



REPUBLIC OF KENYA



KENYA LAW
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**Kibowen v Ruto & 14 others (Environment & Land Case
174 of 2015) [2023] KEELC 16128 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 174 OF 2015
FM NJOROGE, J
MARCH 15, 2023**

BETWEEN

STEPHEN KIBOWEN PLAINTIFF

AND

RAYMOND RUTO 1ST DEFENDANT

KIPKORIR RUTO 2ND DEFENDANT

KIPCHUMBA RUTO 3RD DEFENDANT

CHEPCHIRCHIR RUTO 4TH DEFENDANT

CHEPKOECH RUTO 5TH DEFENDANT

AND

LOICE YATOR 1ST PROPOSED DEFENDANT

SIMON RUTO 2ND PROPOSED DEFENDANT

JANE RUTO 3RD PROPOSED DEFENDANT

WILLY RUTO 4TH PROPOSED DEFENDANT

ALEX RUTO 5TH PROPOSED DEFENDANT

BENSON RUTO 6TH PROPOSED DEFENDANT

VALARY RUTO 7TH PROPOSED DEFENDANT

FRIDA RUTO 8TH PROPOSED DEFENDANT

GILBERT RUTO 9TH PROPOSED DEFENDANT

NANCY RUTO 10TH PROPOSED DEFENDANT



RULING

1. This ruling is in respect of the proposed defendants' Notice of Motion application dated 24/01/2023 brought under Article 159 (2), (d) of the Constitution, Order 1 Rule 10, Order 3 Rule 8 and Order 51 Rule 1 of the Civil Procedure Rules which sought the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this suit, the 6th to the 15th proposed defendants be joined to the suit forthwith as 6th to 15th defendants.
 - c. That Agricultural Finance Corporation (AFC) be joined in the proceedings as third party.
 - d. That the honorable court to conduct a site visit to the locus in quo of the property and ascertain the same.
 - e. That leave be granted to the plaintiff to amend the statement of defence to include the 6th to 15th defendants in these proceedings.
 - f. That costs be in the cause.
2. The application is supported by the affidavit of Simon Ruto the 7th proposed defendant sworn on 24/01/2023. The grounds on the face of the application and the supporting affidavit are that the suit property is the proposed defendants' ancestral land; that the proposed defendants have built physical structures on the suit property including their homes; that they are raising their children on the suit property; that are not aware of a pending court case over the suit property and that they have evidence that they are willing to present which will assist the court in the complete settlement of all questions in the proceedings. They state that their family stand risk of loosing their property and being rendered homeless if the application is not allowed.

The Response

3. In response to the application, the plaintiff filed a replying affidavit sworn on 30/01/2023 and filed on 07/02/2023. He deposed that he instituted the present matter in the year 2015 seeking to evict the defendants from land parcel No. Lembus/Kiplombe/157 but no orders have been made on preservation of the suit property; that the defendants have made numerous applications and have frustrated the hearing and determination of this suit; that the authority to plead purportedly given to the 7th proposed defendant has not been signed by the 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th proposed defendants; that the applicants are guilty of non-disclosure of material facts; that they failed to disclose that by an application dated 18/04/2016 Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkeitany had earlier applied for their joinder alongside the Agricultural Finance Corporation (AFC) which application was dismissed; that Nakuru Civil Appeal No. 69 of 2016 was filed to challenge the said dismissal; that the applicants have also failed to disclose that the said appeal was dismissed on 01/04/2022; that this suit had been stayed by the ruling delivered on 19/05/2021 in Nakuru Civil Appeal No. 69 of 2016; that the dismissal thereof by the Court of Appeal paved way for the resumption of this suit; that the proposed joinder of Agricultural Finance Corporation is res judicata; that he believes that the proposed defendants are agents of the defendants and will add no value in determining the issues in controversy between the parties herein; that it is in the interest of justice that the defendants be restrained from wasting the suit property pending the hearing and



determination of this suit and that the continued delay in finalizing this matter is causing him mental agony, untold suffering and that he has suffered loss and damage.

