



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 1018 OF 2012

LENAH WANJIKU MBIYU1ST PLAINTIFF

DAVID WAIGANJO KOINANGE.....2ND PLAINTIFF

VERSUS

EDDAH WANJIRU MBIYU.....1ST DEFENDANT

SALIM MANJI.....2ND DEFENDANT

KOINANGE INVESTMENT & DEVELOPMENT LTD.....3RD DEFENDANT

AND

PAUL MBATIA KOINANGE.....APPLICANT

RULING

The Application

The application before Court is a Notice of Motion dated 7th January 2013 by by the Applicant wherein he is seeking leave to join the suit as a 3rd Plaintiff, to enable him tender evidence and participate in this proceedings. The application is supported by the Applicant's affidavit sworn on 7th January 2013, wherein he states that he is one of the beneficiaries of the estate of the late Mbiyu Koinange who was his father. The Applicant avers that the 1st and 2nd Plaintiffs are his sister and brother respectively and further, that the 2nd Plaintiff is one of the administrators of his late father's estate.

It is the Applicant's averment that he is a director of the 3rd Defendant and he annexed as evidence, undated letters from the Registrar of Companies showing the directors of the 3rd Defendant addressed to Judy Thongori & Advocates. As further evidence, the Applicant has also annexed company details dated 26/03/08 and 11/01/05 as well as correspondences dated 27/09/04, 01/08/03, 04/08/03, 01/08/03 between the said directors and the Registrar of Companies.

The Applicant has alleged that there have been attempts to remove him as a director of the 3rd Defendant

and further, that the shareholding of the 3rd Defendant is 50,000 shares, seventy five percent of which are owned by the estate of the late Mbiyu Koinange. It is the Applicant's contention that the suit property known as LR No. 209/9099 is part of the estate of his late father Mbiyu Koinange in which he, the 1st and 2nd Plaintiffs are beneficiaries. The Applicant annexed a list of the properties of the estate of Mbiyu Koinange as evidence.

The Applicant states that although the 1st Defendant holds no shares in the 3rd Defendant's company, being an administrator of the estate of the late Mbiyu Koinange, she owes a fiduciary and legal duty to conduct herself in a manner that would benefit the entire estate. It is the Applicant's case that the dispute herein revolves around the management and handling of prime assets of the estate of the late Mbiyu Koinange located within the central business district of Nairobi, in which the Plaintiffs and other beneficiaries have an interest and legitimate claim.

Further, the Applicant has contended that the 1st Defendant has purported to enter into a lease agreement over the suit property without involving other administrators and beneficiaries. A copy of a lease agreement dated 15th September 2009 between Koinange Investment and Development Company and City Shopping Complex has been annexed as evidence.

The Applicant alleges that the 1st Defendant instigated his unlawful removal as a director of the 3rd Defendant in order to advance illegal dealings in the suit property. The Applicant contends that it would be in the interest of justice for him to be admitted as a 3rd Plaintiff in order to assist the court arrive at a fair, just and equitable decision.

The Applicant reiterated In a supplementary affidavit sworn on 29th January 2013 that the subject matter of this suit is ownership, control and management of LR No. 209/9099 which forms part of the estate of Mbiyu Koinange which he is interested in as a beneficiary. It is the Applicant's averment that as a beneficiary of the estate of his late father, nothing prevents him from bringing an action before any court of law and therefore, that it is only just and fair that he be joined as a party so that he can ventilate the issues relating to his interest in the suit property.

The Response

The application is opposed by the Defendants who filed grounds of opposition dated 14th January 2013 as well as a replying affidavit sworn by the 2nd Defendant on 15th January 2013. The Defendants have stated that the Applicant is no longer a director of the 3rd Defendant, having been removed through a special resolution by the board of directors made on 29th August 2009. The Defendants have annexed as evidence a copy of the special resolution, notification of change of directors and secretaries dated 1st September 2009, and letters from the Registrar of Companies dated 4th November 2009 and 7th September 2011. It is the Defendants' case that the Applicant was removed as a director for among other reasons, defrauding the company.

While stating that the Applicant's sole objective of applying to be enjoined in this suit is to enable him ventilate grievances concerning his removal as a director of the 3rd Defendant, the Defendants aver that the correct procedure for the Applicant would be to file separate proceedings under the Companies Act for the court to make a determination on his removal. Lastly, the Defendants averred that the application before court is not made in good faith, and that the Applicant does not have any serious issues he intends to present before the court for adjudication.

The Submissions

The Applicant's counsel filed written submissions dated 5th June 2013, while Counsel for the Defendants made oral submissions at the hearing of the application on 29th January 2014. The Applicant submitted that since he is a son of the late Mbiyu Koinange, and he has *locus standi* to prosecute this suit whose

subject matter is the management, ownership and control of the suit property which forms part of the estate of the late Mbiyu Koinange. Counsel for the Applicant argued that there is no law that forbids the Applicant from instituting any suit in his name over property which he is a beneficiary. It is the Applicant's submission that it is only with his enjoinder that light will be shed on the real issues for determination in this matter.

