



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 1547 OF 2013

TURERE OLE TAYIANA.....PLAINTIFF

VERSUS

MOSES TING'A TURERE.....DEFENDANT

RULING

Coming up for determination is an application dated 30th January 2014 filed by the Plaintiff for orders that the **Maasai Springs Water Company Limited** (hereinafter “**the company**”) be joined as a 2nd Defendant to these proceedings and that the Amended Plaint annexed to the application be deemed as filed upon payment of the requisite fees and summons be served upon the added Defendant. The application is premised on grounds that company distills and disposes of water from the suit property. Thus, the company is a necessary party to the proceedings and its presence before court may be necessary so as to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

In the supporting affidavit, the Plaintiff deposed that the suit is against his son who misrepresented facts to him leading to the sinking of a borehole on his property. He subsequently learnt that the company was to be involved in the distillation, marketing, and selling for commercial use the water that was to be obtained. On further enquiry, he learnt that the company sells the bottled water for local consumption in Kiserian, Rongai, Isinya and Magadi for profit. It is the Plaintiff’s deposition that the said company is directly involved in a series of acts in regard to the dispute in these proceedings.

The Defendant swore a Replying Affidavit on 26th November 2014 wherein he opposed the application. The Defendant deposed that the same was baseless, scandalous, frivolous, vexatious and an abuse of the court process on the basis that the Plaintiff had not provided compelling reasons to grant the orders sought and that the issues could adequately be addressed during hearing through cross-examination without joining the company. Further, that the company was merely a vehicle used by Global Worship Centre Church (*the Church*) to run the water project. Additionally, the basis of this suit, being the agreements entered between him on behalf of the Church and the Plaintiff dated 16th December 2009 and 5th January 2010 do not in any way involve the company and therefore it would be baseless to include them in this matter. It was further deposed that the company was no longer operational. The Defendant opined that joinder of the company to the suit would only serve to convolute the issues which is against the overriding objective of the Court.

The Plaintiff replied in a Further Affidavit sworn on 11th December 2014 and deposed that whereas he had no agreement with the company, it continues to operate from his property without his authority and

without paying rent. The Plaintiff refuted the Defendant's averments asserting that there was no association between the company and the church and that the company was fully operational selling water in supermarkets. Further, that the company being a limited liability company is distinct and separate entity from the Defendant and that any orders issued in these proceedings may adversely affect the company. Thus, its inclusion would help the court determine the issue of trespass at once without having to institute separate proceedings.

Both parties filed written submissions in further support of their cases, which I have carefully read and considered the authorities cited by counsel. To enable this court determine whether the company is a necessary party to this suit, a brief background of the dispute is essential. The suit property Kajiado/Loodariak/645 belongs to the Plaintiff. He agreed to earmark a portion of the property for purposes of sinking a borehole. According to the Plaintiff, the borehole was meant for his own use and that of the immediate community. However, that the Defendant, the brain behind the idea, duped him into signing agreements and commenced a commercial water bottling and distribution company utilizing water from the said borehole. The Defendant contends that the Plaintiff was fully aware of the contents of the agreements which were signed after numerous family deliberations, and that the agreements provided for a commercial water bottling and distribution project.

Order 1 Rule 10(2) of the Civil Procedure Rules provides for joinder of any person, either as plaintiff or defendant, whose presence before court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Gikonyo J. in the case of Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another Nairobi Civil Case No. 517 of 2014 [2015] eKLR explained circumstances where joinder may be disallowed, as follows:

But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

On perusal of the pleadings, it is evident that there is commercial water bottling and distribution project undertaken on the Plaintiff's land. This, according to the Plaintiff amounts to trespass by Maasai Springs Water Company Limited which operates the said project and sells the water in various supermarkets in the area. In support of this allegation, the Plaintiff annexed a copy of CR12 Form from the Companies Registry which revealed that the Defendant and one Mc Mullen Jonathan Mark are the directors and shareholders of the company. He also annexed a copy of a receipt of purchase of bottled water of Maasai Springs Ltd from Super Star Supermarket dated 1st December 2014 indicating that the company is in operation. The Defendant on his part claimed that the said company runs the water project on behalf of the church which has no capacity to do so. Further that all the rights, privileges and duties stipulated in the agreements, subject matter of the suit, can only be attributed to the parties thereto but not the company which is not a party to the agreement. Notably, however, the Defendant did not establish to the satisfaction of the court that the project was undertaken by the company for the benefit of the church.

The subject matter of the suit is trespass on the suit property and tapping, bottling and distributing water from the borehole for commercial gain without the Plaintiff's authority. The Plaintiff seeks to establish that the project is undertaken by the company for its benefit without his authority contrary to the Defendant's averments that the same is undertaken on behalf of the church. The cause of action and relief sought against the company is the same as that pursued against the Defendant. The issue of trespass is the common question of fact arising between the Defendant and the company party.

In that regard, I am satisfied that the Plaintiff has established sufficient cause to show that the company is a necessary party to the suit. The application dated 30th January 2014 is hereby allowed. The plaintiff is granted leave to file an amended plaint enjoining "Masai Springs Water Company Limited" as the 2nd Defendant in this proceeding within 14 days of the date of this ruling. The Defendants shall have

corresponding leave of 14 days from date of service of the amended plaint upon them to file an amended defence or defences as the case may be.

Costs of the application shall be in the cause.

Ruling dated, signed and delivered this.....**10th**.....day of.....
September.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendant