



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC CASE NO.213 OF 2017
(FORMERLY ELC CC.1426 OF 2013)

PETER KAMAU KUNG'U.....PLAINTIFF/RESPONDENT

-VERSUS-

JAMES THENDU GITAU.....1ST DEFENDANT/ RESPONDENT

GITHUNGURI CONSTITUENCY

RANCHING CO.LTD.....2ND DEFENDANT/ RESPONDENT

THE LAND REGISTRAR, THIKA.....3RD DEFENDANT/ RESPONDENT

AND

PETERSON MURAGE

KARIUKI.....4TH INTENDED DEFENDANT/APPLICANT

WILSON MUCHIRI KARAGU.....5TH INTENDED DEFENDANT

MARGARET WANGUI MUCHIRI.....6TH INTENDED DEFENDANT

RULING

By an application dated 5th September 2017, the Applicant herein *Peterson Murage Kariuki* has sought for the following orders:-

- 1) That an order do issue joining *Peterson Murage Kariuki*, the Applicant herein as the 4th Defendant, *Wilson Muchiri Karagu* as the 5th Defendant and *Margaret Wangui Muchiri* as the 6th Defendant in the matter herein.
- 2) That the suit herein be amended to reflect the addition of the Applicant, the Intended 5th Defendant and the intended 6th Defendant herein as the 4th, 5th and 6th Defendants respectively and the Amended Plaintiff be served upon the parties.
- 3) That an order do issue directing the Plaintiff, the 1st, 2nd and 3rd Defendants to avail the pleadings filed in this suit, to Counsel for the Applicant so that the Applicant may be able to respond to the same.
- 4) That costs be in the cause.

It is supported by the following grounds:-

- 1) The Applicant is the registered owner of the property the subject matter of the suit *LR.No.Ruiru/Kiu Block 2 (Githunguri)/1536*, having purchased the said piece of land from *Wilson Muchiri Karagu* and *Margaret Wangui Muchiri* and consequently registered as the proprietor of the land upon transfer of the said property.

2) *The Applicant seeks to be joined to the suit so as to defend his rights as the registered proprietor of the suit property.*

3) *That having bought the property, the subject matter from Wilson Muchiri Karagu and Margaret Wangui Muchiri, the Applicant further seeks that Wilson Muchiri Karagu and Margaret Wangui Muchiri be joined to this suit as Defendants as the Applicant intends to claim as against the said Intended Co-Defendants.*

4) *That the conduct of and the finding of the court in this suit will affect the Applicant's proprietary rights under Article 45 of the Constitution of Kenya, 2010 and Section 24 of the Land Registration Act, which the Applicant ought to be allowed to defend.*

5) *The joinder of the Applicants, Peterson Murage Kariuki, Wilson Muchiri Karagu and Margaret Wangui Muchiri as Defendants in this suit will be necessary so as to avoid proliferated litigation and to ensure complete settlement of all the questions involved in the proceedings.*

The application is also supported by the *affidavit* of **Peterson Murage Kariuki**, the Applicant herein who averred that he purchased the suit property **Ruiru/Kiu Block 2(Githunguri)/1536**, from **Wilson Muchiri Karagu and Margaret Wangui Muchiri**, who were the registered owners of the said property as evidenced by the title to the said land and **Share Certificate PMK-1**. He further alleged that before the purchase, he had conducted a *search* on **25th April 2014**, at the **Thika Lands Registry** and found that at the time, there were no registered encumbrances on the property and a **Certificate of official search**, was issued indicating the same **PMK-2**. It was his contention that upon the transfer of the land by the previous owner, he proceeded with the process of registration as proprietor of the land and the said registration process was not impeded at the time. He was therefore registered as the proprietor and was issued with a **Title Deed** bearing his name as the registered proprietor of the land **PMK-3**.

Further, that in **May 2017**, as the proprietor of the suit property, he sought to sell the said piece of land and consequently entered into a **Sale agreement** with '**Big Ten for Ten Investment Co. Ltd**', who paid the full purchase price, concluded the agreement and even proceeded to have the property valued for stamp duty purpose – **PMK-4**.

However the said land could not be transferred to the purchaser due to the fact that there was a **prohibition** of registration by a **Court Order**

issued in **Milimani ELC.No.1426 of 2013 (Peter Kamau Kungu...Vs.... The Land Registrar, Thika & Others**. Upon carrying a further search at the land registry, he discovered there was a **restriction** registered against the title, prohibiting any dealings with the property until the said court matter is heard and determined and as such the transfer process could not be completed. It was his allegation that he was not aware of the above stated ongoing case relating to the suit property and only came to know about it in **May 2017**. He therefore sought to be enjoined in the suit as it would affect and is affecting title to his land and as a registered proprietor his rights of proprietorship have been affected.

