



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 368 OF 2015**

**MAYFAIR HOLDINGS LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MUNICIPAL COUNCIL OF KISUMU.....DEFENDANT/RESPONDENT**

**AND**

**PAULINE MAUWA AKWACHA.....INTERESTED PARTY/APPLICANT**

**RULING**

The Applicant filed a Notice of Motion dated 25<sup>th</sup> June 2018 seeking to be joined in the suit as an Applicant; that the court on its own motion be pleased to recall, review, and/or set aside the judgment delivered on 30<sup>th</sup> May 2018; that the judgment be declared a nullity and/or set aside and the case be heard afresh; and that the Respondent provides costs of this application.

The application is based on the grounds that the Applicant's interests was not considered yet she has an interest in the suit parcel, that the application is prompt and within reasonable time, that the suit violates the constitutional rights of the applicant to be heard on the disputed parcel, and that it is in the interest of justice that the application be allowed.

The application is also based on the supporting affidavit of the Applicant dated 25<sup>th</sup> June 2018. The Applicant deponed that she had a bona fide claim on the plot known as Kisumu/Municipality/Block 8/297, and that they have been paying rent and maintaining the premises. That the Applicant and her husband were tenants of one Shakeel Shabir in which they entered into a lease agreement dated 16<sup>th</sup> May 2001.

That in 2005, there arose a dispute between Sandrani Gilani of Mayfair Holdings and Shakeel Shabir over the plot Kisumu/Municipality/Block 8/244. That the disputed plot was in fact a road reserve that had fraudulently registered in the Plaintiff's name and given to the Applicant by Kisumu Municipality to carry on their businesses. That the Plaintiff has persistently declared that the plot is his and that he even holds a title deed for the same.

That the Plaintiff had sued the Applicant in a case formerly known as Kisumu High Court Case No. 100 of 2011 alleging that she had encroached into his parcel Kisumu/Municipality/Block 8/297, which matter has not been heard to conclusion. That the Plaintiff chose to institute another suit (the present suit) over the same subject matter and not join the Applicant yet he was aware that the Applicant stood to be affected by the decision.

That the suit was heard to conclusion and judgment entered in the Plaintiff's favour which adversely affects the Applicant. That the same Advocate acting for the Plaintiff in the case against the Applicant was aware that she was an Applicant yet chose not to join her in this suit. That the Applicant only became aware if the judgment in this suit on 18<sup>th</sup> June 2018 after being informed by a court

clerk of an order concerning the land, which she confirmed after visiting the Land court registry.

The Applicant contends that she had absolute interest in this case and the failure to join her violated her rights under Article 50 of the Constitution. That there was an error on the face of the record which ought to be corrected.

### **DEFENDANT'S RESPONSE**

The Defendant responded through the replying affidavit of its Advocate dated 17<sup>th</sup> July 2018 deponing that based on what had been disclosed by the Applicant, it was clear beyond peradventure that the Plaintiff was being economic with the truth by either concealing material facts or failing to disclose relevant facts to the court.

That it was settled law that a party seeking equitable reliefs is under a duty to make full disclosure and not to conceal any relevant/crucial facts or matters. That the conduct of the Plaintiff was a demonstration that it did not deserve the orders made on 30<sup>th</sup> May 2018.

### **PLAINTIFF'S RESPONSE**

The Plaintiff filed Grounds of Opposition dated 18<sup>th</sup> September opposing the application on the grounds that the matter was concluded and no party can be joined after the conclusion of the suit; that the application is unknown in law as the applicant is not a party to the suit; that the Applicant is not the owner of the suit parcel and cannot therefore lay a claim to the same; that the application is an abuse of the court process; and that the Applicant has a separate suit against the Plaintiff in which it can ventilate its issues. Parties proceeded by way of written submissions.

### **APPLICANT'S SUBMISSIONS**

Counsel for the Applicant submitted that Rule 10 (2) of the Civil Procedure Rules allows a party to be enjoined in a suit as a necessary party, a necessary party being a party whose presence is necessary in determining the matter. That the Applicant has a bona fide claim by virtue of being a tenant of one Shakeel Shabir. That the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 defines an interested party as a person or entity that has an identifiable legal stake or interest or duty in the proceedings and may not be directly involved in the litigation.

Counsel submitted that the Applicant demonstrated that she has an identifiable stake in the suit and it was only right that she be joined in the proceedings pursuant to her right to access to justice and a fair hearing under Articles 48 and 50 of the Constitution.

