



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC101 OF 2016

ESTHER NYAMBURA MUTURI.....PLANTIFF

VERSUS

MWANAJUMA HASSAN.....DEFENDANT

HALIMA RAJAB KIONI.....INTERESTED PARTY

RULING

1. The application for determination is the Notice of Motion dated 26th July 2016 in which the applicant, Halima Rajab Kioni seeks to be enjoined in the suit as an interested party. The application is brought under Section 1A and 3A of the Civil Procedure Act, Order 1 Rule 1 and 3 and Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules.

2. The application is made on the grounds on the face of the application and supported by the affidavits of the applicant sworn on 26th July 2016 and 9th November 2016. The applicant deposes that she is the second wife of the late Juma Nassaro Kwakatengo with whom she got married in 1987 and that the deceased and herself purchased the suit property in 1999. She deposed that they lived on the suit property with her late husband until sometimes in 2002 when the deceased married the plaintiff herein and the applicant had to relocate to some other place. The applicant deposes that the defendant who is her sister-in-law moved into the suit property due to sickness and could not afford to rent a house and incur medical expenses at the same time. According to the applicant, the deceased is survived by six children and the suit relates to the estate of the deceased to which the applicant and her children are beneficiaries and that it is in the interest of justice that she be enjoined as an interested party.

3. The application is opposed by the plaintiff who filed an affidavit in response sworn on 13th September 2016. The plaintiff deposes that she deposes that the applicant is a stranger to her as she is the only wife to the late Juma Nassaro Mwakatengo and that the applicant has failed to prove her alleged marriage to the deceased.

4. Both parties files written submissions through their respective advocates in which they mainly outlined their respective facts as contained in the affidavits.

5. I have carefully considered the arguments advanced in this matter and the relevant laws as well as the authorities cited. Order 1 Rule 3 of the Civil Procedure Rules provides that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising

out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.

In the plaint dated 12th May, 2016, the plaintiff alleges that the defendant has been scheming to sell, demolish or evict her for the suit plot where she has been living and in paragraph 4 thereof the plaintiff states that on 28th April 2016 the defendant in the company of one Robison Kithome stormed her house and gave 14 days’ notice to vacate lest she be evicted or the plot is sold or demolished. The plaintiff’s main prayer is for a permanent injunction to restraint the defendant from the acts complained. There is no remedy in the plaint that the plaintiff is seeking against the applicant. In her application, the applicant seems to bring in issues that relate to the estate of the late Juma Hassaro Mwakatengo, in my view those are matters for succession that ought to be dealt with by a family court and not this court. From the plaint, the complaint relates to a specific incident in which the defendant has been specifically named. I am aware that the court has wide discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court was necessary to enable the court effectually and completely adjudicate upon the matter and settle all questions in the suit. I do not however think that in the present suit, and from the pleadings filed that the applicant would be a necessary party to be enjoined.

6. The cause of action by the plaintiff relates to the incident that allegedly took place on 28th April 2016. The plaintiff has named the defendant and the other parties who infringed or attempted to infringe her rights on that day. The applicant could rightly have an interest in the suit property but her claim if any lies in another court and not this court.

7. I am persuaded by the holding in the case of **JOSEPH LEBOO & 2 OTHER –VS- DIRECTOR KENYA FOREST SERVICES & ANOTHER (2013) eKLR** where Munyao, J stated and was held that:

“Courts needed to exercise caution before making any order for a person to be joined as a defendant were the applicant for that joinder did no emanate from the plaintiff. The choice of whom to sue choice of whom to sue was that of the plaintiff and there could be cogent reasons why a litigant had opted not to sue some other person. Even, in the absence of any reason, the choice to sue had to be left to the litigant and it was not to be disturbed without the presence of compelling reasons...” It was further held that:

“Where there was an application for a person to be joined as a defendant, the plaintiff objected to such joinder, the court had to be cautious before making an order for such joinder. It had to be clear that the remedy sought by the plaintiff in the proceeding, was to be directed against the party sought to be enjoined, or that the remedy the plaintiff sought could not be granted or the proceedings could not be properly conducted without the person sought to be enjoined being a party...”

8. Even though the applicant has demonstrated that she may have an interest in the subject matter, I am not persuaded that the cause of action in this case requires her to be enjoined as a party. Consequently, I find no merit in the application and the same is hereby dismissed.

Each party to bear own costs.

Dated and signed at Mombasa this 11th day of July, 2017.

C. YANO

JUDGE