



Nyamai & 291 others v South Eastern University College (Environment & Land Case E001 of 2021) [2023] KEELC 17199 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2021**

LG KIMANI, J

APRIL 27, 2023

BETWEEN

WILLIAM NYAMAI & 291 OTHERS PLAINTIFF

AND

SOUTH EASTERN UNIVERSITY COLLEGE RESPONDENT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion dated 21st of September 2022 seeking the following orders:
 1. Spent
 2. That the Court be pleased to enjoin Ukamba Agricultural Institute Limited as a Respondent in these proceedings.
 3. That the costs of this application be provided.
2. The grounds in support of the application are that the proposed defendant, Ukamba Agricultural Institute Limited, is the duly registered owner of LR 13529 is the subject matter of these proceedings and any orders made will affect them and if made in their absence will amount to condemning them without according them a chance to be heard. The Applicant has also stated that their joinder in these proceedings will help solve the issues in controversy.
3. The Applicant stated that the Respondent claims that they were established to succeed Ukamba Agricultural Institute where it inherited rights and liabilities of the said Ukamba Agricultural Institute vide notice 102 of 2008 dated 18th July 2008. The Applicant states that Ukamba Agricultural Institute is a different entity from Ukamba Agricultural Institute Limited, the former is established under the [Education Act](#) and the latter under the [Companies Act](#) and therefore having perpetual succession.



4. The Applicant insists that since there are no annexed company resolutions confirming that the Respondent took over the properties of the said limited liability company, it will be necessary to enjoin the said company in these proceedings as they are the duly registered owners of the suit property and are still in existence and capable of being sued as such.

The Respondent's Replying affidavit

5. Prof. Geoffrey M. Muluvi swore the Replying Affidavit and stated that the Respondent is the successor of what was previously known as South Eastern University College (SEUCO) that succeeded Ukamba Agricultural Institute(UKAI) by virtue of Legal Notice 102 of 2018, where as a result all the property, rights and liabilities held by UKAI were vested to SEUCO and annexed a copy of he said Legal Notice.
6. Later on through the University Charter dated 1st March 2013, there was established South Eastern Kenya University (SEKU) as a fully chartered public university to succeed South Eastern University College (SEUCO) which fully inherited all the property, assets, rights and liabilities that were held by the University College among them, the suit property situated in Yatta, Kwa Vonza area known as LR 13529.
7. It is therefore the Respondent's position that as a result of the two legal instruments, Ukamba Agricultural Institute(UKAI) ceased to exist and any other entity trading and/or operating in that name is a fake and any decision of this Court will not affect it in any way. In their view, enjoining the non-existent entity will be a waste of the court's time.

The Applicants' Submissions

8. Counsel for the Applicants submitted that according to the legal notice No.102, the Respondent shall be the successor to Ukambani Agricultural Institute. It is their submission that Ukambani Agricultural Institute (UKAI) and Ukambani Agricultural Institute Ltd are not the same and that it would not serve justice if the Applicants are claiming adverse possession against them while they are not parties to these proceedings.
9. The Applicant relied on Order 1 Rule 10(2) of the *Civil Procedure Rules*, and Nambuye J's holding in the case of *King'ori v Chege and 3 others* [2002] 2KLR 243, submitting that the proposed Respondent has interest and qualifies to be enjoined for the reasons that it is the duly registered owner of the suit property.
10. On the Court's discretion, they relied on the case of *Civicon Ltd v Kivuwatt Ltd & 2 others* (2015) eKLR where the court held that it must be exercised judicially as well as the case of *Martin Kirima BA Thambu v Jeremiah Miriti* [2017] eKLR and urged the Court to find in favour of the applicant.

Respondent's submissions

11. The Respondent submitted that by virtue of the said Legal Notice 102 of 2008, Ukamba Agricultural Institute(UKAI) ceased to exist and was not succeeded by South Eastern University College, therefore, the intended party to be enjoined to this suit does not have locus standi and/or capacity to be enjoined in this suit as it is a non-existent entity.
12. Counsel for the Respondent highlighted paragraph 4 of the said legal Notice 102 of 2008 which states that all rights and liabilities and assets held by Ukambani Agricultural Institute shall be transferred to the University College. It is their submission that a non-existent person cannot sue and is incapable of maintaining the action and court cannot allow it to proceed while relying on the case of *Fort Hall Bakery Supply Co. v Frederick Mungai Wangoe* [1959] E.A 474, Page 475.



13. The Respondent submitted that the Applicants have not demonstrated that the intended party has any interest that warrants them to be enjoined in the proceedings.

