REPUBLIC OF KENYA

IN THE E.L.C COURT OF KENYA

AT EMBU

ELC CASE NO. 10 OF 2020 (O.S)

EUNICE WANGUI MBOGO……1ST APPLICANT

JUSTIN NDARU NJIRU……2ND APPLICANT

VERSUS

MARGARET MBUCU MATHURI sued as administrator of

ADRIANO MATHURI NGONDI……1ST RESPONDENT

PITHON NJIRU NGIRI……2ND RESPONDENT

PRISCILLA WANTHIGA NGUYU sued as administrator of

LAMECK NGUYU KARANJA…… 3RD RESPONDENT

RULING

1) This ruling is on a notice of motion dated 16th September, 2021 filed by the Applicants on 27th October, 2020. The Application is expressed to be brought under Order 8 Rule 1 and 3, Order 5 Rule 17 of the Civil Procedure Rules 2010, Sections 100, 1, 1A, 3 and 3A of the Civil Procedure Act.

APPLICATION

2) The Applicants are **EUNICE WANGUI MBOGO,** and **JUSTIN NDARU NJIRU**, while the Respondents are three (3) - **MARGARET MBUCU MATHURU,** sued in her capacity as administrator to the estate of **ADRIANO MATHURI NGONDI,** then **PITHON NJIRU NGIRI** and finally **PRISCILLA WANTHIGA NGUYU** who is sued in her capacity as administrator to the estate of **LAMECK NGUYU KARANJA.**

3) The motion came with four (4) prayers but prayer one is now moot. The prayers for consideration are therefore prayers 2,3 and 4 which are as follows:

Prayer 2: This court do grant leave to the plaintiffs to serve this application and subsequent pleadings in this case upon the intended respondents by way of substituted service by affixing the pleadings on the notice boards of Embu Law courts & Siakago Law Court.

Prayer 3: That leave be granted to the plaintiff to further amend the originating summons in terms of the draft amended

originating summons annexed herewith.

That leave be granted to the plaintiff to enjoin **DOREEN MURUGI NJERU, PRISCILLA WATHIGA NGUYU, LEWIS GITONGA NJERU, MARGARET MATHURI, JOSEPH KIMANI MWIKONYI, SAMUEL NDIRANGU MUGO, MORIS MUGO NGARI, WILSON NJERU MURIUKI, MERCY MUTHONI ROTICH, MERCY MUTHONI ROTICH, FAITH MARGERY NGINYA, JOHN IRERI MACHAKI, JOSPHINE WANDIA NJAGI, NJIRU NGIRI PITHON, JOSEPH KAMARU MWIKONYI, HUDSON WAINAINA M** as respondents in the suit and the originating summons be amended forthwith to include them.

Prayer 4: Costs be provided for.

4) The application is supported by grounds, interalia, that the respondents had subdivided the suit parcel of land into several portions and transferred them during the pendency of the suit; that the new owners are likely to be affected by the orders which will be made by the court; and there is therefore need to amend the originating summons to reflect the new land parcel numbers. The applicants allege that they don't know the new owners and only got to know their names by virtue of having conducted searches on the land. It is alleged that their postal addresses are also not known. It is pleaded that the respondents will not suffer any prejudice if the orders sought are granted.

5) With the application is filed two supporting affidavits, both dated 22.09.2021 and sworn by the 1st and 2nd applicant respectively. The 1st applicant reiterates the contents of the grounds in the application and avers that she is claiming ownership of two acres of land no. Embu/Kithunthiri/1484. It is her assertion that her mother Juliana Mbuya Njiru had filed a suit seeking cancellation of the respondent's title on grounds of fraud. It is said that she had sought adverse possession in Embu ELC 5 of 2017 and has appeal in Nyeri Court of appeal.

6) According to the 1st applicant, when she initially filed the suit, the land was intact. She then filed an application for temporary injunction seeking to preserve the property but the application was dismissed. It is her assertion that upon the dismissal of the application the respondent subdivided the land into three portions Embu/Kithunthiri/3569,3570 and 3571. It is her further assertion that the land was subdivided further into several other portions which were then transferred to the intended respondents.

