



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC NO. 262 OF 2017**

**(formerly Machakos HCCC No. 218 of 2012)**

**STEPHEN KIRUMBA GICHURU.....PLAINTIFF**

**VERSUS**

**PARSITAU OLE SAYO .....FIRST DEFENDANT**

**JAMES KINTALEL SAYO.....SECOND DEFENDANT**

**RULING**

What is before Court is a Preliminary Objection dated 10th May, 2015 by the Plaintiff against the Defendants on the following grounds:

1. That the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants Notice of Motion dated 9th June, 2014 is bad in law, incompetent, incurably and fatally defective as it:
  - a. Offends the provisions of Order 1 Rule 10 (1), (4), of the Civil Procedure Rules, 2010 as the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants are not parties to the suit.
  - b. The 2nd Defendant in the said application has not demonstrated authority to swear the supporting affidavit for and on behalf of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants.
2. The Plaintiff shall therefore pray that the Defendant's Notice of Motion application together with any orders issued be struck out with cost.

Both the Plaintiff and the Defendant filed their respective submissions which I have considered.

**Analysis and Determination**

Upon perusal of the Preliminary Objection, the written submissions and the pleadings filed herein, I find that the two main issues in the Preliminary Objection are as follows:

- Whether the Defendant's Notice of Motion application dated 10th May, 2015 offends the provisions of Order 1 Rule 10 (1), (4), of the Civil Procedure Rules;
- Whether the 2nd Defendant in the said application has not demonstrated authority to swear the supporting affidavit for and on behalf of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants.

I note that the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants have indicated that they have been

residing on the suit land for a long time and their inclusion in the suit is pertinent to enable the court make a proper determination of the matter. This fact has not been controverted by the Plaintiff who is opposed to them being enjoined in the suit.

Order 1 Rule 10 (2) of the Civil Procedure Rule stipulates that: ***'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.'***

I find that the presence of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants is necessary as it will enable the court effectually and completely adjudicate upon the matter at hand and settle all questions involved in the dispute. Further, the Plaintiff has not demonstrated any prejudice he will suffer if the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants are enjoined in this suit.

On the second issue as to whether the 2nd Defendant in the said application has not demonstrated authority to swear the supporting affidavit for and on behalf of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants, section 19(1) of the Environment and Land Court Act provides that ***'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence.*** It is clear that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.

This position is affirmed in the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR where Justice Ochieng held that ***.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '***

In relying on the legal provisions and the Case Law above, I find that the failure by the 2nd Defendant to demonstrated authority to swear the supporting affidavit for and on behalf of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants is not fatally defective. Plaintiff seeks to rely on technicalities and this offends the provisions of section 19(1) of the Environment and Land Court Act and the Constitution.

In the circumstances I decline to strike out the Defendant's Notice of Motion dated 10th May, 2015 and proceed to dismiss the Preliminary Objection. Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 31<sup>st</sup> day of October, 2017**

**CHRISTINE OCHIENG**

**JUDGE**