



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 388 OF 2017

BENSON NDICHU MWENDIA.....PLAINTIFF

VERSUS

JOHNSON BYEBEI TUMDEFENDANT

BENARD OCHIENG OGADAINTERESTED PARTY

RULING

(Application for joinder as interested party; plaintiff suing defendant over ownership of certain properties; defendant selling the properties to the applicant but no transfer effected; central question in the suit is whether the properties should be owned by the plaintiff or defendant; not necessary for the applicant to be enjoined to the proceedings for the determination of this question; application dismissed).

1. The application before me has been filed today by one Benard Ochieng Ogada, who wishes to be enjoined to this suit as an interested party.
2. The background of the matter is that through a plaint filed on 12 October 2017, the plaintiff sued the defendant over ownership of the land parcels Nakuru Municipality Block 15/682 and 683. He claimed to own these two parcels of land and alleged that the defendant has interfered with them by building a wall and also fraudulently registering himself as proprietor. In the suit, the plaintiff sought orders that he be declared the rightful owner of the two plots, an order of permanent injunction against the defendant, and an order of eviction. Upon service, the defendant entered appointed an advocate Mr. A.N. Geke, to appear on his behalf but he did not file any defence to the suit.
3. The matter proceeded for hearing on 7 May 2018 as an undefended cause with the plaintiff testifying and being cross-examined by counsel for the defendant. He then closed his case. Mr. Geke then sought an adjournment which I declined principally because there was no defence upon which the defendant could purport to testify. I then invited counsel to file written submissions and directed that the matter be mentioned today.
4. On this day, Mrs. Wanderi, learned counsel for the plaintiff, and Mr. Bosire, learned counsel for Mr. Geke for the defendant, mentioned that they have filed submissions but it transpired that this application had been filed. Both Mrs. Wanderi and Mr. Bosire declared that they are ready to proceed with the same and I therefore took in their submissions alongside the submissions of Ms. S.C Tarus, for the applicant. Mrs. Wanderi opposed the application whereas Mr. Bosire supported it.
5. The core reason upon which the application is founded is that the defendant, through a sale agreement dated 16 June 2016, sold the suit properties to the applicant. The applicant has averred in his supporting affidavit that prior to entering into the sale agreement, he made inquiries with the Ministry of Lands Registry and confirmed that the defendant owns the suit properties. After executing the sale agreement, he built a fence around the suit properties and all this time nobody laid claim over the same. He later learnt of the existence of this case. He wishes to have these proceedings stayed and for him to be allowed to file a defence.
6. I have considered the application which as I have mentioned is one vide which the applicant wishes to be enjoined to this suit as an interested party. I have seen that the application is premised upon the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, and Order 51 of the Civil Procedure Rules. These are general provisions of the law which invoke the court's inherent powers. There is no clear cut provision in the Civil Procedure Act, Cap 21, Laws of Kenya, or Civil Procedure Rules, which covers the joinder of interested parties to a suit. However, courts generally utilize the provisions of Order 1 Rule 10, which permits the court order a person to be enjoined as a party to proceedings. The said provision of the 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.

7. From the above, it will be discerned 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.

8. Thus what the court needs to be convinced of, is that it is necessary for the said party to be enjoined, for the court to effectually and completely adjudicate the dispute, and settle all questions. The test is one of necessity. If the court can hear and determine the questions in the matter without the involvement of the applicant, then it need not order his joinder to the suit.

9. In our case, the issue before court is whether or not it is the plaintiff or defendant who holds good title to the two properties in issue. The applicant herein does not purport to hold any independent title, and indeed it is his position, that he has purchased the suit properties from the defendant. No transfer has been effected by the defendant to the applicant. The reason that the applicant wants to come to the case is only that he has entered into a sale agreement with the defendant, whereas the central question in this litigation, is whether it is the plaintiff or the defendant, who is entitled to hold title to the two properties. I regret to inform the applicant that the mere fact that he has entered into a sale agreement with the defendant cannot assist this court in determining whether it is the plaintiff or defendant who has good title to the suit properties. We do not need the applicant in order to determine that question, as it is a question that is solely between the plaintiff and defendant. The issue of whether the applicant will obtain title to the land is of course contingent on the defendant succeeding in the case, but as I have said, it is not necessary for the interested party to be present so that this court can determine who as between the plaintiff and the defendant is entitled to the properties in question.

10. I am not therefore persuaded to allow this application and it is hereby dismissed with costs to the plaintiff.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23RD day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr.Kabalika holding brief for Mrs. Wanderi for the plaintiff.

Mr. Bosire holding brief for Mr. Geke for the defendant and holding brief for Ms. Tarus for the applicant.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU