



**Waweru & 2 others v Githunguri Constituency Ranching Co Limited & 3 others
(Environment & Land Case 50 of 2018) [2023] KEELC 16851 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 50 OF 2018
JG KEMEI, J
APRIL 13, 2023
FORMERLY ELC 163 OF 2014 - NAIROBI**

BETWEEN

**JOHN RIMUI WAWERU 1ST PLAINTIFF
JOSEPH KINYANJUI MUTHONI 2ND PLAINTIFF
LANDLUCK INVESTMENTS LTD 3RD PLAINTIFF**

AND

**GITHUNGURI CONSTITUENCY RANCHING CO LIMITED 1ST
RESPONDENT
ATHI RIVER WATER SERVICES BOARD 2ND RESPONDENT
SINO HYDRO COMPANY LIMITED 3RD RESPONDENT
COUNTY GOVERNMENT OF KIAMBU 4TH RESPONDENT**

RULING

1. Vide a Notice of Motion dated the 6/12/2021 the Applicants moved the Court for orders of leave to amend their amended Plaint dated the 6/7/2021 as per the draft annexed thereto.
2. The Application is based on the grounds that; the proposed amendments are intended to enjoin new parties as the Plaintiffs; the proposed intended Plaintiffs are beneficiaries of the sewerage compensation; the proposed amendments will not prejudice the Respondents and it will serve the interests of justice so that all affected persons are heard on merit.
3. In support of the Application the 1st Applicant swore an affidavit dated the 6/12/2021 reiterated the grounds already enumerated above.



4. On the 22/2/2022 Mr Warutere holding brief for Mr Kanyi for the 1st Respondent intimated to the Court that he had instructions to oppose the Application. Despite several accommodations by the Court the 1st Respondent failed to file neither the Replying Affidavit nor the written submissions thus the Application is not opposed.
5. The 2nd Respondent filed its objection on the 16/5/2022 through the Replying Affidavit sworn by Martha Wanjiku, its legal officer who deponed that there is no nexus between the proposed Plaintiffs and the properties allegedly held by them; their claims raise no reasonable cause against the 2nd Defendant; the proposed amendment is baseless, unfounded and an abuse of the process of the Court as the proposed Plaintiffs have failed to identify the alleged respective plots hence will be a waste of time to hear a matter involving 84 Plaintiffs on speculative claims . In any event the parcels of land mentioned under para 11-95 of the proposed Plaint are not among the ones listed in the gazette notice No 673 of 5/2/2016 which were acquired by the County Government of Kiambu.
6. The 2nd Respondent urged the Court to dismiss the Application with costs.
7. The 3rd and 4th Respondents informed the Court through their counsels on record that they did not wish to oppose the Application.
8. With leave of the Court sought and granted on the 13/6/2022 parties undertook to canvass the Application by way of written submissions. Only the 2nd Respondent filed submissions which I have read and considered.
9. The 2nd Respondent faulted the Applicant's deponent for failing to show the authority of the 83 proposed Plaintiffs to allow him to depone on their behalf.
10. Quoting the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules the 2nd Respondent pointed out that a party who has applied to be enjoined in a suit either as a Plaintiff or Defendant or interested party must demonstrate that his presence is necessary to enable the Court to effectually and completely adjudicate upon and settle all issues involved in the suit. The Applicant must demonstrate that he has a common interest in the matter and that he is not introducing a new cause of action. In buttressing this proposition the 2nd Respondent placed reliance on the case of Francis Muruatetu & Anor Vs Republic & 5 Others (2016) eKLR.
11. Reliance was also placed on the case of Meshack Kibe Muiruri & 4 Others (suing on behalf of 850 Others Vs Muranga County Government & Anor) (ELC 47 of 2020) where the Court in part stated that joinder of parties is the inclusion of a party or parties to a suit who have the same rights against whom rights are claimed as co-Plaintiffs or co-Defendants. That a party seeking joinder must demonstrate that he is a necessary and proper party and that his presence is necessary to enable the Court to effectively adjudicate and settle all the questions in the suit.
12. It was the submission of the 2nd Defendant that the proposed Plaintiffs have not demonstrated that they have common or personal interest in the matter; the parcels of lands claimed to have been acquired are not among the ones acquired and listed in the Gazette Notice No 673 of 5/2/2016 ; the proposed Plaintiffs have failed to describe the mother title from which their properties arose; not exhibited a survey plan in support of their position; have no reasonable cause of action against the 2nd Respondent; enjoinder of 83 persons will complicate the case and the Applicants have not demonstrated the prejudice that it will suffer if joinder is disallowed. Moreover, the suit was filed in 2014 and no explanation has been proffered for the inordinate delay in filing the instant Application.
13. The key issue is whether the Applicant is entitled to leave to amend the suit and enjoin the proposed Plaintiffs.



