REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 136 OF 2000

JOSEPH NJAU.....APPLICANT

VERSUS

ROBERT MAINA CHEGE.....DEFENDANT

P. MUTHONI GATHITU.....DEFENDANT

NGIGI MBUGUA AND CO ADVOCATES.....DEFENDANT

KAMALIZA SECURITY GUARDS LTD.....DEFENDANT

JUDGMENT

The plaintiff Joseph Njau Kingori filed this case against the defendants Robert Maina Chege, P Muthoni Gathitu, Ngigi Mbugua and Co advocates and Kamaliza Security Guards Ltd seeking various reliefs. The plaint was accompanied by an interim application seeking among others a mandatory injunction against the defendants/respondents, their servants or agents to compel them to reinstate the applicant/plaintiff on the suit premises together with his tools and personal effects and secondly that the Court be pleased to restrain the respondents, the servants or agents from taking possession of suit premises or putting a third party in possession.

This Court in its ruling delivered on 31st July, 2000 allowed that application. The effect of that ruling was that the defendant/respondent were required to put back the plaintiff into the premises had he been ejected from and secondly they were restrained from putting a third party into the premises.

That ruling of 31st July, 2000 sparked off the application by the first and second defendants/respondents dated 17th August, 2000 seeking among others an order that there be stay of execution of the ruling and order given on 31st July, 2000 pending the hearing and determination of this application and secondly that one Peter Chege be joined as a defendant to this suit and the plaintiff be directed to amend the plaint accordingly and that costs be provided for.

The first and second defendants' application dated 17th August, 2000 was consolidated with an application dated 14th August, 2000 filed by the firm of Kalya and Company Advocates on behalf of one Peter Kuria Chege seeking orders that there be stay of execution of the ruling and order given on 31st July, 2000 pending the hearing and determination of this application. Secondly that Peter Kuria Chege be joined as a defendant to this suit and the plaintiff be directed to amend the plaint accordingly and that costs be provided for. The grounds in support are set out in the body of the applications, supporting affidavits and oral submissions in Court and the major ones are that one Zakaria Gikomi Chege owned jointly with Pricillah Muthoni Gathitu the property on which the plaintiff was a tenant. That Zakaria Gikomi Chege passed away and the intended party Peter Kuria Chege applied for letters of administration

to that estate and he was granted the same and they have since been confirmed, that there is no dispute that Zakaria Gikomi Chege is deceased and no dispute that the deceased was the proprietor of the suit property, that the authorities they have relied on show that the only person who can sue and be sued on behalf of an estate is an executor or administrator that it follows that Peter Kuria Chege is not only a necessary party to this suit but he is the only competent person to be sued in this matter, that the request for amendment should be freely allowed as no injustice will be caused and if there is any injustice then that can be atoned by an award of costs, that the request should be allowed as that is the person who should have been sued in the first instance, that the first and second defendants are not the right parties to have been sued, that even if it is alleged that the first defendant used to receive rent then he was a volunteer and this fact has been denied, that this Court has power to allow the joining of a party to these proceedings and that power arises to avoid injustice to parties, that the first and second defendants may be brothers of the administrator but they are not the right persons to be sued as they do not have competing rights with the plaintiff.

Further that the Landlord and Tenant Act does not have anything to do with the property of a deceased person, secondly there is nothing to show that an administrator is not recognized under the Act, that this is the first move to join one Peter Kuria Chege and so it is not true that this Court has made a finding as it regards the joinder of Peter Kuria Chege to these proceedings, that the claim is invalid as wrong parties were sued, that even if it can be taken that a lease was made between the plaintiff and the first and second defendants it was invalid and unlawful as the two did not have letters of administration to the estate which covers that property.

On the basis of the foregoing both counsels for the applicant urged the Court to allow both applications. They further relied on the following authorities: The case of *Evans Obino Nyanmois v Ndege Okangi Kisumu* CA No 32/98 where it was held that the respondent sued a party who had no *locus standi* and the suit against the appellant was a nullity from the very beginning and the appeal was also a nullity from the very beginning. The case of *Touristic Union International and another v Mrs Jane Mbeyu and another* Nairobi CA 145/1990 where it was held *inter alia* that the only proper person empowered to agitate a suit on behalf of a deceased person in the personal representative who is an executor or an administrator of a deceased person and by administrator is meant a person to whom a grant or letters of administration has been made.