The Supplementary Affidavit

4. In response to the plaintiff's replying affidavit, the 7th proposed defendant filed a supplementary affidavit sworn on 24/02/2023 on 27/02/2023. He reiterated that the applicants are members of the same family living on the suit property and on the verge of losing their ancestral land. He then deposed that Mzee Samuel Chepkeitany had been diagnosed with a terminal sickness and is admitted in hospital and he cannot therefore prosecute his case without members of his family who also live on the suit property; that due to his old age he lost contact with the file and could not appeal the ruling of Justice Munyao; that the decided appeal did not include the issues that are before this court and that they are separate issues which is why the Agricultural Finance Corporation is a necessary party.

Submissions of the Applicants

5. The proposed defendants filed their submissions dated 21/02/2023 on 24/02/2023 while the plaintiff filed his submissions dated 27/02/2023 and filed on 07/03/2023.
6. In their submissions the proposed defendants identified the following issues for determination: -
 - a. Whether the court has powers to grant the orders sought;
 - b. Whether the applicants have an identifiable stake in the suit property;
 - c. Whether any party to the suit will suffer irreparable damages if the application is allowed.
7. On the first issue, they submitted that this court is seized with jurisdiction to grant the orders sought and relied on Order 1 Rules 10(2) and the cases of *JMK v MWM & another* [2015] eKLR, *Central Kenya Ltd v Trust Bank & 4 Others*, CA No. 222 of 1998 in support of their arguments.
8. On the second issue, they submitted that they have an identifiable stake in the suit property as it is their ancestral land where they have lived since time immemorial and they are on the verge of losing it if they are not joined in this suit as defendants. They cited among other decisions the case of *Francis Kariuki Muruatetu & another v Republic & Others* (SC Petition No 16 of 2015 [2016] eKLR in support of their arguments.
9. On the third issue, they submit that no party will suffer any irreparable damage if the application is allowed and they relied on the case of *Central Kenya Ltd v Trust Bank & 4 others*, CA No. 222 of 1998 for that proposition and sought that their application be allowed.

Submissions of the Plaintiff

10. The plaintiff identified the following issues for determination: -
 - a. Whether the proposed 6th to 15th defendants should be joined as defendants and Agricultural Finance Corporation should be joined as a third party.
 - b. Who should bear costs of this suit.
11. On the first issue, the plaintiff submitted that the court delivered a ruling in this matter on 14/07/2016 where it dealt with the issue of joinder of the Agricultural Finance Corporation and therefore the said prayer is res judicata. The plaintiff also submitted that the defendants appealed to the Court of Appeal,



which appeal was dismissed. They cited the decisions in the cases of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR, *Joseph Njau Kingori v Robert Maina Chege & 3 others* [2002]eKLR, *Marigat Group Ranch & 3 Others v Wesley Chepkoiment & 19 Others* [2014]eKLR, *Fedrick Ngari Muchira, Howard Kipkoech Korir & 98 Others v Pyrethrum Board of Kenya* [2013]eKLR among other cases and submitted that if the applicants have any useful information which will assist the court in resolving the matter under controversy then they ought to be listed as witnesses. They also submitted that the houses whose photographs have been annexed to the application were built during the pendency of this suit with a view of defeating his claim.

12. On the second issue, the plaintiff sought that the proposed defendant's application be dismissed with costs of Kshs. 60,000/=.

Analysis and Determination

13. After considering the application, the replying affidavit and the submissions, the issues that arise for determination are as follows: -
 - a. Whether the 6th to 15th proposed defendants should be joined in the suit as defendants and the Agricultural Finance Corporation (AFC) as a third party;
 - b. Whether the court should conduct a site visit of the property

Whether the 6th to 15th proposed defendants should be joined in the suit as defendants and the Agricultural Finance Corporation (AFC) as a third party.

14. The 6th to 15th proposed defendants are seeking to be joined in the present proceedings as defendants on the grounds that the suit property is their ancestral land. The plaintiff opposed their joinder to the suit and stated that if they have any information that would assist the court in making a determination, then they should be called as witnesses.
15. Order 1 Rule 10(2) of the *Civil Procedure Rules* provides as follows:

“(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.”

