

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA (LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 0821 OF 2013

(Arising out of Civil Suit No. 0615 of 2012)

MUKUYE STEVEN & 73 OTHERS:..... APPLICANTS

VERSUS

MADHIVANI GROUP LTD. RESPONDENT

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

This application is brought under ***Order 1 r.13 CPR; O52 r.2 CPR & Section 98 CPA*** seeking orders that the Applicants be joined as defendants to the main suit vide ***Civil Suit No. 0615 of 2012*** and all the applications arising therefrom. The grounds of the application supported by the affidavits of Lumaama Apollo and Walusimbi Godfrey are that;

- 1. The Applicants purchased and acquired various pieces of land that form the suit land property and thus have an equitable interest in the same.***
- 2. The applicants are in full possession of their various plots and land purchased save that the order obtained by the Defendant from this court stopped them from developing the property.***
- 3. The Applicants learnt that the Respondents filed a suit against Prince David Ssimbwa, Mr. Moses Walugembe and Hajji Karim Nsanja whom the Respondent knew very well had sold some of the suit land to the Applicants but never made them parties yet the orders in the main suit are likely to affect their interest.***

4. It is just and equitable that the application be granted.

Counsel Joseph Luzige and Robert Bawutu who jointly represented the Applicants submitted that Lumaama Apollo and the other Applicants in “*Annextures L01*” to affidavit of Walusimbi G. purchased various pieces of land in the suit land comprised in ***FRV 45 Folio 2 land at Nakigalala Kansiri Estate*** from the three Defendants in the main suit, Prince David Simbwa, Moses Walugembe and Haji Karim Nsanja, and that the Applicants have a high interest as equitable interest holders in suit land and would be prejudiced if they are not joined as parties in the main suit.

Further, that the Applicants are in full possession of their various pieces of the suit land, which is within the knowledge of the Respondent as stated its plaint in paragraph 4. That ***Civil Suit No. 0615 of 2012*** which was filed only against three Defendants also concerns the 74 other Applicants who derive their interest from the Defendants in main suit. Further, that since the cause of action in the main suit is founded on trespass by the Defendants jointly and severally upon the suit land, and an order of eviction, *inter alia*, is sought against them jointly/severally, their servants, agents, employees, assignees and/or any other persons deriving any purported title, if passed by court would adversely affect the interest of the Applicants, and it would be desirable that the Applicants be joined as parties to the suit.

Furthermore, that a temporary injunction which was granted earlier in the main suit restraining the Defendants from further acts of trespass on the suit land, among other activities, envisaged the Applicants, and hence the need to add them in the main suit. Counsel relied on ***Samson Sempasa v. P.K Ssengendo HC Miscillenous Application No. 577 of 2013 (Arising from Civil Suit No. 234 of 2013)*** where this court held that before a person can be joined as party, it must be established that

the party has high interest in the case, and that the orders sought in the main suit would directly legally affect the party seeking to be added.

Counsel also cited **Section 33 Judicature Act** arguing that joinder of parties is intended to avoid multiplicity of suits, and that **Order 1 r.10(2) CPR** allows court on its own motion to join parties. Counsel fortified their submissions with the case of **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] I.E.A 55**, where it was held that for a party to be joined it must be shown, *inter alia*, that it is desirable to have that person joined to avoid multiplicity of suit.

Counsel for the Respondents Paul Kuteesa opposed the application as lacking merit, and that **Order 1 r.13 CPR** under which the application was brought is not the proper procedure. That the proper procedure is under **Order 1 r.10 (2) CPR** where the addition of a party is at the discretion of court, but that the discretion must be exercised judiciously on sound principles. Counsel fortified this latter proposition with the case of **Yahaya Kariisa v. Attorney General & A'nor, S.C.C.A. No.7 of 1994 [1997] HCB 29**.

Counsel further argued that a plaintiff is *dominus litis* and is at liberty to sue anybody he/she thinks he/she has a claim against and cannot be forced to sue somebody. That the Plaintiff consciously brought the suit against those to whom his knowledge he had a cause of action; and does not have any other information/facts on which to found a cause of action against any of the other Applicants. Counsel relied on **Santana Fernandes v. Kaala Arjan & Sons & 2 O'rs [1961] EA 693** where court ordered addition of defendants and later it was found that the plaintiff did not have a cause of action against the defendants and the plaintiff had to suffer costs.

Counsel submitted that the Applicants have failed to show that their presence is necessary to enable court to completely and effectively adjudicate on all questions involved in the suit and to avoid a multiplicity of suit. That apart from Lumaama

who attached a sale agreement (in Luganda vernacular) to show that he purchased the land, the others Applicants have not shown what interest they have in the suit land.

Counsel also submitted that it is the Respondent who is in possession of suit land, and that this court granted a temporary injunction against the Defendants and those claiming under them to maintain the *status quo*. Counsel argued that before a court can grant an injunction, as it did in this case, it considered the *status quo* which is that the Respondents are in possession. Counsel submitted that the Applicants have failed to show that the orders in the suit would legally affect their legal interest.

Consideration.

The issue for determination is whether the Applicants can be added as defendants in *Civil Suit No. 0615 of 2012*. *Order 1 r.10 (2) CPR* 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.”*[underlined for emphasis].*

Order 1 r.13 CPR under which this application was brought provides that;

“Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or summons or at the trial of the suit in summary manner.”

