



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 2163 OF 2001

THINDIGUA COMPANY LTD..... PLAINTIFF

VERSUS

FRANCIS P. GITAU NJUNGE.....1ST DEFENDANT

JOSEPH KIMANI..... 2ND DEFENDANT

NDAGWATHA KIARIE..... 3RD DEFENDANT

BERNARD KARANJA NDUNGU..... INTERESTED PARTY

BERNARD KINYANJUI PETER INTERESTED PARTY

RULING ON DIRECTIONS

1. This matter has been listed for mention severally for directions. The parties have failed to agree on the directions that ought to be given in order to obtain compliance of the parties with the provisions of order 11 of the Civil Procedure Rules to facilitate the timeous hearing of the suit.
2. The parties filed submissions on the directions they would like to be issued to facilitate the trial and one fact that does not appear to be in dispute is that the 2nd Defendant is deceased and no substitution in regard to him has been made and thus the suit as against the 2nd Defendant has abated. The plaintiff seeks a direction that this suit be consolidated with case file **NO. 560 of 2002** and that the 3rd Defendant's counterclaim cannot proceed by virtue of a judgment in file **NO.2358 of 2007** and a pending appeal and further seeks direction that the 4th & 5th Defendant do file their defence and do comply with order 11.
3. The 1st Defendant states that the 4th & 5th Defendants/interested parties had applied to be enjoined as interested parties as their interest in the suit was by virtue of their having purchased the suit property from the 2nd Defendant who is now deceased and only wished to be party to the suit as interested parties. The 3rd Defendant applied to be enjoined as a defendant and has in this regard filed a defence and counterclaim.
4. The 4th and 5th Defendants have stated that their entry in the suit was through the 2nd Defendant who is now deceased. Without substitution of the 2nd Defendant the suit against him as abated and to the extent that the 4th and 5th Defendant/interested parties interest in the suit is directly

linked to the claim as against the 2nd Defendant and thus if the suit against the 2nd Defendant has abated then they may see no reason to remain in the suit. As the 4th and 5th Defendants state they applied to be enjoined as interested parties and not as Defendants it is their view that they should not be forced to remain in the suit as Defendants as the Plaintiff has made no claim against them. It is true they may have acquired an interest in the suit property but that was through the 2nd Defendant who had privity of contract/relationship with the plaintiff. The plaintiff in the premises can only have a claim against the 4th and 5th Defendants through the 2nd Defendant and cannot have a direct claim against the 4th and 5th Defendant and for that reason I do not think they can be proper defendants in a suit by the plaintiff.

5. In the circumstances of this matter and having reviewed the pleadings and the record it is necessary that the plaintiff comes out clearly as to whether it wishes to proceed with the suit against the 2nd Defendant (now deceased) as that does determine how the 4th and 5th Defendants involvement in the suit will be. I have perused the application that the 4th and 5th Defendants made for joinder as parties in this suit and it is clear they sought to be enjoined as interested parties and not as defendants. On the basis of the attendant circumstances they had nothing to defend and could only be interested parties. I am satisfied that the record indicated they would join the suit as defendants inadvertently and I accordingly restore the 4th and 5th Defendants as interested parties in the suit.
6. It is essential for the 4th and 5th Defendants (now interested parties) to file a statement of how their interest in the suit property arises together with any supporting documents. Thus just like the other parties to the suit have to file their witness statements the interested parties should also file their statements and any supporting documents to enable the court and the other parties to know the nature of their interest.
7. I note from the court record that the plaintiff had on 1st November 2002 filed an application seeking the consolidation of **HCCC NO.560 of 2002** with the present suit. The file record does not show how that particular application was dealt with and as the plaintiff seeks the consolidation of the suit I direct that the plaintiff liaises with the other parties in regard to that application within the next 14 days of this ruling to determine whether the same can be granted by consent at the time this matter is fixed for a pretrial conference.
8. The court in view of the unsettled nature of the pleadings cannot give any final specific directions and invites all the parties to within 45 days from the date of this ruling to review their pleadings with a view to making full compliance with order 11 of the Civil Procedure Rules.
9. The matter is fixed for a pretrial conference on 23rd July 2014.

Ruling dated, signed and delivered at Nairobi this 22nd day of May 2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

..... For the Defendants