16. The Court of Appeal in the case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR held as follows;

“Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. ___ The objective of these Rules 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 enjoined. In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined...”



From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. __ We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

17. In support of their application, the proposed defendants attached to their supporting affidavit photographs alleged to be of houses on the suit property together with an authority to plead signed only by the proposed 7th defendant. The proposed 7th defendant alleges that he has evidence that will assist the court in determining the issues in controversy in this matter which evidence he has not adduced. It must be recalled that the said dwellings are challenged by the plaintiff as having been erected on the suit land during the pendency of the present suit to defeat his claim. Evidence on that issue is yet to be presented or accessed by this court for its veracity.
18. The proposed defendants are also seeking that the Agricultural Finance Corporation be joined in the suit. The plaintiff on the other hand argues that the court had already pronounced itself on the joinder of the Agricultural Finance Corporation to the suit and it therefore makes the proposed defendants prayer res judicata.
19. A perusal of the court record indicates that indeed the court delivered a ruling on 14/07/2016 on the application dated 18/04/2016 filed by Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkaitany who wished to be joined in the suit as defendants together with the Agricultural Finance Corporation. The court in its ruling dismissed the said application and held that AFC is not a necessary party to the proceedings.
20. Section 7 of the [Civil Procedure Act](#) provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
21. The Court of Appeal in the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) (2017) eKLR held as follows:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”



22. It is my view that since this court had already pronounced itself on the issue of joinder of the Agricultural Finance Corporation as a party to this suit, the doctrine of res judicata estops the 6th to 15th proposed defendants from seeking the same order.
23. I have considered the ruling of my brother Hon. Justice Munyao relied on by the plaintiff and I think the present application can be distinguished from the one giving rise to that ruling on the ground that the rights of the applicants in the former application have been determined or were pending to of Samwel Kipruto Chepkeitany, are individuals who having admitted to being in occupation of the suit land, require to be joined to the present suit for the final disposal of the issues of occupation and eviction. They had not earlier on applied for joinder and therefore their prayer for joinder cannot be deemed to be res judicata like that relating to the Agricultural Finance Corporation. In this court's view, it is only just to join them as defendants to the suit.

Whether the court should conduct a site visit of the property.

24. As parties shall have sufficient opportunity to call evidence of occupation it is my view that it will not be necessary for the court to conduct a site visit of the suit property.
25. In conclusion, the application dated 24/01/2023 succeeds partially and only to the extent that the 6th to 15th defendants are hereby joined to the suit as substantive defendants in that order. Taking note that this is an old case and having ordered joinder of the 6th to 15th defendants, it is proper case management that the newly joined defendants, who are offspring and/or kin to Samwel Kipruto Chepkeitany just like the original 1st to 5th defendants, be treated in the same manner as those original defendants in this litigation.
26. Consequently, the statement of defence filed by the 1st to 5th defendants should apply to them and the proper cause of action at this juncture would be to order that both the plaint and the statement of defence filed by the 1st to 5th defendants be amended to include their names and statements of fact relating to their claim. I therefore order that the plaintiff shall, drawing from the material disclosed in the application by the applicants, amend his plaint to include the applicants as the 6th to 15th defendants and appropriately plead against them. The amended plaint shall be served on the firm of Ham & Hamsley Advocates within fourteen (14) days of this order. On their part, the defendants collectively shall, still through the firm of Ham & Hamsley Advocates, amend the existing defence of the 1st – 5th defendants to include the 6th to 15th defendants within fourteen (14) days upon service of the amended plaint. Within the same period of fourteen days provided above, the 6th to 15th defendants shall file and serve the following documents in a single bundle, duly indexed and paginated:
 - a. List of witnesses.
 - b. Witness statements.
 - c. List of documents.
 - d. Copies of documents.
27. In default of compliance with this order on the part of the defendants, the order of joinder issued in this ruling shall stand automatically vacated at the expiry of fourteen days from the date of service of the amended plaint and the suit shall be set down for hearing with the original 5 defendants who were already on record before the instant application was filed.
28. This suit shall be mentioned on 18th April 2023 for further directions.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH
DAY OF MARCH 2023.**

MWANGI NJOROGE

JUDGE

