



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 123 OF 2017

MARY WANJIKU NJOROGE.....PLAINTIFF

VERSUS

DANIEL MURAGE.....1ST DEFENDANT

SAMMY MAINA MWANGI.....2ND DEFENDANT

AKUISI FARMERS CO. LTD.....3RD DEFENDANT

AND

ALICE WAMAITHA.....INTENDED INTERESTED PARTY

RULING

(Application for joinder as interested party; plaintiff claiming certain land owned by 1st and 2nd defendant; the same having been excised from a Block purchased by members of the 3rd defendant; applicant claiming that she owns neighbouring land; applicant wishing for a resurvey of the whole block; dispute of the parties having nothing to do with the applicant's land; test to be applied for one to be enjoined as interested party; applicant must show that it is necessary for him to be enjoined for the court to properly determine the case; dispute herein capable of being determined without the input of the applicant; application dismissed with costs).

1. The application before me is the Notice of Motion dated 20 March 2018 filed by one Alice Wamaitha, who has applied to be enjoined in this suit as an interested party. In addition she has sought orders of an injunction to stop the respondents from subdividing the land known as Kieseges/Subukia West Block 4 (Akuisi) until this case is heard and determined. The application is said to be brought pursuant to the provisions of Order 1 Rule 10 (2) and 25 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya.

2. The background of this suit is that the plaintiff commenced the same by way of a plaint which was filed on 22 March 2017. In the plaint, the plaintiff has pleaded that she is a member of Akuisi Farmers Company Limited (the 3rd defendant) and that by virtue of her membership, she is entitled to get two parcels of land. She has averred that on 24 November 1976, she was allocated the Plots No. 496 and 580 by the 3rd defendant after balloting for the same. She then embarked on developing the two plots by planting trees, digging dams, planting coffee and digging a borehole. It is averred that sometimes in the year 1991, the directors of the 3rd defendant schemed to fraudulently take away the plaintiff's land and allocate the same to the mother of the 1st and 2nd defendants, which then led the plaintiff to file the suit Nyahururu Civil Case No. 223 of 1991. A decision was reached that the 3rd defendant do allocate the plaintiff not less than 4 acres of land which should be inclusive of the area that she has developed. It is averred that in total disregard to the decree, the 3rd defendant issued title to the 1st and 2nd defendants. It is further pleaded that the 2nd and 3rd defendants had sued the plaintiff through the case Nakuru CMCC No. 538 of 2012 which suit was dismissed. The plaintiff has contended that the 1st and 2nd defendants obtained title to part of the Plots No. 580 and 496 owned by the plaintiff which title is Kieseges/Subukia West Block 4/22 (Chui Farm). It is pleaded that this title encroaches into the plaintiff's Plots No. 580 and 496. In the suit, the plaintiff wants the title deed issued to the 1st and 2nd defendants to the land parcel Kieseges/Subukia West Block 4/22 (Chui Farm), cancelled and an order directing the District Land Registrar, to issue title to the plaintiff in accordance with the decree in Nakuru CMCC No. 538 of 2012.

3. The defendants filed a joint statement of defence. They have pleaded that the 3rd defendant has allocated to the plaintiff 2 parcels of land being Plots No. 20 and 21, which together comprise of 4 acres. It is averred that the Plots No. 580 and 496 do not even exist. It is pleaded that the plaintiff went way beyond the area that she was shown. The 3rd defendant has denied disregarding the orders issued in Nyahururu PMCC No. 223 of 2011, and has pleaded that it allocated the plaintiff land in accordance with the said decree and its facilitation for issuance of title to the 1st and 2nd defendants was not inconsistent with the decree. They have averred that there is absolutely no reason why the title of the 1st and 2nd defendants should be cancelled.