7) The 1st applicant avers that she wishes to amend the originating summons to indicate the correct land parcel numbers and the new owners to the parcels of land as they will be affected by the orders issued by the court. She reiterates that she does not know the intended respondents or their postal addresses. Ultimately it was pleaded that no prejudice will be occasioned to any of the parties if the orders sought are granted.

8) The 2nd applicant's affidavit is similar to that of the 1st applicant save that he claims two and a half acres of the suit parcel of land.

RESPONSE

9) The application was opposed by way of replying affidavit and grounds of opposition. The replying affidavit is dated 22.11.2021 and filed on 23.11.2021. The same is sworn by Margaret Mbucu Mathuri, the 1st respondent. She avers that the suit is res judicata to Embu No. 5 of 2017, which touches on the same subject matter and the parties are substantially the same. It is argued that the parties sought to be included in the suit got registered in the resultant subdivisions of L.R Embu/Kithunthiri/1438 in execution of the judgment in Embu ELC No. 5 of 2017.

10) It is pleaded that the issues arising as a result of execution of a decree should be decided in the same suit but not a different suit. According to the respondents the orders sought in the application are not capable of being granted. The application has been termed a non-starter and one that ought to be dismissed with costs.

11) In the grounds of opposition the respondents listed four grounds which are as follows;

i) The suit is res judicata Embu ELC No. 5 of 2017

ii) Affidavit cannot be amended.

iii) Application lacks merit

iv) Application is bad in law and fatally defective.

SUBMISSIONS

12) The application was canvassed by way of written submissions. The respondents filed their submissions on 11.2.2022. They submitted that the suit was res judicata Embu ELC Case No. 5 of 2017 and that the parties purportedly to be "enjoined" are beneficiaries of a decree in the said suit. It is argued that the decree was neither appealed nor set aside and that the suit therefore offends the mandatory provisions of section 34 of the Civil Procedure Rules.

13) The respondents further argue that the court is called upon to bar (enjoin) the said parties to the suit. It is argued that the parties cannot pray for the intended respondents to be barred from the suit while they are not even parties to the said suit. In opposition to the application, the respondents relied on the case of Kakamega High Court Succession Cause No. 263 of 2002 and prayed that the suit be dismissed with costs.

14) The applicants on their part filed submissions on 14.2.2022. They reiterated the averments in the application. On the issue of leave to amend, the applicants relied on the provisions of Order 8 Rule 3 and 5(1) of the Civil Procedure Rules. They further relied on the case of **Ochieng & Others Vs First National Bank of Chicago Civil appeal No. 147 of 1991** as cited with approval in **St. Patrick's Hill School Ltd V Bank of Africa Kenya Ltd [2018]** where the Court of Appeal set out the principles of governing the amendment of pleadings. The applicants also relied on the case of **Harrison C. Kariuki Vs Blueshield Insurance Company Ltd [2006]Eklr** which cited with approval the case of **Central Bank of Kenya Vs Trust Bank Ltd [200]EALR 365.**

15) The applicants submitted that they have demonstrated that the intended respondents are necessary parties in the suit by virtue of being the registered owners to parcels of land which the plaintiffs are claiming by way of adverse possession.

16) On the issue of joinder of parties the applicants relied on **Order 1 Rule 10(2) of the Civil Procedure Rules** and equally relied on the case of **JMK Vs MWM & Another [2015].** It was further submitted that the court has discretion to allow joinder of the intended defendants as parties in the proceedings and to put this point across they relied on the case of **Civicon Limited Vs Kivuwatt Limited & 2 Others [2015] Eklr.**

17) On what is to be considered for grant of an application for joinder, the parties relied on the case of **Central Kenya Ltd Vs Trust Bank Ltd & Others CA No. 222 of 1998** and the case of **Meme V Republic, [2004] 1 EA 124**. It is the applicants case that the intended defendants have a stake in the proceedings; that their presence will result in complete settlement of all the questions involved in the proceedings; that they would be affected by the outcome of the suit; and finally that joinder will prevent a likely course of proliferated litigation. Ultimately it was argued that the defendants had not shown what prejudice they stand to suffer if the amendment is allowed.

