



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 1562 OF 2014

JOSEPH NGANGA NDUNGU..... 1ST PLAINTIFF
SIMON KAMAU GIKUNYU.....2ND PLAINTIFF
CATHERINE WANJIKU NDUNG’U.....3RD PLAINTIFF
RUTH NYAMBURA WANYOIKE.....4TH PLAINTIFF
SUSAN WARUKIRA GICHOHI.....5TH PLAINTIFF
JOHN KANGETHE.....6TH PLAINTIFF
JERUSAH N. MWAURA.....7TH PLAINTIFF
AGNES ITABARI.....8TH PLAINTIFF
JOSEPH KAMAU KINYANJUI.....9TH PLAINTIFF
MARIA GORET KIRIA.....10TH PLAINTIFF
SAMUEL MWANGI MUCHIRI.....11th PLAINTIFF

Versus

ORIGINAL WAPENDWA AFYA BIDII HOUSING
CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT
RULING

What is before me is the 11th Plaintiff’s application brought by way of Notice of Motion dated 13th December, 2016 in which the 11th Plaintiff has sought orders that, one, John Ngei Vuti and Maria Mbeneka Advocate be joined in this suit as Plaintiff and interested party respectively. The Application has been brought on several grounds. In summary, the 11th Plaintiff has contended that John Ngei Vuti had purchased Plot No. 61 and Plot No. 62 from one, Pauline Wanjiru Wambui on 21st April, 2010 before he sold the same to the 11th Plaintiff. The 11th Plaintiff has contended that the agreement for sale between John Ngei Vuti and Pauline Wanjiru Wambui in respect of the said parcels of land was drawn by Ms. Maria Mbeneka advocate in the firm of Kimani, Kibucho and Karuga Advocates. The 11th Plaintiff has contended further that the agreement for sale between the 11th Plaintiff and the said John Ngei Vuti in respect of the same properties was also drawn by the same advocate. The 11th Plaintiff has contended Ms. Maria Mbeneka advocate acted for the defendant during the sub-division of L.R No. 4148/308 (I.R No. 89990) that gave rise to among others, Plot No. 61 and Plot No. 62.

The 11th Plaintiff has contended that it is necessary for John Ngei Vuti to be joined in this suit as a Plaintiff and for Ms Maria Mbenekato be joined as an interested party so that the court may make a just determination of the suit. The 11th Plaintiff has contended further that the joinder of John Ngei Vuti and Ms. Maria Mbeneka to the suit is necessary to enable the 11th Plaintiff to establish the relationship between the 11th Plaintiff and the Defendant.

I have considered the 11th Plaintiff’s application together with the affidavit filed in support thereof. The application was not opposed by the Defendant. I will consider the application under two limbs. In the first limb, I will consider the prayer for joinder of John Ngei Vuti as a plaintiff in the suit. The 11th Plaintiff’s application was brought under Order 1

rule 10(1) and (2) of the Civil Procedure Rules. Under Order 1 rule 10(1) of the Civil Procedure Rules, the court has a discretionary power to add a person to a suit as a plaintiff where a suit has been instituted in the name of a wrong plaintiff or where it is doubtful whether the suit has been instituted in the name of the right plaintiff. The court must be satisfied that the suit was instituted through a bona fide mistake and that it is necessary for the determination of the real matters in dispute for the person to be added as a party to the suit. Under Order 1 rule 10(2) of the Civil Procedure Rules, the court has power to join as a plaintiff the name of any person whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

Order 1 rule 10(3) of the Civil Procedure Rules provides as follows:

“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.”

There is no evidence that John Ngei Vuti has consented to being joined in this suit as a plaintiff. In the absence of such consent, the 11th Plaintiff's application for the joinder of John Ngei Vuti as a plaintiff in this suit is a non-starter. The application is incompetent and must fail on that ground alone. The rationale for requiring consent to be obtained before a person is added to a suit as a plaintiff is that one cannot be forced to be a plaintiff in a suit save where one is added to a suit by the court of its own motion. See, the case of Lombard Banking Kenya Ltd. vs. Shah Bhaichand Bagwanji [1960] E.A 969. A person can only be a plaintiff in a suit if he has some right to a relief against a defendant in respect of which the burden of proof is on him. It is futile to join a person to a suit as a plaintiff without his consent because he may not have a claim against the defendant in the suit. There is also the cost consequence factor in the event that the suit is dismissed with costs. It is only fair that the consent of a person sought to be joined as a plaintiff in a suit be obtained before being exposed to such expense.

Apart from the 11th Plaintiff's failure to obtain consent of John Ngei Vuti for his joinder as a plaintiff in the suit, I am also not satisfied that a case for his joinder has been made out. The 11th Plaintiff has not established valid grounds that warrant the joinder of John Ngei Vuti as a plaintiff in this suit. It is not in dispute that the 11th Plaintiff acquired Plot No. 61 and Plot No. 62 from John Ngei Vuti who claimed to have acquired the two parcels of land from one, Pauline Wanjiru Wambui who was a member of the Defendant. The Defendant has disowned the sale transaction between the said Pauline Wanjiru Wambui and John Ngei Vuti and the subsequent sale transaction between John Ngei Vuti and the 11th Plaintiff. I am not convinced that the presence of John Ngei Vuti in the suit would assist the court in determining the real matters in dispute in the suit. In my ruling of 29th January, 2016, I did not suggest in any way that it was necessary to join John Ngei Vuti in this suit as a plaintiff. I am of the view that if what the 11th plaintiff desires to achieve by the joinder of John Ngei Vuti to the suit is to create a connection between him and the Defendant, he can achieve that by summoning John Ngei Vuti as a witness.

With regard to the prayer seeking the joinder of Ms. Maria Mbeneka advocate to this suit as an interested party, I am also not satisfied that a case has been made out for such joinder. The 11th Plaintiff has not demonstrated that the said Maria Mbeneka advocate has sufficient interest in the dispute between the parties herein to warrant her joinder as a party to the suit. The evidence placed before the court shows that Maria Mbeneka advocate witnessed the agreement for sale which the 11th Plaintiff entered into with John Ngei Vuti in respect of Plot No. 61 and Plot No. 62. I am not persuaded that the mere fact that an advocate has drafted or witnessed an agreement for sale without more, warrants his or her joinder to a suit concerning the agreement. If that was to be the case, advocates would be parties in nearly all contractual disputes in

in our courts. I am of the view that whatever information the 11th Plaintiff may require from Maria Mbeneka advocate can be obtained from her as a witness rather than a party to the suit.

The upshot of the foregoing is that the 11th Plaintiff's application dated 13th December, 2016 fails wholly. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 16th day of February 2018

S. OKONG'O

JUDGE

Ruling read and delivered in open court in the presence of:

Mr. Ndiso h/b for Mr. Opondo for the 1st to 10th Plaintiffs

Mr. Terer h/b for Mr. Mutura for the 11th Plaintiff

No appearance for Defendant

Catherine Court Assistant