



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 201 OF 2016

SHIRVLING SUPERMARKET LIMITED.....PLAINTIFF

VERSUS

JIMMY ONDICHO NYABUTI.....1ST DEFENDANT

JOHN ANTHONY ANGWENYI.....2ND DEFENDANT

AND

CHARLES N. MAGETO.....INTENDED INTERESTED PARTY

R U L I N G

1. The intended interested party/applicant, Charles Mageto vide a Notice of Motion dated 6th March 2017 filed on the same date seeks to be enjoined as an interested party to the instant suit. The applicant further seeks an interim order of injunction restraining the defendants from trespassing into, interfering, dealing, and/or wasting or taking possession of **LR No. Kisii Municipality/Block III/299** and/or in any manner dealing with the subject property in a manner prejudicial to the applicant's interest.

2. The application is made under Sections 1B and 3A of the Civil Procedure Act, Order 8 Rule 3 and Order 40 Rules 1, 2, 3 and 4 (1) (e) of the Civil Procedure Rules and is grounded on the following grounds set out on the face of the application:-

1. THAT the interested party became the registered proprietor of the leasehold interest in that parcel of land known and described as Kisii Municipality/Block III/299 on 27th February, 2008 having purchased the same from Charles Magare Okeyo and Benson Onwonga Okeyo the immediate registered owners of the same.

2. THAT by averments in paragraphs 3 and 4 of the counterclaim the second defendant indirectly challenges the applicant's ownership of LR No. Kisii Municipality/Block III/299, which is a product of a subdivision of Kisii Municipality/Block III/262 and lays a claim over it.

3. THAT by the doctrine of res judicata, the defendants are precluded from further on LR No. Kisii Municipality/Block III/299 vis-à-vis the applicant's ownership of the same.

4. THAT the said LR No. Kisii Municipality/Block III/299 legally belongs to the interested party by operation of the law.

5. THAT the presence of the applicant in this matter shall enable the court to effectively and completely adjudicate upon and settle all the issues in controversy.

6. THAT none of the parties in this suit will be prejudiced by the applicant being enjoined in the suit.

3. The application is further supported on the affidavit sworn in support by the said Charles N. Mageto dated 6th March 2017. The applicant deposes that he became the registered owner of the leasehold interest in the suit property on 27th February 2008 following purchase from Charles Magare Okeyo and Benson Onwonga Okeyo as per certificate of lease annexed as "CNM1". The applicant avers that the latter had purchased the suit property from one Zacharia Angwenyi and had the property transferred to themselves. The applicant further avers the court in Kisii HCCC No. 3 of 2001 determined that the suit property rightly belonged to Benson Onwonga Okeyo and Charles Magare Okeyo as per the ruling by **Wambilyangah, J.** delivered on 12th February 2002. "CNM3". An appeal against the ruling was withdrawn and the applicant hence avers that any dispute in regard to the suit property as between the said Benson Onwonga Okeyo and the estate of Zachariah Angwenyi is *res judicata* and that the applicant's title remains indefeasible.

4. The applicant further states that despite the 2nd defendant herein being aware that the ownership dispute was decisively adjudicated in the referred to suit, the 2nd defendant on 19th July 2016 lodged a complaint against the applicant to the National Land Commission alleging that the applicant had unlawfully acquired title to the suit property. The applicant has appropriately moved the court and has obtained leave to institute judicial review proceedings for prohibition against the National Land Commission and proceedings are now pending before the court. Letter dated 19th July 2016 from the National Land Commission and court order granting leave for judicial review are annexed as “CNM5 and 6” respectively. On the basis of the foregoing, the applicant contends that he ought to be enjoined as an interested party in these proceedings as his presence is necessary to enable the court to effectively and completely adjudicate upon and settle all the issues in controversy.

5. The plaintiff and the defendants filed grounds of opposition dated 9th March 2017 and 25th April 2017 respectively. The application was argued by way of written submissions. The applicant filed his initial submissions on 25th September 2017 and supplementary submissions on 2nd October 2017. The plaintiff filed their submissions on 5th October 2017 while the defendants filed their submissions on 7th February 2018.