18) The applicants also submitted on the issue of substituted service and relied on the provisions of Order 5 Rule 17 of the Civil Procedure Rules. They further maintained that they had experienced difficulty in effecting service on the intended defendants which was evident from the affidavit by the process server and urged the court to allow the prayer for substituted service. Ultimately the court was urged to allow the prayers as sought in the application.

ANALYSIS AND DETERMINATION

19) I have considered the application, the responses made, and the rival submissions. I have also looked at the court record. The applicants have filed this application seeking to have joined in the suit the intended respondents, on grounds that the suit parcel of land Embu/Kithunthiri/1484 which the applicants claim by way of adverse possession had been subdivided and transferred to the said intended respondents during the pendency of the suit.

20) It is their case that the said intended respondents will be affected by the outcome of the suit and that their presence is therefore necessary to enable the court completely adjudicate and answer all questions in the suit. The application is said to have been filed to avoid a multiplicity of suits by the intended respondents. According to the applicants, the respondents do not stand to suffer any prejudice if the application is allowed and it is argued that they have failed to produce any evidence to show that they would suffer

any prejudice.

21) Apart from the prayer for joinder of parties, the applicants have also sought for orders to be allowed to effect service of this application by way of substituted service, they allege that it has been difficult to effect personal service on the intended respondents.

22) The respondents on their part have opposed the application by filing grounds of opposition and a replying affidavit. They contend that the prayer as framed is one that seek to enjoin the parties which essentially means barring them from joining the suit. It is their arguments that such prayer cannot be granted as prayed. They also claim that the suit is res judicata to EMBU ELC 5 of 2017 which, according to them, related to the same subject matter and the parties were substantially the same. It is also their case that the resultant subdivisions and subsequent transfer was in execution of the judgment in EMBU ELC 5 of 2017 which they aver was determined in their favour and no appeal was preferred against the determination.

23) Before I determine the application on it's merit I find it worthwhile to first determine the issues raised in the grounds of opposition, partly because some of the issues raised therein are points of law which have the potential of disposing off the application and essentially the suit in it's entirety depending on whether the said points of law have merit.

24) In the grounds of opposition, the respondents have raised four grounds of opposition;

i) The suit is res judicata Embu ELC No. 5 of 2017

ii) Affidavit cannot be amended.

iii) Application lacks merit

iv) Application is bad in law and fatally defective.

25) I will start with the first ground on the issue of Res Judicata. It has been raised both in the grounds of opposition and replying affidavit. The doctrine of Res judicata is provided under section 7 of the Civil Procedure Act which provides that: *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

26) The essence of the doctrine of res judicata is to oust the jurisdiction of the court to try a matter that has already been tried by a competent court over the same subject matter and involving the same parties. In the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** the court, on the role of res judicata, articulated as follows:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

27) The elements to be met for the doctrine to be applicable were set out in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** where the court stated as follows;

"In order to rely on the defence of res judicata there must be:

(i.) a previous suit in which the matter was in issue;

(ii.) the parties were the same or litigating under the same title.

(iii.) a competent court heard the matter in issue;

(iv.) the issue has been raised once again in a fresh suit".

28) In order to determine whether the matter was res judicata the court has to look at the suit in ELC No. 5 of 2017. The said suit was instituted by Juliana Mbuya Njiru against Pithon Njiru Ngiri, Nguyu Karanja and Margaret Mbucu Mathuri sued in her capacity as administrator to the estate of Adriano Mathuri Ngondi. The plaintiff in that suit had sought to be registered as owner of suit parcel Embu / Kithunthiri /1484 by way of adverse possession. The suit was determined by the court and was dismissed. The court ordered eviction of the plaintiff from the suit parcel of land together with her family.

29) The suit before me was filed by Eunice Wangui Mbogo and Justin Ndaru Njiru, who are children of the plaintiff in ELC No. 5 of 2017. It is filed against the same defendants in ELC No. 5 of 2017. Like their mother the plaintiffs herein have also brought a suit on adverse possession, each claiming ownership of a share of parcel of land Embu/Kithunthiri/1484. Their claim is similarly on adverse possession just as the claim in ELC No. 5 of 2017.

30) I note that the issue of res judicata was also raised before this court in an interlocutory application where the applicants had sought for injunction and the court proceeded to determine the said application on it's merit. Being that the prayer has also been raised before me, I will nonetheless determine it. I bear in mind that my duty is limited to determining this application and not to conduct a mini trial

31) I have looked at the pleadings in ELC NO. 5 of 2017. I note that the parties therein are not similar to the parties before this court. The applicants herein though children of the plaintiff in ELC No. 5 of 2017 are essentially different from their mother who was the plaintiff in ELC No. 5 of 2017. There is therefore no prima facie similarity of parties in the suit. Likewise, though both suits are on adverse possession, the nature of a suit on adverse possession is one pegged on proof of possession and occupation for a period of more than 12 years of a given parcel of land. The applicants have filed this suit seeking to proof such ownership in their own capacity and not on behalf of their mother. As earlier pointed out their mother had filed the suit on her own behalf and not on behalf of her children. In the determination of the suit in ELC No. 5 of 2017 the court pointed out that the plaintiff therein had failed to prove her own possession of the land. In the circumstances I find thise claim and cause of action to be different and the matter herein is not res judicata.

32) The grounds of opposition also raises other grounds to wit: Affidavit cannot be amended, Application lacks merit, Application is bad in law and fatally defective. I am of the view that I have to determine the application on it's merit in order to establish the said grounds of opposition.

33) The application, at Prayer 3, seeks that the court 'enjoin' the intended respondents to the suit. The respondents have pointed out to the court that the applicants have sought to enjoin the parties to the suit, which essentially means to have them barred from joining the suit, yet they are already not parties to the suit. According to them the prayer as sought cannot be granted. I have perused the application as filed and the applicants indeed have used the word "enjoin".

34) The difference in meaning of the said word was elaborated in the case of Estate of Barasa Kanenje Manya (Deceased) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) it was stated that

"Join" and "enjoin" exist in the English lexicon, but they do not mean the same thing. To "join" a party to a suit means to add that person to the suit. To "enjoin," in law, means to injunct, or to bar a party from doing something. "Enjoinder" means a prohibition ordered by injunction".

35) As alluded to in the above case, the word "enjoin" in law means to injunct or bar a party from doing something. From the pleadings filed before the court, the applicants are seeking the intended respondents to be made parties to the suit as opposed to having them barred from performing an action or joining the suit.

36) In the same case of **Re Estate of Barasa Kanenje Manya (Deceased) (supra)** the court, while moved under similar circumstances, exercised it's discretion and held as follows,

"I am inclined to stretch the application of Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules, to presume that the applicants intended to apply for "joinder" as opposed to "enjoinder," and to proceed to determine the application on its merits based on that presumption".

37) In the circumstances, I am also inclined to invoke the provisions of Article 159 of the constitution and presume that the applicants intend to apply for joinder as it is evident from the pleadings that that is what they seek as opposed to enjoin or injunct the intended respondents.

38) On the merits of the prayer for joinder, the applicants are seeking to have the intended respondents joined in the suit and aver that they are the current registered owners of the suit land. It is submitted that their acquisition was pursuant to subdivision carried out on the suit parcel of land during the pendency of the suit. According to the applicants, the intended respondents are likely to be affected by any orders made regarding the suit parcel and they are therefore necessary parties to the suit.

39) The legal position on joinder of parties is Order 1 Rule 10 (2) of the Civil Procedure Rules which provides 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

The principles to be considered for joinder of a party were well enumerated in the decision in **Meme vs Republic [2004]1 124,** which principles are;

a) *joinder of a person because his presence will result in the complete settlement of all questions involved in the proceedings,*

b) joinder to provide a protection of a party who would otherwise be adversely affected in law,

c) joinder to prevent a likely course of proliferated litigation.

