



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO. 111 OF 2016**

**OCCRA REALTORS LTD.....PLAINTIFF**

**VERSUS**

**ABDUL GHANI KIPKEMBOI KOMEN.....1<sup>ST</sup> DEFENDANT**

**ABDUL KHALID KIPEMEI KOMEN.....2<sup>ND</sup> DEFENDANT**

**ABDUL KHADIR KIPLAGAT KOMEN.....3<sup>RD</sup> DEFENDANT**

**AND**

**SAMUEL MUNA NJENGA .....1<sup>ST</sup> INTERESTED PARTY**

**NANCY KABURA MUNA .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

***(Application to be enjoined as interested parties; suit by plaintiff to enforce some agreements for sale of land with the defendants; plaintiff having other downstream agreements with third parties; some of the purchasers now wishing to be enjoined to the suit as interested parties; the test to be applied; issue between plaintiff and defendants can be resolved without an input from the applicants; applicants can file their own separate suit if they so wish; application dismissed)***

1. The application before me is that dated 27 June 2016. It is an application by two persons, that is, Samuel Muna Njenga and Nancy Kabura Muna, to be enjoined as interested parties to this suit. A little background to this suit will shed light as to why the applicants have deemed it necessary to file this application.

2. This suit was commenced on 8 April 2016 by Ocro Realtors Limited as plaintiff. The plaintiff's case is that on 21 April 2011, it entered into a written agreement with the 1st and 2nd defendants whereby the 1st and 2nd defendants contracted the plaintiff to plan, subdivide and sell, 66.6 acres to be excised from the land described as L.R No.10013/4 Njoro Ngata. On 14th November 2011, the 3rd defendant through another written agreement, made a similar contract with the plaintiff over his 33.3 acres share. It is pleaded that the defendants were dealing with their share of 100 acres bequeathed to them through the succession cause of the estate of the late Kibowen Komen where they were beneficiaries. On the basis of the two agreements, the plaintiff engaged the services of planners and surveyors who demarcated the land. The plaintiff then sold the 66.6 acre share of the 1st and 2nd defendants to the following

purchasers :-

- (a) 15 acres to Sally Cherop Chelimo, Marton Kiptoo Cheluget and Grace Tamsta Kelelwet at Kshs. 600,000/= per acre.
- (b) 7 acres to Jesse Muchina Njoroge at Kshs. 400,000/= per acre.
- (c) 10 acres to Emmanuel Otondi Otieno/Hellen Nyansiaboka Otondi at Kshs. 500,000/= per acre.
- (d) 29 acres to Smartline Sacco at Kshs. 475,000/= per acre.

The 33.3 acre share of the 3rd defendant was sold as follows :-

- (a) 10 acres to Njoro Head Teachers Association at Kshs. 600,000/= per acre.
- (b) 2 acres to Enock Gichaba Otara at Kshs. 600,000/= per acre.
- (c) 2 acres to Ruth Onyango Odhiambo at Kshs. 540,000/= per acre.
- (d) 1 acre to Nicholas Wasonga Orago at Kshs. 500,000/=.

3. It is pleaded that these purchasers paid their purchase price in full save for Smartline Sacco who have a balance of Kshs. 3, 785,000/=. It is pleaded that the plaintiff company duly paid the defendants the proceeds of sale of their land through bank transfer, cash payments and purchase of various moveable assets, being a combine harvester valued at Kshs. 2.664 Million, one Massey Ferguson Tractor valued at Kshs. 1.1 Million, a Subaru pick-up valued at Kshs. 400,000/=; a Toyota Land Cruiser valued at Kshs. 800,000/=; a Nissan B13 valued at Kshs. 400,000/= which amounts were deducted from the sales account of the defendants individually. It is averred that the purchasers took possession of their portions of land and have had continuous uninterrupted and peaceful possession and have developed them, until March 2016, when the defendants started blocking their access to the land and invaded the same thus interrupting the occupation of the purchasers.

4. It is pleaded that the defendants are now purporting to cancel the sale agreements to the various purchasers and are also purporting to unilaterally revoke the sale agreements between them and the plaintiff.

5. In the suit, the plaintiff wants an order of permanent injunction against the defendants to stop them from interfering with the sold portions of land; a declaration that the purchasers who have already purchased the various portions of 100 acres are the right owners by way of purchase; an order directing the defendants to surrender the original title deed to the Land Registrar so as to give effect to the sale agreements and costs of the suit.

6. The defendants filed defence vide which they have inter alia pleaded that the agreement that they had with the plaintiff was premised on a condition precedent that the title document of the property was to be obtained by the plaintiff which document has never been obtained. They have pleaded that no planning nor surveying has ever taken place and that the plaintiff did perpetrate a fraud and illegality in engaging the services of planners and surveyors. They have pleaded that they are strangers to the purchasers mentioned, and have averred that if there was any sale with them, the plaintiff acted out of his authority. They have pleaded that the agreement that they had with the plaintiff was terminated on 1 March 2014 due to the plaintiff's irregularity. It is also pleaded that the agreement with Smartline Sacco was terminated due to non-performance by the said Smartline. They have asked that the suit be dismissed.

7. There are on record several applications but they have no bearing on this application and I will therefore not refer to them.

8. In this application, the two applicants aver that they purchased 5 acres from Jesse Muchina Njoroge, the director of the plaintiff company at Kshs. 4,000,000/=. They state that they then took vacant possession, but since March 2016, the defendants have been interfering with their quiet occupation and have denied them access to the land. They believe that they are the legal, equitable and lawful owners of the 5 acres that they purchased. They are therefore of the view that they have an interest in the case and their presence is necessary. They believe that their presence will effectively and fully determine all issues in the matter.