The case of *Virginia Edith Wambui Otieno v Joash Ochieng Ougo and Omolo Siranga* (1982-1988) KAR 1049 where it was held *per incuriam* that an action by an intestate intended administrator before the granting of letters of administration is incompetent at the date of its inception.

The case of *The Administrators of The Estate of Maxwell Maurice Ombogo v Standard Chartered Bank Ltd and The Law Society of Kenya Nairobi* CA 162/99 where it was held *inter alia* that in the absence of administrators and executors it is only persons named in section 46 of the Law of Succession Act who can deal with a deceased person's property being any police officer or administrative officer who becomes aware of any person's death to report the death either to an assistant chief or the area the deceased resided.

The plaintiff who is a respondent to both applications has opposed the two applications on the basis of the grounds set out in the replying affidavits and submissions in Court and the legal authorities referred to and the one major ones are that:

> 1. Since both applications are seeking to join the same party to the proceedings and seeking the same prayers the second application is an abuse of the due process of the Court, that regarding the application dated 14th August, 2000 by the firm of Messers Kalya and Company Advocates it cannot stand as one Peter Kuria cannot apply for any reliefs in this matter as he is neither a defendant nor a plaintiff as such an application can only be made by a defendant or a plaintiff to the suit or by the Court on its own motion, it is their stand that Peter Kuria Chege is a stranger to the proceedings with no *locus standi* in the matter and so the application dated 14th August, 2000 should be dismissed, that there was an application filed by Mr Thiongo advocate on behalf of three applicants among them the two defendants for whom Messers Lilian and Co Advocates are acting

which was purportedly withdrawn by a notice of withdrawal filed the same date of 17th August when the application under review was filed, the application under review cannot hold as the same was filed before the notice of discontinuance or withdrawal had been endorsed by the Deputy Registrar and as such there is a duplication and so the application under review was an abuse of the due process of the Court. On stay of execution apart from the prayer being a duplication the same cannot be granted as there is no demonstration that the party wants to move to the Court of Appeal as they have not applied for proceedings, that the party sought to be joined to these proceedings is not a necessary party to the proceedings as the issue in controversy was whether the three defendants had levied distress and if it was levied whether it was properly levied or not and so it has nothing to do with property ownership as the cheques were always being written in the presence of Robert Maina Chege and receipts issued by their agents, that the joining of the administrator to the estate is unnecessary as the administrator has not deponed that he is the one who receives the rent for the premises or that he is the one who carried out the eviction, it is their stand that a person can be a landlord by virtue of receiving rent only and it is not necessary that he be an owner, that introducing the intended party will prolong the proceedings, that the authorities they have relied on relate to administration of an estate and have nothing to do with distress for rent and or eviction. Lastly, that the applicants have not come to Court with clean hands as they only want to circumvent the Court orders of 31st July, 2000.

In reply counsel for the first and second defendants maintained that the party they intend to join is a necessary party, that the rules require to put in a notice of withdrawal and it is not necessary that the withdrawal notice be endorsed by the Deputy Registrar in order for it to become effective. That Peter Kuria Chege has not been heard in this matter and he should be heard as he has a right to be heard, that the dispute is not on ownership but on tenancy and the intended party is the right person to be heard, that the plaintiffs should not be allowed to choose parties, that they are not introducing a new cause of action as they are simply telling the plaintiff that he should have sued the right person, that they are not in breach of any Court order as the orders complained of are wrong orders and are of no effect as the suit is null and void as the plaintiff did not sue the right party and the intended party has just come to Court to state that he is the right party to have been sued.

Counsel for the intended party on the other hand submitted in reply that order 1 rule 10 allows a third party to apply to be made a party to the proceedings, that the application is not an abuse of the due process of the Court as they have been brought by different parties, that the issue of stay pending appeal has not arisen, they maintain that the issue of receiving rent is not an overriding issue, the overriding issue is whether rent was being received by the right person. Herein the persons who are alleged to have been receiving rent are not the proper ones. It is necessary that the intending party be joined as a party.

