



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 210 OF 2017

LOCAL AUTHORITIES PROVIDENT FUND (LAPFUND).....PLAINTIFF

VERSUS

DANIEL KASIRIMO OLE MUYAA.....DEFENDANT

RULING

Application before Court for determination is the Defendant's Notice of Motion dated the 4th April, 2017 brought pursuant to section 3 of the Environment and Land Court Act, Order 1 Rule 10(2) of the Civil Procedure Rules, Articles 159 (2) of the Constitution and all the other enabling provisions of the law. The application seeks to enjoin two more parties to the suit herein and also to extend time for the Defendant to file a Defence and Counterclaim. It is premised on the following grounds which in summary is that it is necessary for the determination of the real matter in dispute that the said ABRAHAM KIPSANG KIPTANUI and TERRY CHEBET MAINA be added as parties to the suit. The presence of ABRAHAM KIPSANG KIPTANUI and TERRY CHEBET MAINA is necessary in order to enable the Court effectually and completely adjudicate and settle the issues in dispute in this Suit. The said ABRAHAM KIPSANG KIPTANUI and TERRY CHEBET MAINA are possessed of material information and facts which would aid in the proper determination of the suit. The said ABRAHAM KIPSANG KIPTANUI and TERRY CHEBET MAINA have a direct interest in the suit herein and would be directly and materially affected by the outcome. The Defendant has been ailing for a long time and has since been confined to a wheel chair and often spends prolonged stays in hospital a situation which has worked to his disadvantage and made it impossible for him to respond to these proceedings in time.

The application is supported by the affidavit of DANIEL KASIRIMO OLE MUYAA, the Defendant herein where he avers that he is the original registered proprietor of land parcel number KAJIADO/ KAPUTIEI – NORTH/1020 measuring 20.2 hectares or 50 acres. He claims on 30th October, 1987 he entered into an agreement for the sale of the suit property with one ABRAHAM KIPSANG KIPTANUI for the price of Kshs. 350,000/= per acre. Further, he gave ABRAHAM KIPSANG KIPTANUI who was the Comptroller of State House and hence a highly influential man and a personal friend all the documentation for the transfer of the suit land after he paid a deposit of Kshs. 150,000/= and also having paid a loan of Kshs. 600,000/= to Kenya Commercial Bank. He contends that after paying the loan and transferring the property to himself, he has tried on numerous occasions to get in touch with Mr. Kiptanui but he became inaccessible and has not paid him the balance of Kshs. 16, 750,000/= He claims in mid 1990s since he was not able to locate Mr. Kiptanui to pay him the balance, he rescinded the Sale Agreement and proceeded to fence off the suit land which he has remained in occupation of to date. He confirms not taking any legal action against Mr. Kiptanui until around 2010 when he learnt that the suit land had been transferred to one TERRY CHEBET MAINA and subdivided into titles KAJIADO/ KAPUTIEI – NORTH/ 36933 and KAJIADO/ KAPUTIEI – NORTH/ 36934 respectively. He explains that sometime in 2010, he filed a dispute with the Kajiado Land Disputes Tribunal which on 21st October, 2010 ruled that 25 acres of the suit land be returned to him which decision was later quashed on grounds of lack of jurisdiction of the said District Land Disputes Tribunal. He avers that he also reported the matter to the Police who managed to trace Mr. Kiptanui who upon being questioned denied transferring the suit land to Terry Chebet Maina and who immediately lodged a criminal complaint against her, for fraudulent transfer and registration of the suit land with Mr. Kiptanui's consent. He confirms that together with Mr. Kiptanui, they allowed the police to conclude the investigations but in a bid to circumvent the law, Terry Chebet Maina apparently quickly disposed of the property to the Plaintiff herein. He insists it is necessary for the determination of the real matter in dispute that ABRAHAM KIPSANG KIPTANUI and TERRY CHEBET MAINA are added as parties to the Suit as their presence is necessary in order to enable the Court effectually and completely adjudicate and settle the issues in dispute in this suit. Further, that they are possessed of material information and facts which would aid in the proper determination of the suit, as they have a direct interest in the suit herein and would be directly as well as materially affected by its outcome. He reiterates that before purchasing the suit land, the representatives from the Plaintiff visited the land and found his sons who resisted their entry into the said land and informed them of the ownership dispute. Further, that aware of the wrangles surrounding the property, the Plaintiff rather than keep off the transaction, took advantage of the situation to 'acquire' the property at way below the market price. He states that the Plaintiff is hence not a purchaser for value without notice. He explained, that he has been ailing for a while and confined to a wheel chair which has worked to his disadvantage. He further explains that the delay in filing a Defence is as a result of his medical predicament. He insists for the Honourable Court to get to the root cause of the matter herein and dispense substantive justice, ABRAHAM KIPTANUI and TERRY CHEBET MAINA ought to be enjoined in the suit.

