



REPUBLIC OF KENYA



KENYA LAW

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**Bomet Technical Institute Limited t/a Lomu Investments v Rutoh & 22
others; County Government of Bomet (Interested Party) (Environment &
Land Case 78 of 2012) [2023] KEELC 16636 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 78 OF 2012
MC OUNDO, J
MARCH 23, 2023**

BETWEEN

**BOMET TECHNICAL INSTITUTE LIMITED T/A LOMU
INVESTMENTS PLAINTIFF**

AND

**JOEL RUTOH 1ST DEFENDANT
ZAKAYO MARTIM 2ND DEFENDANT
ZAKAYO RUTOH 3RD DEFENDANT
JOSEAH SITONIK 4TH DEFENDANT
PHELMONA SOL 5TH DEFENDANT
JOHN KORGOREN 6TH DEFENDANT
PETER MART 7TH DEFENDANT
STEPHEN RONO ALIAS SEINO 8TH DEFENDANT
ANDREW MARTIM 9TH DEFENDANT
ANTONY BETT 10TH DEFENDANT
BERNARD SANG 11TH DEFENDANT
JOHN CHEPKWONY 12TH DEFENDANT
JULIUS TOWETT 13TH DEFENDANT
RICHARD CHELULE 14TH DEFENDANT
JOSEA MUTAI 15TH DEFENDANT
EDWIN NGENO 16TH DEFENDANT**



WILSON SANG 17TH DEFENDANT
JOHN RUTOH 18TH DEFENDANT
BERBARD SANG ALIAS KOLONGE 19TH DEFENDANT
KIBET RUTOAH 20TH DEFENDANT
GILBERT RONO 21ST DEFENDANT
JOHN KORGOREN ALIAS TALIBAN 22ND DEFENDANT
**BOARD OF MANAGEMENT, ST MICHAELS PRIMARY SCHOOL,
 BOMETPRIMARY SCHOOL, BOMET 23RD DEFENDANT**

AND

COUNTY GOVERNMENT OF BOMET INTERESTED PARTY

RULING

1. Before me for determination is a Notice of Motion application dated the November 29, 2021 filed pursuant to the provisions of Section 3, 3A of the *Civil Procedure Act* Order 1 Rule 9, Order 51 Rule 1 & 3 of the *Civil Procedure Rules 2010* and all enabling provisions of law wherein the 1st to 22nd Applicants /Defendants herein seek to be removed from the proceedings for misjoinder and thereafter the court to make any other order that it deems fit in the circumstance. The Defendants also seek for costs of the application.
2. The said application is supported by the grounds therein as well as the supporting affidavit of Richard Chelule the 14th Applicant/Defendant herein on his behalf and on behalf of his co-Defendants being 1st, 2nd, 4th, 5th, 7th to 22nd Defendants herein, dated the November 29, 2021 to the effect that the save for the 23rd Defendant, they were not in possession of the suit land herein nor had they any proprietary interests thereto. That secondly the 3rd and 6th Defendants were deceased and the suit against them had abated.
3. The said application was opposed by the Replying Affidavit dated the January 17, 2022 sworn by Benard Mutai the Director of the 1st Plaintiff to the effect that save for the suit against the 3rd and 6th Defendants which had abated, the application herein was incompetent, misleading, inept and had a character for dismissal as it had been filed to delay the finalization of the suit which was in its final stages.
4. That the Defendants were necessary parties for the court to effectually and completely determine the issues in question, more specifically being under whose instruction and command they had invaded and/or trespassed on the Plaintiff's suit property in the year 2012 and put up structures for the 23rd Defendant.
5. The 23rd Defendant did not oppose the said application.
6. The application was disposed of by way of written submissions to which the 1st to 22nd Applicants/ Defendants framed their issues for determination as follows:
 - i. Are the 1st to the 22nd Defendants properly enjoined in this suit?
 - ii. Are the 1st to 22nd Defendants in possession of the suit land?



