Mbindyo v Ndolo & 3 others (Civil Appeal 118 of 2021)
[2023] KEHC 3390 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3390 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 118 OF 2021

FR OLEL, J

MARCH 28, 2023

BETWEEN

MILCAH KAMENE MBINDYO ..... APPELLANT

AND

BENJAMIN NDOLO ..... 1ST RESPONDENT

YVONNE KOKI ..... 2ND RESPONDENT

CHARLES STEPHEN MBINDYO ..... 3RD RESPONDENT

MARY MUNYEKE ..... 4TH RESPONDENT

(Being an appeal form the ruling and orders of Hon. A.G Kibiru Chief Magistrate, delivered on 7th July 2021 at the Chief Magistrate's Court at Machakos vide Civil Suit No. E187 of 2020)

JUDGMENT

1. This appeal arises from a Ruling/Order of A.G Kibiru (CM) dated 7th July 2021, where he dismissed the appellant's application dated 5th April 2021, where she was seeking to enjoin the proposed 3rd and 4th Respondents herein as the 3rd and 4th Defendants in the primary suit.

2. Being aggrieved by the said ruling the appellant did file her memorandum of appeal on 19th July, 2021 and raised five (5) grounds of appeal namely that;

    a. The learned trial magistrate erred in law and fact in failing to grant leave to enjoin the 3rd and 4th Respondents herein whose presence in the lower court's proceedings as 3rd and 4th Defendants was crucial for easy of determining the issue of the paternity in regard to the 1st and 2nd Defendants.

    b. The learned trial magistrate erred in law and fact in failing to find the presence of the 3rd and 4th Respondents herein was necessary as parties in the cause of action brought by the Appellant

herein to enable the court to reach an effectual and complete determination of issues arising out of the said suit.

c. The learned trail magistrate erred in law and fact in failing to hold that any party to the suit could enjoin another defendants as the law permits.

d. The learned trial magistrate erred in law in failing to exercise his discretion in a judicious manner.

e. The learned trial magistrate erred in law and fact by failing to consider the merits of the appellant's applications.

3. The appellant therefore prayed that the Ruling of Hon. A.G Kibiru (CM) dated 7th July 2021 be set aside and they be awarded cost of this appeal.

Brief Facts

4. The appellant challenged the paternity of the 1st and 2nd Respondent's and alleged that the proposed 3rd and 4th Respondents were their biological parents and therefor there was their need to enjoin them in the proceedings before the lower court as they were key persons of interest and necessary parties in the proceedings, whose presence would aid the court in effectively determining the issues raised in the suit. The Appellant stated that the 1st and 2nd Defendants had in their pleadings confirmed that the intended 4th Defendant was their mother. The appellant further alleged that the said 4th Respondent , (Mary Munyeke) cohabited with the intended 3rd Defendant (Charles Stephen Mbindyo) in the 60's a union out of which 1st and 2nd Defendants were born and therefore could not be children of Prof. Benjamin Stephen Mbindyo (the appellant's late husband).

5. The 2nd Respondent denied the Appellant's averments and stated that the issued raised by the appellant were malicious rumours and made without any basis whatsoever. They were children of the late Prof. Benjamin Stephen Mbindyo (deceased) and including the proposed 3rd and 4th Respondent in the suit would not add value to the dispute before court in any manner. The proposed 3rd and 4th Respondents were unnecessary parties to this suit and adding them would waste the court's time and stop expeditious disposal of this matter. Further she stated that the plaint as filed did not disclose any cause of action against the proposed 3rd and 4th Defendant's nor did the plaintiff annex any amended plaint with any sustainable claim as against them. She prayed that the said application be dismissed with costs.

6. The 3rd Respondent too did file his replying affidavit wherein he denied cohabiting with the 4th Respondent and stated that the 1st and 2nd Respondent were biological children of his deceased brother Prof. Benjamin Stephen Mbindyo. He also annexed DNA results which confirmed his ascertion that the 1st and 2nd Respondent were his brother's children. Finally, he stated that his involvement in the matter in dispute would not be of help to court as he was unnecessary party and joining him to the suit would waste the courts precious time.