Analysis and Determination

14. The Applicant has brought this Notice of Motion dated 21/9/2022 pursuant to Order 1 Rule 3 of the [Civil Procedure Rules](#) and Section 1A, 1B & 3A of the [Civil Procedure Act](#). Order 1(3) provides that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

15. The rules governing joinder of a party are found in Order 1 of the [Civil Procedure Rules](#). Order 1(10) 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.”

16. Courts have pronounced themselves extensively on joinder of parties to a suit. The Court of Appeal in [Civicon Limited v Kivuwatt Limited & 2 others](#) [2015] eKLR stated thus;

“In the case of *Gurtner v Circuit* [1968] I All ER 328 it was held that, a party may be enjoined if he can demonstrate that any order in the action would directly affect him either legally or financially. (Denning, M.R.) stated thus:

“...The bureau clearly had a commercial interest in resisting the declaration; but that is not enough. John Stephenson J accepted the analysis of the rule and the many previous decisions under it contained in the exhaustive judgment of Devlin, J., in *Amon v Raphael Tuck & Sons, Ltd.* (1956) 1 All ER 273 and took the view that the court had no jurisdiction to add a party against the will of the plaintiff unless the person seeking to be added was:

“...at least able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action...”

...The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party...”

Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment



should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.”

17. In *Pravin Bowry v John Ward and Another* [2015] eKLR the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) where the court stated as follows:

“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.” (Emphasis by underline).”

18. The Respondent on the other hand has insisted that Ukamba Agricultural Institute ceased to exist by dint of Legal Notice 102 of 2008, the South Eastern University College Order, 2008 which states at paragraph 3(4) that:

“All rights, liabilities and assets held by or by anybody on behalf of Ukambani Agricultural Institute, existing at the commencement of this Order, shall be automatically and fully transferred to the University College.”

15. It is the 1st Respondent’s submission that an action by a non-existent entity is not maintainable; however, misjoinder of a party does not defeat a suit. The 5 Judge Bench on the case of *Ndii v Attorney General* (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment) found that:

“Be that as it may, order 1 rule 9 of the Civil Procedure Rules is clear that a suit cannot be defeated for misjoinder or non-joinder and that what the court should be bothered with is the determination of the rights of the parties; that rule reads as follows:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

To the extent that this rule is applicable to the petitions such as the one before court, we can confidently say that regardless of whether the 1st respondent has been properly joined to this suit, this court is in good stead and ideally placed to ‘deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.’”

15. The Court has considered that the land the subject matter of this suit is Land Reference Number 13529 and the grant issued is in the name of Ukamba Agricultural Institute Limited described as a limited liability company, limited by guarantee having its registered office in Nairobi (Post office Box 30627). The Respondent states that by Legal Notice No. 102 of 2008 dated 18th July 2008 South Eastern University College (SEUCO) was established to succeed Ukamba Agricultural Institute and as a result all property, rights and liabilities held by UKAI were vested to SEUCO.



16. It is to be noted from the reply by the Respondent that a charter under the *Universities Act*, 2012 dated 1st March 2013 was granted to the South Eastern Kenya University establishing the Respondent herein as a fully fledged university. By the said charter the South Eastern University College Order, 2008 was revoked but with certain reservations as contained in the said charter one of which is that “all funds assets and other property acquired by virtue of that order, shall, so far as not inconsistent with this charter, be deemed to have been given, taken, done or acquired under this charter”
17. The Respondent did not provide the court with any proof that subsequent to the Legal Notice No. 102 of 2008 and the Charter dated 1.3. 2013, the said Ukamba Agricultural Institute Limited ceased to exist in the records of the Registrar of Companies or under the *Companies Act*. In the courts view the question that arises and can only be determined at the trial is whether the entities known as Ukamba Agricultural Institute and Ukamba Agricultural Institute Limited are one and the same entity.
18. Taking the above question into account and the fact that the title document to the suit land is in the name of Ukamba Agricultural Institute Limited, the Court finds that it is in the interests of justice and for purposes of determining all the questions in controversy in this suit that the said Ukamba Agricultural Institute Limited be joined as a party to this suit and the Originating Summons be amended accordingly.
19. The final order of the Court is that the application dated 21.9.2022 is hereby allowed in the following terms;
 1. Leave is hereby granted to the Applicant to join Ukamba Agricultural Institute Limited as a Respondent in this suit.
 2. The Applicant to file and serve a further amended Originating Summons within 14 days from the date of ruling
 4. That the costs of this application are awarded to the Respondent

DELIVERED, DATED AND SIGNED AT KITUI THIS 27TH DAY OF APRIL, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Ruling read virtually and in open court in the presence of-

Musyoki C/A

Kalwa Advocate for the Plaintiff/Applicant

M/S Wambui Advcate for the Respondent