The respondents referred the Court to look on the Code of Civil Procedure page 1006 paragraph 3 it is stated “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 named whether as plaintiff or defendant be stuck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit be added. Page 1008 paragraph 1 that “the Court must be satisfied before the application is granted that the amendment has become necessary through a *bona fide* mistake which instance may be of fact or law”. Page 1016 paragraph 5 it states “parties cannot be added so as to introduce quite a new cause of action”. Paragraph 6 states “parties cannot be added so as to alter the nature of the suit”. Page 1018 paragraph 10 it states that “necessary parties who ought to have been joined that is parties necessary to the constitution of the suit without whom no decree at all can be passed”. Page 1019 in the case of a defendant two conditions must be met:

1. There must be a right to some relief against him respect of the matter involved in the suit.
2. That his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit ..... was one without whom no decree can be made effectively. A proper party was one without whom no decree can be made effectively. A proper party is one in whose absence on effective order can be made but whose

presence is necessary for a complete and final decision on the questions involved in the proceedings. Paragraph 4 a proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation. An interest which will be cognizable in the Court of law. That is an interest which the law recognizes and in which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. Page 1026 paragraph 11 it states" a person may be added as a defendant to a suit though no relief may be claimed against him provided his presence for a complete and final decision of the question involved in the suit. Such a person is called or proper party as distinguished from a necessary party".

Order 1 rule 10(2) states "the Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party
2. He must be a proper party.
3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

The first issue to be considered in respect of these two applications, is their competence, I will begin with the application dated 14th August, 2000 whereby the intended defendant wants to come into the matter. He has applied on his own as a party. The application seeks two reliefs. The first one is stay of execution of the orders of this Court made on 31st July, 2000. This is a substantive relief which can only be availed to a party affected by those orders which orders went to bind the parties to the suit as at the time they were made. That relief which is substantive is not available to a stranger to the proceedings and I rule that the same is incompetent.

As regards the prayer that he be joined as a party on his own the Court has had to revisit order 1 rule 10 (2) of the Civil Procedure Rules which deals with additions of a defendant to a proceeding. A reading of that provision allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under order 1 rule 22. Herein the Court has not moved on its own. It has been moved by the intending party on its own formally. The operative words in order 1 rule 10(2) of the Civil Procedure Rules are "either upon or without the application of either party". The use of the word "either party" denotes that the formal move has to be made by a party already participating in the proceedings. There is no addition of use of the words "or any other party or 3rd party" under that rule. It would seem that an intending party cannot come in on his own and choose which position he wants. For this reason the second prayer of the application dated 14th August, 2000 fails as well.

As observed from the submissions of the respondent's counsel the two applications were a duplication and the application by the 1st and 2nd defendant would have surficed. For the reasons given the application dated 14th August, 2000 be and it is refused with costs to the respondent to it.

Turning to the application by the first and second defendant I have to determine its competence. First an issue was raised by the respondent to it on the issue of stay of execution. A perusal of the record shows that there was an application for stay pending appeal filed by former counsel on record which was dismissed with costs to the respondent. A notice of withdrawal of that application was filed on 17th August, 2000 and on the same date another application seeking stay of execution pending appeal was

filed by the incoming counsel for the 1st and 2nd defendant upon notice of change of advocate being filed. The respondent's counsel submitted that the second application brought by the incoming counsel was invalid as the same had not been endorsed by the deputy registrar on the record. All that this Court can say is that the application for leave to appeal to the Court of Appeal is still pending disposal and the issue of its competence will be dealt with at the time it will be argued and that is when the issue of whether the notice of withdrawal takes effect upon the filing of the notice or upon the endorsement by the Deputy Registrar of such withdrawal on the record will be considered. Herein the stay of execution we are dealing with is the one pending the hearing of the application. As parties to the proceedings and since the orders had been made against them they were entitled to seek stay pending the hearing of the interim application.

As regards the second prayer of seeking to bring in another defendant. The operative words in order I rule 10(2) are that "the name of any person who ought to have been joined ..... or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon all questions involved in the suit be added."

The plaintiff has opposed the move to add the intended party because he has no relief he is seeking against the intended party. His complaint is contained in paragraph 6 of the plaint whereby he alleges that the 1st and 2nd defendant instructed the 3rd defendant who engaged the 4th defendants to distrain for rent illegally and then eject him from the premises. He was eventually ejected from the premises hence these proceedings. According to him the two were the landlords. The plaintiff says he has no cause of action against the intended party as he did not distrain for rent neither did he eject the plaintiff from the premises. The plaintiff sued the 1st and 2nd defendant as his landlords. He maintains the move to bring in the intended party is to prolong litigation and confuse issues since the plaintiff has not named him in his plaint the Court has to turn to the defence.