Rule 10(2) (supra) provides for joinder of parties to a suit on court’s own motion or on application of a party at any stage of the proceedings. The parties joined under this rule are those who ought to have been added in the first place, but who

were not. Because their presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, court may either upon or without the application of the parties order their mandatory joinder as parties. The mode of application if court does not move itself, but is moved by the party, appears to be in a summary/oral manner and can be made at any stage of the proceedings and leave is granted on such terms as may appear to court to be just. If it is the defendant moving court under this rule he/she must be prepared to demonstrate that he/she could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person. See: ***Deported Asians Property Custodian Board v. Jaffer Brothers Ltd.*** (*supra*) per Mulenga JSC (R.I.P.)

On the other hand, under ***rule 13(supra)*** the applicants are empowered to bring the application before the court to be added as parties any time before or at the trial. An application brought before the trial may be by notice of motion or chamber summons. If on the other hand it is brought at the trial it may be by a summary/oral manner. It would follow that under this rule the joinder of parties is voluntary, but the application must be made before or at the trial in the manner aforementioned. In either case, it is emphasized that the court grants the joinder either upon or without the application of the parties at its discretion, See: ***Yahaya Kariisa v. Attorney General & A'nor, S.C.C.A. No.7 of 1994 [1997] HCB 29***, and the fundamental consideration is to enable the court to effectually and completely deal with all matters brought before it and to avoid multiplicity of proceedings. See: ***Kololo Curring Co. Ltd. v. West Mengo Co-op Union Ltd. [1981] HCB 60***.

Before a person can be joined as party, it must be established that the party has high interest in the case. In addition, it must be clearly demonstrated that the orders sought in the main suit would directly legally affect the party seeking to be added. These considerations have been amplified in the case of the ***Deported Asians***

Property Custodian Board v. Jaffer Brothers Ltd (supra) where the Supreme Court held that for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person, and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person. See also: ***Dr. Samson Sempasa v. P.K Sengendo (supra); Gokaldas Laximidas Tanna v. Store Rose Muyinza, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.***

In the instant application, the Walusimbi G on his behalf and on behalf of the other 73 Applicants stated in his affidavit that they have equitable interest in suit land comprised in ***FRV 45 Folio 2 land at Nakigalala Kansiri Estate*** through purchase of various pieces of land from Prince David Simbwa, Walugembe, and Nsanja who are the 1st 2nd , and 3rd Defendants respectively in the main suit. In addition, the Respondent in the main suit seeks, *inter alia*, orders of eviction and general damages against the Defendants jointly and severally for trespass on to the suit land. It would follow, therefore, that an order affecting the Defendants with regard to the suit land would affect the Applicants who claim to derive interest through purchase of the various pieces of land from the Defendants. This is the more reason that the Applicant ought to be joined as parties to enable the court effectually and completely determine all the matters in controversy and avoid multiplicity of proceedings that would otherwise arise therefrom.

Joining the Applicants in this case would be in line with the purpose and effect of ***Section 33 of the Judicature Act (Cap.13)*** which enjoins courts as far as possible to determine all matters in controversy as between the parties completely and finally and to avoid all multiplicities of legal proceedings concerning any of the matters. In that regard, it is called for; and in the interest of justice, that all matters

concerning the suit land in the instant case be determined finally and completely to avoid litigating over them again, which necessitates the joining of the Applicant as parties to the main suit.

Mr. Paul Kutesa raised the issue of a plaintiff being *dominus litis*, and that a plaintiff cannot be forced sue a defendant they do not have a claim against, and that in this case the Plaintiff has no information/facts about the other Applicants on which to found a cause of action against them. This court is acutely aware of that as the general position of the law enunciated in several cases. See: ***Maj. Roland Kakooza Mutale v. Attorney General, H.C.M.A. No. 665 of 2003; Gakou & Brothers Enterprises Ltd. v. SGS Uganda Ltd., H.C.M.A. No. 04631 of 2005; The Inspectorate General of Government v. Blessed Construction Ltd & A'nor. H.C.M.A. No. 73 of 2007.***

However, under ***Order 1 rr.10 (2)& 13 (supra)*** when the court exercises its discretion upon or without the application of the parties, and it orders for addition of the parties to the proceedings on the ground that their presence is considered necessary for the effective and complete settlement of all the questions involved in the suit, reference is in effect being made to ***Section 33 of the Judicature Act (supra)***; which is a principal municipal law providing for the specific situation, and the common law principle of a plaintiff being *dominus litis* becomes secondary. The adding of the Applicants to the main suit as defendants by order of court judiciously exercising its discretion within the provisions of the law would not amount to “forcing” the plaintiff to sue persons it does not have a claim against, or forcing the plaintiff to sue “wrong parties.” ***Order 1 r. 10(2) (supra)*** envisages this situation and provides that; “*the name of any person who ought to have been joined, whether as plaintiff or defendant...*” may be added in appropriate cases. This does not in the least affect a plaintiff’s standing as *dominus litis*.

Suing only the Defendants against whom the Respondent seeks orders of eviction and damages, but who now only have bare interest in the suit land having sold to the Applicants, and omitting to sue the Applicant who now claim equitable interest in the suit land, would not enable this court to effectually and completely adjudicate upon, and settle all questions involved in the suit.

Court finds that this a proper case in which the Applicants should be added as parties to the main suit as defendants. The application is accordingly allowed and leave granted to add the 73 Applicants as Defendants to the main suit. It is further ordered that Walusimbi, the duly authorized representative of the said Applicants, shall act for and on their behalf in this suit and any other applications arising therefrom. The pleadings should be amended to reflect the changes within 15 days from the date hereof. Costs of the applications will be in the cause.

BASHAIJA K. ANDREW

JUDGE

03/10/2013