



**IN THE HIGH COURT OF KENYA**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 1784 OF 2007**

**HENRY ORYEM OKELLO.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

*(Suing as a Legal Representative of labule okello lutwa ( Deceased)*

**SUKHDEV SIGHN LALAY .....1<sup>ST</sup> DEFENANT/APPLICANT**

**LAZARUS KIBUI NDEGWA .....2<sup>ND</sup> DEFENDANT/RESPONDENTS**

**RULING:**

The 1<sup>st</sup> Defendant herein **Sukhdev Sighn Lalay** has brought this Notice of Motion dated 30<sup>th</sup> April, 2013 under **Order 1 Rule 10(2) & 14 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya** and other enabling provisions of Laws of Kenya seeking for Orders that:-

1. ***Spent***
2. ***That the 1<sup>st</sup> Defendants name be struck out from this suit with costs and damages paid to him accordingly.***
3. ***Costs of the application be provided for.***

The application is premised on the grounds stated on the face of the application and on the annexed affidavit of **Sukhdev Sighn Lalay**. These grounds are:-

- a. *The Plaintiff claim does not disclose any reasonable cause of action against the 1<sup>st</sup> Defendant.*
- b. *The Plaintiffs are not the legal representatives of the Estate of the deceased who is alleged to be the owner of the suit property.*
- c. *The 1<sup>st</sup> Defendant was a tenant and duly paid rent as was required of him; little did he know that the suit property has a dispute in ownership.*
- d. *The 1<sup>st</sup> Defendant has been wrongly accused and dragged into these proceedings without any proper grounds at all.*

In his Affidavits, the applicant stated that he had a special arrangement with the 2<sup>nd</sup> defendant, that he renovate the house to his taste with the hope that the 2<sup>nd</sup> Defendant would sell the same to him. That later the 2<sup>nd</sup> Defendant illegally and without consideration sent auctioneers to auction his goods and personal belongings and finally forced him out of the house. He averred that with the said eviction, his interest in the suit property was thwarted since he is now out of the suit premises. He has no further interest in proceedings with the case and he prayed that the suit against him should be dismissed as the case is now between the Plaintiffs and 2<sup>nd</sup> Defendant. He contended that there was need to save courts time and mitigates costs by withdrawing or removing unnecessary parties and issues to the suit.

The application was opposed by the Plaintiffs, who filed their grounds of opposition on 6<sup>th</sup> February, 2014. Plaintiffs averred that the 1<sup>st</sup> Defendant filed this Notice of Motion on 30<sup>th</sup> April, 2013 and only served it upon the Respondents on 23<sup>rd</sup> January, 2014.

They contended that the instant application is an abuse of the courts process since the matter is set for hearing on **26<sup>th</sup> June, 2014**. Therefore the application is mala fide and intended to delay the trial of this suit. Plaintiffs also contended that there are several issues of facts as well as law against the applicant which arose out of the pleadings which cannot be decided by the court through affidavits. The 2<sup>nd</sup> Defendant, though having alleged that he was taking a neutral stand, seemed to support the Notice of Motion. In his submissions, he alleged that the 1<sup>st</sup> Defendant was lawfully evicted from the suit premises by the 2<sup>nd</sup> Defendant for non-payment of rent upon a court order dated 14<sup>th</sup> November, 2011. 2<sup>nd</sup> Defendant further submitted that 1<sup>st</sup> Defendant had no capacity to defend this suit as the 2<sup>nd</sup> Defendant does not need the presence of 1<sup>st</sup> Defendant to defend his suit as he (2<sup>nd</sup> Defendant) had purchased the premises lawfully.

It was the 2<sup>nd</sup> Defendant contention that the counsel for the Plaintiffs is an interested party and cannot be neutral or independent in the prosecution of the suit.

The parties herein canvassed this Notice of Motion by way of Written Submissions which I have considered. I have also considered the relevant provisions of the law and I make the following findings.

It is evident that the plaintiffs herein filed this suit on 15<sup>th</sup> February, 2006 against the 1<sup>st</sup> Defendant and sought for various relieves among them vacant possession and mesne profit.

The 2<sup>nd</sup> Defendant subsequently sought to be enjoined as a party to this suit. The said application was allowed on 13<sup>th</sup> October 2009. Thereafter the 2<sup>nd</sup> Defendant filed an application for striking out the suit which was rejected by this court. The applicant herein had filed this application on 30<sup>th</sup> April, 2013 but did not to serve it until January, 2014. No proper explanation has been given for that delay. The suit herein has a hearing date of 26<sup>th</sup> June, 2014.

The application is premised under **Order 1 Rule 10(2)** which states as follows:-

***“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 to effectually and completely adjudicate upon and settle all questions involved in the suit, be added”.***

Application for striking out a Plaintiff or Defendant may be made by way of Chamber Summons. However, the applicant herein has filed a Notice of Motion. I will not deal with technicalities herein but the substance of the application as provided for by Article **159** of **the Constitution 2010**.

This suit has been pending since the year 2007. The 1<sup>st</sup> Defendant had participated in this matter all

through. He has only decided to prosecute this application after the suit was set down for hearing. All the issues raised by the 1<sup>st</sup> Defendant cannot be decided on mere affidavits. The court has to interrogate the evidence adduced and come up with a determination on whether there is a cause of action against the 1<sup>st</sup> Defendant or not. I find that this is one suit that the parties should allow the court to decide it on merit rather than on technicalities. This way the matter will be expedited in keeping with the spirit of **Sections 1A, 1B and 3A of the Civil Procedure Act**.

The suit is coming up for hearing on **26<sup>th</sup> June, 2014**. The 1<sup>st</sup> Defendant should prepare to proceed with the case so that if at the end of the trial, the court finds that he was wrongly sued, then the suit will be decided in his favour with the usual costs following the event. I was guided by the following authorities in arriving at the above decision - **Perry Vs Carson ( 1962) EA 515 CF** where the court held:-

**“ An application to remove a party cannot be allowed unless it will leave the suit intact”.**

I will also borrow this wordings from the decision in the case of **Deported Asians Property Custodian Board Vs Jaffer Brothers Ltd ( 1999) EA 55 ( SCU) .**

**“ A party may be joined in a suit not because there is a cause of action against it but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter “.**

I find and hold that since there are facts herein in controversy, the presence of the 1<sup>st</sup> Defendant is necessary in order to enable the court effectively adjudicate upon this matter.

For the expeditious disposal of this matter, I find it prudent not to allow the instant application. From the foregoing the 1<sup>st</sup> Defendant’s application dated 30<sup>th</sup> April 2013 is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered this **16<sup>th</sup> day of May , 2014**

**L.GACHERU**

**JUDGE**

In the Presence of:-

..... for the Plaintiffs/ Applicants

..... for the Defendants/Respondents

..... for the other Defendants

Lukas: Court Clerk

**L.GACHERU**

**JUDGE**