The application is opposed by the Plaintiff which filed Grounds of Opposition dated the 12th September, 2017 pursuant to Section 3A of the Civil Procedure Act, Order 1 Rule 1 and 2, Order 51 Rule 14 (c) of the Civil Procedure Rules, and Section 4 (1) (a) of the Limitation of Actions Act and all the other enabling provisions of the law. They state as follows:

1. The orders sought by the Defendant/applicant to enjoin **Abraham Kiptanui and Terry Chebet Maina** more so as Co- plaintiffs in this suit are misguided, incompetent and lacking any merit or legal justification as the alleged individuals have neither issued any demands and/or threatened to take any legal action against the Defendant herein as relates to the Plaintiff's suit premises known as **KAJIADO/KAPUTIEI-NORTH/52489**.

2. The substantive prayers sought in the suit have neither any bearing on nor will the decision of this Honorable Court affect or prejudice the alleged parties proposed to be enjoined herein in any manner.

3. The request to enjoin **Abraham Kipsang Kiptanui** to these proceedings will only serve to embarrass and/or delay the expeditious fair hearing and determination of the Plaintiff's case and as such infringe on the Plaintiff's right of access to justice enshrined in Article 47 of the Constitution of Kenya due to the following reasons;

a. There is no privity of contract between the Plaintiff and the said Abraham Kipsang Kiptanui nor is the Plaintiff familiar with his whereabouts.

b. There is nothing that stops the Defendant herein from filing a separate suit to litigate any disputes he may have against the said Abraham Kipsang Kiptanui save for the Limitation of Actions Act.

c. The property the Defendant alleges to have sold to the said Abraham Kiptanui is known as **KAJIADO/KAPUTIEI/1020** which is not only different but distinct from the Plaintiff's property known as **KAJIADO/KAPUTIEI-NORTH/52489**.

d. The property the Defendant alleges to have sold to the said Abraham Kiptanui and thereafter subdivided by him is **KAJIADO/KAPUTIEI/1020** and was subdivided to No. **KAJIADO/KAPUTIEI-NORTH/36933** and **KAJIADO/KAPUTIEI –NORTH 36934**; these are different from the suit property owned by the plaintiff.

e. There is no iota of evidence attached to the application dated 4th April 2017 showing any privity of contract or transaction between Abraham K. Kiptanui and Terry Chebet Maina over the Plaintiff's suit property namely **KAJIADO/KAPUTIEI-NORTH/52489**.

f. The Plaintiff is the absolute and registered owner of the property known as **KAJIADO/KAPUTIEI-NORTH/52489** and under Article 40 of the Constitution as read together with Section 24 of the Land Registration Act, 2012 is vested with all rights and privileges and hence the suit can be effectively determined between the Plaintiff and the Defendant who is a trespasser.

4. The Defendant has failed to establish or show any probable or reasonable interest, the parties whom it seeks to enjoin as Co- Plaintiffs have in the Plaintiff's suit premises i.e . **KAJIADO/KAPUTIEI-NORTH/52489**.

5. The grounds as per the Defendant's Application alluding that the two parties seeking to be enjoined as plaintiffs as being in possession of material information and facts essential in proper hearing and determination of the main suit are fallacious and devoid of any merit.

6. The criteria to be followed when enjoining a party as an interested party has succinctly been stated by the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others (2014) eKLR** where the essential elements to be satisfied before the court include; "*whether the intended interested party has a state or proximate interest in the proceedings and whether he or she feels that such interest shall not be well articulated unless he or she appears in the proceedings*". The enjoining of a party to the suit is a matter of the Court's discretion and is not of right.

7. The Defendant states that it is necessary to enjoin the two parties to aid in determination of the real matter in dispute but ideally the dispute arising is between him and **Abraham Kipsang Kiptanui** is a breach of contract, which is time, barred as provided under **Section 4(1) (a) of the Limitation of Actions**.

8. Consequently, the Defendant has not demonstrated how the enjoinder of Abraham K. Kiptanui and Terry M. Chebet in this suit as Co- Plaintiffs will assist the Court in the just and expeditious determination of the issues at hand as opposed to diverting the Court on other issues that do not form the basis of the Plaintiff's Claim relating to the suit premises known as **KAJIADO/KAPUTIEI-NORTH/52489**.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the interested party Notice of Motion application dated 4th April, 2017 including the supporting and replying affidavits plus the annexures thereon, the following are the issues for determination:

- Whether TERRY CHEBET MAINA and ABRAHAM KIPTANUI should be enjoined in this suit
- Whether the Defendant should be granted leave to file a Defence and Counterclaim out of time

On the question as to whether TERRY CHEBET MAINA and ABRAHAM KIPTANUI can be enjoined in this suit the question we need to ask is who is an interested party. Black's Law Dictionary 9th Edition, page 1232 defines an interested party as

"A party who has a recognizable stake (and therefore standing) in the matter"