I have perused the defence filed on 16th July, 2000 and find that in paragraph 4 of the defence it is averred that the 1st and 2nd defendants are not the owners of the said property and therefore not landlords and shall at the onset raise a preliminary objection. The defence does not name the owner in paragraph 5 of the said defence. The defendants number one and two denied being aware of any wrongful eviction and they state that the eviction was proper and lawful. They do not aver that they did not effect it or that some other party is the one who effected the eviction. That defence has not been amended to introduce the landlord and the person who carried out the lawful and proper eviction.

I have looked at the affidavit in support of the application under review and find that the affidavit in support of the application was sworn by the counsel. In paragraph 2 of the said affidavit it states that the counsel had been informed by the 1st and 2nd defendant and which information counsel believed to be true that Peter Kuria Chege is the administrator to the estate of Zacharia Gikomi and he is therefore an obvious party. The annexture to that application is a copy of a confirmation grant issued to Peter Kuria Chege. Issued on 3rd July, 1998.

As stated earlier on the defence on the record does not mention who the owner and landlord of the premises is, does not specifically say the landlord is the one who carried out the eviction complained of. The affidavit introducing the intended party in brief, it does not state what role he has played in the causation of the facts leading to this application neither does it disclose whether the estate has been distributed to the beneficiaries or not. The Court has judicial notice of the position in law that an administrator acts as a trustee for the estate and after being issued with the grant and ascertaining the assets and the beneficiaries he eventually distributes the estate to the beneficiaries.

The affidavit relied upon does not state the role the intended party played in the causation of the events leading to these proceedings. It is noted earlier on that it has to be shown that the intended party:

i. is a necessary party;
ii. a proper party;
iii. there is a relief flowing from him to the plaintiff;
iv. the ultimate order or decree cannot be enforced without his participation in the proceedings.

It is the finding of this Court that the applicants have not satisfied the above ingredients for the following reasons:

1. The defence of the 1st and 2nd defendants who have sought to bring him into these proceedings does not name who is the owner or the landlord.

2. The defence avers that the eviction was not wrongful and although they denied that they effected it they have not stated that he is the one who knows about it.

3. The common ground and major reason as to why they want to introduce him is because he is an administrator of an estate of a deceased person who owned the suit property and they have shown a confirmed grant.

This Court has judicial notice of the fact that an executor or administrator of any estate is not necessarily an owner. He is a trustee sort of for himself if he is a beneficiary and on behalf of other beneficiaries. His role is to collect, gather, assemble and then distribute the estate to the beneficiaries. It was necessary to get a deponement either from those seeking to bring him into the proceedings or himself or his counsel showing that:

(a) he is a beneficiary or just administrator.

(b) he has not distributed the estate and the reasons why the estate has not been distributed. This will avoid a situation where the confirmed grant will act as an umbrella for the real culprits in the mater.

The deponement by counsel for the 1st and 2nd defendant that he is the administrator and therefore a necessary and proper party alone is not enough. The Court needed to be told more about the current position of the estate and his role is the causation of the events leading to the causation of the proceedings herein. The Court herein agrees entirely with the submission of the applicants that the legal position is that the necessary, right and proper party to be sued and to sue on matters relating to an estate is an executor of a will or administrator of an estate. Herein neither the 1st and 2nd

1. Defendants who are the applicants have shown so in their defence that the estate has not been wound up and that the administrator is still administering the estate.

2. There is no deponement to that fact that the estate has not been wound up and property distributed.

3. There is no averment in the defence that the administrator of the estate is the one who knows more about the events leading to the proceedings herein.

In the premises there is nothing to show that any relief flows from the intended party to the plaintiff.

There is nothing to show that the ultimate order or final decree cannot be enforced against the defendants without the intended party’s participation in the proceedings.

For these reasons the application dated 17th August, 2000 also fails. It is refused with costs to the respondent to that application.

Dated and delivered at Eldoret this 27th day of March, 2002

R.N NAMBUYE

JUDGE