



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 46 OF 2015

PROTUS HAMISI WAMBANDA:::PLAINTIFF

VERSUS

ELIZABETH SHIJEYI SHAVA:::DEFENDANT

ELDORET HOSPITAL :::INTERESTED PARTY

RULING

INTRODUCTION

This ruling is in respect of an application dated 27th June, 2016 by Eldoret Hospital who wishes to be enjoined in this suit as an interested party. The application is brought by way of Notice of Motion seeking for orders:

1. That Eldoret Hospital be enjoined as an interested party in this matter.
2. That the costs of the application be in the cause.

The application is premised on 5 grounds and the supporting affidavit of Miten Lodhia sworn on 27th June, 2016.

Background of the case.

By a plaint dated 18th January 2015, and filed in court on 19th February 2015, the plaintiff herein sued the defendant for an order of a permanent injunction restraining the defendant from interfering with parcel known as Kapsaret/Kapsaret/Block 10 (Lamayuet)11 and a declaration that the plaintiff is the lawful owner of all that parcel of land to the exclusion of all and sundry.

The plaintiff further filed an application on the same day under certificate of urgency seeking for a temporary and mandatory injunction against the defendant from interfering with the suit land.

On 20th February 2015, the court gave an order restraining the Uasin Gishu County land Registry from transacting any business on the parcel of land known as Kapsaret/Kapsaret Block 10 (Lamayuet)11 measuring 0.9 acres.

Further on 18th August 2015, an interested party one Erick Lagat Kipkoech filed an application seeking to be enjoined as such in this suit. By consent of the parties, the interested party was allowed to be enjoined on 26th August, 2015.

Eldoret Hospital filed the current application seeking to be enjoined as an interested party. In support of its application; the applicant through a sworn affidavit of Miten Lodhia, avers that the defendant herein sold 0.7 of an acre being part of land parcel Kapsaret/Kapsaret Block 10 (Lamayuet)¹¹ to the interested party. The applicant has also annexed a copy of a sale agreement dated 15th February 2015 between it and the defendant. He avers that the sale was to secure the interests of the interested party arising from medical bills incurred by the defendant herein.

The interested party further stated that they have a legitimate interest in the land and is thus entitled to be heard in the current case. The applicant reiterated that it would be in the interest of justice that it is enjoined in this suit.

It should be noted that at the hearing of this application, Mr. Omusundi Counsel for the defendant indicated that he would not be participating in the application therefore the application proceeded with the Counsels for the plaintiff and the proposed interested party having dispensed with the appearance of Mr. Omusundi.

Interested Party's Counsel's Submission

Miss Cheso argued the application on behalf of the interested party and relied on the grounds filed herein and the supporting affidavit of Miten Lodhia sworn on 27th June, 2016. She also relied on the authorities filed in court to support the interested party's application.

Miss Cheso Counsel for the interested party submitted on the test and threshold on whether a party should be enjoined in a suit as an Interested Party.

She stated that a party must demonstrate that they have a stake in the case, must have an interest in the subject of the suit and that the enjoining of a party will avoid filing of multiplicity of suits and saved the courts time.

Counsel referred the court to the case of Maria Soti Educational Trust -vs- Registrar of Titles & Another 2014 eKLR, where Sila Munyao J highlighted the thresholds. Miss Cheso also referred to the case of Trusted Society of Human Rights Alliance -vs- Mumo Matemo & others.

She submitted that the applicant had demonstrated that it has an interest in the suit property herein and that they have annexed a sale agreement showing that the applicant bought 0.7 acres of the suit property at a consideration of Kshs 4.5 million.

Further she also submitted that the applicant will be severely affected by the decision of this court looking at the prayers sought in the plaint dated 18th February, 2015 which she stated that the prayers would substantially affect the rights of the applicant.

Counsel stated that if the applicant is not enjoined in this suit and a decision is made without notice to the applicant, by the time the applicant gets to know of the outcome of the case, the applicant might be time barred to file a case.

Counsel distinguished that the applicant has brought the application under Order 1 rule 10 sub rule 2 and not Order 1 Rule 3 and 15 of the Civil Procedure Rules.

The distinction is that the applicant seeks to be enjoined purely as an interested party and not as a defendant or as a Third party as was stated in the case of Joseph Leboo & 2 others -vs- Director of Kenya Forest Service. Counsel stated that the court has discretion to define the parameters within which the interested party will participate in the case and filing another suit goes against the overriding objective.

She prayed that the application be allowed as the applicant has demonstrated an interest in the suit and that the court has discretion to grant the orders sought.

Plaintiff's Counsel Submissions

Mr. Okara Counsel for the Plaintiff vehemently opposed the application by the interested party and relied on the replying affidavit of Protus Hamisi Wambanda sworn on 9th March, 2017 and filed on the same day.

He also relied on two authorities filed in court on 16th March, 2017. He submitted that the interest of the interested party is not purely an interested party so called but rather an actual litigant.