- iii. Will it prejudice the Plaintiffs if the orders sought are granted?
7. On the first issue for determination, the 1st to 22nd Defendants submitted that they had not been properly joined in the suit as the Plaintiff's presentation in his own testimony in Court was that he had admitted that they were not in actual possession of the suit land and that indeed it was the 23rd Defendant which was in possession therein. That the Plaintiff upon reading the mind of the Court after the court had indicated that it would not issue Orders in vain, then filed an application dated January 23, 2020 to amend its Plaint to join St Michael Primary School, the 23rd Defendant herein, eight years after filing of the case and which was an afterthought after realizing that the case against the 1st to 22nd Defendants would fail.
 8. That the Director of the Plaintiff has a personal vendetta against the 1st to 22nd Defendants wherein he had decided to file this suit to victimize them because of their humble status in the society.
 9. On the second issue for determination, the 1st to 22nd Defendants submitted that they were not in actual possession of the suit property, that they neither till or graze their animals thereon and also did not have any claim to the suit land. That they were therefore wrongly joined thereto. Reliance was placed on the decision in [Civil Case No 342 of 2014](#) in the High Court of Kenya at Nairobi.(Sic)
 10. That a misjoinder of parties could not defeat a whole suit and therefore a Court could order the name of an improperly joined party to be struck out and the name of a person who ought to be joined to be added. That in this case, the right party to be sued was the 23rd Defendant and not the 1st to 22nd Defendants.
 11. That the Plaintiff did not stand to suffer any damage were the 1st to the 22nd Defendants struck off the record for misjoinder as it was the 23rd Defendant who was in possession of the suit land. That the orders sought by the Plaintiff could only be enforceable against the 23rd Defendant. That their application was merited and ought to be allowed with costs against the Plaintiff in the interest of justice.

Respondent/Plaintiff's Submissions.

12. The Plaintiff framed its issue for determination as follows;
 - i. Whether the 1st to 22nd Defendants/Applicants should be struck out from the suit for misjoinder. Have they met the requisite conditions?
13. The Plaintiff relied on the provisions of Order 1 Rule 10 (2) (sic) to submit that it was trite that a Plaintiff always has the right to choose the parties he/she wished to sue in a civil claim. That it was the sole prerogative and right of a Plaintiff to choose who to sue and in the event, the Defendant so sued shall be adjudged not liable, there would be an appropriate order for compensation by the payment of costs. Reliance was further placed on the decided case in [Civicon Limited vs Kivuwatt Limited and 2 Others](#) 2015 eKLR to buttress the submissions.
14. That the twin test for determining the question of who is a necessary party in a suit was reiterated by the Court in the case of [Kizito M Lubano v KEMRI Board of Management & 8 Others](#) [2015] eKLR. That in the instance case the 1st to 22nd Defendants were necessary parties in the suit and their presence was necessary for the court to effectually and completely determine the issues in question more specifically being under whose instruction and command they had invaded and/or trespassed on the Plaintiff's suit property in the year 2012 to put up structures for the 23rd Defendant.



15. That by the Applicants filing this application, they were trying to redefine the scope of the Plaintiff's case by apportioning blame only to the 23rd Defendant while in real sense they were jointly liable for trespass for which they should await the determination by the Court.

Determination.

16. By consent, the suit against the 3rd and 6th Defendants is herein marked as abated pursuant to the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules.
17. Back to the merit of the Application which I have considered, the arguments for and against the 1st to 22nd Applicant/Defendant's' application seeking to be struck out from the suit. I have further considered the submissions, and the authorities cited therein.
18. With regard to joinder of parties, Order 1 Rule 9 of the Civil Procedure Rules states that no suit shall be defeated for misjoinder or non-joinder of parties and requires that the court deals with the matter in controversy so far as regards the rights and interests of the parties actually before it. On the other hand, Order 1 Rule 10(2) of the Civil Procedure Rules also provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either part, 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 Defendants, 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.”