4. In this application, the applicant, has contended that this matter touches on entitlement, use and occupation of all the parcel of land known as Kiesege/Subukia West/Block 4 (Akuisi). She has stated in her affidavit that she is a shareholder of Akuisi Farmers, the 3rd defendant, and that she was allocated 12 acres of land comprised in the plot numbers 325, 326, 409, 497, 498, and 591, each measuring 2 acres. She has stated that she has lived on her allocated land parcels since the year 1996. She has deposed that the 3rd defendant unilaterally brought surveyors to readjust the boundaries thus causing her land to shrink in acreage, which movement has caused her to be moved to a neighbour's land, and the neighbor to be pushed to another person's land, which she avers has caused confusion. She has said that this prompted the filing of the case Nyahururu PMCC No. 223 of 1991, and also led her to file the case Nyahururu PMCC No. 224 of 1991, of which she has annexed a copy of the plaint. She has deposed that any orders issued in this suit will effectively and directly affect her parcels of land. She is of the view that it is therefore prudent for her to be enjoined to this proceedings as the orders sought herein will by extension affect her interest, boundaries and size of her parcels of land. She has complained that the action of the 3rd defendant of regularly moving boundaries is malicious and aimed at depriving her, her rightful entitlement, and she has invited this court to adjudicate and decide this matter judicially, once and for all. She has deposed that it is prudent for the whole of the land parcel Kiesege/Subukia West Block 4 (Akuisi) to be resurveyed and the official boundaries to be set, which should take account of the developments of the respective portions as utilized by respective occupants. She has stated that this court had previously ordered a surveyor to visit the ground which order was in respect of the plaintiff, but she has stated that the movement of the plaintiff will inevitably affect her as owner of the adjoining land. She has averred that the order of survey should also be extended to cover her and the entire land parcel Kiesege/Subukia West Block 4 (Akuisi). She is of the view that her joinder to these proceedings will save judicial time, and avert a multiplicity or duplicity of suits.

5. The plaintiff did not oppose the application, but the same is opposed by the defendants, who filed a replying affidavit sworn by Joseph Githaiga Ndirangu, a director of the 3rd defendant. He has averred that the 3rd defendant company purchased the block of land known as Kiesege/Subukia West Block 4 (Akuisi) in the late 1970s, from one Mr. Rabat, who it is said was the applicant's husband or analogous partner. It is also stated that the applicant is sister to the plaintiff. It is averred that during the transaction, the seller, reserved 12 acres for the benefit of the applicant, which reserved portion was demarcated and remains available to the applicant to date, a fact which the applicant is said to be aware. It is stated that it is through the above circumstances that the applicant became a nominal member of the company but not through any subscription of shares. It is further averred that the applicant does not reside in the 12 acres apportioned to her but lives several kilometers away in land that has no connection to the block purchased by the 3rd defendant. He has deposed that the 3rd defendant allowed its members to settle in the block of land purchased pending official survey on the understanding that upon survey, they may be moved but as near as possible to the site that they had temporarily settled on. It is deposed that on 10th February 2018, the applicant appeared on site when a surveyor visited the land with a view of ascertaining the boundaries between the plaintiff and defendants, and it was agreed that if the applicant wished to engage the surveyor to ascertain her boundaries, she was at liberty to do so. It is said that a date was agreed for the survey but the applicant did not show up. He has pointed out that the suit Nyahururu RMCC No. 224 of 1991, where the applicant had sued, was a matter that related to her entitlement to 12 acres, and not the whole block of land. He has deposed that survey and subdivision of the block has already been done and concluded and more than 700 members of the 3rd defendant company have been allocated their shares and many of them are in occupation. To the best of the knowledge of the 3rd defendant, none of its other members, save for the applicant and the plaintiff, have any complaint about the survey and distribution of the land. He is of opinion that the applicant can only lodge a claim concerning her individual parcel of land, and cannot seek orders to affect the whole of the parcel of land and more than 700 members without their consent.

6. I took in the submissions of Ms. Wairimu, learned counsel for the applicant, and Ms. Okeke, learned counsel for the defendants and I have taken note of these in arriving at my decision. Inter alia Mr. Okeke, raised issue that the application is fatally defective as under Order 1 Rule 25, pursuant to which this application is premised, the direction is that the application be through summons in chambers but not through a motion as is the case herein. He also did not think that the applicant is a necessary party to these proceedings. On my part, I do not think the fact that this application was filed through a Notice of Motion rather than a Chamber Summons, is a significant issue, and I do not think any prejudice has been caused to the parties through the procedure proffered herein. I will not strike out this application on the grounds that the same is fatally defective and will proceed to decide on the merits of it.