7. The 4th Respondent too, filed a replying affidavit opposing the Appellant's application and denied cohabiting with the 3rd Respondent. She affirmed that she cohabited with the late Prof. Benjamin Stephen Mbindyo in the late 1960's and early 1970's and were blessed with two children (the 1st and 2nd Respondent) but parted ways when he got married to the plaintiff. She also remarried and they lived apart until his death. She stated that the application to enjoin her was vexatious, is an abuse of the process of court, clearly meant to embarrass her and the 3rd Respondent yet there is no cause of action as against them. She further denied discharging parental responsibility on the 1st and 2nd Defendant as they were adults who were over 48 years old. She prayed that the appellants application be dismissed.

Appellant Submissions

8. The appellant did file her submissions on 26th January 2023 and stated that the trial magistrate erred in law and in fact in failing to hold that any party to the suit could enjoin other defendant's as permitted by law (in particular Order 1 Rule 10(2) of the *Civil Procedure Rule* 2010). The appellant thus had locus standi to bring the instant application to join a party to enable the court effectively and completely adjudication upon and settle all questions involved in the suit. The trial court was therefor wrong in failing to hold that the presence of the 3rd and 4th Respondent was necessary as parties in the cause. The appellants placed relied on *Lucy Nungari Ngigi and 128 others v National Bank of Kenya ltd and another* [2015] eKLR, *Amon v Raphael Tuck and Sons Ltd* [1956] I ALL ER 273 as cited in *Pizza Harvest Limited v Felix Midigo* [2013] eKLR.

9. She further averred that the proposed 3rd and 4th Respondents cohabited during conception of the 1st and 2nd Respondents and while the appellant's husband was away studying out of the county and thus the deceased could not be the 1st and 2nd Respondent's father. It may at some point be necessary for a DNA sample to be acquired from the 3rd and 4th Respondents so as to accurately determine if they are the biological parents of the 1st and 2nd Respondent's. Thus their presence will aid the court in determining the facts in issue conclusively to warrant them being enjoined. See *Andy Forwards Services Ltd and another v Price Waterhouse Coopers Limited and another* [2012]eKLR .

10. The appellant also submitted that the trial court did not exercise its discretionary powers in a judicious manner so as to ensure the ends of justice are met. It was a higher risk for the orders prayed for in the application to not be granted then when they are granted. There was high probability that the DNA of the deceased and that of the 3rd Respondent were similar and the only difference can be determined if they are subjected to a concurrent test which would require DNA of the 3rd Respondent to be taken and that would be the only way to sufficiently authenticate or challenge that issue. No prejudice would then be suffered by the 3rd and 4th Respondent if enjoined.

11. The appellant prayed that the appeal be allowed as prayed

2nd Respondent Submissions

12. The 2nd Respondent filed written submission (On her own behalf and on behalf of the 1st Respondent) on 16th December 2022 opposing the appeal. She stated that the trial court considered the pleading filed and correctly found that the appellant needed to satisfy the court that parties to the enjoined will help court efficiently and completely adjudicate upon and settle all questions involved in the suit. The issue before court was that the 1st and 2nd defendants were not children of the late Prof. Benjamin Stephen Mbindyo and that the appellant had not set out what issues she has with the intended defendants that would call for determination as there was no claim set out against them in the amended plaint.

13. She further submitted that the appellant did not demonstrate before the trial court how the proposed 3rd and 4th defendant were necessary parties in order to enable court completely adjudicate upon and settle all questions. It was her contention that it was possible to adjudicate all matters in the suit without the presence of the proposed 3rd and 4th defendants as no cause of action was disclosed against the said parties.

14. That in the amended plaint dated 30th November 2020 upon which the appellant relied upon, she sought the following prays;

    a. A declaration that Benjamin Ndolo and Yvonne Koki the Defendants herein are not children sired or a dependents of the late Prof. Benjamin Stephen Mbindyo.

b. A declaration that the DNA samples extended from the deceased body on 25/11/2020 by the defendants, their servants and/or agents were unlawfully obtained therefore null and void.

c. General damages for mental and psychological torture.

15. The 2nd Respondent reiterated that as could be seen, no cause of action was demonstrated in the amended plaint as against the intended 3rd and 4th defendants. She relied on the case of *Carol Construction Engineers Ltd versus Naomi Chepkorir Langat* (2019) eKLR and *Irene Kemunto Omgori versus Housing Finance Company of Kenya Ltd* (2018) eKLR.

