



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 608 OF 2014

PETER IRUNGU WAINAINA.....APPLICANT

-VERSUS-

CHEGE NJIHIA.....1ST RESPONDENT

NJUGUNA KIHARA.....2ND INTENDED RESPONDENT

THE DISTRICT LANDS

REGISTRAR, MURANG'A..3RD INTENDED RESPONDENT

RULING

Back ground

1. Peter Irungu Wainaina, the plaintiff, has taken out the motion dated 23rd July, 2015 in which he sought the following orders;

1. That the applicant be granted leave to join Njuguna Kihara and the District Lands Registrar, Murang'a as parties to this suit as set out in the draft amended originating summons.

2. That the draft amended originating summons annexed hereto be deemed as filed and summons to enter appearance against the intended 2nd and 3rd respondents do issue for service upon them.

3. That the costs of this application be in the cause.

2. The motion is premised on the grounds on the face of the application and is supported by the affidavit of the plaintiff's counsel Mary W. Mungai. The motion is opposed by the defendant Chege Njihia who filed grounds of opposition.

3. It is the submissions of the plaintiff's counsel, that it is necessary to enjoin the proposed 2nd respondent in the suit because he is the beneficiary and administrator to the estate of Wamaitha Kihara who was initially the registered proprietor of **Loc. 18/Kirere/210** (herein after referred to as the suit property) and who sold the suit property to the applicant's father.

4. He deposes that the intended 2nd respondent sold the suit property to the 1st respondent while aware that the applicant has been in adverse possession of the suit property since 1991.

5. He avers that the 3rd respondent (District Land Registrar, Murang'a) is a necessary party in the suit because the Registrar made entries in the register enabling change of proprietorship from Wamaitha Kihara to the 2nd respondent by way of transmission instead of by way of transfer knowing too well, that the 2nd respondent was not a beneficiary of the estate of Wamaitha Kihara thus denying the Government revenue by failing to pay stamp duty.

6. The defendant on his part has urged this court to dismiss the motion on the ground that the application is supported by an incompetent affidavit having been sworn by the applicant's counsel, and that the 2nd and 3rd respondents are not proper parties as they have no legal interest in the subject matter.

7. I have considered the rival submissions plus the material placed before me. Let me begin with the preliminary issue as to whether or not the supporting affidavit deposed by Mary W. Mungai (counsel for the applicant) is incompetent and therefore should be struck out. **Order 19 Rule 3(1)** of the Civil Procedure Rules (CPR) states who should swear an affidavit. **Order 19 Rule 3(1)** provides:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

8. Under **Order 19 Rule 3(1)**, the applicant should have sworn the supporting affidavit instead of his counsel being the one with facts within his knowledge and able to prove them if called upon by the court. The above notwithstanding, I am of the view that the issue raised is a technical one envisaged under **Article 22(3)(d)** and **159(2)(d)** of the Constitution. Further, **Order 19 Rule 7** of the CPR allows a court to receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality. Under the circumstances, I find that if I uphold the preliminary issue, then I will have unfairly denied the plaintiff the right to bring all the necessary parties in this suit to help the court reach a more informed decision. For that reason, I overrule the preliminary objection and deem the supporting affidavit as properly filed.

Analysis and determination

9. **Order 1 Rule 10(2)** of the CPR read together with **Order 8(5)** of the CPR and **Section 100** of the Civil Procedure Act, empowers a court at any stage of the proceedings either upon or without the application of either party, on such terms as may appear to the court to be just and necessary for the determination of the real matter in dispute, order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before 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. In enjoining a party to a suit, certain guiding principles should be considered as set out by my brother, **Havelock J.** in the case of **Technomatic Limited T/A Promopack Company v Kenya Wine Agencies Limited & another [2014]** eKLR where he stated:

“Order 1 Rule 10 (2) states ‘the Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions

involved in the suit be added’.

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

- 1. He must be a necessary party.**
- 2. He must be a proper party.**
- 3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.**
- 4. The ultimate order or decree cannot be enforced without his presence in the matter.**
- 5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”**

11. Applying the above principles to the instant case, I am satisfied that the proposed respondents fit within the grounding principles for the following reasons;

The 2nd proposed respondent is the administrator of the estate of the late Wamaitha Kihara, and the person who sold the suit property to the 1st respondent. The proposed 3rd respondent effected the changes in the register by way of transmission and issued the 1st respondent with a title deed. I am clear in my mind that unless the proposed parties are enjoined as parties in the suit, then the court will not effectively and completely adjudicate upon and settle all questions involved in the suit. Furthermore, I do not see what prejudice the 1st respondent will suffer if the proposed respondents are joined as parties in this suit.

12. For the foregoing reasons, I hereby allow prayers 1 and 2 in the notice of motion dated 23rd July, 2015.

Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nyeri this 3rd day of January, 2018.

L N WAITHAKA

JUDGE

Coram

N/A for the plaintiff

N/A for the defendant

Court assistant – Esther