

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 151 OF 2017 (OS)

DAVID KIMALEL BIRIR.....APPLICANT

VERSUS

SAMMY KIPROTICH TANGUS.....1ST RESPONDENT

RULING

The application is dated 4.10.2017 wherein the applicant seeks an order that Peter Macharia Njeri be enjoined in these proceedings as the 2nd respondent and that the applicant be at liberty to serve the amended originating summons within 14 days of service and that the draft amended originating summons be deemed as duly filed and served. The application is based on allegations that the proposed 2nd respondent was the registered owner of the suit property prior to the registration of the respondent and that the proposed respondent's title to the suit land had extinguished prior to transfer of the same to the respondent. The applicant claims that it is necessary to enjoin 2nd respondent to determine the real issues in contrary and that the presence of the proposed 2nd respondent is necessary to completely adjudicate upon and settle all questions raised in the suit. The application is supported by affidavit of the applicant, David Kimalel Birir who reiterates the grounds of the application.

The respondent filed grounds of opposition stating that a claim of adverse possession can only be brought against the registered owner of the land. He states that the 2nd respondent is one of the defendant's witnesses and any issue to be raised during hearing will be settled after hearing.

I have considered the application and rival submissions and do find that the proposed 2nd respondent is a necessary party though no claim of adverse possession has been made against him as he is not the registered owner of the land. However, he was the first registered owner of the land and therefore the plaintiff's right to the said land under the principle of adverse possession crystalized 12 years after he took possession from the intended 2nd respondent and if proved the rights will be deemed to have continued even after registration of the 1st respondent as the owner. The issues raised by the plaintiff against the intended 2nd respondent cannot be dealt with by way of submissions only as the plaintiff's rights are alleged to have accrued when the intended 2nd respondent was the registered owner and therefore it is necessary to enjoin the 2nd respondent. The 2nd respondent ought to be enjoined for the court to understand under what circumstances the plaintiff took possession.

A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order *suo moto* for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. According to Order 1 rule 10(2) of the Civil Procedure Rules: -

“(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..... whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

I do find merit in the application and do hereby allow the same. I Do order that peter Macharia Njeri be and is hereby enjoined in these proceedings as the 2nd respondent and that the applicant to serve the 2nd respondent with the amended Originating Summons, which are deemed to be duly filed, within the next 14 days. Costs in the cause.

Dated and delivered at Eldoret this 19th day of June , 2018.

A. OMBWAYO

JUDGE