16. The 2nd Respondent further submitted that there was no intention to plead any claim against the 3rd and 4th defendant as there was no draft further amended plaint outlining such a claim nor was there any prayer for leave to further amend the plaint. It would thus serve no purpose to enjoin the proposed 3rd and 4th Defendants as there was no cause of action as against them. Emphasis was placed in *Rubina Ahmed and 2 others v Guerdiin Bank Ltd (sued in the capacity as succession in the title to first National Finance Bank Ltd)*[2019]eKLR.

17. With regard to the issue of discretion the 2nd Respondent reiterated that the appellant did not set out a clear cause of action against the two defendants and therefore there was no error in dismissing the said application. The trial court did not misdirect itself on any issue thus did not arrive at the wrong decision. The appellate court therefore could not interfere with the discretion as exercised by the trial court. Reliance was placed on *Charles Onchery Ogoti v Safaricom Limited and another* [2020] eKLR.

18. Finally the 2nd Respondent submitted that the trial court had correctly found that the appellant did not set out what issues she had with the intended to raise as against the defendants that would call for determination as there was no claim as against them. She thus prayed that this appeal be dismissed with costs.

1st,3rdand 4thRespondent Submissions

19. The said Respondent's gave a brief background of the primary suit and stated that it is the plaintiff who filed a suit and sought a declaration to the effect that the 1st Respondent is not a child of the late Prof. Benjamin Stephen Mbindyo and he should be barred from attending his burial. By consent of counsels of the parties a consent order was issued to the effect that the 1st Respondent was to have samples of DNA extracted from the deceased (Prof Benjamin Stephen Mbindyo) by close of business of 25th November 2020 at his own costs and those sample were to be used to confirm whether the 1st and 2nd Respondent's herein were the biological children of Benjamin Stephen Mbindyo (deceased).

20. Later the Appellant amended the plaint and sought orders to the effect that the 1st and 2nd Respondents herein be declared not children of the late Prof. Benjamin Stephen Mbindyo(deceased) and a declaration that the DNA samples extracted from the deceased body on 25/11/2020 by the 1st and 2nd Respondents be declared to have been unlawfully obtained and therefore null and void. There were no prayer seeking any declaration as against the proposed 3rd and 4th Respondents. It was therefore clear that the appellant only aim is to frustrate the parties and waste courts time and parties resources.

21. The Respondent's submitted that under order 1 Rule 10(2) and (4) of the Civil Procedure rules point to the fact that for a court to enjoin a party to the suit, the parties should be necessary parties to that suit. It is clear from the amended plaint dated 30th November 2020 that there is no claim raised as against the 3rd and 4th Respondents and thus there is no need to enjoin them. It would be prejudicial to waste time and resources to defend themselves in a suit whose outcome will be inconsequential to them reliance was placed on the case of *Kenneth Kariuki Githii v Royal Media Services Ltd* [2009]eKLR.

22. The Respondent's also submitted that the application as filed is an abuse of the process of the court and was meant to embarrass them and settle personal vendetta. The application was frivolous and vexatious a waste of court's precious time and scarce resources and should therefore be dismissed suo moto. The Respondent's relied on the authority of *Madison Insurance Co. Ltd versus Augustine Kamande Gitau* (2020) eKLR, where Justice G.V Odunga stated that suits without substance will not be allowed and thus prayed that this appeal be dismissed.

Analysis and Determination

23. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

24. As held in *Selle & Another v Associated Motor Boat Co ltd & others* [1968] EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif v Ali Mohammed Sholan* [1955], 22 E.A.C.A 270

25. In *Coghlan v Cumberland* [1898] 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

26. Also in Peters v Sunday post limited, the court of Appeal East Africa stated that ;

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a

jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

27. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

28. The appellant did file her application dated 5th April 2020 brought pursuant to order 1 rule 10(2) &(4) of the *civil procedure rules* and Section 1A, 1B and 3A of the *civil procedure Act* and all other enabling provisions of law. In the said application the applicant sought to enjoin the 3rd and 4th respondents as defendants in the suit on the basis that they were the biological parents of the 1st and 2nd defendants, who were born out of cohabiting relationship between the said parties in the 1960's and therefor they were in a good position to address issues raised challenging the paternity of the 1st and 2nd defendants. They were thus to be deemed to be to be necessary parties and persons of key interest in the proceeding whose presence was necessary in determining the issues raised.

