



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C CASE NO. 128 OF 2014 (ORIGINATING SUMMONS)

IN THE MATTER OF TITLE NO. KYENI/MUFU/3060

BETWEEN

THE ESTATE OF NYAGA RUANDERI (DECEASED).....1ST PLAINTIFF

CIAKUTHI NJOROGE.....2ND PLAINTIFF

AND

THE ESTATE OF MARIKO

KANYAKIRI GAKUTHI (DECEASED).....1ST DEFENDANT

ONARAT VUKO MARIKO.....2ND DEFENDANT

GABRIEL NYAGA NJOROGE.....3RD DEFENDANT

JOHN NJOKA KANYAKIRI.....4TH DEFENDANT

VIDEA WARUI NJOROGE.....INTERESTED PARTY

RULING

1. By a notice of motion dated 21st October 2017 filed under certificate of urgency under the provisions of **Order 1 Rule 10 (2), Order 22 (1) of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and all enabling provisions of the law**, the Applicant, Videa Warui Njoroge, sought the following orders;

a. Spent

b. Spent

c. That the honorable court be pleased to issue an order enjoining the Applicant herein as an interested party in this suit.

d. That the honorable court be pleased to set aside the proceedings and the judgement delivered on 6th October 2017 and the interested party be permitted and granted leave to participate in the proceedings.

e. That the honourable court be pleased to issue any further orders/relief as may be necessary for ends of justice to be met.

f. That the costs of this application be provided for.

2. The said application was based upon the several grounds enumerated on the face of the motion. The main ground was that the Applicant had an interest in one (1) acre out of *Title No. Kyeni/Mufu/3060* (hereinafter the suit property) and that the suit was heard and judgement rendered in her absence. She accused the 2nd Plaintiff of having omitted to join her in the suit despite being aware that she was in occupation of part of the suit property.

3. The said application was supported by an affidavit sworn by the Applicant on 21st October 2017. She stated that she was the daughter of

the 1st Plaintiff who was deceased. She contended that she had been residing on one acre of the suit property since 1988 and that she was not aware of the suit until after delivery of judgement on 6th October 2017.

4. It was her further case that the suit property initially belonged to Mariko Kanyariki and that upon his death she was awarded a portion of one acre vide *Runyenjes Succession Cause No. 76 of 2011*. She annexed a copy of the certificate of confirmation of grant as an exhibit.

5. The Applicant faulted the 2nd Plaintiff for claiming the entire suit property on account of adverse possession whereas she did not occupy the entire land. She, therefore, wanted the judgement dated 6th October 2017 to be set aside so that she is accorded an opportunity of being heard.

6. The 2nd Plaintiff filed a replying affidavit sworn on 20th November 2017 in opposition to the said application. She conceded that the Applicant was her step-daughter and that the 1st Plaintiff had given her a place to stay on the suit property after the Applicant separated with her husband.

7. The 2nd Plaintiff further stated that the Applicant had fraudulently obtained the letters of administration on the basis of which she was awarded one acre out of the suit property. It was her case that she had not yet been registered as proprietor of the one acre at the time judgement herein was delivered.

8. It was the 2nd Plaintiff's contention that the Applicant was all along aware of this suit and ought to have applied to be joined in the suit before it was heard and concluded. She further contended that it was too late for the Applicant to be joined in the suit. She, therefore, asked the court to dismiss the Applicant's said notice of motion for being misconceived, without merit and an abuse of the court process.

9. When the said application was slated for hearing on 21st November 2017, the advocates for the concerned parties agreed to canvass it through written submissions. The Applicant filed her written submissions on 21st December 2017 whereas the 2nd Plaintiff filed hers on 23rd January 2018.

10. The court has considered the Applicant's notice of motion dated 27th October 2017, the supporting affidavit and annexures in support thereof, the replying affidavit in opposition thereto as well as the written submissions of the parties. In the court's opinion, there are only two main issues for determination in the instant application, namely;

- a) Whether the Applicant has made out a case for joinder as an interested party.
- b) Whether the Applicant has made out a case for setting aside the judgement dated 6th October 2017.
- c) The provisions of **Order 1 Rule 10 (2) of the Civil Procedure Rules** provide 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.”

12. It was submitted by the 2nd Plaintiff's counsel that under the said provisions, a party can only be added when a suit was in progress. However, no authority was cited for that proposition. The court finds no justification for such a proposition either. If the Rules Committee had intended that a party could only be added or joined before judgement, nothing would have been easier than to state so expressly.

13. On the basis of the material on record, the court is satisfied that the Applicant has an interest in the suit property (whether valid or not) which she desires to ventilate. Such an interest does not have to be one which must necessarily succeed. As long as it is not merely a frivolous or fanciful interest, a citizen's right to be heard shall not be curtailed.

14. On the basis of the case of **Gichuki Gathaara Kimiti Vs Ndirangu Njogu & Another Nyeri High Court Civil Case No. 28 of 2004**, the court is satisfied that in appropriate cases, a person can be joined as an interested party in a suit where judgement has already been rendered. That is what the Hon. Justice H.M. Okwengu did in that suit. This court finds that the instant application for joinder is merited. The Applicant has shown sufficient cause, hence she will be joined as an interested party.

15. The second issue is whether or not the judgement dated 8th October 2017 should be set aside. The 2nd Plaintiff's counsel submitted that the Applicant was aware of the existence of this suit much earlier. It was submitted that she participated in a related suit through her brothers, the 3rd and 4th Defendants herein. The particulars of the related suit were not, however, disclosed.

16. From the court's own assessment of the material on record, there is no evidence to demonstrate that the 3rd and 4th Defendants are the Applicant's brothers. The evidence shows that the Applicant was a daughter of the 1st Plaintiff Nyaga Ruanderi and the step-daughter of the 2nd Plaintiff.

17. The court has been unable to find the report filed by the Deputy Registrar in relation to the site visit before delivery of judgement. The court is, therefore, unable to establish if the Deputy Registrar met the Applicant during the visit and whether the nature and particulars of this suit were availed to her.

18. The court is of the view that the Applicant ought to be accorded a chance to be heard in these proceedings. Whether her case will be strong or weak is a matter for the trial court. Whether or not she will be able to demonstrate that the 2nd Plaintiff was at all material times in actual occupation of 3 acres of the suit property as opposed to 4 acres is also a matter for the trial court.

19. In the circumstances, the court is satisfied that the judgement dated 6th October 2017 ought to be set aside under **section 3A of the Civil Procedure Act (Cap 21)** in order for the Applicant to be accorded an opportunity to be heard. The right to a fair hearing under **Article 50 (1) of the Constitution of Kenya, 2010** is a fundamental right. It is not one of the rights capable of limitation under the law.

20. The upshot of the foregoing is that the notice of motion dated 21st October 2017 is hereby allowed in terms of prayers (3) and (4) thereof. The court further makes the following consequential orders;

- a) The 2nd Plaintiff shall be at liberty to amend her originating summons dated 22nd October 2014 within 21 days and serve it on all the concerned parties.
- b) The interested party shall be at liberty to file a response to the originating summons within 21 days from the date of service of the amended originating summons or if the originating summons will not be amended then within 21 days upon the lapse of the leave to amend.
- c) The suit shall thereafter be mentioned on 25th September 2018 for directions on the hearing thereof.
- d) Costs of the application shall be in the cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19TH** day of **JULY, 2018**.

In the presence of Mr Siro holding brief for Mr. Kamunyori for the Plaintiffs, Mr. Kathungu holding brief for Ms Muthoni for the Respondents and in the absence of the interested party.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

19.07.18