6. In the present suit, the plaintiff vide a plaint dated 29th June 2016 and filed in court on 13th July 2016 states they purchased land parcel **LR No. Kisii Municipality/Block III/298** from one, Francis Nyangau Monari who transferred the property to them and are now registered as the bonafide owners of the property. The plaintiff further avers the 1st defendant who at the time the plaintiff purchased the property was occupying a portion of the property, was on 3rd June 2016 evicted from the property but reverted back to the property at the instigation of the 2nd defendant who alleged to own or have interest in the said property **LR No. Kisii Municipality/Block III/298**. The plaintiff in the suit seeks inter alia orders:

1. **That the plaintiff is the lawful, bonafide and registered owner of LR No. Kisii Municipality/Block III/298.**
2. **An order of eviction of the defendants.**
3. **Permanent injunction.**
4. **General damages for trespass.**
5. **Costs of the suit.**

7. In the defence filed by the defendants, the defendants have pleaded that the suit land **Kisii Municipality/Block III/298** was fraudulently acquired by the plaintiff stating that, the subdivision of the original title **Kisii Municipality/Block III/263** into **Block III/298** and **299** was revoked. In the intended amendment of the defence to introduce a counterclaim the 2nd defendant by the counterclaim seeks:-

- (a) **A declaration that land parcel number Kisii Municipality/Block III/298 belongs to the estate of the late Zachariah Angwenyi.**
- (b) **A permanent injunction against the plaintiff restraining them from in any manner dealing with land parcel Kisii Municipality/Block III/298 which belongs to the 2nd defendant.**

8. The applicant/intended interested party has predicated his application for joinder under Order 8 Rule 3 which deals with amendment of pleadings with leave of the court. This provision has no application to the instant application. The appropriate provision is Order 1 Rule 10(2) which provides as follows:

- (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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. **Has the applicant demonstrated he has sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?**

9. Earlier in this ruling, I made reference to the pleadings in the instant suit. It is clear that the orders and reliefs sought by the plaintiff as per the plaint and by the 2nd defendant in the counterclaim relate to land parcel **Kisii Municipality/Block III/298**. This is the property both the plaintiff and the 2nd defendant each claim to be entitled to as beneficial owners. This property is the subject matter in the suit and any orders the court may make can only affect this property. The proposed interested party states he is the registered owner of land parcel **Kisii Municipality/Block III/299** and his reason to seek to be enjoined in the instant suit, as far as I can discern, is because the 2nd defendant has asserted that land parcels **298** and **299** were subdivisions from land parcel 262 which subdivision the 2nd defendant claims to have been revoked. The proposed interested party avers that the 2nd defendant by inference is challenging the ownership of land parcel **299** in the suit. The proposed interested party states that his interest in land parcel **299** may be affected if he is not enjoined to the suit to enable him to protect and safeguard his interest. The applicant has further annexed in support of his application a ruling in Kisii HCCC No. 3 of 2001

where vide a ruling dated 12th February 2002 **Wambilyangah, J.** upheld the existence of land parcels **Kisii Municipality/Block III/298** and **299** as two distinct parcels of land. He held that the defendants in the case, Benson Onwonga Okeyo and Charles Magare Okeyo held a valid and indefeasible title to land parcel **Kisii Municipality/Block III/299**. This is the leasehold interest that the proposed interested party purchased from the said defendants. The ownership of the said land parcel **Kisii Municipality/Block III/299** cannot therefore be in issue in the instant suit the court having previously pronounced itself on the issue. Neither the plaintiff nor the 2nd defendant has sought any orders/prayers that would affect the current proprietorship of land parcel **Kisii Municipality/Block III/299** in regard to which the proposed interested party has an interest.

10. The Court of Appeal in the case of **Pravin Bowry –vs- John Ward & Another [2015] eKLR** considered the applicable principles, or test in an application for joinder. The court adopted with approval the holding by the Uganda Supreme Court in the case of **Deported Asians Property Custodian Board –vs- Jaffer Brothers Ltd [199] 1 E.A 55 (SCU)** where the court stated:-

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis by underline).