29. The 2nd respondent opposed the said application and termed the appellants allegations as malicious rumor's and were made to vex the said parties and unnecessarily delay hearing of the said suit. It was her contention that the said parties were un-necessary parties to this dispute as no cause of action had been disclosed as against them to warrant their being enjoined in these proceedings and thus the said application needed to be dismissed as unmerited.

30. Both the proposed 3rd and 4th Respondents also filed replying affidavits where they vehemently denied the appellants averments, especially on the issue of cohabiting together in the 1960's and siring both the 1st and 2nd Respondent. While the proposed 3rd respondent maintained that those were his brother's children, the 4th respondent was categorical that she sired the 1st and 2nd respondent with the late Prof Benjamin Stephen Mbindyo in the late 1960's and early 1970's. That they parted ways when the said Prof Benjamin Stephen Mbindyo married the appellant and she also got married elsewhere.

31. The 3rd respondent acknowledge that he and other relatives did assist in upbringing of the 1st and 2nd respondent, when it became difficult for his brother to do so due to animosity and hatred which the appellant exhibited towards the said 1st and 2nd respondents , who grew up under the care of their paternal grandmother. He stated that he was not involved in this dispute and would be of no help to the court if enjoined. Similarly the 4th respondent asserted that her presence was not necessary in determining the matters as pleaded and prayed that the said application be dismissed with costs.

32. Order 1 rule 10(2) of the civil procedure rules 2010 provides that;

> " 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 enjoined 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 effectively and completely to adjudicate upon and settle all questions involved in the suit be added.

33. The appellant must thus demonstrate that;

    a. The respondent's ought to have been joined or

    b. Their presence before court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

34. To determine whether the presence of the applicants is necessary the court must critically analyze inter alia if;

    a. The nature of the plaintiff's case,

    b. The remedies sought by the plaintiffs.

    c. The reasons advanced by the applicant for her desired inclusion of the defendants

    d. The effect of grant or refusal of the orders sought by the plaintiffs, the existing defendants and the persons seeking to be enjoined as defendants.

35. Before the court determines the above parameters, the parties need to understand that there is a distinction between the two scenarios provided for under Order 1 rule 10(2) of the Civil procedure code, namely 'a person who ought to be joined' and ' a person whose presence is necessary. See: the Electoral commission v Sebuliba Mutumba Richard and 2 others, Misc. Application no. 30 of 2012 (Court of Appeal of Uganda) paragraph 5. There, the court of Appeal referred to the decision of the supreme Court in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1991] EA 55 where Mulenga, JSC observed,

> " in order for a person to be joined to a suit on the ground that his presence was necessary for the effective and complete settlement of all questions involved in the suit, it was necessary to show 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 suits, 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."

36. The distinction is even more clearly stated in Mulla, Code of Civil Procedure, Volume 2 page 1488. According to the learned authors, a necessary party is one without whom no order can be effectively made. In order that a person be considered a necessary party, there must be a right to some relief against him in respect to the matter involved in the suit.

37. A proper party on the other hand is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. It seems in real practice, the distinctions are often not taken, in the rule's application as the line distinguishing could, in real cases, be difficult to draw. It appears a party could be a proper and a necessary party at the same time, depending on the circumstances of the case.

38. A proper party should however have a defined, subsisting, direct and substantive interest in the issues arising in the litigation. The interest must be cognizable in the court of law, that is, an interest which the law recognizes and which the court will enforce.

39. The obvious reason, among others, for impleading a necessary party to a suit is because a necessary party could have relevant evidence to give on some of the questions involved in the suit, making them a necessary witness. Where a necessary party is not joined as such, the case is that of non-joinder. A suit should not however be dismissed on the ground of non-joinder. A necessary party may still decline the right to be impleaded in the suit if it appears to the court that the same shall result in the abuse of the process of the court.

40. Enjoining a person to an action ensures the person is bound by the final order or decree of court on the pronouncement on the issues involved. It should be noted that failure to implead a necessary party to the proceedings is fatal. The condition precedent is that the court must be satisfied that the

presence of the party sought to be added, would be necessary in order to enable the court to effectually and completely adjudicate and settle all questions involved in the suit. To bring a person as a party-defendant is not a substantive right but one of the procedure and the court has discretion in its proper exercise.

41. In my view, an applicant sought to be joined to a suit could be that who ought to be joined (at the time the suit was being filed); he/she could also be a person whose presence is necessary in the suit. He /she could be both, depending on the facts and circumstances of the case. The person sought to be added however need not to be both (a person who ought to be joined or whose presence is necessary), since the provision of 0rder.1 rule 10(2) is disjunctive.

42. However, in considering whether or not to grant an application under Order 1 rule 10 (2) civil procedure Rules, court's exercises there discretion, judicially, taking into account all the circumstances of the case. See: *M/s United India Insurance Co. Ltd Versus Sharda Adyanathya*, AIR 1998 Kant 141 (FB); Mulla code of Civil Procedure, Vol.2 paragraph 1569.

43. A court could suo moto add a party, within the purview of Order 1 Rule 10(2) provided it is satisfied that the party ought to be joined, or is a necessary party.

44. A review of decided cases and authoritative writing on the subject, therefore brings out the factors that have guided courts in an application brought under order 1 Rule 10(2) of the Civil procedure code. I hasten to add that, these factors are not necessarily cumulative, and may not be relevant in all cased, depending on the circumstances. The factors include;

    a. For a person to be joined on the ground that his or her presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit, the person must show;

        (i). Either that the orders which the plaintiff seeks in the suit would legally affect the interests of that person or that it is desirable for avoidance of multiplicity of suits to that he/she is bound by the decision of the court in that suit, See:*Ayigihugu & Co. Advocates v Kidza* [1985] HCB 46, at 47;

        Or

        (ii). Where it is shown (on application by the defendant) that the defendant cannot effectually set up a defence he/she desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

    b. There is need not to add a party against the will of another, especially where adding a party is opposed by the opposite party. This is common in a situation where a person seeks to join a suit as a defendant against the plaintiff's wishes. Thus, the view that a plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody. And where he sues a wrong party, he has to shoulder the blame, See: *Bahemuka v Anywar & another* [1987] HCB 71;

    c. The requirement that a defendant to be added must be one against whom the plaintiff has some cause of complaint which ought to be determined in the suit. See: *Fatuma Osman Hussein v Mahendra Umadbhai Patel* [1995] KALR 67.

    d. Court has no jurisdiction under Order 1 Rule 10(2) to order the addition of parties as defendants where the matter is not liable to be defeated by non-joinder, when they were not persons who ought to have been sued in the first place; and where their presences as a party is not necessary to enable the court to effectively to adjudicate on all the questions involved. See: *Major Ronald Kakooza Mutale Vs. Attorney General*, Msc Application no.665 of 2003.

e. Where adding a person would lead to introducing a new cause of action, a court ought to refuse the request to add a party.

f. Where adding a party would alter the nature of the suit, the same ought to be declined.

45. See also: Mulla, code of Civil Procedure, vol.2; *Mohamed Badsha v Nicol* [1879] 4 Cal 355; *Raleigh v Goschen* [1898] 1 Ch.73; *The Electoral Commission v Sebuliba Mutumba Richard and 2 others*, Court of Appeal Misc Application no.30 of 2012.

46. The appellant in her application dated 5th April 2021 sought to add the proposed 3rd and 4th Respondents as the 3rd and 4th Defendant in the suit before the primary court. In the said application at paragraph (E) of grounds on the face of the application and paragraph 7 of the supporting affidavit she did plead and averred that the appellants are necessary parties in the proceedings before court and will conclusively aid the court in effectively determining the issues raised in her suit.

47. All the respondents strenuously opposed this application and submitted that there is no cause of action pleaded as against the proposed 3rd and 4th Respondent's and thus were not necessary parties to the suit.