Counsel averred that the nature of the claim the Applicant has against the Defendants is within the Court's jurisdiction and further, that the claim is similar to the one being raised by the Plaintiffs. Lastly, it was submitted that the enjoinder of the Applicant in this suit is necessary and will save judicial time since multiplicity of suits over the same subject matter will be avoided.

Mr. Mbaabu, learned Counsel for the Defendants submitted before court that the application is based on two grounds which are firstly, that the Applicant is a director of Koinange Investment and Development Company and secondly, that the Applicant as a beneficiary of the estate of the late Mbiyu Koinange and therefore ought to be enjoined as a 3rd Plaintiff. Counsel for the Defendants averred that the Applicant has no interest in the outcome of this suit and further, that he has other avenues to ventilate his claims. It is the Defendants' submission that the interests that the Applicant may have are well ventilated and well represented by other persons in the suit.

While submitting that the application is based on falsehoods, Counsel stated that the Applicant is not a director of the 3rd Defendant, and referred the court to documents annexed to the replying affidavit showing the process through which the Applicant was removed. Counsel for the Defendants argued that even if the Applicant was a director, the company to which he claimed directorship was already a Defendant in the suit and therefore, that it would be improper to have a director as a Plaintiff and the company as the Defendant. Further, it was argued for the Defendants, that if the Applicant has an issue in respect to his removal, the proper procedure would be to file a separate suit or application under the Companies Act to challenge his removal as director and not in a land court.

In respect to the Applicant being a beneficiary of the estate, it was submitted that the estate of Mbiyu Koinange is the majority shareholder of the 3rd Defendant who owns the property in dispute and therefore, the issue was whether a beneficiary can be joined to articulate issues of the estate. Further, it was submitted that the Applicant had not furnished evidence to show that he was a beneficiary of the estate. It was the Defendants' submission that even if the Applicant was a beneficiary, he cannot be joined as a party pursuant to section 82 of the Law of Succession Act, which provides that the personal representative of the estate is the proper person mandated to institute legal proceedings on behalf of the estate. Counsel submitted that the Applicant is neither an executor nor administrator of the estate and lacks capacity to institute legal proceedings on behalf of the estate of Mbiyu Koinange. Further, it was argued that the Applicant has to raise whatever issues he has through the administrators who are already parties to the suit as the 1st and 2nd Plaintiffs.

Lastly, Counsel stated that the application has no merit and if allowed, would introduce extraneous matters to this proceedings, and open floodgates for other beneficiaries to be enjoined in the suit.

The Issues and Determination

I have carefully considered the pleadings and submissions made by the Applicant and Defendants. The main issue arising is whether the Applicant has shown grounds to be joined as a Plaintiff to this suit.

Order I Rule 1 of the Civil Procedure Rules states as follows with regard to joinder of a party as a Plaintiff:

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

The Plaintiffs in their claim as pleaded in the Plaint dated 18th December 2012 seek an injunctive order to restrain the Defendants or anyone claiming through them from trespassing upon LR No. 209/9099. The 1st Plaintiff stated in the Plaint that she is a beneficiary of the estate of the late Mbiyu Koinange and at the same time an appointed agent of the suit property. The 2nd Plaintiff is said to be a co-administrator of the estate of the late Mbiyu Koinange. Their claim against the Defendants is as beneficiaries of the Estate of the Mbiyu Koinange, and they are disputing the management by the Defendants of the property known as L.R. Number 209/9099, which they claim will deprive them as beneficiaries the use and enjoyment of the said suit property.

It is not disputed that the 3rd Defendant is the registered proprietor of the suit property, and that the estate of the late Mbiyu Koinange is a majority shareholder in the said company. It is also not disputed that the 1st Defendant is an administrator of the estate of Mbiyu Koinange. In addition, the 1st Plaintiff, 2nd Plaintiffs and the Applicant all allege that they are beneficiaries of the estate of the late Mbiyu Koinange.

It therefore is apparent that the Applicant's cause of action herein is arising from the same acts or transactions as those affecting the 1st and 2nd Plaintiffs, namely the management of the suit property and with respect of which they seek to challenge the Defendants' control and management of the same. In addition, the Applicant claim the same legal status of beneficiary of the estate of the Mbiyu Koinange as do the 1st and 2nd Plaintiff, from which common questions of law and fact will arise.

It is therefore my finding that the Applicant is for these reasons a proper party to be joined as a Plaintiff herein. The arguments raised by the Defendants as to the merits of the Applicant's case as a beneficiary and/or director of the 3rd Defendant will be matters to be decided upon after trial, and not this stage.

The Applicant's Notice of Motion dated 7th January 2013 is accordingly allowed and Paul Mbatia Koinange is hereby joined as the 3rd Plaintiff in this suit. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____26th____ day of ____March____, 2014.

P. NYAMWEYA

JUDGE