14. Order 8 Rule 3 of the [Civil Procedure Rules](#) provides for amendment of pleadings with leave of Court as follows: -

"(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."

15. Further, Order 8, Rule 5 [Civil Procedure Rules](#) gives the Court the general power to amend.

"5. For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the Application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

16. For the Court to allow the amendment, it has to first look into the intent and purpose of the amendment and whether any prejudice will be suffered by the other party or parties in dispute and whether prejudice can be compensated by way of costs.

17. In the case of [Institute For Social Accountability & another Vs Parliament of Kenya & 3 Others](#) [2014] eKLR the Court held:-

"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the Court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The Court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side."

18. I am guided by the dicta of the Court of Appeal outlined the principles in amendment of pleadings in [Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Limited](#) [2013] eKLR as follows: -

"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 Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts.” (emphasis is mine).

19. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
20. The question of amendment of the Plaintiff is for the purposes of joinder of 83 proposed Plaintiffs into the case. The two issues will therefore be dealt with together as they are joined at the hip.
21. Order 1 rule 1 of the [Civil Procedure Rules](#) under which the Application is brought provides as hereunder:

“All persons may be joined in one suit as Plaintiffs 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 or fact would arise.

22. Order 1 rule 10(2) of the said Rules 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.”

23. Flowing from the above legal texts the guiding principles when an intending party is to be joined are as follows:
 - a. He must be a necessary party.
 - b. He must be a proper party.
 - c. In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff.
 - d. The ultimate order or decree cannot be enforced without his presence in the matter.
 - e. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

24. In the case of the *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd* [1999] 1 EA 55 it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because



that party's presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...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 a 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."

25. Equally in the case of *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR the Court observed as follows:

"Again the power given under the Rules is discretionary which discretion must 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...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." (emphasis is mine).

26. In this case the Proposed Plaintiffs' case is that they acquired parcels of lands from the 1st Defendant/ Respondent and annexed share certificates and ballot numbers of plots all allegedly issued by the 1st Respondent. It is their claim that their parcels were ceded/transferred by the 1st Respondent to the 2nd - 4th Respondents for the construction of the sewerage plant hence their plea of trespass. I have perused the gazette notices alluded to by the 2nd Respondent which give a list of parcel numbers registered in the name of the 1st Respondent. I have also perused the minutes of the various meetings of the stakeholders of the construction of the sewerage plant in which the 1st Defendant stated categorically that the 1st Defendant had allocated land to its members and gave several proposals to meet the land requirements of the project including restructuring land that had been preserved for public utility so as to compensate those members that would be affected by the project. The 2nd Respondent has admitted that it was allocated about 32.1 ha for the project but at some point was found insufficient leading to requisitioning of more land. All these are issues that are in controversy and are best left to the hearing so that the parties may have their day in proving their claims in Court on merit.
27. Flowing from the above I am persuaded that the Applicants have demonstrated that they are necessary and proper parties to the suit; they have common questions of fact and law against the Defendants flowing from the same transactions and or series of transactions; have demonstrated sufficient interest in the matter at hand; to prevent the filing of multiplicity of issues; their presence will enable the Court to determine in finality the issues in controversy;



28. Final orders

- a. The Application dated the 6/12/2021 is allowed.
- b. That the Applicants be and are hereby granted leave to amend its Plaintiff in terms of the draft amended Plaintiff.
- c. That the draft amended Plaintiff be and is hereby deemed as duly filed and served upon payment of requisite Court fees within 7 days of this Ruling.
- d. Upon service, the Respondents be and are hereby at liberty to file and serve their amended defence within 14 days.
- e. The Applicants to file and serve a reply to the amended defence within 7 days of service.
- f. Parties are directed to expeditiously and speedily comply with Order 11 of the [Civil Procedure Rules](#) and fix the matter for hearing noting that this is an old matter having been filed in 2018.
- g. Costs be in the cause.

29. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

1st, 2nd and 3rd Plaintiffs – Absent

Wachira HB Kanyi for 1st Defendant

Kichwen HB Odoyo for 2nd Defendant

3rd Defendant – Absent

Ms. Cheserek for 4th Defendant

Court Assistants – Kevin/Lilian