11. The court further in the **Bowry** case (supra) referred to the court’s decision sitting in Mombasa in the case of **Civicon Limited –vs- Kivuwatt Limited & 2 Others [2015] eKLR** where the court while observing that exercise of discretion is called for in applications for joinder stated as follows:-

“Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined.

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party, in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

12. Whereas under the Civil Procedure Rules it is apparent that a party ought to be enjoined in proceedings either as a plaintiff or a defendant, the applicant in the instant matter merely applies to be enjoined as an interested party. The Civil Procedure Rules have no provision for a party to be enjoined as an interested party and thus an issue does arise as what role an interested party would play in a civil proceedings and what the nature of pleadings by such a party would be. In my view, a party in any civil proceedings before the court must either be a plaintiff and/or a defendant and thus for a party to be enjoined must either join the suit either as a plaintiff and/or a defendant. If a party is joined as a plaintiff, such a party of necessity must be seeking some form of relief from the defendant or some of the defendants and if as a defendant, there ought to be a plaintiff or plaintiffs who are seeking a relief from such a defendant and/or there is a defendant who desires the party to be enjoined as a co-defendant to enable them to plead their defence. In other words, the plaintiff in the suit and/or a defendant in the counterclaim in the suit must have sought orders which if granted would directly affect the interest of the applicant on the party sought to be enjoined by an already existing party. The applicant must therefore demonstrate he has an interest in the subject matter of the suit and/or he stands to be affected by any orders that may be made in the suit regarding the subject matter. Alternatively, the applicant must show he is a necessary party and his presence in the suit is necessary to enable the court to effectually and completely adjudicate and settle all the issues in the suit. If the application is by an already existing party, the applicant must equally demonstrate how the person sought to be enjoined is interested in the suit and how he stands to be affected by any orders that the court may make in the matter.

13. In Petitions and Judicial Review matters, by their very nature, parties other than the applicants and the respondents are invariably affected and these are enjoined to the proceedings as interested parties. It is in regard to such matters that there has been considerable litigation and the law settled as to who qualifies to be enjoined as an interested party. The Supreme Court of Kenya has ably dealt with the issue of who qualifies to be enjoined as an interested party in the following cases; **Trusted Society of Human Rights Alliance –vs- Mumo Matemu & 5 Others (SC Petition No. 12 of 2013) [2015] eKLR** and **Francis Kariuki Muruatetu & Another –vs- Republic & 4 Others (SC Petition No. 16 of 2015 [2016] eKLR.**

14. In the **Muruatetu** case (supra) the Supreme Court while citing its decision in the **Mumo Matemu** case (supra) with approval laid down the principles which govern joinder of interested parties as follows:-

(i) Personal interest and/or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is nearly peripheral.

(ii) The prejudice to be suffered by the intended interested party incase of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replica of what the other parties will be making before the court.

15. The proposed interested parties interest is in land parcel **299** whereas the plaintiff's and the defendants interest is in land parcel **298**. Although the applicant states that the 2nd defendant has raised issue in regard to how land parcels **298** and **299** came into being, the subject matter in the suit is who between the plaintiff and the 2nd defendant is the owner of land parcel **298**. The ownership of land parcel 299 is not in issue in the suit between the plaintiff and the defendants. The applicant therefore has not demonstrated that he has an interest in the subject matter of the suit and/or that he is liable to be affected by any order that the court may make at the conclusion of the trial. I am not satisfied that the applicant is a necessary party whose presence is necessary in order to determine and adjudicate all the issues in the present suit. Instead the enjoyment of the applicant as an interested party in the suit would merely serve to blur and confuse the issues for adjudication in the suit.

16. Having held that the applicant is not a necessary party in these proceedings it follows that the applicant's application for injunction is unsustainable and cannot be granted. Nobody has made any claim on land parcel 299 and neither has it been shown there has been any interference with the same by any party to these proceedings.

17. The net effect is that I find no merit in the application for joinder by the proposed interested party dated 6th March 2017 and I accordingly dismiss the same. I award costs of the application to the plaintiff and the defendants which I assess at kshs. 7,500/= for the plaintiff and kshs. 7,500/= for the defendants to be paid by the intended interested party.

18. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 16TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 2nd defendants

..... for the intended interested party

..... court assistant

J. M. MUTUNGI

JUDGE