



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 50 OF 2016

MIKA CHEPKAITANY.....PLAINTIFF

VERSUS

KIMOI LOIRO.....DEFENDANT

RULING

(An application for leave to join the suit as an interested party; plaintiff's suit being about two specific properties in respect of which he claims to be the registered owner and copies of whose title deeds are annexed; applicant alleging that he owned the original plot prior to subdivision into the new plots; applicant wishes to be joined to the suit so that he can explain to the court that he is the owner of the whole land; court notes that interested party in a suit commenced by plaintiff is not provided for in the rules; application dismissed)

1. This ruling is in respect of Notice of Motion dated 31st October 2016, filed by William Rotich Chepkonga, who seeks leave to join these proceedings as an interested party. The application is brought under Order 1 Rules 3 and 10 of the Civil Procedure Rules.

2. The application is supported by the affidavit of the applicant who deposes that he is the owner of a parcel of land known as Kampi Ya Moto/Kampi Ya Moto Block No. 1/16 which was initially measuring about 15 acres. He sold 1 acre out of this land to the defendant and leased a portion measuring 6.5 acres to the plaintiff. He accuses the plaintiff of transferring to himself the 6.5 acres and the 1 acre which had been sold to the defendant. He thus wishes to be joined to the suit so that he can explain to the court that he is the owner of the whole land.

3. The plaintiff responded to the application through replying affidavit filed on 23rd February 2017. She deposed that Kampi Ya Moto/Kampi Ya Moto Block No. 1/16 does not exist; that though the said parcel initially belonged to the applicant and his brother, it was subdivided into two equal portions of 7.5 acres each and sold to the plaintiff in 1994 and 1996; that the two resulting plots are Kampi Ya Moto/Kampi Ya Moto Block No. 1/983 and Kampi Ya Moto/Kampi Ya Moto Block No. 1/984; that he is the registered owner of both plots. He exhibited copies of the title deeds in support of his ownership. He further deposes that it is indeed the defendant who is pushing for the applicant to be joined so as to use the applicant both as spear and shield.

4. The application was disposed of by way of written submissions. In that regard, the applicant filed submissions on 18th July 2017 while the plaintiff filed submissions on 17th July 2017. The defendant neither filed a replying affidavit nor any written submissions. It is however noted that Messrs Mongeri &

Company Advocates is on record for both the applicant and the defendant.

5. I have considered the application, the response to it and the submissions. The application is brought under Order 1 Rules 3 and 10 of the Civil Procedure Rules. Rule 3 states

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.

On the other hand, rule 10 states:

(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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

6. The proceedings herein having been commenced by way of a plaint, parties to the suit are supposed to be plaintiff(s) under Order 1 rule 1 of the Civil Procedure Rules, defendant(s) under Order 1 rule 3 and where necessary third and subsequent parties under Order 1 rule 15. The rules go to great length to 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. Nevertheless, I acknowledge that there are several cases in the recent past where parties have been allowed by courts to join proceedings commenced by way of a plaint as interested party. This could be in the spirit Article 159 of the Constitution. However, Article 159 was not intended to permit chaos in litigation.

7. Procedure, as it is commonly stated, is the handmaiden of substance. This is of particular importance is regards parties to proceedings and capacities in which they move the court. The Court of Appeal **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others** [2013] eKLR stated as follows:

We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil

Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”

8. Parties in proceedings commenced by way of a plaint have clearly determined 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. The advent the party known as "Interested Party" in proceedings commenced by way of a plaint 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. It is not clear whether such a claim by an interested party is a counterclaim. The result is even more confusion in the matter.

9. Such difficulties have been noted by other judges. Munyao J. observed as follows 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.

10. The applicant's reason for wishing to be joined is so that he can explain to the court that he is the owner of the whole land which he refers to as Kampi Ya Moto/Kampi Ya Moto Block No. 1/16. I have looked at the plaint herein and I note that the plaintiff's case is one seeking an injunction in respect of two parcels known as Kampi Ya Moto/Kampi Ya Moto Block No. 1/983 and Kampi Ya Moto/Kampi Ya Moto Block No. 1/984. I have also looked at the defence and counterclaim filed by the defendant. The defendant does not seek any judgment in respect of Kampi Ya Moto/Kampi Ya Moto Block No. 1/16. It is therefore clear to me that this suit only concerns the two parcels known as Kampi Ya Moto/Kampi Ya Moto Block No. 1/983 and Kampi Ya Moto/Kampi Ya Moto Block No. 1/984 whose title deeds have been annexed.

11. The applicant does not state that he wishes to advance any claim against any of the parties herein. He simply wishes to explain some interest in Kampi Ya Moto/Kampi Ya Moto Block No. 1/16. If the explanation that he wishes to offer is relevant to the case, he can do so as a witness. He need not be an interested party for that purpose. As previously noted, the applicant and the defendant are represented by

the same firm of advocates. It shouldn't be difficult for the applicant to testify as a defence witness. If however the applicant were to have a claim against any of the parties to this suit, a suit to that effect can be filed so that the court considers its merits. I have also considered whether the applicant should instead be made a defendant. The plaintiff has no claim against the applicant and there would be no reason to impose him on the plaintiff. Such an imposition could be prejudicial if ultimately the applicant seeks costs of the suit against the plaintiff. I see no reason to make such an imposition in the circumstances.

12. I have said enough to show that I am not persuaded that the present application should be allowed. In the end Notice of Motion dated 31st October 2016 is dismissed with costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 21st day of September 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Makau holding brief for Mr. Gai for the plaintiff

Ms. Moenga holding brief for Mr. Mongeri for the defendant and the applicant

Court Assistant: Gichaba