



Oyugi v Kabiru & 3 others; Odida (Applicant) (Environment & Land Case 58 of 2019) [2023] KEELC 16669 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 58 OF 2019
LA OMOLLO, J
MARCH 28, 2023**

BETWEEN

JECHONIA ODIDA OYUGI PLAINTIFF

AND

SIMON IGOKO KABIRU 1ST DEFENDANT

JAMES GATWA KABIRU 2ND DEFENDANT

CATHERINE NJOKI KABIRU 3RD DEFENDANT

NASIOKI AUCTIONEERS 4TH DEFENDANT

AND

ELIJAH OCHIENG ODIDA APPLICANT

RULING

Introduction

1. This ruling is in respect of the Applicant’s Notice of Motion application filed on July 27, 2022. The said application is expressed to be brought under Order 1 Rule 10, Order 40 Rule 3 of the [Civil Procedure Rules](#), Section 3 and 3A of the [Civil Procedure Act](#) and Rule 44 of the [Probation Rules](#).
2. The application seeks the following orders:
 - a. spent
 - b. That the former Plaintiff, Jechonia Odida Oyugi be replaced by the Plaintiff herein for purposes of continuing these proceedings. (sic)



- c. That upon such substitution is (sic) undertaken, the pleadings herein be amended together with compliance documents.
3. The application is based on the grounds on its face and supported by the affidavit sworn by Elijah Ochieng Odida on July 26, 2022.

Factual Background.

4. This suit was commenced by way of a Complaint dated June 17, 2019 which was subsequently amended on October 22, 2019.
5. The prayers sought in the Amended Complaint are as follows:
 - a. A declaration that the Plaintiff herein is the rightful and legal owner of the suit plot no LR 12249/127 measuring 0.082 hectare in Nakuru Municipality
 - b. A permanent order of injunction restraining the Defendants herein by themselves, their employees, agents and or any other person acting under their authority from dealing, occupying, purporting to transfer or in any other manner interfering with the Plaintiff's rights over the suit property.
 - c. General damages.
 - d. Mesne profits
 - e. Costs of this suit.
 - f. Any other or further relief which this honorable court may deem fit to grant.
6. The Defendants/Respondents filed their statement of Defence dated November 4, 2021 wherein they seek that the Plaintiff's suit be dismissed.
7. The application under consideration first came up for hearing on July 27, 2022 when the court directed that it be served upon the Defendants/Respondents and scheduled it for hearing on September 22, 2022.
8. The application was set down for hearing on numerous occasions but did not proceed. Finally, on November 9, 2022 the court issued directions that it be heard by way of written submissions.
9. It was mentioned on November 23, 2022 to confirm filing of submissions and was reserved for ruling.

The Applicant's Contention.

10. The Applicant contends that he is the son of Jechonia Odida Oyugi the Plaintiff herein.
11. He further contends that in the Amended Complaint dated October 22, 2019, the Plaintiff seeks a declaration that he is the rightful owner of Plot No LR 12249/127 measuring 0.082 hectares in Nakuru Municipality and a permanent injunction restraining the Defendants/Respondents herein by themselves, their employees, agents and/or any other person acting under their authority from dealing, occupying, purporting to transfer or in any other manner interfering with the Plaintiff's rights over the suit property.
12. He also contends that the Plaintiff is experiencing hearing difficulties occasioned by his old age and cannot therefore effectively continue with these proceedings.



13. It is his contention that he wishes to substitute the Plaintiff in these proceedings in his capacity as his son to enable him best represent his interests.
14. He ends his deposition by stating that it is in the interest of justice and fairness that he is allowed to take over these proceedings on behalf of the Plaintiff.

Defendants'/respondents' Contention.

15. In response to the said application, the Defendants/Respondents filed the Grounds of Opposition dated November 7, 2022. The grounds are as follows:
 - a. That the application is a non-starter having been made by a person who is not a party to the suit.
 - b. That the alleged Plaintiff/Applicant has utterly failed to meet the minimum threshold for grant of an order for substitution of the Plaintiff.
 - c. That the application and orders sought are unknown in law and in any case, there exist less drastic and/or other means by which the Plaintiff's case can proceed.
 - d. That the application is otherwise a delay gimmick and an abuse of the court process intended to deny the defendants an opportunity to face and/or cross-examine their accuser

Analysis And Determination.

16. Neither of the parties filed their submissions to the application.
17. Upon consideration of the application and the grounds of opposition, the only issue that arises for determination is whether Jechonia Odida Oyugi should be substituted by Elijah Ochieng Odida as the Plaintiff herein.
18. Order 1 Rule 10 provides as follows:
 - (1) Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit.
 - (2) 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.
 - (3) No person shall be added as a Plaintiff suing without a next friend or as the next friend of a Plaintiff under any disability without his consent in writing thereto.



- (4) Where a Defendant is added or substituted, the Plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the Plaintiff shall be served on the new Defendant and, if the court thinks fit, on the original Defendants.
19. An analysis of Order 1 Rule 10 (1) reveals that substitution or joinder may be ordered in the following circumstances:
- a. Where a suit has been instituted in the name of the wrong person as Plaintiff.
 - b. Where it is doubtful that it has been instituted in the name of the right Plaintiff.
20. Sub-section 1 further provides that where the court is satisfied that the suit has been instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff.
21. The ground upon which the Applicant brings the present application is that he is the son to the Plaintiff Jechonia Odida Oyugi who has allegedly developed hearing difficulties and cannot effectively continue with these proceedings.
22. I am of the view that this application ought to have been brought by the Plaintiff. The application describes Elijah Ochieng Odida as the Plaintiff/Applicant. This is erroneous. Elijah Ochieng Odida is a stranger to these proceedings.
23. Further, this court needs to be certain that the Plaintiff (Jechonia Odida Oyugi) has consented to this application and that he is certain the Applicant (Elijah Ochieng Odida) that shall properly protect his interests.
24. The Applicant has failed to attach evidence demonstrating that he is the son of the Plaintiff and has also not attached any medical reports to demonstrate that indeed the Plaintiff is suffering from such infirmity as would make his participation in this suit impossible.

Disposition.

25. In the circumstances, I find that the application filed on July 27, 2022 lacks merit and is hereby dismissed with costs.
26. The Plaintiff is at liberty to explore other legal options to ensure that his suit proceeds without further delay.
27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF MARCH, 2023 PURSUANT TO THE NOTICE ISSUED ON 22ND MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Gatonye for the 1st – 3rd Defendant

No appearance for the Defendants.

Court Assistant; Ms. Monica Wanjohi.

