



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISC. 50 /2017

FESTUS KIOKO KINGOO.....APPLICANT

VERSUS

TANATHI WATER SERVICES BOARD.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

1) There is before me a notice of motion application expressed to be brought under section 1A, 1B and 1C of the Civil Procedure Act, order 1 Rule 10(2) of the Civil Procedure Rules for orders:-

1. Spent

2. That the applicant herein be added as a defendant in this suit and be granted leave to put in her defence, and defend the suit on merit.

3. That costs of the application be provided for.

2) The application is predicated on the grounds on its face and is supported by the affidavit of Agnes Mwikali Kioko sworn at Machakos on the 18th January, 2018 and filed in court on even date together with the application.

3) The application is opposed by Festus King'oo Kioko, the plaintiff/applicant vide his replying affidavit sworn at Machakos on the 23rd January, 2018 and filed in court on the 26th January, 2018.

4) On the 18th January, 2018 the court directed that the application be disposed off by way of written submissions. The applicant filed her submissions on the 28th February, 2018 while the respondent filed his on the 8th March, 2018.

5) The applicant's counsel submissions are that the applicant is a necessary and proper party to this suit as the orders of the court will have a direct effect on her interests and as such, she ought to be enjoined as a defendant.

6) The counsel went on to correctly submit that joining a party to a suit is a matter of court's discretion.

7) The counsel cited Order 1 rule 8(3) of the Civil Procedure Rules which provides as follows:

“Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit”

8) The counsel further cites Order 1 rule 10(2) of the Civil Procedure Rules which provides that:-

“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 effectively and completely to adjudicate upon and settle all questions involved in the suit, be added”

9) The counsel submitted that the overriding objective of the above mentioned rule is to facilitate just, expeditious, proportionate and affordable resolution of disputes. He went on to add that a separate suit would escalate cost even for the plaintiff, make un-proportionate demand of time and other resources of the court in dealing with a dispute that can be concluded in this suit once and for all.

10) The applicant's counsel relies on the case of Deported Asian's Property Custodian Board Vs Jaffer Brothers Limited (1999) EA 55(SCU) which was cited with approval in the case of Pravin Bowry Vs John Ward and Another [2015] eKLR where the court expressed itself as follows:-

“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 interest 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 decision of the court in that suit.

Alternatively, a person qualifies (on application by 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.”

11) On the other hand, the respondent's counsel submitted that the applicant has not demonstrated that she has any benefit in the present suit land being parcels number Mavindini/Mavindini/118 and 1194. The counsel urged the court to dismiss the application with costs to the respondent.

12) From the affidavit evidence and the submissions that were filed herein, it is clear that there is a dispute between the applicant and the respondent herein as to whether or not land parcels Mavindini/Mavindini/1189 and 1194 form part of the matrimonial property. The two however do acknowledge that they were in some form of a relationship of which the applicant says that this is the right forum to resolve the dispute so as to facilitate a just, expeditious, propositional and affordable despite resolution. On the other hand, the respondent is of the view that the dispute between him and the applicant should be resolved in a maintenance cause or under the Children's Act.

13) Having read the application and the supporting affidavit as well as the replying affidavit and the submissions that were filed, I would agree with the respondents that the applicant has not shown that she is a necessary party to this suit. The issues that she has raised concerning matrimonial property can be dealt with in a substantive suit and not in a miscellaneous application such as this one where the only evidence available is affidavit evidence.

14) Arising from the above, my evidence is that the application has no merits. Same is dismissed with costs to the respondent.

Signed , dated and delivered at Makueni this 18th April, 2018.

MBOGO C.G

JUDGE

In the presence of

Ms Kyalo for the applicant

Mr. Langalanga holding brief for J.A Makau for respondent

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

18/4/2018