



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 6 OF 2014

LUCY WAMBUI MURIITHI..... APPELLANT

VERSUS

SUSAN WANJIRU KIMOTHO.....1ST RESPONDENT

KIRINYAGA COUNTY GOVERNMENT.....APPLICANT/2ND RESPONDENT

BEING AN APPEAL FROM THE RULING DELIVERED ON 27TH FEBRUARY, 2014 BY HON J.A KASAM – Ag. S.R.M AT KERUGOYA CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 154 OF 2013)

RULING

KERUGOYA CHIEF MAGISTRATE’S COURT CIVIL CASE No. 154 of 2013 is still pending in the subordinate Court and by a Notice of Motion dated 16th July 2013, **THE KIRINYAGA COUNTY GOVERNMENT** (the Applicant herein) applied to be enjoined in the suit in which the plaintiff seeks a declaration that she is the legal owner of land parcel No. KABARE/NYANGATI/5908 while the defendant alleges that she is the owner of the same property which she refers to as plot No. 34A.

The Applicant’s case however is that land parcel No. KABARE/NYANGATI/5908 is a sub-division of land parcel No. KABARE/NYANGATI/716 which was acquired from the previous owner for public purposes and the previous owners were compensated with land in **MWEA** and its environs. That application was supported by the affidavit of **ARTHUR KAMAU** the Applicant’s Senior Administrative officer and to which were several annexures showing that indeed the owners of land parcel No. KABARE/NYANGATI/716 were compensated with land parcel No. KIRINYAGA/MARURUMO/217 yet they still occupy both parcels of land.

That application was opposed by the plaintiff who by a replying affidavit dated 29th July 2013 deponed, inter alia, that she is the registered proprietor of the land in dispute and has no claim against the Applicant which has no title over it and therefore should not be enjoined in the suit.

The defendant did not file any response to the application but nonetheless filed submissions indicating that it was not opposed to the application.

The application came up for hearing before **HON. J. KASAM** Ag. Senior Resident Magistrate who in a short ruling delivered on 27th February 2014 allowed the Applicant to be enjoined in the proceedings as a defendant.

Aggrieved by that ruling, the Plaintiff/Appellant filed this appeal seeking to set aside that ruling and set

forth the following grounds:

- 1. That the learned magistrate erred in law and in fact in delivering a ruling in favour of the Applicant/2nd defendant yet it did not prosecute at all its application dated 16th July 2013.**
- 2. That the learned magistrate erred in law in not appreciating the principles of law to be applied in determining such an application.**
- 3. That the learned magistrate erred in law and in fact in finding that Kirinyaga County Government has all the exclusive rights and reliefs in respect of the suit land parcel No. KABARE/NYANGATI/5908 while that is incorrect as the Appellant is the legal owner and therefore has all the exclusive rights and reliefs as she is the registered owner of the suit land.**
- 4. That the learned magistrate erred in law and in fact in allowing the application to the effect that the Applicant/2nd defendant be enjoined as a defendant in the plaintiff's suit despite the fact that the plaintiff seeks no relief from Kirinyaga County Government and the issues in this case can be determined conclusively without the Applicant/2nd defendant being added as a defendant.**
- 5. That the learned magistrate erred in law and in fact in allowing the application whereas on the face of the ruling, it was not clear who was the Applicant whether MR. KAMAU or Kirinyaga County Government.**
- 6. That the learned magistrate erred in law and in fact in ignoring in toto the Appellant's pleadings and submissions thereto.**

When the appeal was placed before me for directions, it was agreed that it be canvassed by way of written submissions which were subsequently filed both by **MS FATUMA ADVOCATE** for the Appellant and **MR. GACHERU ADVOCATE** for the 1st defendant/Respondent. The 2nd defendant/Respondent did not file any submissions.

I have considered the appeal and the submissions by counsel.