The deponent alleged that he intends to claim against the Intended 4th and 5th Defendants, having bought the suit property from them. Further, he contended that if the prayers sought are not allowed, he will suffer injustices as any orders given by the court will affect his proprietary rights and might lead to loss of his land which he lawfully purchased. He also stated that it is in the interest of justice that the orders sought should be granted. It was the Applicant's further contention that the joinder of the parties herein is necessary as the Intended Defendants are necessary parties in ensuring complete settlement of all the questions involved in the proceedings.

The application is contested by the Intended 5th & 6th Defendants only. The other parties to the suit did not oppose the application.

Wilson Muchiri Karagu, swore a **Replying Affidavit** and averred

that his advocate has advised him that these proceedings **are misconceived, ill-advised and misplaced** and ought to be dismissed *in limine* as the relief sought by the Applicant cannot issue as the same is outside the scope of court as the 5th & 6th Intended Defendants did not give their consents to the Applicant to apply for their joinder to the suit. Further that the application herein is **an abuse of the court process** as the Applicant is not a party to the current suit and as such cannot apply to have another party enjoined to the suit which he is not a party. He also stated that the 5th & 6th Intended Defendants do not have any interest whatsoever over the suit property. He contended that they purchased the suit property from **James Thendu Gitau** in **September 2012**, as per the **Sale Agreement WMK-3**. He alleged that they were issued with a **Share Certificate** and a **Clearance** from **Githunguri Constituency Ranching Co.Ltd** and were later issued with a **title deed** by **Thika Lands Registry** on **18th October 2012 WMK-7**. It was his contention that they followed proper procedure and conducted due diligence before purchase of the suit land and they were therefore innocent purchasers for value. Further that during the purchase of the suit property, the title documents were not encumbered and the subject suit herein had not been filed.

He further deposed that they sold the suit property to **Peterson N. Murage** on **29th April 2014** for **Kshs.3,000,000/=** and the suit land was not encumbered then. He alleged that neither the Plaintiff nor the Defendants herein have ever sought to enjoin the 5th & 6th Defendants as they have no interest at all over the suit property. Further that their inclusion herein will not assist the court in any way to reach any informed decision. He urged the Court to dismiss the instant application.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law and it makes the following findings;-

There is no doubt that the suit herein was filed on **2nd November 2013**, by the Plaintiff **Peter Kamau Kung'u** against the Defendants thereon. He sought for various orders among them a declaration that the Plaintiff is the owner of the property denoted by **Share Certificate No.3858** and **Ballot No.2952** and which is part of **Title No.Ruiru/Kiu Block 2/1536** and the transfer effected in the register of the 2nd Defendant from the name of the Plaintiff to the 1st Defendant's name is **null and void**.

It is also evident that the suit land now is in the name of **Peterson N. Murage Kariuki**, the Intended 4th Defendant(Applicant) having been issued on **28th October 2014**. There is a **Sale Agreement** attached to the **Supporting Affidavit** dated **29th April 2014**, which shows that the said **Peterson N. Murage** bought the parcel of land from **Margaret Wangui Muchiri** and **Wilson Muchiri Karagu** for a consideration of **Kshs.3,000,000/=**. Further, it is evident that the said **Margaret Wangui Muchiri** and **Wilson Muchiri Karagu**, were registered as the proprietors of the suit property on **18th October 2012**, before the suit herein was filed.

Since application is for joinder of the Intended Defendants which is opposed, the law that governs joinder of parties is Order 1 of the Civil Procedure Rules and for consideration today is **Order 1 Rule 3** which states as follows:-

“All persons may be joined as defendants against 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, if separate suits were brought against such persons any common question of law or fact would arise”.

Further **Order 1 Rule 10(2)** gives the court discretion to allow joinder of parties at whatever stage of the proceedings. However the said discretion must be exercised judicially. It states 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”.

From the above provisions of law, it is clear that all persons may be

joined as Defendants against whom any right to relief in respect of or arising out of the same transaction would arise. Further, in determining whether to join or not to join a party to proceedings, the Court will have to be satisfied that the said party is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit.

