



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND COURT**  
**ELC. CASE NO. 1248 OF 2013**

**KITUKU KALUU.....1<sup>ST</sup> PLAINTIFF**

**DAUDI NZOMO ALIAS DAVID NZOMO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSIAH KITUKU & 13 OTHERS..... DEFENDANT**

**AND**

**SAMUEL WAMBUA KAMUYA ALIAS WAMBUA KAMUYA...APPLICANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 7<sup>th</sup> May 2014 in which the Applicant seeks for the following orders:

1. Spent.
2. Spent.
3. That this honorable court be pleased to allow the Applicant, Mr. Samuel Wambua Kamuya alias Wambua Kamuya, to be enjoined as a Plaintiff in this suit and the pleadings filed amended accordingly.
4. That this honorable court be pleased to allow the Applicant to file his Affidavit in support or reply to the Plaintiff's Application dated 15<sup>th</sup> October 2013 as well as written submissions on the same within a reasonable time.
5. That costs of this Application be in the cause.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Applicant sworn on 7<sup>th</sup> May 2014 in which he averred that even though he has filed a witness statement in this suit in support of the Plaintiffs' case, he feels that his interests and his late father's estate are unlikely to be taken care of without his direct participation in this suit. He further averred that this suit was precipitated by disagreements over the interpretation of a judgment of this honorable court issued in HCCC No. 2749 of 1981 KIU Ranching and Farming Co-operative Society Ltd versus Kisee Maweu and 19 Others issued on 14<sup>th</sup> January 1992 by Hon Justice J. W. Mwera (as he then was) and on a related similar case HCCC No. 2207 of 1982 KIU Ranching and Farming Co-operative Society Ltd versus Ngila Thiaka & 123 Others. He averred further that his late father Kamuya Nganda was defendant number 4 in HCCC No. 2749 of 1981 and also appears as the 4<sup>th</sup> person in the schedule of registered proprietors of L. R. No. 7612/2, the suit land, and he wishes to represent the interests of the estate of his late father. He

further averred that he was defendant number 43 in HCCC No. 2207 of 1982 referred to in the pleadings herein and he was also mentioned severally in the annexures as one of the residents of the suit land and he therefore intends to pursue his interests in the suit land. He stated further that he currently occupies approximately 60 acres out of approximately 200 acres of the land he occupied at the time HCCC No. 2749 of 1981 was being heard at the time judgment was issued in favour of the defendants while his late father occupied approximately 20 acres. He further averred that his occupation of the land was interrupted in the year 2005 when the area Chief allowed strangers to invade his land and to take possession of parts thereof and he wishes to pursue eviction of these person from his share of the suit land. He averred further that he as well as other 123 persons named in HCCC No. 2207 of 1982 are direct beneficiaries of the judgment in HCCC No. 2749 of 1981 and consequently they are opposed to the demarcation exercise being conducted by the Defendants because the exercise is not following the status quo as it existed at the time both suits were filed but rather seeks to introduce strangers as beneficiaries of the aforementioned judgment. He added that the Defendants are in the process of selling part of the suit land without the decree holders consent or court approval. He further stated that the exercise being undertaken by the Defendants will deprive him and many others substantive portion of the land they have always occupied and thus defeat the purpose of the judgment in HCCC No. 2749 of 1981 leading to grave miscarriage of justice. He averred further that he was a key witness during the hearing of HCCC No. 2749 of 1981 and a key player in many disputes that have arisen between the Plaintiff in HCCC No. 2749 of 1981 and the original persons occupying the suit land, or between the genuine beneficiaries of the judgment in that case and the area government administration as exemplified in some of the annexures to the Defendant's Replying Affidavit in this matter. He added that the decree holders in HCCC No. 2749 of 1981 were registered as the proprietors of the suit land as trustees of all other original occupants including himself and his late father. He stated that if this Application is not allowed, his rights and those of the estate of his late father would be gravely affected and they stand to suffer irreparable loss and damage in that the present suit seeks subdivision of the suit land amongst the decree holders in HCCC No. 2749 of 1981 only to the exclusion of the other 123 persons who occupied the land at the inception of the suit and to whom the benefit of the judgment was intended. He further stated that his participation in this suit on account of the wealth of information he has will be beneficial to the Plaintiff and especially to the court and will assist the court in determining the real issues in contest and arrive at a fair and just judgment.

