



REPUBLIC OF KENYA



KENYA LAW
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**Njira v Gakuyo Real Estate Limited (Environment & Land Case
18 of 2018) [2023] KEELC 17548 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17548 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 18 OF 2018**

**A KANIARU, J
MAY 17, 2023**

BETWEEN

NELSON RUNJI NJIRA PLAINTIFF

AND

GAKUYO REAL ESTATE LIMITED DEFENDANT

RULING

1. The application before me for determination is notice of motion dated 4/4/2021 and filed on 14/4/2021. It is expressed to be brought under order 1 rule 10 of Civil Procedures Rules. The applicant – Nelson Runji Njira – is the plaintiff in the suit while the respondent – Gakuyo Real Estate Limited – is the defendant. It is essentially an application for joinder of a party and the prayers sought are as follows:
 - a. That this court be pleased to grant leave to the plaintiff to enjoin David Kariuki Ngari as a co-defendant in the suit.
 - b. That costs of this application be provided for.
2. The application is premised on the grounds, inter alia, that the intended 2nd defendant was part of the impugned sale transactions being contested in the suit; that he signed the amended sale agreement dated 17/9/2019; that the amended sale agreement gave the intended 2nd defendant possession of the land; and that the intended 2nd defendant is therefore a critical party to the proceedings.
3. The application came with a supporting affidavit in which it is deposed, inter alia, that there was the first sale agreement in which the defendant now sued was the buyer but there was the second agreement indicating the intended 2nd defendant as the buyer; that the intended 2nd defendant was granted immediate possession of the land in the second agreement thus making him a critical party; and that no prejudice will be occasioned to any party by the joinder of the intended second defendant.



4. The application was responded to vide a replying affidavit dated 28/9/2021 and filed on 4/10/2021. It was sworn by one Dickson Michind Nyokabi who introduced himself as the Chief Executive Officer of the defendant. He deposed, inter alia, that the amended agreement (also called second agreement by the plaintiff) was an addendum to the earlier agreement and that the defendant already sued is the beneficial owner under that agreement and not the intended second defendant. The intended second defendant was said to have been an agent of the defendant already sued and “thus the available legal remedy to the plaintiff/Applicant is rightfully against the defendant as opposed to its agent.”
5. Further, the amended sale agreement was said to reflect that the intended second defendant was acting through the defendant now sued and that the same amended agreement was peripheral to the earlier agreement.
6. The application was canvassed through written submissions. The applicant’s submissions were filed on 2/2/2022. According to the applicant, joinder of the intended 2nd defendant is important because the amended agreement granted him immediate possession of the suit land. After such joinder amendment was said to be subsequently necessary. The court was urged to appreciate that the law on amendments allows that amendments be freely granted provided that no prejudice is occasioned to the other side. It was further pointed out that there is no prejudice if the other side can be compensated with costs. To drive the point home, cases of *Eastern Bakery Vs Castelino* [1958] 461, *Tiidesley Vs Harper* [1878] 10 ch.D, *Budding v Murdoch* [1875] 1 Ch.D p. 42, *Simoniab v Johar* [1962] E 336 and *Ochieng and others v First National Bank of Chicago*: Civil Appeal No. 147 of 1991 were cited and quoted as deemed necessary.
7. The respondent’s submissions were filed on 16/1/2023. The respondent cited the relevant provisions of Civil Procedure Rules on amendment - specifically order 8 rules 1(1) 2 (a) and (b) and order 7 rule 7 (1) – and submitted that the amended plaint in this case was filed on 8/4/2021, which is three years after the suit was filed. The amended plaint was therefore said to be filed out of time and without leave of court. The court was therefore urged to strike out the plaint. To buttress the submission to strike out the suit, the respondents cited and quoted the case *Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another v Francis Babati Diwani & 2 others* [2014] eKLR and *Harrison C. Kariuki v Blue Shield Insurance Co. Ltd* [2006] eKLR.
8. On joinder, the respondent averred that the intended second defendant should not be made a party in the suit as he was acting as an agent of the defendant now sued in this matter. The land sale transaction was said to be between the applicant and the respondent now sued and not the intended 2nd defendant in his personal capacity. It was submitted that the respondent already sued is “an artificial legal person” and is “capable of hold property, suing and being sued.”
9. Ultimately, the application was said to lack merits and the court was urged to dismiss it and award costs to the respondent.
10. I have considered the application, the response made to it, rival submissions, and the entire court record in general. The suit is premised on two land sale agreements. The first agreement shows the applicant as the seller and the respondent as the purchaser. The second agreement – styled as Amended Sale Agreement – shows the applicant as the seller and the intended 2nd defendant as the purchaser. It is not clear to me why the name of the purchaser had to change. Such change is not a minor thing in my view; it is fundamental. As pointed out by the applicant, it is the purchaser indicated in the second agreement who is put in immediate possession of the suit land. Further, it is clear that the joint account into which the purchase money is to be deposited is in the names of the applicant and the intended second defendant.



11. Joinder is always necessary where the presence of a party is deemed necessary for proper administration of justice. It is also necessary where it becomes apparent that parties may be held jointly liable for the remedy or relief sought. It is necessary to appreciate that in any given suit, the person suing is the dominus Litis, or Lord of the law suit if you like. This is the person who profits from a favorable judgement but he is also the one liable for the effects of an adverse judgement including costs. Bearing this in mind, this person has to be given the necessary freedom to choose whom to sue. It is him who knows best those who have wronged him and where, as in this case, it is not outrightly clear as to who the relief should be sought, joinder becomes desirable. It is not lost on me that in the first or initial agreement, the respondent – Gakuyo Real Estate Limited – is clearly shown as the purchaser. In the amended agreement however, Gakuyo Real Estate seems to be relegated to the background while the 2nd intended defendant gains prominence in the transaction.
12. The respondents would have the court believe that the entire suit should be struck out since the amended plaint was allegedly filed when pleadings had already been closed. In the context of this case, I don't understand how anyone can say that there is an amended plaint filed. The only amended plaint I see is an attachment to the application now under consideration. The application is seeking leave join the intended 2nd defendant as a party. The amended plaint referred to contains a description of the intended second defendant and the necessary information relating to the intended 2nd defendant's role in the matter. That plaint is not filed. It can only be filed after the application is allowed.
13. The respondent also says that the pleadings are closed. I have gone through the entire court record. The respondent has not yet filed any defence to the suit. The only thing the respondent has done is to file responses to the interlocutory applications filed in this matter. If the court chooses to treat the pleadings as closed, this might also mean closing the doors to the respondent so that no defence is filed. Needless to say, this would not be a very good scenario as both sides deserve to be heard.
14. I am persuaded that the merits of the application before me have been well demonstrated. The submissions filed by the respondents do not at all persuade that joinder is un-necessary. I therefore allow the application by the applicant. Costs in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF MAY, 2023.

In the absence of Macharia for plaintiff and Triple N.W. (absent) for the defendant.

Court assistant: Leadys

A. K. KANIARU

JUDGE

MAY 17, 2023

