



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 79 OF 2017

EVANS NAKHABALA WEKESA.....PLAINTIFF/ RESPONDENT

VS

KENYA AFRICAN NATIONAL UNION.....DEFENDANT/APPLICANT

RULING

1. The application that is before the Court is a Notice of Motion filed on the 7/11/17 by the Defendant applicant seeking for the following Orders;

- a. That the Honourable Court be pleased to make Five Emukei Transporters Ltd a party in this case.
- b. That the Applicants be allowed to amend their defence and counter-claim to incorporate their claim against the intended parties and the annexed draft of annexed defence and counter-claim be deemed to have been filed upon payment of the filing fees.
- c. Costs of this application to be provided.

2. The application is premised on the following grounds; that the dispute between the Plaintiff and Defendant herein is based on Parcel of Land No. MURANG'A TOWNSHIP BLOCK 111/12 which was in the name of the Plaintiff at the time of filing the suit. The Defendant then filed a defence and counterclaim claiming the parcel of land and on 16/03/16 the Plaintiff's claim was allowed while that of the Defendants was dismissed. The Defendants then filed an application for stay of execution of the decree and setting aside of the judgment. That application was certified urgent but no Orders were given for stay and on the hearing date parties were advised to discuss. That before the Defendant's application could be heard the Plaintiff Respondent transferred the suit property to the intended party herein. On 5/10/17 the Defendant's application was allowed and the suit is to be heard on merits. In view of the current development the applicant avers it became necessary to amend the defence and counterclaim in Order to include the current registered owner of the suit property.

3. The application is supported by the affidavit of Pharis Solomon Chege who is the Secretary of the Defendant applicant herein. In addition to reiterating the grounds on the face of the application he explains that the suit filed against them by the Plaintiffs was heard in their absence which led to the dismissal of their counterclaim. That their application for stay was not heard in good time until the file was transferred to this Court and that they had been advised by the judge to discuss the matter with their opponents. He avers that no discussions took place and in that period of delay the Plaintiffs transferred the suit land to the intended party namely Five Emukei Transporters Ltd. That transfer is suspect as it was done on 22/05/16 before the Defendant's application was scheduled to be heard. That the suit land is commonly known as KANU Murang'a Branch therefore the intended party also knew it had a dispute in

Court. That it is necessary to enjoin the intended party in Order to fully effect the ruling of this Court delivered on 5/10/17.

4. The Plaintiff Respondent filed his replying affidavit dated 11/12/17 and deposed that the application is misleading to the Court, lacks merit and amounts to an abuse of Court process. He says that the prayers sought are not tenable as the Plaintiff has no interest in the suit property having no title thereto. Further that the Plaintiff has no claim against the intended 2nd Defendant as stated in the counterclaim therefore he avers the application is incompetent and an exercise in futility.

5. The applicant s in their written submissions submitted that they were condemned unheard but this Court in its ruling delivered on 5/10/17 Ordered that the suit be heard afresh on merits. They aver that unless the intended parties are enjoined in this suit the Order of this Court will not be fully achieved as the Respondent has since removed the subject matter of the suit from his ambit. It thus necessitates the joinder of the new registered owner as a party to this suit so that they too will be bound by the Orders that will be given by this Court. The applicant s have called upon the Court not to condone the behavior of a mischievous litigant who chooses to remove the subject matter of a pending suit so as to defeat the course of justice. They maintain that they are in possession and occupation of the suit property.

6. The Plaintiff Respondent in his submissions avers that applicant s encroached on the suit property which belonged to him while they had their own parcel of land known as MURANGA MUNICIPAL COUNCIL-PLOT NO 1193/0032 KANU KIHARU (300085-MUKUYU). He contends that the applicant s are not in occupation of the suit land and that the applicant s have an active office at Mukuyu Market in Murang'a Town. He disputes the possibility of a political party to have two different offices in the same town. He also claims that the Respondent has been paying rates and rent for the suit property. He admits to have transferred the suit property to the intended party herein but claims the transfer was done legally and procedurally. He contends that the applicant s have not demonstrated ownership or occupation of the suit property. He maintains that the applicant s are not in occupation of the suit property and that the intended party is now the owner of the suit property. He claims that the applicant s claim can only be canvassed in a different suit.

7. Joinder of parties is governed by **Order 1 rule 7 of the Civil Procedure Rules**. The common test to apply in determining an application for joinder of parties is that a common question of fact or law would arise between the existing and intended parties. Ordinarily joinder of parties would be declined where the cause of action proposed or being sought is completely incompatible to or totally different from the existing cause of action or the relief.

8. I am guided by the decision of Gikonyo J in the case of **Lucy Nungari Ngigi & 128 Others vs. National Bank of Kenya Limited & Anor. Civil case No. 517 of 2014 (2015) eKLR** which stated as follows:-

“ Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule. The Court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in Order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties”.

The issues raised by the Respondent on the ownership of the suit land are to be determined in the main suit. The current application is for enjoinder of a party who the applicant s feel has become a necessary party to the suit in Order for the issues in the main suit to be effectively and completely adjudicated upon and settle all questions involved in this suit. Since the transfer to the intended party was done during the subsistence of the suit herein, and ownership of the suit property is in issue the Intended Party has surely become a necessary party to this suit.

9. The application therefore has merit and it is allowed with the Orders are;

- a. Five Emukei Transporters Limited be and is hereby enjoined as a party to the proceedings.
- b. That the applicant be and is hereby allowed to amend its defence and counterclaim as per the draft on record and the same be deemed properly filed thereon subject to the payment of the necessary fees.
- c. Parties to take the necessary steps to comply with the provisions of Order 11 within the next 30 days and thereafter set the matter for hearing.

10. Costs shall be in favour of the applicant.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 15TH DAY OF FEBRUARY, 2018.

J.G. KEMEI

JUDGE.