



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 24 OF 2014

BENDELE GACHIRI KAMAU.....PLAINTIFF/RESPONDENT

VERSUS

GITHINJI KARUKU NGONDI.....1ST DEFENDANT/RESPONDENT

JAMES MUNENE GITHINJI.....2ND DEFENDANT/RESPONDENT

AND

GRACE MARY MUTHONI KARIUKI....INTENDED INTERESTED PARTY/APPLICANT

RULING

This is in respect to the application by **GRACE MARY MUTHONI KARIUKI** (the Intended Interested Party/Applicant) dated 8th September 2017 in which she seeks the following orders:

1. That this Honourable Court be pleased to enjoin GRACE MARY MUTHONI KARIUKI the Applicant herein as an Interested Party in this suit and she be granted leave to defend this suit.

2. That the costs of this application be provided for.

The gravamen of the application is that the Applicant and her husband who is the 2nd defendant herein have set up their matrimonial home on the land parcel No. NGARIAMA/LOWER NGARIAMA/819 (the suit land) where they live and have fully developed since 1990. However, the 2nd defendant has since disappeared without trace. The Applicant is therefore apprehensive that should this suit proceed without being defended, her interest in the suit land will not be presented and she and her children may be rendered destitute.

The application is opposed and the plaintiff has filed a replying affidavit describing it as frivolous, vexatious, lacking in merit and an abuse of the Court process. He has deponed that his suit seeks orders that he is entitled to 2 acres out of the suit land by way of adverse possession and such an order can only be made against the registered proprietor. There is therefore no cause of action against the Applicant to entitle her to be enjoined in these proceedings. Therefore, this application serves no purpose.

The defendants did not file any response to the application.

The application was canvassed by way of written submissions which have been filed both by **Mr. MACHARIA ADVOCATE** for the Applicant and **Mr. MUYODI ADVOCATE** for the plaintiff.

I have considered the application, the rival affidavits and submissions by counsel.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides 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 involved in the suit, be added”. Emphasis added

It is clear therefore that where a person can demonstrate that his presence in the proceedings ***“may be necessary in order to enable the Court***

effectually and completely adjudicate upon and settle all questions involved in the suit", then such a person can seek to be enjoined in the proceedings. In ***TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS MUMO MATEMU & OTHERS SUPREME COURT PETITION No. 12 of 2013 (2015 e K.L.R)***, the Court said:

"Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings, and champions his or her cause"

Counsel for the plaintiff has rightly submitted that a claim for adverse possession can only be maintained as against the registered proprietor of the land in dispute. The Applicant's case, as I understand it, is that although her husband the 2nd defendant is the registered proprietor of the suit land, he has disappeared ever since the Court found him to be a contemnor and a warrant of arrest has been issued against him. She has deponed in paragraph 8 of her replying affidavit that the 2nd defendant has:

"..... ceased from participating in this suit"

Her fear therefore is that if the suit proceeds without her presence, her interest may not be considered. And what is her interest in the suit land? This is found in paragraphs 3, 4, 5 and 6 of her supporting affidavit in which she has deponed as follows:

3: "That the 2nd defendant herein is the registered owner of all that parcel of land known and referred to as NGARIAMA/LOWER NGARIAMA/819 having been given the same as a gift by the 1st defendant who held the same in trust for him and his family"

4: "The 2nd defendant, and I got married sometime in the year 1990 and our marriage has been blessed with three issues namely MARGARET WAMBERE, LEAH WANGECHI and SOLOMON GITHINJI."

5: "That our (sic) marriage in the year 1990, the 2nd defendant and I set up our matrimonial home on land parcel No. NGARIAMA/LOWER NGARIAMA/819 where I and my children have been residing all along"

6: "That I have developed the aforesaid land extensively by farming assorted cash and subsistence crops on which I solely depend on for my livelihood as well as that of my aforesaid children".

By his Originating Summons as amended on 12th June 2002, the Plaintiff is laying a claim to two (2) acres out of the suit land which, as per the Green Card, measures 1.79 Ha (about 4.5 acres) or thereabout. He says he has been in adverse possession since 1984. However, from the Applicant's affidavit, she and her family have set up their matrimonial home on the suit land. The Applicant is in effect contesting the Plaintiff's occupation of the suit land. That of course will be determined by the trial Court. In the absence of the 2nd defendant, the evidence of the Applicant will be important in determining whether in fact the plaintiff is in exclusive occupation and possession of the suit land which is a key element in a claim for adverse possession. I do not therefore think that the Applicant's interest in this suit can be regarded as merely cursory. Of course if the 2nd defendant elects, as I understand he has, not to take part in these proceedings, nothing stops this Court from making adverse orders against him as the registered proprietor of the suit land. It is however clear to me that there can be no justification in shutting out the Applicant from this suit since her presence is "***necessary***" to enable this Court adjudicate over this dispute.

Ultimately therefore and upon considering all the issues herein, I make the following orders with respect to the Applicant's Notice of Motion dated 8th September 2017:

- 1. The Application is allowed.***
- 2. The Applicant to file and serve her pleadings within 15 days of this ruling.***
- 3. Costs in the cause.***

B.N. OLAO

JUDGE

7TH MARCH, 2018

Ruling dated, delivered and signed in open Court at Kerugoya this 7th day of March 2018

Applicant present

1st Defendant present

Plaintiff absent

2nd Defendant absent

Mr. Muyodi absent

Mr. Macharia absent.

B.N. OLAO

JUDGE

7TH MARCH, 2018