The Application is contested. The 11<sup>th</sup> Defendant, Kinuka Sukali, filed his Replying Affidavit sworn on 26<sup>th</sup> May 2014 in which he averred that he was duly authorized by the other Defendants/Respondents to swear this Affidavit on his own behalf and on their behalf. He averred further that the Applicant was the 1<sup>st</sup> Plaintiff in HCCC No. 51 of 2005 which was dismissed with costs and therefore he cannot properly seek to be enjoined in this suit because that would be tantamount to this court allowing the Applicant to use the Defendants on the same subject matter twice and this will defeat the rule of res judicata. He annexed a copy of the order of dismissal. He further averred that it is surprising that the Applicant is seeking to be enjoined as a co-Plaintiff in this suit because the position taken by the Plaintiffs is completely different from his and if any part is to be disenfranchised it would be the Applicant because he was not one of the defendants in HCCC No. 2749 of 1981 but was a defendant in HCCC No. 2207 of 1982 which case the Plaintiffs are denying was consolidated with HCCC No. 2749 of 1981. He added that this Application is a further delay of finalization of contractual obligations between the Defendants and a 3<sup>rd</sup> Party namely Gichuki & Associates Surveyors with whom the Defendants entered into contract with on 13<sup>th</sup> January 2012 to carry out survey work and therefore what the Applicant is seeking to stop is something that has already been done. On those grounds, he requested the court to refuse this Application.

The main issue arising in this Application for my determination is whether or not to issue an order enjoining the Applicant as a Plaintiff in this suit. **Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010** provides for joinder of parties and sets the criteria for who can be joined. This order provides 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”.***

This rule grants this court power to enjoin a party to a suit so that the issues in dispute may be properly and effectively adjudicated where the court is of the opinion that it would be necessary to enjoin such a party to the suit for the effective determination of the matters in dispute. In this particular suit, the Applicant seeks to be enjoined as a Plaintiff citing various reasons as enumerated earlier. His main argument is that he has a direct interest in the suit land both on his own behalf and on behalf of the estate of his late father. He particularly wants to seek an order of eviction against the Defendants on the ground that they have invaded the portion of the suit land belonging to him and the estate of his late father. The Plaintiffs never filed any response to this Application and appear not to oppose it. The Defendants on their part have strenuously opposed this Application.

Looking at the Plaint dated 8<sup>th</sup> October 2013 and filed on 16<sup>th</sup> October 2013 filed in this suit, the Plaintiffs sued the Defendants seeking a permanent injunction restraining the Defendants from interfering with their ownership and occupation of the suit land and an order that the suit land be subdivided equally between the registered owners and title deeds to issue accordingly. In that Plaint, the Plaintiffs claim that they together with 18 other persons, including Kamuya Nganda, the Applicant's late father, were awarded the suit land by judgment of the court delivered on 14<sup>th</sup> January 1992 in HCCC No. 2749 of 1981. The Applicant now claims that he wishes to be enjoined in this present suit so that he can agitate the interests of his late father's estate as well as his own interests in the suit land.

The joinder of the Applicant in this suit as a Plaintiff has been opposed by the Defendants on the ground that he had earlier on sued them in HCCC No. 51 of 2005 seeking similar orders which suit was dismissed for want of prosecution. They annexed a copy of the court order. They argue that allowing the Applicant into this suit as a Plaintiff amounts to res judicata. This position is strenuously opposed by the Applicant.

My finding is that the Plaintiffs have by their own admission stated that one of the beneficiaries of the suit land is the Applicant's late father Kamuya Nganda. The Applicant seeks to be enjoined in this suit in order to ensure that the interests of the estate of his late father are taken into account. The Plaintiffs have notably not opposed the joinder of the Applicant in this suit. The Defendants have not demonstrated that the Applicant's suit being HCCC No. 51 of 2005 covered the same issues as the ones that the Applicant is raising in this suit. In light of this, I find that the Applicant should be enjoined in this suit to take care of the interests of the estate of his father.

This Application is accordingly allowed and costs shall be in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF APRIL 2016.**

**MARY M. GITUMBI**

**JUDGE**