



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 163 OF 2015**

**RUTH NYAMBURA KARIUKI.....PLAINTIFF**

**VERSUS**

**J W K.....DEFENDANT**

**AND**

**S W W.....INTERESTED PARTY/APPLICANT**

**RULING**

S W W (*hereinafter referred to as the intended interested party*) comes to this court with the application dated 16th day of July, 2015 and filed on 17.7.2015 seeking to be enjoined in this matter as an Interested Party and be allowed to file a defence or a replying affidavit. The application is based on grounds that the intended interested party has a beneficial interest as the spouse of the defendant the registered owner of the suit land being Eldoret Municipality Block [particulars withheld]. That the intended interested party has therefore had an interest in the outcome of the suit. She believes that the presence of the interested party in the suit will be necessary as the suit land is matrimonial property and that she is a stranger to any sale of the land by the defendant and claims that the alleged sale by the defendant to the plaintiff is illegal for all purposes. That it is just and fair that the intended interested party be enjoined in this suit so that she can defend her right.

The application is supported by the affidavit of proposed interested party who states that she is the interested party in the above case hence competent to swear this affidavit. That the defendant is the registered owner of all that parcel of land known as Eldoret Municipality Block [particulars withheld] measuring 0.0975 hectares.

Moreover that the defendant is her husband having been married since the year 1975 and they have been blessed with 4 issues that are three sons and one daughter.

That sometimes on 1987, the defendant through her effort bought a parcel of land namely Eldoret Municipality Block [particulars withheld] which was registered in the defendant's name. That she is the one who paid the first instalment as at that time her husband was not in Eldoret and she signed the agreement on his behalf him being her husband. That she and the defendant have developed the said parcel where they constructed 15 bed sitters for rental purposes and a separate permanent house which is their matrimonial property. That the subject land is their main source of income and a matrimonial property.

That she did not give consent for the sale to the plaintiff as required by land Control Act Cap 302 Laws of Kenya hence the agreement made between the Plaintiff and the defendant is null and void. That

sometimes in the year 2013, the defendant entered into a sale agreement with the plaintiff without the consent of the family more particular her being his spouse, as required by the law and especially on matrimonial property. That the plaintiff and the defendant did not obtain Land Control Board consent, and if so obtained as alleged by the plaintiff, the same is obtained fraudulently, irregularly and the same is null and void. That when she learnt about the sale, she went and put a notice on the walls and on the gate that the plot was not for sale. That when she objected to the said sale, the plaintiff caused the police to arrest her twice with an intention to intimidate her but she was not charged because at station they realized she was fighting for her rights. That she also caused the registration of caution on the said Eldoret Municipality Block [particulars withheld] to restrict any further transaction. That after confronting the defendant, he admitted having sold the subject land without her consent and that of her children, and he further informed her that this suit has been filed by the plaintiff against him.

The plaintiff opposes the application and has filed a replying affidavit stating that she is advised by her advocates on record which information she verily believes to be true is that the application and more so the affidavit in support is legally untenable and ought to be dismissed with costs. She believes that the defendant is propping the interested party to defeat ends of justice and that the proposed interested party's interests can be taken care by the defendant.

**Mr. Bosire** submits that the applicant is the legal wife of the defendant and that the suit property is matrimonial property purchased during the subsisting of the marriage and therefore she has a right to the property.

**Mr. Yego** on the other hand opposes the application and submits that there was no mention of spousal consent and that the transaction was on the verge of completion when this application was filed.

I have considered the application and the provisions of section 28(a) of the Land Registration Act, 2012 which provides as follows:

***“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-***

***(a) ..... Spousal rights over matrimonial property.***

.....

***(j) any other rights provided under any written law.”Section 93(2) of the Land Registration Act, 2012*** provides that if land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

*Order 1 Rule (10) (2)* of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

Failure to allow this application will be akin to denying the applicant her day on the seat of justice. The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.

In ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

*“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”*

At page 460, the learned judge added:

***“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”***

And in  MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206, at page 210, the Court of Appeal stated as follows:

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

From the foregoing, it is clear that by virtue of being the spouse to the defendant, the applicant has an interest in the suit land and is entitled to be heard to protect the same. The application to be enjoined is allowed. The applicant to file defence within 14 days.

**DATED AND DELIVERED AT ELDORET THIS 6th DAY OF NOVEMBER, 2015.**

**ANTONY OMBWAYO**

**JUDGE**