



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 33 OF 2017

JULIUS GATAMBIA.....1st APPLICANT

AMOS KAGUAI NJOROGE.....2nd APPLICANT

VERSUS

JAMES MACHARIA GICHURE.....1st RESPONDENT

CHEGE MUTUA.....2nd RESPONDENT

RULING

1. The matter coming before me for determination is a Notice of Motion dated 15th December 2017 brought under, *Order 1 Rule 14 Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act*, where the Applicants seeks leave of the court to amend their Originating summons so as to enjoin New Beginning with God Self Help Group as the 3rd Respondents herein.

2. The said application is supported by the grounds on the face of it and the annexed affidavit sworn by the 1st Applicant Julius Gatambia on the 15th December 2017.

Applicant's case

3. The Applicant submitted, while relying on the grounds of their application sworn affidavits dated the 15th December 2017, 11th January 2018 as well as 26th January 2018, that they were desirous of amending their originating summons and to include New Beginning with God Self Help Group as the 3rd Respondents.

4. They submitted that the suit was filed as an Originating summons on the 30th October 2017. That during the pendency of the suit, the 2nd Respondent herein purported to sell and transfer the subject suit to New Beginning with God Self Help Group wherein this group was issued with the title on the 11th September 2017 and are now the proprietors of the suit land.

5. That the Civil Procedure Rules makes provision to enjoin parties to a suit and since the orders being sought herein are likely to affect the New Beginning with God Self Help Group, that it was important if they were to be enjoined as the 3rd Respondents herein.

2nd Respondent's case.

6. The application was opposed by the 2nd Respondent who confirmed that indeed the suit land being Nyandarua/Kirima/713 was sold and transferred to the New Beginning with God Self Help Group on the 11th September 2017 wherein they were issued with a title deed thereby extinguishing the 2nd Respondent's right over the same. They submitted that following this transaction, there was no remedy that could be sought against the 2nd Respondent but only against New Beginning with God Self Help Group herein. It was further submitted that the 1st Respondent having passed away and the pleadings having not been amended, the same were incompetent and ought to be struck out. That further the application was fatal since the Applicants failed to annex a draft of the amended plaint thereto so as to enable the 2nd Respondent and the court benefit from knowing the remedy the Applicants were seeking from the 3rd Respondent in advance.

7. In rejoinder Counsel for the Applicants submitted that they had come to learn of the 1st Respondent's death only upon service and that his kin are in the process of taking out letters of Administration so as to substitute him. That their failure to annex the draft copy of the Origination Summons was not fatal since they had already indicated the nature of the amendments they had intended to make. That the

exclusion of the draft Originating Summons to the application was therefore not prejudicial to the Respondents.

8. I have considered the submission by both parties herein as well as the annexures thereto.

9. The provisions of Order 1 rule 10(2) of the Civil Procedure Code provide 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.

10. From the above procedural rule, the court has unfettered discretion to admit or strike out of proceedings a party with or without there being an application to that effect. It is trite law that the court, upon satisfying itself that that a person whose presence before it may be necessary to assist it effectually and completely to determine all questions involved in a dispute, may enjoin such person to the suit.

11. Article 50 (1) of the Constitution of Kenya, states that:

‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body’.

12. The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In the case of **Onyango vs. Attorney General (1986-1989) EA 456, Nyarangi, JA** asserted at **page 459**:

‘I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.’

13. At page 460 the learned judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

14. And in the case of **Mbaki & Others vs. Macharia & Another (2005) 2 EA 206**, at page 210, the Court of Appeal held 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.”

15. From the affidavit and the submission by the Applicant, the decided authorities herein, and further, based on the fact that this court hesitates to place unnecessary hurdles on the access to justice and by extent access to the court. In the absence of any sign of bad faith on the part of the Applicants, I find that the Applicants have persuaded me to exercise the court’s discretion under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules to enjoin New Beginning with God Self Help Group to these proceedings as the 3rd Respondents so that they may be afforded an opportunity to be heard.

16. I do hereby direct the Applicants herein to file and serve their amended Originating summons within the next 14 days from the delivery of this ruling.

17. Further orders are to effect that the New Beginning with God Self Help Group shall upon service of the pleadings, file and serve their response within 14 days.

18. I make no orders as to costs.

Dated and delivered at Nyahururu this 30th day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE