

REUBEN WAWERU KARANJA.....3RD DEFENDANT

LEAH WAMBUI GAKUU.....4TH DEFENDANT

JANE NJOKI WAKIBI5TH DEFENDANT

RULING

(Application by a party to be enjoined as defendant; suit by plaintiff seeking orders to evict certain persons in possession of land claimed to be owned by the plaintiff; applicant stating that the plaintiff's land was subdivided and she has a share in one of the subdivided parcels; application to enjoin a defendant only to be allowed in the clearest of cases; applicant has option to file a separate suit or be enjoined as third party; application dismissed)

1. The application before me is that dated 30 October 2017 filed by one Lucy Wanjiku Gitau, the administrator of the estate of one Josphat Gitau Gichanga. The application is said to be brought pursuant inter alia to the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules. In the application, the said applicant has sought orders that she be enjoined to this suit as the 5th defendant.

2. The suit itself was commenced on 22 September 2015 by way of plaint. In the plaint, the plaintiff has pleaded that he is, and has been, the absolute proprietor of the land parcel Maela/Ndabibi Block 3/69 (Ngati) measuring 2.226 Ha, and has been so registered from 22 November 1995 when the register of the land was opened. He has averred that he acquired this land by virtue of being a member of Ngati Farmers Co-operative Society Limited. He has claimed that from January 2014, the named five defendants trespassed into his land and started cultivating portions of it. In the suit, the plaintiff has sought for orders that he be declared the lawful owner of the suit land, a permanent injunction against the defendants, orders of eviction, mesne profits and costs.

3. The five defendants named in the plaint, entered appearance and filed defence through the law firm of M/s Njiiri Kariu & Njau Advocates. In their statement of defence, the defendants pleaded that the plaintiff

was registered as trustee of the said land on behalf of his extended family. It is averred that the suit land was distributed between him and the late Josphat Gitau Gichanga where each was awarded 1.113 Hectares from the suit land. The defendants pleaded that between the years 2004 and 2013, they purchased the portion that they are in possession of from the late Josphat Gitau Gichanga who is registered owner of the land parcel now referred to as Maela/Ndabibi Block 3/871 (Ngati) which was excised from the land parcel No. 69. It is pleaded that the late Gitau died on 22 November 2014 before he completed the survey and transfer process to them.

4. The applicant wishes to be enjoined to this suit as a defendant on the grounds that the land parcel No. 871 was extracted from the land parcel No. 69 which is under litigation.

5. Nothing was filed by the plaintiff to either oppose or support the motion and counsel for the plaintiff did not appear in court during the hearing of the application. Neither did the existing defendants file anything to oppose the motion although I do note that they are represented by the same firm of advocates as the applicant herein.

6. I have gone through the application and the reasons given for wishing to have the applicant enjoined as defendant in this suit. As I pointed out earlier, the application is based upon the provisions of Order 1 Rule 10 of the Civil Procedure Rules, which provides as follows :-

10. Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

7. It will be seen from the above, that the court has power to order the addition or removal of parties to a suit, including the addition of a person as defendant. It will also be seen from Order 10 Rule 4 above, that where the court directs that a person be added as defendant, the plaint will need to be amended as may be necessary.

8. Despite the wide powers given to a court under Order 1 Rule 10 (2), in my view, a court needs to tread carefully before ordering the addition of a party as defendant. This is because the effect of that would be to impose upon the plaintiff a party that the plaintiff had opted not to sue for reasons best known to the plaintiff. It could be that the plaintiff feels that he has no cause of action against such proposed defendant or does not seek any orders against such person. Before making an order for the addition of a defendant, it must be readily apparent that there is a clear cause of action against the proposed defendant based on the pleadings that the plaintiff has presented before the court. For example, in a personal accident case, an owner of a motor-vehicle may apply to be enjoined as defendant in a case where his driver has been sued. Here, the cause of action on vicarious liability is clear and obvious. But where the cause of action is not

so clear cut, I think the court needs to hesitate before making an order for joinder, unless the plaintiff is in agreement, for the order can impose hardship upon the plaintiff, who may be at a loss on how to proceed to amend his pleadings as he may not have had any intention to bring suit against the proposed defendant.

9. In our case, it is said by the applicant, that the land parcel No. 69 was subdivided and the deceased got title to a portion of the said land which became registered as Maela/Ndabibi/871 (Ngati). Now, I cannot tell at this stage of the proceedings if this is really the position. I am also unable to tell at this stage of the proceedings, and based on the material before me, whether the plaintiff has any cause of action against the applicant so that I may demand that the plaintiff sues the applicant and amends his plaint. I also find it difficult to ask the plaintiff to sue for cancellation of title to the land parcel Maela/Ndabibi/871 (Ngati) for I do not know what the plaintiff thinks of this parcel of land. To me, the issue is not so clear and obvious to enable me make the order for the applicant to be enjoined as a party.

10. If indeed the defendants purchased a portion of the suit land from the applicant, there is the option of bringing her as a Third Party to the suit, which will inevitably lead to her joinder in this matter. The applicant also has an option of filing a separate suit of her own, which on consideration, may be consolidated with this one. I therefore do not see any prejudice that the applicant stands to suffer by me not allowing this application.

11. I am afraid that I am not persuaded that this is a clear case in which to enjoin the applicant as a party to this case and for those reasons, I dismiss the application, but I make no orders as to costs as none of the parties opposed it.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30TH day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-