In determining the application herein, the Court will have to answer

the question of whether the Intended Defendants are necessary parties in enabling the Court to effectually and completely adjudicate the suit herein.

The threshold of what the Court should consider in an application under **Order 10 Rule 10** was laid down in the case of **Hadson Moffat Kamau...Vs...Makomboki Tea Factory Ltd (2007) eKLR**, where the Court held that:-

“Under Order 1 Rule 10, a party seeking to benefit from the discretion of the court must satisfy the conditions set out which are:-

i. That the omission/addition has been made through bonafide mistake.

ii. That the Applicant is a necessary party for the determination of the real matter in dispute.

iii. The Applicant is a person who ought to have been joined at the first instance and that his presence before it may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

On the first threshold, it is evident herein that the Plaintiff did not oppose the application herein. The Court therefore did not have the benefit of knowing whether the omission herein was *bonafide* or not. However the Plaintiff filed the suit in the **year 2013**. By that time the suit property was registered in the name of 5th & 6th Intended Defendants. It is not clear whether the Plaintiff was aware by then that the suit land was in the names of other third parties and not the 1st Defendant herein. However, after the 5th & 6th Intended Defendants sold the suit property to the Applicant, Intended 4th Defendant, they ceased to have any proprietary interest on the suit property. By the time of filing the suit herein, the Applicant, Intended 4th Defendant, had not obtained any proprietary interest and it is not clear whether the Plaintiff was even aware that the suit land was now registered in the name of the Applicant. The said omission would therefore be a *bonafide* one.

On the second threshold of whether the Applicant is a necessary party for the determination of the real matter in dispute, it is clear that the Plaintiff is seeking to be declared the rightful owner of the suit property herein. However, it is clear that the suit land is now registered in the name of the Applicant, 4th Intended Defendant. Whatever determination the Court would make herein would impact on the Applicant's proprietary rights. The Applicant confirmed that he

purchased the suit property from the 5th & 6th Intended Defendants. Once they sold and transferred the suit land to him, the 5th & 6th Intended Defendants ceased to have any proprietary or any beneficial interest over the suit property and it would be unnecessary to drag them into this matter. The Court finds that the Applicant (4th Intended Defendant) herein is a necessary party to the determination of the real matter herein in dispute. However the 5th & 6th Intended Defendants are not necessary parties. They can only be useful witnesses for the Intended 4th defendant/Applicant herein but not parties to the suit.

On the 3rd threshold that the presence of the Applicant is necessary

to enable the Court effectually and completely adjudicate upon and settle all the questions in dispute, the Court finds that indeed the presence of the Applicant/Intended 4th Defendant, is necessary in order to enable the

Court effectually and completely adjudicate the matter in dispute herein. The Applicant, Intended 4th Defendant is the one holding the title for the suit property and the Plaintiff is claiming ownership of the same. The Court finds that the presence of the Applicant is necessary for effectual and complete adjudication of the questions in dispute herein. However, the presence of the 5th & 6th Intended Defendants is not necessary at all as parties to the suit. However as the Court stated earlier, they can be useful witnesses herein.

Having now carefully considered the instant application and the available evidence, the Court finds that the Applicant, 4th Intended Defendant's application dated 5th **September 2017** succeeds only in regard to himself as a party to this suit and as a 4th Defendant. However the 5th & 6th Intended Defendants are not necessary parties herein and the Court declines to join them as 5th & 6th Defendants herein.

Consequently, the Court makes the following findings:-

i. That the Applicant, Peterson Murage Kariuki be enjoined as a 4th Defendant herein.

ii. The suit be amended to reflect the addition of the Applicant as 4th Defendant and the Plaint to be amended within the next 14 days from the date hereof and be served on all the parties.

iii. The Plaintiff, 1st, 2nd & 3rd Defendants to avail and serve the pleadings already filed in this suit to the Applicant's Advocate within a period of 14 days from the date hereof. The Applicant has leave of 14 days to file its pleadings after service by the other parties.

iv. This being a 2013 matter, parties to comply with Order 11 within a period of 30 days after close of pleadings and thereafter fix the matter for Pre-trial directions before the Deputy Registrar of this court.

v. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of April 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Respondent

No appearance for 1st Defendant /Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

No appearance for 4th Intended Defendant/Respondent

No appearance for 5 Intended Defendant

No appearance for 6th Intended Defendant

Lucy - Court clerk.

Court – Ruling read in open court in the absence of all the parties herein and their advocates though aware of Ruling date.

L. GACHERU

JUDGE