7. There is no precise requirement in the Civil Procedure Rules, which expressly relate to the inclusion of an interested party to the case. However courts usually utilize the provisions of Order 1 Rule 10, which permit the court to enjoin a person to the suit, if the presence of such party is deemed necessary. The said provision of law is drawn as follows :-

10. Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

8. It will be seen from the above, especially from sub-rule 2, that the court may order the name of a person "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit" to be

added. It follows that for the court to allow a joinder, it must be convinced that the presence of the person is "necessary" and the court must also be persuaded that it cannot "effectually and completely" adjudicate the dispute and settle all questions, without the presence of such party. The test is therefore fairly high. If the court is able to effectively determine the issues in the case without the involvement of the party sought to be enjoined, then the court should be slow in allowing such a person to enjoin the proceedings, although of course, each case must be assessed depending on its own unique surrounding circumstances. This is because a joinder of a person to a case burdens the litigants with an additional party. There are costs involved in serving and in accommodating an extra party to a suit. There are also risks of additional delays, and the danger of complicating the dispute, so as to accommodate the interests of the added party. It must indeed be "necessary" for such party to be enjoined, for the court to permit the joinder. If the test were not as high, joyriders, busybodies, and curious on-lookers, would be applying to be enjoined to suits where really the dispute does not involve them, and by their joinder, they will only go to complicate the matters in dispute.

9. The case of the plaintiff herein is that she is entitled to 4 acres of land, and that a portion of what she occupies, is within the title identified as Kieseges/Subukia West Block 4/22 (Chui). She now wants that title cancelled and part of the land comprised in that title allocated to her. The applicant herein seeks to be enjoined as interested party on the claim that she is entitled to 12 acres of the whole block purchased by the 3rd defendant, which is Kieseges/Subukia West Block 4 (Akuisi). It is clear to me that what is in issue is only one parcel of land, identified as Kieseges/Subukia West /Block 4/22 (Chui) and which land has a title which is held by the 1st and 2nd defendants. The dispute herein does not cover the whole of the block which is Kieseges/Subukia West Block 4 (Akuisi). In fact, it does seem to me that the whole block must have been subdivided by now, or else you would not have the subdivided title Kieseges/Subukia West Block 4/22 (Chui). If the applicant has an entitlement to 12 acres of the whole block, I wonder what connection that has, with the entitlement of the plaintiff to 4 acres of land, and what connection that has, to the 1st and 2nd defendant's title to the land parcel Kieseges/Subukia West/Block 4/22 (Chui). The dispute herein has nothing to do with the applicant's entitlement, or otherwise, of 12 acres. The dispute here is whether or not the plaintiff should be granted 4 acres within the 1st and 2nd defendant's title comprised in the land parcel No. 22. If the applicant has any issue to raise over her entitlement to 12 acres, or where this 12 acres should be located, that is a completely separate matter, and it should not be allowed to complicate the determination of the dispute of the plaintiff, that she should get land within the land parcel No. 22. Further, if the applicant feels aggrieved by the manner in which the whole Block was subdivided, she is free to file a suit for determination, but again, that ought not to derail the litigants herein from narrowing on their dispute over one parcel of land.

10. I really do not see what connection the applicant's claim to being entitled to 12 acres out of the whole block has to do with what the litigants are disputing in this case. The issue between the plaintiff and defendants do not need the input of the applicant. That dispute can be decided without the applicant being a party to the case. It was stated that the applicant is a neighbor of the plaintiff, but I do not see how a neighbor can be said to be interested in the outcome of a case that does not concern her. The parties herein are not litigating over the plots that the applicant claims belong to her.

11. In essence, I am not of the opinion that it is necessary to enjoin the applicant so that this court can effectually and completely determine the case between the plaintiff and defendants. I am therefore not persuaded that this application should succeed and the same is dismissed with costs to the defendants. Since the applicant is not a party to this case, I opt to assess the costs to the defendants straight away, and taking into consideration the fact that the defendants filed documents to oppose the application, served the same, and attended to the hearing of it, resources which they ought not to have been made to spend, I assess the costs of the defendants at Kshs. 15,000/= and the same should be paid by the applicant herein within 14 days, and in default, the defendants are at liberty to execute for the same.

12. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 24th day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Gikonyo holding brief for Mr. Chege for applicant.

Mr. Katithi holding brief for Mr. Okeke for the defendants/respondents.

No appearance on the part of M/s Nancy Njoroge & Co. Advocates for the plaintiff.

Court Assistant :Nelima Janepher .

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU