



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

**AT NYERI**

**ELC CASE NO. 667 OF 2014**

**MOSES KINAICHU MUGENYO**

**JOSEPH KIHARA GITUI**

**WANJENI KAGERI (*Suing on behalf of***

***Giakaburi Kanjikeru S.H.G* ..... PLAINTIFFS/RESPONDENTS**

**-VERSUS-**

**MARGARET WANDIA NGUNU..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE DISTRICT LAND REGISTRAR, NYERI..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Vide the plaint dated 18<sup>th</sup> January, 2012 the plaintiffs pray that the 1<sup>st</sup> defendant be compelled to re-open a public access road found between the parcels of land known as No. Magutu/Gatei 444 and 445 and in default, the 2<sup>nd</sup> defendant be ordered to re-open the said road.
2. Upon being served with suit papers, the 1<sup>st</sup> defendant/respondent filed the statement of defence dated 19<sup>th</sup> March, 2012 in which she admits being the registered proprietor of the parcels of land herein but denies that there exists any access road between the two parcels of land.
3. On 10<sup>th</sup> November, 2015 the 1<sup>st</sup> defendant filed the notice of motion dated 10<sup>th</sup> November, 2015 praying that this suit be struck out with costs to her.
4. The application is premised on the grounds that the suit was filed jointly by the plaintiffs when the 2<sup>nd</sup> plaintiff had no capacity to sue or be sued (was adjudged bankrupt). Owing to that misjoinder of the parties, the applicant contends that the suit is an abuse of the court process.
5. The application is supported by the affidavit (supporting affidavit) of the 1<sup>st</sup> defendant/applicant sworn on 10<sup>th</sup> November, 2015. In that affidavit, the 1<sup>st</sup> defendant/applicant has reiterated the grounds on the face of the application and annexed a copy of the receiving order issued on 8<sup>th</sup> July, 2004 marked **MWN-1** and a copy of the order lifting the receiving order, marked **MWN-2**.
6. In reply to the issues raised in the 1<sup>st</sup> defendant/applicant's application, the 2<sup>nd</sup> plaintiff/respondent,

Joseph Kihara Gitui, filed the affidavit (replying affidavit) he swore on 15<sup>th</sup> December, 2015. In that affidavit, the 2<sup>nd</sup> plaintiff/respondent admits that by the time the suit was instituted, there existed a receiving order against him but contends that the application has been brought in bad faith (to defeat the cause of justice).

7. Arguing that his co-plaintiffs had no receiving orders, the 2<sup>nd</sup> plaintiff/applicant urges the court not to strike out the suit.

8. When the application came up for hearing, counsel for the 1<sup>st</sup> defendant/applicant, **Mr. Karigithu**, reiterated the 1<sup>st</sup> defendant/respondent's contention that the current suit was filed when there existed a receiving order against the 2<sup>nd</sup> plaintiff/respondent hence bad in law.

9. Counsel for the plaintiffs/respondents, **Mr. Mugo**, submitted that the 2<sup>nd</sup> plaintiff/respondent is not the plaintiff but Giakaburi Self Help Group. Terming the 2<sup>nd</sup> plaintiff/respondent a mere official of the Self Help Group, Mr. Mugo submitted that the other officials of the Self Help Group had capacity to sue.

10. Maintaining that the suit is properly before court, Mr. Mugo submitted that it would be unjust to strike out the suit.

11. In a rejoinder, Mr. Karigithu pointed out that the plaintiffs have described themselves as such (Plaintiffs have not stated that they are suing on behalf of the Self Help Group).

### **Analysis and determination**

12. Whilst it is not in dispute that the 2<sup>nd</sup> plaintiff/respondent had no capacity to sue or to be sued when the instant suit was filed, there being more than one plaintiff in this matter, the issue that arises is whether joining the 2<sup>nd</sup> plaintiff/respondent to the suit rendered the suit fatally defective?

13. The answer to the foregoing question is found in **Order 1 Rule 9** of the Civil Procedure Rules which provides as follows:-

***“ No suit shall be defeated by reason of the misjoinder or non- joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

***Rule 10 (2) on the other hand provides:-***

***“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.”***

14. It is clear from the foregoing provisions of the law that misjoinder of parties is not a ground for striking out pleadings. There being no other reason or ground advanced in support of the application, I decline to grant the orders sought. Instead, I direct that the 2<sup>nd</sup> defendant's/respondent's name be strike out from the suit.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 18<sup>th</sup> day of February, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Ms Wambui for the defendant

N/A for the plaintiffs

Court assistant - Lydia