



Mwaura & 30 others v Waithima & 9 others (Environment & Land Case 4, 340, 35 & 54 of 2014 (Consolidated)) [2023] KEELC 16791 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16791 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 4, 340, 35 & 54 OF 2014 (CONSOLIDATED)
FM NJOROGE, J
APRIL 12, 2023

BETWEEN

AYUB NJUGUNA MWAURA & 30 OTHERS PLAINTIFF

AND

PETER WAITHIMA 1ST DEFENDANT
JAMES NGUGI NJUGUNA 2ND DEFENDANT
JOHN TEBERE 3RD DEFENDANT
NICHOLAS GACHUNGI KIHINGO 4TH DEFENDANT
MATHENGE NDERITU 5TH DEFENDANT
BOM MBEGI JUBILEE PRIMARY SCHOOL 6TH DEFENDANT
NAKURU COUNTY GOVERNMENT 7TH DEFENDANT
CABINET SECRETARY MINISTRY OF EDUCATION 8TH DEFENDANT
THE HON ATTORNEY GENERAL 9TH DEFENDANT
NAIVASHA LAND REGISTRAR 10TH DEFENDANT

RULING

1. This ruling is in respect of the 1st, 2nd, 3rd and 4th defendants' preliminary objection dated 13/02/2023 on the following grounds:
 - a. That there was no leave sought, obtained or granted to add 2nd to 31st Plaintiffs in this Suit as Claimants and their Claim should be struck out against the 4 defendants (cited) with costs.
 - b. That no leave was sought to implead 5th to 10th defendants in these pleadings.



- c. That the amended plaint that included new plaintiffs was not accompanied by summons to enter appearance and it has therefore abated as against the 1st, 2nd, 3rd and 4th defendants and should be struck out.
 - d. That the amended plaint was served upon the 1st, 2nd, 3rd and 4th defendants on 07/02/2023 beyond the period allowed by law for service and or permitted by the court on various dates terminating with the orders of 26/01/2023.
 - e. That the amended plaint was filed after the period permitted by the court or rules had expired and it is therefore a nullity.
 - f. The amended plaint was filed by a counsel who has never served Notice of Change of Advocates.
2. The preliminary objection was canvassed by way of written submissions. The 1st, 2nd, 3rd and 4th defendants filed their submissions dated 16/02/2023 on the same date while the plaintiffs filed their submissions dated 24/02/2023 on the same date.
 3. The 1st, 2nd, 3rd and 4th defendants in their submissions relied on the case of *Kencom Sacco Society Limited vs David Machio & 4 Others* [2020] eKLR and submitted that the plaintiff filed an amended plaint without leave of court. They also submitted that the plaintiff added over thirty plaintiffs and three defendants without leave of court. They further relied on order 1 rule 10(3), order 5 rule 1(1), (3) and (5) of the *Civil Procedure Rules*, the cases of *Pecker Woods Ltd vs Bank of Africa Limited* [2021] eKLR, Nyeri Miscellaneous application No. E017 of 2020 *Rift Valley Agricultural Contractors Limited vs AFC & NNK* and sought that their preliminary objection be upheld.
 4. The plaintiffs in their submissions relied on order 8 of the Civil Procedure Rules and submitted that parties to a suit have a right to amend their pleadings at any stage of the proceedings. They also submitted that the purpose of amendment of pleadings is to facilitate the determination of the real question in controversy between the parties and that the delay alluded to by counsel for the 1st to 4th defendants was not inordinate and did not prejudice them in any way. The plaintiffs also relied on the case of *Simon Wachira Nyaga vs Patrick Wamwirwa* Kerugoya Civil Appeal No. 211 of 2013 [eKLR] and sought that the court dismisses the preliminary objection.

Analysis and determination

5. After considering the preliminary objection and the submissions, the only issue that arises for determination is whether the preliminary objection has merit.
6. A perusal of the court record indicates that on 11/5/2022, the court granted the plaintiffs in ELC 4 of 2014, 35 of 2014, 54 of 2014 and 340 of 2014 leave to amend their respective plaints to join the board of management Mbegi Secondary School, the School Committee, Mbegi Primary School and the Hon Attorney General on behalf of the Ministry of Education as defendants. The amended plaints were to be filed and served within sixty days of the said order while the newly joined defendants were granted sixty days to file their defences to the suit.
7. On 09/11/2022, the parties were granted 14 more days to comply with the orders issued on 11/5/2022. On 26/01/2023 the plaintiffs were allowed to serve the defendants with the amended plaint.
8. From the court record, the plaintiffs were granted leave to amend their plaint and join the three defendants already set out in this ruling. Of the parties the plaintiffs were allowed to join, only the Attorney General and the Board of Management Mbegi Jubilee Primary School were joined. I am



inclined to agree with the 1st to 4th defendants that leave was not granted to the plaintiffs to join more plaintiffs and the other defendants. However, it is noteworthy that the 1st -4th defendants stand to lose nothing out of the joinder or non-joinder of any other party in these proceedings since they have already categorically stated that they have no interest in the suit land and that they have been wrongly sued. It is therefore difficult to hold, perchance their stance is proved correct in the end, that any joinder would in those circumstances affect them.

