



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 426 OF 2017

GIKONYO MUNA.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

T/A MUIBAU AUCTIONEERS.....2ND DEFENDANT

JOSEPH MUNA GIKONYO.....1ST APPLICANT /intended interested party

MWANIKI GIKONYO.....2ND APPLICANT /intended interested party

RULING

1. The Applicants herein jointly filed a Notice of motion under order 1 rule 10(2) of the Civil Procedure Rules, Section 19 of the Environment and Land Court Act, 2011 section 3A of the Civil Procedure Act, Cap 2 laws of Kenya, Article 159(2) (a) of the Constitution of Kenya and all other enabling provisions brought by way of Certificate of urgency on 21/11/2017 for the following orders:-

a) Spent

b) That this Honourable Court be pleased to grant leave for the Applicants to be enjoined in the proceedings herein as interested parties.

c) That the Honourable Court be pleased to order for the amendment of pleadings filed herein to enjoin the Applicants as interested parties.

d) That the Honourable Court be pleased to issue injunction orders restraining the respondents herein or any other person acting on their behalf or authority from selling parcel of land No.Loc.19/Gacharageini/1489 by public auction or otherwise until the suit filed herein is heard and determined.

e) That costs of this application be provided for.

2. The application is premised on the following grounds: -

a) The Applicants are the sons of the Plaintiff herein and the proceedings in this case have been going on without their knowledge. That they have just learnt of the same from their uncle.

b) The Applicants were not aware that the parcel No.Loc.19/Gacharageini/1489 was subject matter of the suit neither were they aware that the said parcel of land had been charged by the Plaintiff for a loan of Kshs.250,000/=.

c) That the said parcel of land initially belonged to their grandmother one Lucy Wangu Muna (now deceased) and was transferred to their father to hold in trust for the family.

d) The Applicants are surprised that the parcel of land was offered as security for loan without their knowledge and even their mother too and since they have an interest in that land they wish to be enjoined in the suit to advance their claim.

e) That since the suit has not proceeded for hearing the prayers sought herein are tenable.

3. Joseph Muna Gikonyo the 1st Applicant in his supporting affidavit deposes that he has sworn the affidavit on behalf of the 2nd Applicant having been authorized to do so. That he is the eldest son in a family of 9 children. He affirms that his family including his mother were in the dark as to the proceedings in this case and the existence of a charge over the suit land in favour of the 1st Defendant. That the land is held in trust by their father for the family. He avers that the orders that would be made in this case will have an effect on them and therefore it is only fair that they be enjoined to the suit. He faults the Defendants for failing to put into consideration that the suit land was family trust land before charging it and claims that the intended sale by the Defendants is unlawful. He avers that there has not been inordinate delay on their part in bringing the application.

4. The Applicants submitted that the property which the subject matter of this suit is ancestral land and it holds their parents matrimonial home. They claim that their mother never gave her consent for the said property to be offered as security for the loan of Kshs.250,00/= allegedly advanced to their father by the 1st Defendant. They maintain that they have sufficiently demonstrated that they have an identifiable legal stake/ interest in the proceedings in this case.

5. The Plaintiff respondent did not oppose the application.

6. The 1st and 2nd Defendant/respondents opposed the application and raised grounds of opposition dated the 9-2-18 that the application is without merit and that the application was for dismissal. On 12-2-18 the 1st and 2nd respondents/Defendants chose to file written submissions however none is filed on record.

7. In their submissions the Applicants have relied on the case of **Football Kenya Federation Vs Kenya Premier League & Another High Court Civil case No. 69 of 2015** in which the Court quoted rule 2 of the Constitution of Kenya (Protection of Human Rights and Fundamental Freedoms) Practice and procedure rules which defines an interested party to mean a person or entity that has an identifiable stake or legal interest in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigations. The Applicants contend that the suit land is comprises of a matrimonial home and is subject to a family trust. That that is their identifiable stake and legal interest in the proceedings and therefore deserve to be enjoined to defend their said interest and stake in the suit property.

Determination

8. Having considered the application, the grounds of opposition, submissions where applicable and the affidavit evidence on record, the issue for determination is whether the Applicants have made out a case for joinder as interested parties to the proceedings, that is to say; are they interested parties? What is their interest? Are they necessary parties to the suit and what prejudice are they likely to suffer if they are not allowed to join into the case.

9. The provisions of Order I rule 10(2) of the Civil Procedure Rules, 2010 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”. [emphasis is mine].

10. The threshold for joinder of parties was set in the Civil Appeal case of **Francis Kariuki Muruatetu & Anor. Vs Republic & 5 Others (2016) eKLR** where the Court held that the Applicant must demonstrate the personal interest that she has in the matter by laying sufficient grounds before the Court; the prejudice she would suffer if she is not enjoined as interested party; set out the case that she intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy.

11. In Kenya, Courts have taken a liberal application to joinder of parties. In the case of **Kingori vs. Chege (2002) 2 KLR 243, Warsame J** had this to say;

“ In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however the Court must guard against the frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before Court for determination”.

12. **Black’s Law Dictionary 9th Edition at page 1232** defines an interested party as;

“a party who has a recognizable stake (and therefore standing) in a matter”.

13. In determining whether or not a person is indispensable or a necessary party, the Court must carefully examine the facts of the case, the relief sought and the nature and extent of the absent parties interest in the controversy raised in the suit.

14. In the case at hand, it would appear that the Plaintiff and the 1st Defendant entered into a loan agreement (contractual) in which the Plaintiff sought and was advanced financial facilities in form of a loan in the sum of Kshs 250,000/-, subject to terms and conditions. The loan agreement dated the 22.1.2013 refers. The Plaintiff offered the suit land to secure the loan upon which a charge was duly registered on the title to secure the interest. It is the 1st Defendants case that the Plaintiff defaulted in repaying the loan as stipulated in the loan agreement and hence the process of recovery and the exercise of its power of sale kicked off. The Plaintiff reacted to the process by filing a suit on the 24.7.13 challenging the Defendant’s right to exercise its power of sale and in specific sought a permanent injunction to restrain the 1st and

2nd Defendants from selling the suit land interalia.

15. Against the above background, it is the Applicant's claim that the suit land is ancestral land that was succeeded by their father, the Plaintiff upon their grandmothers demise. That it became registered in the name of the Plaintiff subject to a family trust and further that the matrimonial home of their parents in which the Applicants and their seven other siblings dwell in is situate. That they are the sons of the Plaintiff. They have averred that they had no knowledge of the loan facility and joinder will help them advance their claim of trust in the proceedings. That they stand to suffer irreparable loss if the land is sold.

16. It is clear from the above facts that the case of the Plaintiff is centred on resisting a statutory power of sale while that of the Applicants is to assert an interest in trust in the suit land. The Applicants have not staged a claim against the Plaintiff the supposed trustee in the land. Trust as a cause of action is not a matter before the Court. What is before the Court is a charge and the right to exercise a statutory power of sale for recovery of monies advanced to the Plaintiff.

17. The controversy as I understand in this case is whether or not the 1st Defendant exercised its statutory power of sale legally; whether the Plaintiff is in default; whether the suit land should be sold in exercise of the power of sale. Can these issues be resolved without the presence of the Applicants in the case? The answer is in the affirmative. As explained above the interests of the parties herein are not emanating from the same cause of action. The Applicants in my considered view are introducing a new cause of action to the proceedings, that is to say a new controversy. They have not demonstrated that the current suit cannot be determined without their input. No nexus has been established between their application and the cause of action as is pleaded before the Court.

18. The case before the parties on record is contractual/commercial. The Applicants are not privy to the loan contract and the Applicant has not demonstrated how their claim vitiates that contract. They have alluded to an allegation that the charge was executed in the absence of spousal consent. Even if that assumption is taken to be true, (which is not) the Applicants are not a spouse in the meaning of the Land Registration Act.

19. Guided by the decision in the **Muruatetu case** this Court is satisfied that the Applicants have not met the threshold and are not entitled to joinder as interested parties in these proceedings.

20. The application is unmeritorious and is dismissed with costs in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF MAY 2018

J.G. KEMEI

JUDGE