9. The plaintiff has not opposed the application, but the defendants have done so, and have filed a replying affidavit sworn by the 1st defendant. He has deposed inter alia that they have never participated in the alleged transaction between the applicants and the plaintiff. He has stated that the alleged cause of action is one tainted by fraud. He has also stated that the applicants can have their cause of action articulated in a different forum.

10. I took in the submissions of Mr. Matiri for the applicants, Mr. Ndubi for the plaintiffs and Mr. Kabiru for the defendants. Mr. Matiri was of the view that the applicants have demonstrated "sufficient interest" in the subject matter of the case and that they have a written agreement. He submitted that the court's discretion is wide under Order 1 Rule 10 of the Civil Procedure Rules. Mr. Ndubi associated himself with the submissions of the applicant's counsel.

11. Mr. Kabiru on the other hand inter alia submitted that the applicants have no title and cannot therefore be said to be legal owners of the land in question. He also pointed out that in their agreement, the seller is one Jesse Muchina Njoroge, and not Ocra Ltd. He submitted that one ought to come to a case either as plaintiff or defendant if he intends to secure his rights. He submitted that if the applicants have any claim, it can only be against Jesse Muchina Njoroge and not the plaintiff or defendants. He submitted that a party must seek specific remedies.

12. I have considered the application which is one for joinder of the applicants as interested parties to this suit. The question of parties coming into suits as interested parties has vexed the courts for a while now as there is nowhere in the Civil Procedure Act or the Rules which make a specific provision for a party to come into a case as interested party. See for example the debate in the case of ***Supermarine Handling Services Ltd vs Commissioner General, Kenya Revenue Authority (2002) 2 KLR 758***. That said, courts have often used the provisions of Order 1 Rule 10 to have persons come into a case as interested parties. That provision of the law is drawn as follows :-

#### **10. Substitution and addition of parties [Order 1, rule 10.]**

*(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.*

13. It will be discerned that subrule (2) above does permit the court to order a person to be enjoined whether as plaintiff or defendant, or to allow a person into the suit, whose presence before the court *may be necessary* in order to enable the court effectually and completely adjudicate the dispute. I do not therefore agree with Mr. Kabiru, that a party to a suit can only be plaintiff or defendant. The court has discretion to allow any other person, whose presence is deemed to be necessary in order to determine the dispute. Apart from persons being enjoined as interested parties, some may be enjoined as *amicus curiae*. It cannot be argued that such persons cannot participate in a suit or that participation in a suit can only be restricted to the plaintiff and defendant.

14. I also do not agree with Mr. Matiri, that the test is one of "sufficient interest". I am not too sure what Mr. Matiri meant by "sufficient". But to me the test is one of "*necessity*", in other words, the presence of the person must be deemed "*necessary*". The applicant must certainly demonstrate that it is of importance that he be enjoined to the suit and must show why it is "necessary" that he be enjoined in the case.

15. In applications of this nature, the court needs to weigh whether or not the person has a mere interest or wishes to make a claim. Several persons are invariably affected by litigation but I do not think that this alone qualifies one to be a party to a case. In a Presidential Election Petition for example, the whole country can argue that they have an interest in the outcome of the said petition, but this by itself cannot qualify them to be interested parties in the petition. The test cannot be too low as to allow all manner of busy bodies to come into suits.

16. In my view, if the court is of the view that the person who wishes to be enjoined in the suit appears to have a claim that he wants to agitate, then the proper avenue ought to be to order such applicant to be enjoined either as plaintiff or defendant, or to be enjoined as a party *sui generis*, who is entitled to make a claim within the suit and whose rights will also be determined as between the existing plaintiff and defendant. If he has a mere interest, then the court ought to weigh that interest, and if not seen to be weighty enough, dismiss the application. If the claim of the parties can be heard and determined without the input of the person sought to be enjoined, then it is not necessary for such person to be permitted to come into the suit.

17. In our case, it seems to me that the applicants want to agitate the claim that they are legally entitled to 5 acres of land. In my view, that claim is best pursued by the applicants filing their own suit or seeking to be enjoined as plaintiffs in this suit, which in the latter case, they need to liaise with the original plaintiff to see how the plaint may be amended to accommodate them. I am not of the view that the avenue of them being enjoined as interested parties is proper in the circumstances of this case. I say so because the case between the plaintiff and defendants is one based on a contract which the applicants are not privy to. I do not see what the applicants will add to or subtract from that contract, or what input they will have in the interpretation of that contract. The issues in this case between the plaintiff and defendants can be determined without the presence of the interested parties in the suit. Moreover, as pointed out by Mr. Kabiru, the applicants have no agreement with either plaintiff or defendant. True, they do seem to have an agreement with one Jesse Muchina a director of the plaintiff company, but we have to be alive to the doctrine of separate corporate personality emphasized in the old company law case of ***Salomon vs Salomon***.

18. I see no prejudice that will be caused to the applicants by me denying them the orders herein. They have leeway to file their own suit and also have leeway to liaise with the existing plaintiff to convince the plaintiff to amend the plaint so as to have them enjoined as plaintiffs.

19. For the above reasons, I am inclined to dismiss this application but I make no orders as to costs.

20. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 22<sup>nd</sup> day of September 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Ms. Alwala holding brief for Mr. Matiri for intended interested parties/applicants

Ms. Wangari holding brief for Mr. Kabiru for defendants.

No appearance on part of M/s Robert Ndubi & Co. Advocates for plaintiff.

C/Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**