The Defendant seeks to enjoin TERRY CHEBET MAINA and ABRAHAM KIPTANUI as Co- Plaintiffs claiming it will assist the Court in the just and expeditious determination of the issues. It is the Defendant's averment that he was the original registered proprietor of land parcel number KAJIADO/ KAPUTIEI – NORTH/1020 and that on 30th October, 1987 he entered into an agreement for the sale of the suit property with one ABRAHAM KIPSANG KIPTANUI who failed to pay the full purchase price and transferred the land to himself. Further that the Defendant rescinded the Sale Agreement and has been in occupation of the suit land to date. It is the Defendant's claim that he learnt that the suit land had been transferred to one TERRY CHEBET MAINA. The Plaintiff has opposed the application and filed Grounds of Opposition stated above. The Plaintiff contends that the enjoinder of ABRAHAM KIPSANG KIPTANUI and TERRY CHEBET MAINA is unnecessary as it will delay the instant suit. Further that there is no privity of contract between ABRAHAM KIPSANG and TERRY CHEBET MAINA.

The Defendant in his submission relied on the case of **Joseph C. Ngeno & 2 Others Vs Daniel Kipkurui Langat & 2 Others (2014) eKLR; Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited and Another Civil Case No. 398 of 2005 (2014) eKLR and Kingori Vs Chege and 3 others (2002) eKLR 250** to support his claim. The Plaintiff relied on the cases of **Kimiti Versus Njogu (2005) eKLR; Kingori Vs Chege and 3 others (2002) eKLR; International Pentecostal Holiness Church & 6 Others Versus StarLand Company Limited & 2 Others (2017) eKLR; Benson Maina Gathithi Mugi & Another Versus John S. Njire & Another (2017) eKLR and Ali Farah Versus Ole Nasisit & 9 Others (2016) eKLR** to support their argument that TERRY CHEBET MAINA and ABRAHAM KIPTANUI should not be enjoined in the suit.

From a cursory look at the various pleadings filed herein, I note the Plaintiff had admitted at paragraph 5 of the Plaintiff that it bought the suit land from TERRY CHEBET MAINA who transferred the suit land to it. I note at page 2 of the Plaintiff's title deed that the suit land was indeed a resultant subdivision from **KAJIADO/KAPUTIEI-NORTH/51838** which is claimed by the Defendant who alleges fraud on the part of ABRAHAM KIPTANUI who he sold to land parcel number KAJIADO/KAPUTIEI-NORTH/1020 which was later subdivided into KAJIADO/KAPUTIEI NORTH/52489 and KAJIADO/KAPUTIEI-NORTH/52490 respectively. These are facts that require viva voce evidence to be adduced as to how TERRY CHEBET MAINA came to be registered as the owner of the suit land which she later transferred to the Plaintiff. I note the Defendant also avers at paragraph 12 of the Defence that ABRAHAM KIPTANUI denied transferring suit property to TERRY CHEBET MAINA and lodged a criminal complaint against her for the fraudulent transfer and registration of the suit property without ABRAHAM KIPTANUI's knowledge or consent.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

'(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.'

In the case of **Trusted Society Of Human Rights v Mumo Matemo & 5 others [2014]eKLR**, the Supreme Court held that: ***' an interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.'***

Further in the case of **Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002]eKLR** Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit: ***' When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.'***

In relying on the facts presented, Order 1 Rule 10 of the Civil Procedure Rules and Judicial Authorities cited above, from the title deed, and the Plaintiff's averments in the Plaintiff that the suit land was purchased from TERRY CHEBET MAINA, it is evident that the presence of TERRY CHEBET MAINA and ABRAHAM KIPTANUI is necessary to enable the court effectually and completely adjudicate upon this suit. ***I find that in the interests of justice it would be proper if TERRY CHEBET MAINA and ABRAHAM KIPTANUI were enjoined in this suit.*** Further that the ultimate orders and decree made in the suit herein will not be enforced without their presence in the matter. I disagree with the Plaintiff that they are not necessary to be part of the suit. I find that it would be pertinent for the two to be enjoined in the suit herein to enable the Court arrive at a proper determination of the suit. I further find that no prejudice will be suffered by the Plaintiff if TERRY CHEBET MAINA and ABRAHAM KIPTANUI were enjoined in this suit. I however, opine that it would be more effective if they were joined as Defendants instead of co Plaintiffs' and in exercising my discretion I direct that TERRY CHEBET MAINA and ABRAHAM KIPTANUI be enjoined in this suit as Defendants.

As to Whether the Defendant should be allowed to file Defence and Counterclaim. I note the Defendant already filed his Defence and Counterclaim on 4th April, 2017. I direct that the same to be deemed to be properly on record.

The costs of the application will be in the cause.

I so order.

Dated signed and delivered in open court at Kajiado this 19th day of June, 2018.

CHRISTINE OCHIENG

JUDGE