40) The law clearly stipulates that joinder can be made of any party as plaintiff or defendant or as one 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. The considerations by the court before allowing a person to be joined in the suit have been stretched to include those who would be adversely affected in law and also to prevent proliferated litigation.

41) From the pleadings before the court, it is evident that the intended respondents are registered owners of resultant subdivisions of the suit parcel of land Embu/Kithunthiri/1484. The said subdivisions have been duly confirmed by the respondents save that they argue that the subdivisions were in execution of the decree in Embu ELC No. 5 of 2017. In the circumstances therefore, the said intended respondents are proper parties to be joined in this suit as respondents. This is in order for them to defend their interest in the property. Assuming that the court makes adverse orders with regard to the titles they hold, then their interest in the land will be affected. It is therefore in their best interest to be joined in the suit.

42) Their presence in this suit will also ensure that they are accorded a right of hearing by participating in the suit. They will therefore not be condemned unheard. The importance of the right to be heard was articulated in the case of ***Mbaki & others vs Macharia & another (2005) 2 EA 206***, at page 210, where the Court 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."

43) Further allowing the prayer for joinder will prevent a multiplicity of suits as the questions and issues relating to ownership of the suit will be determined completely. I therefore find that the prayer for joinder is merited.

44) The prayer for joinder has also been made alongside the prayer for amendment of the originating summons to include the names

of the intended respondents. The legal provisions on amendment of pleadings is Order 8 Rule 3 of the Civil Procedure Rules which allow amendment of pleadings.

45) It is trite law that amendment of pleadings should be allowed freely and at any stage of the proceedings unless the said amendments are prejudicial to the other party. This was as held in the case of **Central Kenya Ltd vs Trust Bank & 4 others Civil Appeal No. 222 of 1998**, where the court stated thus:

"all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

46) Further, in ***Halsbury's Laws of England, 4th Ed. , Vol. 36*** at ***paragraph 68, on*** amendments of pleadings, it was stated as follows: -

"…The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. …. The person applying for amendment must be acting in good faith.

47) The amendment sought herein is inclusion of the names of the intended respondents who are shown as owners of the respective parcels of land which are resultant subdivisions of the suit parcel. From the pleadings by the respondents, they have not made any explanation with regard to any prejudice they would suffer in case the amendments are made. I do not find any prejudice either if the amendments are made, bearing in mind the fact that the court has already made a determination that the intended respondents are necessary parties to this suit. The applicants are also acting in good faith in seeking the amendments to be made. The prayer for amendment is therefore also allowed in order to reflect the real parties having an interest in the suit property and the exact parcels of land which are now in dispute.

48) There is also a prayer made for service of this application and subsequent proceedings to be made on the intended respondents by way of substituted service. The applicants aver that they have experienced difficulty in effecting service on the intended respondents.

49) The provisions of Order 5 Rule 17 of the Civil Procedure Rules provide that where a court is satisfied that summons cannot be served in accordance with the rules as stipulated in the Civil Procedure Rules, then it can order for summons to be served by affixing a copy of the summons in some conspicuous place in the court house or the defendant's last known place of residence or place of business. Such service is considered as having been effected personally on the said party.

50) For a court to allow substituted service the party seeking such orders must prove difficulty in effecting personal service on the other party. The applicants in this case have averred to have experienced difficulty in effecting service upon the intended respondents. It is their case that they have attached an affidavit of service which they allege has proven such difficulty. From the affidavit of service filed, I do not see any difficulty as alleged by the applicants. What I see is a process server who served several persons at different destinations and this cannot be said to have amounted to difficulty in effecting service. The process server if anything managed to serve 9 of the 15 intended respondents and did not state any efforts made in effecting service on the other intended respondents.

51) The applicants in their application have nonetheless stated that they do not know the intended respondents as they do not reside on the suit parcel of land or their postal addresses. In the circumstances I am inclined to allow service by way of substituted service as prayed for in the application.

52) Accordingly the application is allowed as prayed and costs shall be in the cause.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **21ST DAY** of **MARCH 2022.**

In the presence of Rose Njeru for Ann Thungu for applicants and in the absence of Mugambi Njeru for 1st to 3rd respondents.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

21.03.2022