



**Abdulrahman v Mohammed & another (Civil Appeal E057 of 2022)
[2023] KEHC 24918 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E057 OF 2022
JM CHIGITI, J
OCTOBER 31, 2023**

BETWEEN

ZAKI ABDULRAHMAN APPELLANT

AND

MOHAMMED SALIM MOHAMMED 1ST RESPONDENT

MAKINI AUCTIONEERS AGENCIES 2ND RESPONDENT

*(Appeal against the ruling of Hon. W.K Chepseba
Chief Magistrate delivered on 20th day of May 2022)*

JUDGMENT

1. On 3rd August, 2021 the Appellant filed the Application dated 23rd April, 2021 in the Chief Magistrates Court at Malindi Civil Suit No. 310 of 2018 Zaki Abdulrahman (Plaintiff/Applicant) vs Mohammed Salim Mohammed (1st Defendant/Respondent) Makini Auctioneers Agencies (2nd Defendant/Respondent) Ephantus Murithi Njue (Intended 3rd Defendant/Respondent)
2. He sought the following orders:
 1. Leave be granted to the applicant to include Ephantus Murithi Njue as a Defendant/Respondent in this suit.
 2. Leave be granted to the applicant to amend his plaint so as to accommodate the new status.
 3. Upon granting prayer 1 and 2 this Honourable court do grant the plaintiff/applicant to sue the intended 3rd Defendant/Respondent personally for trespass and damages and other incidental thereto.



4. Leave be granted to compel the 1st Defendant/Respondent and intended 3rd Defendant / Respondent Ephantus Murithi Njue to reconnect electricity power.
 5. Leave be granted to applicant that the Respondent either by himself, his servant agent and/or employee be restrained and prohibited to continue using the front part and/or a path of applicant residential house as a juakali workshop and/harassing the applicant or threatening the applicant and/any manner whatsoever interfering with applicant. The OCS Malindi police station to ensure compliance and yet outove.
 6. Cost of this application be in the cause.
3. Upon hearing the application, the court issued a ruling on 20th May, 2020.
 4. Being dissatisfied with the ruling, the appellant has lodged the appeal that is before this court for determination. He raises the following grounds:
 1. That the Honourable Magistrate erred in law in fact by failing to consider that his ruling is erroneous and are not based on any evidence that the Respondents had not filed any affidavit in reply or ground of opposition yet still dismissed the application.
 2. That the Honourable Magistrate erred in law in fact by failing to find that the replying affidavit which was sworn by one Ahimed Mohamed Salt the signatory entitled is not party, an intruder that is not capable to oppose a suit. The suit was commenced in the name of the 1st Defendant/Respondent Mohamid Salim Mohamed
 3. That the Honourable Magistrate erred in law in fact by falling to find that the application before him filed by appellant followed process as provided by the law.
 4. That the Honourable Magistrate erred in law in fact by failing to consider the effect of his ruling against the appellant have very adverse effects on the appellant and had been carefully given a consideration.
 5. That the Honourable Magistrate erred in law in fact by failing to appreciate observe the laid down principal of law.
 6. That the Honourable Magistrate erred in law in fact in being expressly biased against the appellant.
 7. That the Honourable Magistrates erred in law in and in fact by failing to find that the appellant had earlier instituted suit vide application dated 25th September Civil Suit no 310 of 2018, Zaki Abdulrahman -vs- Mohamed Salim Mohamed& Makini Auctioneers Urgencies since the institution of the suit much have happened along the way.
 8. That the Honourable Magistrates erred in law in fact by failing to find that the appellant which has triggered the need to amend plaint dated 25th



September 2018 to capture the newly arising issues carried on orchestrated by 1st Defendant/Respondent and intended 3rd Defendant/Respondent.

5. The appellant prays that the appeal be allowed the ruling of Hon. W. Chepseba Chief Magistrate delivered on 20th day of May 2022 be set aside and be substituted with a ruling allowing the notice of motion dated 23rd April 2021.

The Respondents case:

6. The letters of Administration Intestate were taken out in Malindi Succession Cause No.39 of 2016 in the Estate of Mohamed Salim Ahmed Alamudi.
7. The deponent one Ahmed Mohamed swore the Affidavit in his capacity as the duly appointed legal administrator of the estate of Mohamed Salim Ahmed who died on 5th March, 2014.
8. Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010. Rule 3 provides that:
 - a. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.
 - b. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.
9. The suit brought by the Appellant was touching on levying distress on the goods in the leased premises where the deceased Mohamed Salim Ahmed was the owner and or landlord.
10. Ordinarily, it would be legal administrator who would be called upon to swear an affidavit on behalf of the deceased estate and in this case Ahmed Mohamed Alamudi would was called upon to take the part.
11. The deponent is the administrator of the deceased's estate and therefore is seized of pertinent facts regarding the said estate. Reliance was placed in the case of Esther Wambui Kanyi & 2 Others vs Njeri Ngaru & Another (2016) eKLR where it was held that;