Counsel referred to Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act which provide for a review of judgment by any person aggrieved by a decree or order. Counsel also cited *Mwihoko Housing Company Limited v Equity Building Society* [2007] 2 KLR 171 which enumerated the circumstances where such a review could be granted – an error or omission on the part of the court; or the discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the Applicant.

Counsel submitted that a review in this case would serve a useful purpose as the Applicant had an identifiable stake in the suit parcel, information which the Plaintiff was aware of, having sued the Applicant in another suit. Counsel cited the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1995] eKLR for the proposition that a person who makes an ex parte application is under an obligation to make the fullest possible disclosure of all material facts within his knowledge, failure to which he will be deprived of any advantage which may have already been obtained by him.

### **DEFENDANT'S SUBMISSIONS**

Counsel for the Defendant submitted that the execution of the order/decreed shall lead to the shutting down of the Applicant's business and thereby interfere with the constitutional property rights, and in that sense the Applicant is a necessary party whose presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter as per *Andy Forwarders Service Limited & another v Price Waterhouse Coopers Limited & another* [2012] eKLR.

Counsel submitted that the joining of the Applicant shall accord her a chance of being heard in line with the universal rules of natural justice and the provisions of Article 50 (1) of the Constitution. That the joining of the Applicant shall not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties Kisumu/Municipality/Block 8/297 or envisaged in the pleadings as per the holding in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR. That the proceedings in the suit are very brief and hearing the suit afresh with the parties given a chance to be heard would meet the ends of justice.

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the Plaintiff submitted that a party seeking to be enjoined in a suit must do so at any time during the pendency of the suit and not after the suit has been concluded. That similarly with a pending application if not determined before recording a consent order would serve no purpose as the intended party is not a party to the suit.

Counsel cited *Apollo Mboya & another v Cabinet Secretary of the National Treasury & 6 others* [2019] eKLR for the proposition that the court has the discretion to enjoin any party to a suit at any stage but this must be done before delivering of a judgment.

Counsel submitted that there was indolence on the Applicant's part as she did not file any application until 29<sup>th</sup> June 2019, a month after the court delivered its judgment. That the Applicant had not offered any reasonable explanation, given that the suit was filed by a plaintiff in 2005. Counsel cited *Meme v Republic* [2004] KLR 637 which enumerated the circumstances which would warrant grant of leave to enjoin a party to a suit – complete settlement of all the questions in the proceedings, protection of the rights of a party who would otherwise be adversely be affected in law, and to prevent a likely course of proliferated litigation. Counsel argued that the Applicant was not in the picture as she had not acquired any proprietorship to the suit property when it was acquired by the Plaintiff in 1993.

Counsel submitted that the court had become *functus officio* at the time the Applicant made her application, having already pronounced its judgment. Counsel cited the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR.

Counsel submitted that allowing the application would offend the doctrine of *res judicata* and that the application was an abuse of the court process as the Applicant lacked any legal basis. That the Applicant has a suit against the Plaintiff where she can have her grievances addressed.

### **Issues for Determination**

#### *1. Whether the Applicant can be joined in the suit after the conclusion of proceedings*

Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:

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

The Court of Appeal in *J M K vs M W M & Another* [2015] eKLR, concurring with the decision of the Trial Judge to decline adding party after conclusion of proceedings, further elaborated on the provision of Order 1 Rule 10 (2) thus:

“We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. *Sarkar's Code*, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.”

This position was also affirmed by the Court of Appeal in the case of *Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its*

*capacity as a successor in Title to First National Finance Bank Ltd* [2019] eKLR.

Nyamweya J in *Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another* [2014] eKLR also held that:

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in **Black’s Law Dictionary Ninth Edition** at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.”

The upshot is therefore that the Applicant herein cannot be joined to this suit, the proceedings having been long concluded and judgment delivered.

The Applicant also fails to meet the second requirement of Order 1 Rule 10 (2) that is being a party whose presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The Applicant’s lays claim to the suit property as a tenant of one Shakeel Shabir, and not the Defendant herein. The Applicant’s claim and the facts of Kisumu High Court Case No. 100 of 2011 as disclosed by the Applicant involve a distinctly separate cause of action from the cause of action that forms the basis of the Plaintiff’s claim in this case.

Furthermore, the Applicant having failed to demonstrate that she is a necessary party to this suit, there are no sufficient reasons warranting the review or setting aside of the court’s judgment as provided under Order 45 Rule 1 of the Civil Procedure Rules. The application ought to be, and is hereby dismissed with costs.

**DATED AT KISUMU THIS 10<sup>TH</sup> DAY OF DECEMBER 2020**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**



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