48. In the amended plaint dated 30th November 2020 (at pages 21 to 23 of the supplementary record of Appeal) the orders sought were;

a. A declaration that Benjamin Ndolo and Yvonne Koki the Defendants herein are not children sired or a dependents of the late Prof Benjamin Stephen Mbindyo.

b. A declaration that the DNA samples extracted from the deceased's body on 25/11/2020 by the defendants, their servants and/or agents were unlawfully obtained therefor null and void.

c. General Damages for mental and psychological torture

This court will proceed to determine if indeed the appellant has within the legal parameters shown that the proposed 3rd and 4th Respondents are necessary parties to the suit and thus should be enjoined.

Based on the pleadings, the nature of the case and remedies sought in the Amended plaint, are the proposed 3rd and 4th Defendants necessary parties to this suit?

49. From the initial plaint filed in this matter dated 23rd November 2020 and the amended plaint dated 30th November 2020, the appellant did not plead any cause of action as against the proposed 3rd and 4th Defendants and no prayers were sought as against them. As elaborated in the citations above, a necessary party is one without whom no order can be effectively made. Further in order for one to be considered a necessary party, there must be a right to some relief against him in respect to the matter involved in the suit.

50. The appellant also ought to show that the orders sought would legally affect the interest of the person sought to be enjoined and that it is desirable to have the party joined to a void multiplicity of suits or that the defendant could not set up a desired defence unless that person was joined or an order made that would bind that other person.

51. The appellant has failed on all the above counts. There is no cause of action pleaded as against the proposed 3rd and 4th Defendants, it has not been shown that the final order sought will affect the said proposed 3rd and 4th Defendants in any manner, it has not been shown that the order sought cannot be effectively made without the presence of the proposed Defendants and there is no right or relief claimed as against them. The proposed Defendant are thus not necessary parties to the suit.

Reasons advanced by the Appellant for the desired inclusion and effect of granting or refusing to grant the orders sought.

52. The appellant submitted that the reasons for seeking to join the proposed 3rd and 4th Defendant is that there is a possibility that the 3rd proposed Defendant is the biological father of the 1st and 2nd Respondent. First and foremost it should be noted that our system of justice is adversarial and he who alleges and fact bears the legal and evidentiary burden of proof as set out under Section 107, 109 and 112 of the *Evidence Act*, Cap 80 laws of Kenya. As already determined above the appellant did not raise any cause of action as against the proposed 3rd and 4th Defendants nor did she seek any prayers as against the said parties. By apply to enjoin them after agreeing (by consent) that DNA of her deceased husband Prof Benjamin Stephen Mbindyo be extracted from his deceased body and expect them to help her prove her case by providing other DNA samples is farfetched. Defendants as a matter of cause do not help plaintiff's prove their case. The person alleging must prove her case independently without the Defendants help. Secondly it is common ground by all parties that the 4th proposed Respondent is the mother of the 1st and 2nd Respondent. Why subject her to DNA and litigation over admitted facts?

53. The respondent's would thus be right to stated that there is bad faith in the application as filed and it constitutes an abuse of the process of this court. Further as rightly observed in Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] KLR Justice G.V Odunga stated that;

> " Where the suit is without substance or groundless or fanciful and/or is brought and instituted with some ulterior motive or for some collateral one o tot gain some collateral advantage, which the law does not recognize as legitimate use the process, the court will not allow its process to be a forum for such ventures. To do so would amount to opening a front for parties to ventilate vexatious litigation which lacks bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the courts resource's, while taking into account the need to allot resources to other cases"

54. As regards the effect of refusing to grant the orders sought, courts as a matter of cause grant orders based on discretion. As stated in *Mbogo v Shah* [1968] EA;

> " An appellate court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the court is exercising it discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice

55. Having analyzed the proceedings before the trial court, submissions filed at the trial court and before this court, the facts as presented in this matter, it has not been shown that the trial magistrate misdirected himself while exercised his discretion or that he arrived at an erroneous decision. The trial court did not err either in law or in fact when dismissing the appellant's application.

Disposition

56. The upshot is that this appeal as no merit and the same is dismissed with costs.

57. The costs of counsel for the 2nd Respondent and counsel for the 1st, 3rd and 4th Respondents are assessed at a global sum of Ksh.150,000/= each. Stay of Execution for 60 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 28TH DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;