The application that gave rise to the ruling subject of this appeal was brought under the provisions of **Order 1 Rule 3, 10 (2) and 14 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**. Those provisions allow a Court to enjoin a party or to substitute a party that has been wrongfully sued if it is deemed appropriate to do so. **Order 1 Rule 3 of the Civil Procedure Rules** provides who may be enjoined as defendants and the test is that there exists a right or relief against the defendant arising from the same acts or transactions and a common question of law or facts arises. Ordinarily, a plaintiff ought not to be saddled with another party as a plaintiff if there is no common interest and equally, a plaintiff should not be made to litigate with a defendant against whom he has no claim. The plaintiff has in paragraph 5 of her replying affidavit deposed as follows:

5: "That I have no claim against Kirinyaga County Government and there is therefore no need for me to be ordered to amend my plaint so as to include them".

However, **Order 1 Rule 10 (2) of the Civil Procedure Rules** is worded as follows:

"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 in the suit, be added" Emphasis added

The reasons advanced by the Applicant/2nd defendant for their enjoinder in this suit are that land parcel

No. KABARE/NYANGATI/5908 is infact public land and no longer private property. Documents have been annexed to the supporting affidavit of **ARTHUR KAMAU** its Senior Administrative officer showing that the previous owner of land parcel No. KABARE/NYANGATI/716 (one **NJUGUNA MWANIKI**) from which land parcel No. KABARE/NYANGATI/5908 was excised was infact compensated with another parcel of land i.e. KABARE/NYANGATI/271. It is important therefore that the Applicant/2nd defendant be enjoined in those proceedings because their presence will “**enable the Court effectually and completely to adjudicate upon and settle all questions in the suit**” relating to the ownership of land parcel No. KABARE/NYANGATI/5908. It cannot be right therefore for the Appellant to allege that the trial magistrate did not appreciate the principle of law to be applied in determining such application. The only error I can detect in the magistrate’s ruling is when she made the following finding as a matter of fact:

“I have considered the evidence herein that the Kirinyaga County Government has all the exclusive rights and reliefs in respect of the land parcel No. KABARE/NYANGATI/1508 (sic) since there are a series of transactions which is (sic) alleged to have existed and/or exist in respect of the land”.

That comment was unnecessary as it suggests that the trial magistrate had already made up her mind about the ownership of the land in dispute. By doing so, the trial magistrate went beyond what was required of her at that stage. Nonetheless, on the basis of the available evidence, the Applicant/2nd Respondent was certainly a proper party to be enjoined in the suit.

The Appellant states that the issues in the suit can be determined conclusively without the Applicant/2nd Respondent being added as a defendant. In view of the un-controverted averments of **ARTHUR KAMAU** as supported by documentary evidence, it cannot be suggested that the suit can be concluded “**effectually and completely**” without the involvement of the Applicant/2nd Respondent. It is of course true that the trial magistrate commenced her ruling as follows:

“Mr. ARTHUR is seeking orders allowing Kirinyaga County Government be enjoined as the defendant to the suit”

The Applicant/2nd Respondent is Kirinyaga County Government and not **MR. ARTHUR** who only swore a supporting affidavit. That description has not however caused any prejudice to the Appellant.

Finally, it is correct that the application was to be canvassed by way of written submissions but the Applicant/2nd Respondent did not file any submissions. I do not think that omission was fatal to the Applicant/2nd Respondent’s case. An application can properly be determined solely on the basis of the rival affidavits filed by the parties even in the absence of submissions oral or written. It is the pleadings that determine what the parties desire the Court to do and submissions only play the role of reinforcing those pleadings. Nothing really turns on that ground of appeal.

The up-shot of the above is that the appeal has no merit and is dismissed with costs to the Applicant/2nd defendant. I direct however that the Applicant/2nd defendant be enjoined as an interested party in **KERUGOYA C.M.C.C No. 154 of 2013** which should be mentioned before the Chief Magistrate on 29th January 2018 for further orders as to hearing.

B.N. OLAO

JUDGE

26TH JANUARY, 2018

Ruling dated, delivered and signed in open Court this 26th day of January 2018 at Kerugoya

Ms Kiragu for Ms Fatuma for Appellant present

Mr. Gacheru for 1st Respondent absent

Mr. Kiarie for 2nd Respondent absent

Appellant present.

B.N. OLAO

JUDGE

26TH JANUARY, 2018