9. Section 1A of the [Civil Procedure Act](#) provides as follows:

- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

10. Section 1B of the [Civil Procedure Act](#) provides as follows:

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

11. The court in the case of [Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs Francis Bahati Diwani & 2 others](#) [2014] eKLR held as follows:

“Striking out of a pleading, especially where the Rule does not expressly provide so, which has been filed out of time is an extreme measure which is resorted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.”

12. The Court of Appeal in the case of [Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others](#) (2013) eKLR held as follows:

“... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”



13. Article 159(2) (d) of *the Constitution* of Kenya obligates this court to see to it that justice is administered without undue regard to procedural technicalities. Though this court is dissuaded by constitutional provisions in article 159(2) (d) from viewing this matter from the perspective of the technicalities raised by the 1st -4th defendants, it is clear to see that some of the missteps of the plaintiff are quite grievous and bound to bring more confusion than order in this matter. The plaintiff failed to indicate that he intended to join numerous other persons as plaintiffs, and chose to omit some of the defendants that the court instructed him to join, and also joined others not envisaged by the court order pursuant to which the amendment to effect joinder was made. In response to the objection by the 1st -4th defendants that he joined other plaintiffs to his suit without leave of court, he stated simply that those additional plaintiffs were parties in the other suits consolidated with which the suit in which the amendment was being made. Save for the 2nd, 8th -11th and the 29th plaintiffs this court is unable to verify that aspect of the 1st plaintiff's proposition. It is also inimical to procedure that only the verifying affidavit of the 1st 2nd and 17th plaintiffs has been filed with the amended plaint while no authority granted to them to swear on behalf of the rest of the plaintiffs had been exhibited. The retort of the plaintiff to the 1st -4th defendant's objection is that "counsel did not need leave to add the parties." This view is contrary to the perspective of this court based on the provisions of order 1 rule 10 sub-rule 2 that provides for joinder, as joinder is usually only at the discretion of the court acting suo motu or upon the application of the parties. Whilst the court had given directions on whom to be joined, the plaintiff appeared to have his own ideas on the issue. All action and objections around this amendment must however be viewed through the prism of order 1 rule 1, 3 and 8 of the *Civil Procedure Rules* which provide as follows:

"(1). All persons may be enjoined as plaintiffs in whom any right to relief in respect or arising out of the same act or transactions is alleged to exist whether jointly, severally or in alternative where, if such persons brought separate suits any common question of law or fact would arise."

(3). 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."

Rule 8 provides as follows:

"(8)(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit."

14. It is my view however that notwithstanding the plaintiff's blunders and in the interest of justice and having regard to the provisions of article 159(2) (d), the plaintiffs' amended plaint should not be struck out but certain deserving measures require to be put in place since the striking out of the amended plaint may only lead all the parties and the court around in circles. I therefore make the following orders



which, just like the orders made on 11/5/2022, shall apply against all the plaintiffs in each individual suits consolidated with the lead file if they have not been joined in the lead file by the amendment:

- i. Firstly, the authority of all the plaintiffs not named as deponents in the verifying affidavit attached to the amended plaint must be availed, or, alternatively, their verifying affidavits be filed;
 - ii. Secondly, summons shall be taken out and served upon all the new defendants joined by the plaintiff requiring them to respond to the plaintiff's claim in the normal manner;
 - iii. The members of the Board of Management named as the 6th defendant must be individually named and joined as defendants on behalf of that Board;
 - iv. The particulars of ownership of the suit parcels of land indicated at paragraph 3 of the amended plaint shall be given clearly in the plaint, with each plaintiff declaring their interest in the matter, and to this end a further amended plaint shall be filed and served;
 - v. The plaintiffs shall comply strictly with the above requirements within 60 days of this order in default of which the entire suit shall be dismissed for want of prosecution.
 - vi. The plaintiffs in individual suits shall be at liberty, perchance they are joined to the suit in the lead file, to withdraw their claims in the respective suits to pave the way for a streamlined conduct of the trial in this dispute through one suit.
15. Consequently, and in view of these remedial measures I have set out herein above, I decline to uphold the preliminary objection of the 1st -4th defendants and I dismiss it with no order as to costs.
16. The instant suit shall be mentioned on June 14, 2023 for further directions.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 12TH DAY OF APRIL 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