“...the Affidavit evidence is not conclusive and a party is still at liberty to call in a deponent for cross-examination on the depositions therein. Furthermore, in my view, the defect herein in regard to affirmation is a curable defect in light of Order 19 Rule.”
12. The Replying Affidavit Sworn by the Administrator was legally binding and within the parameters laid down under the Civil Procedure Rules and the *Evidence Act*. Therefore, the Replying Affidavit was neither defective nor wanting in the capacity of the deponent.
13. On the question of the effect of enjoinder of Ephantus Murithi Njue as the intended 3rd Party to the main suit, it is the Respondent's case that:

“...the Appellant brought this suit vide a Complaint 25th September, 2018, where Appellant avers that the 1st Defendant has purported to instruct the auctioneers from Makini Auctioneers agencies the 2nd Defendant herein to levy distress against the Plaintiff, the distress is both illegal and contrary to express provisions of the law and some of the intended goods to be distrained are tools of trade not liable to distress in any event.”



14. The Plaintiff further contends that the leased premises is a business cum residential premise and is a shop premises within the meaning of Section 2 (1) of the Landlord Tenant (shop, hotel& catering establishment) Act chapter 301 of the Laws of Kenya and that the Plaintiff tenancy is not having been reduced into writing is a controlled tenancy within the meaning of the said act and the distress is unlawful.
15. The Appellant argued that has been sued with diffident pleadings concerning the same property and has been subjected to numerous proclamations and attachments of his property and no report has ever been made to the court as is required by the law and it has not been shown how much has been recovered from the sale of the attached goods.
16. The Appellant also avers that he has lost his property together with a spare shop and some tools of trade that are not liable to distress and the Plaintiff herein has suffered loss of income due to incessant and unlawful attachment of his property.
17. The Appellant claimed against the Respondents for a permanent injunction restraining the Defendants his servants and/or his agents from levying distress upon the Plaintiffs goods contained in the leased premises.
18. The Appellant prayed for permanent injunction, cost of the suit and any other relief that this Honourable Court may deem just to grant.
19. On the 9th day of February, 2021 virtually before the Trial Magistrate, the Appellant sought leave to amend his Plaint dated 25th September 2018 and he requested for 14 days. The Court granted the Appellant time to amend his Plaint and the matter was given mention date for confirm compliance by the Appellant.
20. The Appellant proceeded and filed an Application seeking to amend his Plaint to enjoin one Ephantus Murithi Njue as the 3rd Intended Defendant/Respondent.
21. The law on joining of parties is entrenched under Order 1 Rule 10(2) which 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”.
22. The Civil Procedure Rules under Order 1 Rule 10 (3) provides that:

“All persons may be enjoined as Defendants against whom any right to relief in respect of arising out the same act or transaction or series of transactions is alleged to exist, whether jointly or severally or in the alternative, where, if separate suits were brought against such person’s commons question of law or fact would arise.”
23. To buttress the argument of what the Courts consider before enjoining a party to a suit reliance is placed in Eldoret High Court Civil No. 136 of 2000: - Joseph Nian Kingori v Robert Maina Chege & 3 others [2002] eKLR and Joseph Leboo & 2 others vs Director of Forest Services & Another (2013) eKLR.



24. From the Plaintiff the Appellant prayed for orders of permanent injunction against the Defendants from levying distress against his goods in the leased premises, whereas the 3rd Intended Defendant is alleged to unlawfully trespass into the pathway of his residential house. There is clearly no common cause of action nor a common question of law or fact that would arise.
25. The proposed intended 3rd Defendant is also accused of constructing iron sheet structures blocking the pathway to his residential house.
26. It is the Respondent's Case that the remedies sought by the Appellant from the 1st and 2nd Respondent are totally different from the remedy sought from the proposed Intended 3rd Defendant.
27. The intended party is not a landlord nor is he an agent or a representative of the landlord of the leased premises as a result of which he has no capacity nor locus standi to levy distress on the Appellants goods. Reliance is also placed in the case of Lucy Nungari Ngigi & 128 others vs National Bank of Kenya Limited & Another (2015) eKLR where the court stated that:

“Joinder is to be refused if, it will lead to practical problems of handling existing cause of action together with one of the party being enjoined; it is unnecessary and finally if it will occasion unnecessary delays or costs on the parties in the suit.”
28. The effect enjoiner to the suit will mean handling the issue of trespass and levying of distress of the leased premises at the same time that is two different cause actions all together.
29. The issue of trespass had not been pleaded by the Appellant in the plaint nor did the written statement hint to the issue of trespass. It is trite law, that Parties are bound by their pleadings.
30. In the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded

“ ... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”
31. The case of Francis Kariuki Muruatetu and Another v Republic & 5Others 12016 eKLR which cited as an authority the case of Trusted Society of Human Rilit Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2015 eKLR a party seeking to be enjoined as an interested party has to demonstrate the prejudice it stands to suffer if not enjoined. It is not for the applicant to negate the possibility of prejudice to be suffered by the principal parties if the application is allowed. As noted above, the Applicants have failed to demonstrate how the orders sought in these proceeding will affect the Applicant. Association or any of its members. It is therefore my view that the application also fails under this head.
32. The Respondents argue that the joinder of the proposed intended 3rd Defendant will forestall the case as new issues will have to be framed which will force this Honourable Court to determine the issues raised.



