



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 305 OF 2017

DANIEL GITHIORA GATUHA.....1ST PLAINTIFF

WANJIKU THEGERA.....2ND PLAINTIFF

DANIEL MUTHEE MWANGI.....3RD PLAINTIFF

VS

JOE KARANJA NJOROGE.....1ST DEFENDANT

MURANG'A DISTRICT LAND REGISTRAR.....2ND DEFENDANT

MURANG'A DISTRICT LAND SURVEYOR.....3RD DEFENDANT

NATIONAL LAND COMMISSION OF KENYA....4TH DEFENDANT

RULING

1. Vide a Notice of Motion dated 20/11/17 the Plaintiffs/Applicants under section 63, 64, 65 & 66 of the Co-operative Act Cap 486 Laws of Kenya Order 1 Rule 10(2). Order 8 Rule 3 of the Civil Procedure Act, 3A of the Civil Procedure Act and all enabling provisions of the law sought orders as thus:-

- a) That the Plaintiffs be granted leave to enjoin the liquidator Kagaa Farmers Co-operative Society as a defendant in the suit.
- b) That the Plaintiffs be granted leave to amend the plaint in terms of the draft amended plaint attached hereto.
- c) That costs be provided for.

2. The application is premised on the affidavit of the 1st Plaintiff and the grounds set out as;

- a) Kagaa Farmers Co-operative which is the original registered owner of the suit properties herein was put under liquidation on 5th September 2014 and it is the law imperative to seek leave to institute suit against the liquidator.
- b) All the property of Kagaa Farmers Co-operative Society now vests in the liquidator by virtue of section 65 of the Co-operative Societies Act.
- c) Any Orders issued in this suit will have a direct effect on the intended defendant as some of the property the subject herein are still registered in the name of Kagaa Farmers Co-operative Society.
- d) The intended defendant is a necessary party to be enjoined in these proceedings to enable the Court determine the real question in controversy between the parties.
- e) It is in the interest of justice to allow the amendments.

3. Daniel Githiora Gatuha, the 1st applicant herein deponed that they are members of Kagaa Farmers Cooperative Society Limited. That the

society was the registered owner of the suit properties which it subdivided and allocated to its members, the Plaintiffs being part of them. It is his case that the Defendants illegally and fraudulently consolidated some of the suit properties to wit: LR No. Mukuyu/Kimorori/Block III/3794 – 3800 to form LR No. Makuyu/Kimorori/Block III/3932. That the properties were not available for consolidation as they had been subdivided and allocated to members between 1998 & 1999. That the said plots were registered and allocated to members including the claimants. That the Defendants are deprived of their properties as a result.

4. Further he averred that the Defendants proceeded to carry out further subdivisions of the new Block LR No. Makuyu/Kimorori/Block III/3932 with the intention of selling to unsuspecting third parties while other parcels are still registered in the name of Kagaa Cooperative Society Limited.

5. That on 5/9/14 the said intended party was placed under liquidation and hence this application to enjoin the liquidator, Kagaa Farmers Cooperative Society Limited as a party. That the liquidator has become a necessary party on two fronts. Firstly it is still registered as owner of some of the plots in controversy and secondly any Orders ensuing from this Court will affect the Kagaa Farmers Cooperative Society Ltd. He has attached a Kenya Gazette Notice dated No. 2387 dated 5/9/2014 marked “DGGI” wherein a liquidator was appointed for one year with effect from 2/9/14. An extension dated 17/6/2016 extended the appointment from 20/6/16 to 20/6/17 for one year is also enclosed.

6. The 1st Defendant opposed the application and filed a replying affidavit on 12/1/2018 claiming that the appointment of the liquidator was stayed by the High Court vide Order issued on 14/7/17 by the Hon. Mr. Justice Richard Mwangi. He has annexed a copy of the said Order. That the said stay issued on 14/7/17 was further extended to 16/10/17. He opined that the Plaintiffs should enjoin the Kagaa Farmers Cooperative Society Limited instead since there is no liquidator currently.