19. It can be deduced from the above holding that a party whose presence in a suit cannot help the court determine the subject matter of the suit is an unnecessary party and should be struck out of the proceedings.
20. In Pravin Bowry v John Ward & another [2015] eKLR the Court of Appeal commenting on who is a necessary party referred to the Ugandan case in Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55 (SCU) where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a co-Defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

21. It is therefore clear that the court may on its own motion or on application of any party to the proceedings order the striking out a party whose presence in a suit will not enable the court to effectually and completely adjudicate upon and settle all questions involved in the matter should be



- struck out. In the exercise of that discretion, the court must as a matter of course, act according to reason and fairness and not according to its whims and caprice.
22. The issue that arises for determination is whether the 1st to 22nd Defendants, excluding the 3rd and 6th Defendants, are necessary parties to this suit and if so, whether any cause of action is disclosed against them.
23. The provision of Order 2 Rule 15(1) (a) of the *Civil Procedure Rules* states that at any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that it discloses no reasonable cause of action or defence in law. The said provision of the law provides:
- “ 1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- a) it discloses no reasonable cause of action or defence in law; or
 - b) it is scandalous, frivolous or vexatious; or
 - c) it may prejudice, embarrass or delay the fair trial of the action; or
 - d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
24. The suit is related to the Respondent/Plaintiff’s further amended Plaintiff in which it seeks that judgment be entered against the Defendants jointly and severally for:
- a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit Property.
 - b) A temporary injunction restraining the Defendants, whether by themselves, agents, servants or anybody claiming under them howsoever, from further entering, occupying, building, cultivating, leasing, selling, transferring or in any other way dealing with the suit property to wit Plot No Bomet Township/270 situated in Bomet Municipality.
 - c) A permanent injunction restraining the Defendants, whether by themselves, agents, servants or anybody claiming under them howsoever, from further entering, occupying, building, cultivating, leasing, selling, transferring or in any other way dealing with the suit property to wit Plot No Bomet Township/270 situated in Bomet Municipality.
 - d) Vacant possession of the suit Property.
 - e) General damages for trespass
25. The Applicants’ application in seeking to be struck from the Suit is founded on the fact that the 1st to 22nd Defendants were not in actual possession of the suit property, that they were not in possession of the suit land, that they neither tilled or grazed their animals thereon and did not have any proprietary interests thereto and therefore they were wrongly joined to the suit.
26. The general objective of Order 1 rule 10(2) of the *Civil Procedure Rule* is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be joined.



27. In the case of *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others* [1998] eKLR it was held that

“For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

28. Up to this point, the Court is lost as to why the Respondent/Plaintiff herein would insist to have the 1st -22nd Applicants/Defendants stay on in the proceedings when they have clearly stated that they are not in possession thereof save for the 23rd Defendant, and neither do they have any interest or claim to the same, such that in the event the court agrees with the Respondent/Plaintiff, would there be any culpability ascribed to the 1st -22nd Applicants/Defendants that was capable of execution and secondly would the participation of the 1st -22nd Applicants/Defendants enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit?

29. Parties are bound by their pleadings. The Respondents/Plaintiff may have a claim over Plot No Bomet Township/270 situated in Bomet Municipality. The 1st -22nd Applicants/Defendants have disowned the said land and have maintained that they are not in possession thereon and which protest was confirmed by the evidence of PW1 and PW2 in the ongoing hearing to the effect that the 23rd Defendant, who did not oppose the Application, was indeed in occupation of the suit land.

30. In my opinion, and upon acting very cautiously and carefully and after considering all facts of the case without embarking upon the merits of the suit, I find no ‘semblance of a cause of action’ as against the 1st to the 22nd Defendants excluding the deceased 3rd and 6th Defendants herein in regard to the execution of the order sought in the suit as there is no direct and real interest in the reliefs sought against them and therefore they are not necessary parties herein. Their presence in the suit is not necessary for effectual and complete settlement of all questions in the suit as the orders which the Plaintiff seeks in the suit, does not affect them.

31. To this effect I allow the application dated the November 29, 2021 to the effect that the 1st to 22nd Defendants names are herein struck off the suit with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 23RD DAY OF MARCH 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

