



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 969 of 2014

MARTHA KARWIRA ANTHONYPLAINTIFF

=VERSUS=

WILLIAM ARIANDA ANDERE.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

AND

JOSEPHINE WANJIRU MWANGI.....PROPOSED INTERESTED PARTY

RULING

1. What is before the court for determination is a notice of motion application dated 3rd November 2017 by the intended interested party, Josephine Wanjiru Mwangi, seeking joinder and leave to participate in this suit. The grounds upon which the application is premised are that the intended interested party was the registered proprietor of **Land Title Number Kajjado/Olchoro-Onyore/1156** (hereinafter referred to as the “**suit property**”) until a fraudulent transfer was registered in favour of the 1st defendant. The applicant has exhibited a copy of a title of the suit property in her name dated 27th November 1986 and she avers that she discovered the fraudulent transfer after conducting a search in June 2011. It is the applicant’s contention that she learnt about this suit in October 2017. She further contends that she needs to be joined and allowed to participate in the proceedings because any order made in the suit will affect her constitutional and proprietary rights.

2. The application is opposed by the plaintiff. Through a replying affidavit sworn on 9th March 2018, the plaintiff avers that she bought the suit property from the registered proprietor, William Arianda Andere, the 1st defendant herein, on 3rd June 2011. The plaintiff avers that the dispute herein arose on 7th June 2011 when she was unable to effect transfer from the 1st defendant because of a restriction placed on the parcel register by the registrar. It is the plaintiff’s contention that this suit has proceeded substantially as she closed her suit on 16th September 2016 and that what now remains is the 2nd defendant’s case. The plaintiff states that there is already an interlocutory judgment against the 1st defendant, the current registered proprietor. According to the plaintiff, the applicant’s application to be joined in this proceedings has been brought late in the day and is a dilatory tactic and an attempt to scuttle her case. The plaintiff contends that the applicant is at liberty to file her own suit since allowing the application when the suit is in its final stages would be prejudicial to her.

3. The application was argued in court on 19th July 2018. Mr. Gatumuta, counsel for the applicant, submitted that the applicant was the registered proprietor and never sold the suit property to the 1st defendant. He stated that the applicant was surprised to find that her title had been transferred without her knowledge. He stated that the applicant held and still holds her original title.

4. In response, Mr. Kariuki for the plaintiff argued that the plaintiff bought the suit property from the registered owner, the 1st defendant herein, and that it was during transfer that she discovered there was a restriction in the register. He submitted that there would be unnecessary delay if joinder is allowed and averred that the applicant should file her own suit.

5. Mr. Terrell for the 2nd defendant submitted that he was not opposing the application. He averred that a party who had presented ownership documents before judgment is entered should be allowed to ventilate her claim.

6. The issue for determination is whether the court should allow joinder at this stage Order 1 Rule 10 of the Civil Procedure Rules gives the court powers to join parties 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.*”

7. The principle which guides the court in considering applications for joinder was set out in Central Kenya Ltd vs. Trust Bank & 4 others Civil Appeal No. 222 of 1998 as follows:-

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

In Lucy Nungari Ngigi & 128 Others vs. National Bank of Kenya Limited & Anor. Civil case No. 517 of 2014 (2015)eKLR the court set out factors upon which the court can decline joinder as follows:-

“But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties”.

8. The case of the applicant is that she is the owner of the suit property and that the suit property was fraudulently transferred to the 1st defendant without her knowledge. She still holds the original title and has possession of the suit property. The case of the plaintiff is that the 1st defendant sold to her the suit property but the transfer has not been effected because of the restriction registered against the title. That restriction was registered at the behest of the intended interested party. Against that background, the 1st defendant has not challenged the restriction and has not bothered to respond to the suit by the plaintiff. Secondly, while aware that there existed a restriction lodged at the behest of the interested party, the plaintiff brought this suit against the 1st defendant and the Attorney General but excluded the intended interested party from the suit.

9. The plaintiff is opposed to the joinder of the interested party and proposes that she files a separate suit. I do not agree with the view taken by the plaintiff. This suit concerns land which the interested party claims legitimately belongs to her. She has the original title and she is also in possession of the land. The court would be acting irrationally if it were to lock out the interested party and proceed to finalize the case and make orders relating to the suit property. I have no doubt that the applicant is a necessary party in the effectual adjudication and determination of the dispute in this suit.

10. It was contended during the hearing that interlocutory judgment was entered against the 1st defendant. I have looked at the prayers sought in the plaint. It is clear that by dint of the prayers sought in the plaint, this suit is not amenable to interlocutory judgment under Order 10(6) of the Civil Procedure Rules. The interlocutory judgment entered by the Deputy Registrar was entered in error. The same cannot stand.

11. Consequently, I make the following disposal orders:

a) The applicant Josephine Wanjiru Mwangi is hereby joined in this suit as a 3rd defendant.

b) The said Josphine Wanjiru Mwangi is allowed to file her pleadings, including counterclaim, if she so deems necessary, within 21 days.

c) The irregular interlocutory judgment entered herein is set aside and the suit against the 1st defendant shall proceed as an undefended cause under Order 10 rule 9 of the Civil Procedure Rules should the 1st defendant fail to enter appearance by the time the suit comes up for hearing.

d) Upon expiry of 30 days from today, the suit herein shall be transferred to Kajiado Environment and Land Court for hearing and determination

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of;

M/S Aboge holding brief for Gatumuta Advocate for the Applicant

June Nafula - Court Clerk