Analysis and Determination:

33. The duty of the first appellate court was restated in *Selle & Another -vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123 thus:

“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 principles 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 conclusions 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 (*Abdul Hammed Saif vs Ali Mohamed Sholan* (1955), 22 E.C.A.

34. I have addressed my mind to the parties' submissions. The Respondent consolidated and argued all the grounds of appeal together raising the following issue for determination:

1. Whether the Replying affidavit was defective and incompetent for want of capacity by the deponent.
2. What was the effect of enjoinder of Ephantus Murithi Njue as the intended 3rd Party to the main suit?

35. In the impugned ruling, the Trial Magistrate made the following finding:

“I have looked at the above submissions together with the averments the relief sought from the Defendants is an injunction to stop levy of distress on goods on the leased premises and the claim against the intended party is for trespass that are entirely different claims, Order 1 Rule 103 provides persons may be joined as Defendants against whom any relief in respect of or arising out of the same transactions is alleged to exist. The effect of enjoining the intended 3rd Defendant will introduce a new cause of action and would the hearing and determination of this suit. I do therefore find that the application does not meet the standards to enable the court exercise its discretion I do therefore find that the application lacks merit and proceed to dismiss it with costs.”

36. The Trial Magistrate failed to exercise her discretion when deciding not to admit the intended interested party as guided by the cases of *Habiba W. Ramadhan & 7 others v Mary Njeri Gitiba* (2017) eKLR; Nairobi High Court ELC Case No. 119 of 2014 the Court stated as follows;

“As already observed by the Court, under Order 1 Rule 10(2) the Court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute....”



37. In the of Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR.

“A large number of 128 people have applied for the leave of the court to be joined as plaintiffs in this suit. Their application is a Motion dated 19th January 2015 which is expressed to be made under Order 9 Rule 8(3), Order 8 Rule 3 and Order 51 Rule of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act*, Articles 48 and 159 of *the Constitution* of Kenya, 2010. The application also seeks for leave to amend the Plaint as is necessary after the joinder.

Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in 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 such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.”

38. The Supreme Court of Kenya outlined the requisite elements to being joined as an interested party to a suit in Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR. The Court stated the following:

“Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements;

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”



39. There is nothing in the ruling of the trial court that can tell the Appellant what considerations informed the dismissal of his application to add the interested party to the suit. By stating, “I do therefore find that the application does not meet the standards to enable the court exercise its discretion” the litigants cannot tell what the standards are.
40. The Trial Magistrate failed and or refused to analyse the evidence that the parties tendered and arrived at a ruling that did not have reasons. It is my finding that, the magistrate should have laid out the principles and applied them to the parties’ evidence and facts of the case.
41. The Trial Magistrate failed to determine the following prayers:
1. Leave be granted to the applicant to amend his plaint so as to accommodate the new status.
 2. Upon granting prayer 1 and 2 this Honourable court do grant the plaintiff/ applicant to sue the intended 3rd Defendant/Respondent personally for trespass and damages and other incidentals thereto.
 3. Leave be granted to compel the 1st Defendant/Respondent and intended 3rd Defendant/Respondent Ephantus Murithi Njue to reconnect electricity power to applicant only KPLC can do this.
 4. Leave be granted to applicant that the Respondent either by himself, his servant agent and/or employee be restrained and prohibited to continue using the front part and/or a path of applicant residential house as a juakali workshop and/or harassing the applicant or threatening the applicant and/ any manner whatsoever interfering with applicant. The OCS Malindi police station to ensure compliance and yet outove.
42. The prayer for Leave to be granted to the applicant to amend his plaint so as to accommodate the new status was a critical prayer that is germane to prayers 1,3 and 4. The Principles of amendment of pleadings were not analysed.
43. In the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR the Court of Appeal made a finding that the law on amendment of pleading in terms of Section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s *Precedents of Pleading* - 12th Edition, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows: -

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an



amendment of the plaint the Defendant would be deprived of his right to rely on Limitation Acts.”

44. There is no plausible explanation that can be given to the Appellant to make him understand what happened to the prayer for the amendment of the Plaint. It matters not whether he appreciates the rule of law fully or not. He is acting in person and the trial court should have gone a notch higher to explain to him the principles that were applicable to his case.
45. The Trial Magistrate should have taken time to address its mind to the entire application and not exercise piecemeal discretion in a quick summary form in the short ruling leaving out key prayers.

Disposition:

46. The Appeal has merit.

Order:

The Appeal is allowed in the following terms:

1. The ruling of Hon. W.K Chepseba Chief Magistrate delivered on 20th day of May 2022 is hereby set aside.
2. The Notice of Motion dated 23rd April 2021 shall be placed before a different Magistrate for hearing and determination within thirty days of today’s date.
3. Costs to the Appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY, THIS 31ST DAY OF OCTOBER 2023.

J. CHIGITI (SC)

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

