



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 86 OF 2002

DOUNE FARMS LTD.....PLAINTIFF

VERSUS

RICHARD SOI & 4 OTHERS.....DEFENDANTS

RULING

1. By Notice of Motion dated 17th January 2017, Borop Multipurpose Co-operative Society Ltd the “Interested Party/Applicant” sought the following orders:

1. Spent.

2. *THAT this honourable court be pleased to grant leave and order that the Borop Multipurpose Co-operative Society Ltd, the Interested Party herein be enjoined in this case as the 6th defendant in the original action and the plaintiff in the counterclaim and Chief land Registrar, Registrar of Titles, Sonaiya Serser, Moses K. Siongok and Joel K. Yegon enjoined as the 2nd, 3rd, 4th, 5th and 6th defendants in the counterclaim.*

3. *THAT this honourable court be pleased to grant leave to the interested party Borop Multipurpose Co-operative Society Limited to amend its defence and counterclaim in terms of the annexed draft.*

4. *THAT upon the grant of the prayers 2 and 3 above, the pleadings in this suit be amended in terms of the annexed draft statement of defence and counterclaim and subject to the payment of requisite court fees.*

5. *THAT the cost of this application be in cause.*

2. The application is brought under Order 1 rule 10 (2) and Order 8 rules 3 and 5 among other provisions and is supported by the affidavit of John K. Rotich, the chairman of the interested party. He deposes that the interested party has a claim over LR No. 9045/9, the suit property, which claim rivals that of the plaintiff. That the best way for the interested party to protect its claim would be if the interested party was substituted as 6th defendant. He further deposes that the interested party’s presence in the proceedings is necessary for a complete determination of the dispute. Additionally, the interested party relies on a supplementary affidavit sworn by Mr. John K. Rotich on 7th February 2017 and filed in court on 8th February 2017.

3. The application is opposed by the plaintiff through the replying affidavit of Richard Kay Muir sworn on 23rd January 2017 and filed in court on 24th January 2017. He deposes that the applicant has been

indolent since it has taken it 15 years to realize that it should be a defendant and not an interested party; that the applicant had a chance to pursue its claim through HCC No. 1561 of 2002 but it squandered that opportunity leading to the said suit being dismissed for want of prosecution on 17th May 2012. That through the present application the applicant is in essence trying to reinstitute the claim that was dismissed for want of prosecution.

4. Parties agreed to dispose of the application by way of written submissions. In that regard, the plaintiff's submissions dated 16th March 2017 were filed on 17th March 2017 while the interested party's submissions dated 19th April 2017 were filed on 2017.

5. The plaintiff submits that the interested party's application coming about 15 years after the suit was filed is too late in the day and that the court should not impose a defendant on the plaintiff.

6. The interested party on the other hand submits that the application should be allowed so as to enable the court to determine once and for all the dispute which has been pending before it ever since the interested party joined the proceedings and that by allowing the application, a multiplicity of suits would be avoided. That the interested party has a legitimate claim over the suit property and thus qualify to be joined as a defendant under Order 1 rule 10(2) of the Civil Procedure Rules. Further, that the alleged delay is not a bar to the application being allowed as amended should be allowed at any stage of the proceedings.

7. I have considered the application, the affidavits sworn both in support and in response to the application and the submissions by all the parties. Going by the rules under which the court is moved, the application may appear as a straight forward affair with clear principles. That however is not the case: the applicant wants to change status from that of "Interested Party" to a defendant. Once made a defendant to the original claim, the applicant wants mount a counterclaim in which it will be the plaintiff while the Chief land Registrar, Registrar of Titles, Sonaiya Serser, Moses K. Siongok and Joel K. Yegon will be 2nd, 3rd, 4th, 5th and 6th defendants in the said counterclaim.

8. The application is brought under Order 1 rule 10 (2) and Order 8 rules 3 and 5. Order 8 rules 3 and 5 provide for general power of amendment of pleadings while Order 1 rule 10 (2) states:

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.

9. The proceedings herein were commenced by way of a plaint. In such a case parties to the suit would ordinarily be plaintiff(s) under Order 1 rule 1 of the Civil Procedure Rules, defendant(s) under Order 1 rule 3 and in some cases third and subsequent parties under Order 1 rule 15. There could also be objector(s) at the execution stage under Order 22 rule 51. Generally, the rules meticulously define the roles parties in suits commenced by way of plaint. I have not seen provision for a party known as "Interested Party" in proceedings commenced by way of a plaint.

10. Nevertheless, there is a recent trend where persons apply to join proceedings commenced by way of a plaint as "Interested Party". Perhaps this is in the spirit Article 159 of the Constitution. By design however, parties in proceedings commenced by way of a plaint have clear roles: it must be clear who is claiming what and from whom. Generally, a plaintiff will not join anyone as a defendant unless he has a claim against him or unless he is a necessary party. Indeed, Order 4 rule 5 makes it mandatory that the plaint shows that the defendant is interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

11. The advent the party known as "Interested Party" has somewhat disturbed this orderly arrangement since it is not always clear what the interested party is claiming and from whom. Generally, an interested

party joins proceedings midstream. In some cases, once joined, the interested party mounts a frontal attack on some of the initial parties to the claim with the result that there is even more confusion in the matter.

12. I am not alone in observing this difficulty. Munyao J. had the following to say in **Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR**:

There is indeed no clear-cut provision in the Civil Procedure Act, Cap 21, or Civil Procedure Rules, 2010, making allowance for a party to be enjoined into proceedings as an interested party...

13. It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it.....

15. In this case, the applicants want to be enjoined as interested parties and be allowed to file defence and counterclaim to the suit. Clearly, they do not just want to come into these proceedings as "interested parties" but as defendants with a counterclaim. Caution needs to be exercised when a party wants to join proceedings as defendant. This is because the court would not want to impose a party upon the plaintiff unless it will not be prudent to determine the matter without such party being defendant. But where the plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him, for each person has a right to choose against whom to assert his claims against. The plaintiff could have his genuine reasons as to why he does not wish to proceed against other persons, and issues of costs will also be involved. This is not to say that in an appropriate case, the court cannot insist that a certain person be made defendant irrespective of the protestations of the plaintiff; it all depends on the circumstances of the case, but the plaintiff's choice on whom he has chosen to sue, ought to be given paramount, though not absolute, consideration.

13. If I were to allow the present application, I would not only be imposing the applicant upon the plaintiff as an additional defendant, I would also allow the introduction of a parallel claim in the nature of the proposed counterclaim, with new parties to it. Such a state of affairs would unjustly and unnecessarily muddle the plaintiff's claim.

14. I see no merit in Notice of Motion dated 17th January 2017. It is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Langat holding brief for Mr. Ogola for the plaintiff/respondent

Mr. Ikua holding brief for Mr. Arusei for the interested party/applicant

Court Assistant: Gichaba