7. Maintaining that he is the chairman of Kagaa Farmers Society Limited, he disclosed that there are stay of execution of the Co-operative Tribunal Orders dated 20/6/17. That the liquidation of Kagaa Farmers Cooperative Society Limited has been further extended until the appeal in the High Court is determined. He has attached an Order by Hon. Mr. Justice Msagha Mboghli dated 6/2/18 in Civil Appeal No. 327 of 2017.

8. Parties elected to canvass the application by way of written submissions which they have both filed.

Determination

9. The gravamen of the application seeks to enjoin the liquidator of Kagaa Farmers Cooperative Society Limited on four grounds; That some of the plots being claimed by the Plaintiffs are still registered in its name; Secondly that any Orders issued by the Court in the main suit is likely to affect the intended party; three that there is no prejudice visited on the intended party and the Defendants if the said party is enjoined; Fourth that the intended party has become a necessary party to allow the Court to effectively and completely determine the issues in controversy.

10. The 1st Defendant is saying that the liquidator is not in office; that the appointment of the liquidator by the Cooperative Tribunal on 14/3/14 has been appealed against by the members of Kagaa Farmers Cooperative Society Limited who were aggrieved by the decision of the Tribunal. That indeed the High Court in Civil Appeal No. 327 of 2017 has issued a stay of execution of the Orders of the said Tribunal until the application in that appeal is heard and determined. He has attached a Court Order dated 6/2/18. I note that both the 1st Plaintiff and the 1st Defendant are appellants and the 1st Respondent respectively in Civil Appeal No. 327 of 2017. That to avoid Court Orders in this suit being issued in vain against a nonexistent liquidator, the application should be declined.

11. Further the 1st Defendant/Respondent has maintained that the application for joinder should be disallowed because the applicant has not provided proof of registration of the alleged suit properties in the name of Kagaa Farmers Cooperative Society Limited. That the Plaintiff Applicant has not established grounds to make Kagaa Farmers Cooperative Society Limited a necessary party for the determination of the issues in dispute in the case. That the Applicants have not laid a claim against the liquidator in the amended draft worth pursuing. He opined that the Applicants will be best advised to enjoin Kagaa Farmers Cooperative Society Limited itself instead of the liquidator.

12. Order 10(2) of the Civil Procedure Rules states 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The law permits joinder of parties on application or by the Court suo moto: Contrary to the 1st Defendant’s deposition that the applicant has not presented proof of ownership of the suit properties registered in the name of intended party, the Court observes that copies of titles for LR Nos Makuyu/Kimorori/Block 111/3795-3799 as well as certificates dated 15/10/14 showing LR No. Makuyu/Kimorori/3800 & 3932 registered in the name of Kagaa Farmers Cooperative Society Limited are in the file.

13. The claim of the applicants in the suit are for declaratory Orders that the Plaintiffs are the registered owners of the suit lands; cancellation of title Makuyu/Kimorori/& 3932 which as stated above was registered in the name of the intended party, Kagaa Farmers Cooperative Society Limited. It is with respect that the Court is satisfied that the Applicant has discharged the burden of proof in that regard and the Intended party becoming a necessary party as envisaged by Order 10(2).

14. As to whether there is a liquidator duly appointed for Kagaa Farmers Cooperative Society Limited this Court is guided by the Order of the High Court in Civil Appeal No. 327 of 2017 issued by my brother the Hon. Mr. Justice Msagha Mboghli on 6/2/18 staying execution of

the Orders of the Tribunal that appointed the liquidator. My understanding therefore is that the appointment of the liquidator was frozen pending the hearing and determination of the appeal. I agree with the Learned Counsel of the 1st Defendant that indeed there is no liquidator. Enjoining a non-existent liquidator in my view would be an exercise in futility and secondly it would amount to subverting a Court Order. No material has been placed before this Court to the effect that the Court order has been set aside.

15. Because of my findings above in respect to joinder, the application to amend the Plaintiff in terms of the draft amended plaintiff has no merit. Consequently, the application fails in its entirety and is dismissed with costs to the 1st Defendant Respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 1ST DAY OF MARCH 2018.

J G KEMEI

JUDGE