Mr. Okara Counsel for the plaintiff/Respondent submitted that the interested party is seeking for actual remedies and that he wants to defeat the prayers of the parties in the suit.

Counsel submitted that the applicants claim can be prosecuted separately. The matter herein is a claim for 0.9 acres and the applicant's claim is for 0.7 acres. It was submitted that allowing the applicant to be enjoined in this suit would delay the conclusion of this matter.

Mr. Okara Counsel for the Plaintiff further submitted that there will be no injury to the applicant if it is not enjoined and that the purported annexed sale agreement has no force in law as the defendant lacked capacity to transact, the said agreement being void or voidable. He further submitted that the defendant is not married to the plaintiff and annexed a marriage certificate to prove the same.

Counsel further submitted that the authority quoted by Counsel for the applicant that is Trusted Society of Human Rights Alliance -vs- Mumo Matemu, the application was disallowed because the Law Society of Kenya was supporting the 1st Respondent therefore it was partisan. Mr. Okara submitted that the applicant was colluding with the defendant to defeat the plaintiff's claim.

Mr. Okara pointed out that the defendant had lodged a caution on the suit land, how come it was possible for her to enter into a sale agreement with the interested party? He urged the court to dismiss the application with costs to the plaintiff.

Miss Cheso in reply to Mr. Okara's submissions stated that section 72 of the Land Registration Act allows the cautioner to remove the caution by himself or herself, by the Registrar or by the court. She further submitted that section 28 of the Land Registration Act provides for overriding interests. She prayed that the application be allowed.

Analysis

I have considered all the arguments by both Counsels for and against the application for enjoining the applicant as an interested party and the supporting documentation herein. I have also considered all the judicial authorities and other legal materials presented before me and I have come to the conclusion that the issues for determination are as follows:-

- 1) Whether the applicant may be enjoined as an interested party in this suit in accordance with order 1 rule 10 (2) of the Civil Procedure Rules?
- 2) Whether the applicant has demonstrated that it has a stake or an interest in the subject of the suit or in other relevant matter affecting the suit?
- 3) Whether the interested party will be affected by the decision in this suit and finally that enjoining the interested party will avoid multiplicity of suits and save judicial time?

Courts have often used the provisions of Order 1 Rule 10 (2) to have persons come into a case as interested parties. That provision of the law provides as follows :-

- 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.

It should be noted that there is no procedure under the Civil Procedure Act and Rules for the joinder of 'interested parties'. The procedure for joining a necessary party is indicated by the Order 1 rule 10 (2) of the Civil Procedure Rules is to be available to either party to move the court, so that a person who is not a party but who seeks to join may be joined in the case and invoke the inherent jurisdiction of the court and the overriding objective of the civil process. The applicant's Counsel has invoked the inherent jurisdiction of the court and the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of disputes.

The question therefore is whether it is in the interest of justice for the applicant to be enjoined as interested party to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added. On this question I find that Order 1 Rule 10 (2) gives the court discretion to order joinder of an interested party.

In answer to the question as to whether the applicant has demonstrated an interest in the subject matter, I find that the fact that the applicant has annexed a copy of a sale agreement between it and the defendant herein shows a stake in the suit land. The said agreement was entered into before the commencement of this suit. There is no evidence on record to show that the defendant is colluding with the Interested party to defeat the plaintiff's claim. Any decision in this matter will substantially affect the applicant in one way or another. It would be in the interest of justice that the issues are articulated, heard and determined once and for all. The submissions as to whether the defendant had capacity to transact are matters to be determined during the trial of the case.

In determining whether the applicant should be enjoined in this suit as an Interested Party, I am further guided by several decisions of the courts.

In the case of **Communications Commission of Kenya & 30 others versus Royal Media Services Ltd & 7 others Supreme Court of Kenya at Nairobi in petition No. 14 of 2014**, stated under paragraphs 22 and 23 of their ruling as follows:-

“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....”

Would it be tenable for the applicant to file a separate suit against the defendant over the same subject matter? My answer to this would be that such a route would increase costs for the parties and make an unfair demand on the courts time and other resources which can be put to better use to serve other litigants. The other worst case scenario would be where similar disputes over the same subject matter have different outcomes which can embarrass the courts.

I am further guided by Article 159 which principle states that justice shall be administered without undue regard to procedural technicalities. The enjoining of the applicant as an interested party will not cause any prejudice or injury to the plaintiff.

Consequently I allow the applicant's application to be enjoined as an interested party in this suit.

The applicant will file a response to the claim if any, within Fourteen (14) days from the date of this ruling, and the plaintiff and defendant may file a reply, if any, within fourteen days of service of the response, after which the matter will proceed for pre-trial directions.

The costs of this application will be in the cause.

Dated and delivered at Eldoret on this 29th day of March, 2017.

M.A ODENY

JUDGE