



Owako v Mong’oa & 4 others; Otieno (Proposed Defendant) (Miscellaneous Civil Case 63 of 2021) [2022] KEHC 16955 (KLR) (28 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL CASE 63 OF 2021
RE ABURILI, J
DECEMBER 28, 2022**

BETWEEN

DAVID OSCAR OWAKO PLAINTIFF

AND

EMILY ANYANGO MONG’OA 1ST DEFENDANT

CHARLES ODENG’ A.K.A. SAMUEL ORWA 2ND DEFENDANT

HON LOKOYPOT 3RD DEFENDANT

THE C.S. LANDS HON KARONEY 4TH DEFENDANT

**THE REGISTRAR OF LANDS ARDHI HOUSE MR. F.J.
LUBULELAH 5TH DEFENDANT**

AND

HON. P.J. OTIENO PROPOSED DEFENDANT

RULING

1. This suit was transferred to this court from Kisumu High Court because all the judges in Kisumu High Court were enjoined to the suit as parties hence they had no option but to recuse themselves from the case. On September 19, 2022, this court, on an oral application by the plaintiff herein allowed the plaintiff to file an application for joinder of a party, for consideration on its merits. This was after the plaintiff had withdrawn his claims against all other defendants except five of the sixteen defendants. The intended party is to be the 6th defendant if the application is allowed. The plaintiff /applicant filed his application dated October 24, 2022, seeking leave of court to enjoin as a defendant to this suit, Hon Mr Justice Patrick J Otieno currently serving at Kakamega High Court.



2. The ground upon which the application is predicated is that the Judge colluded with others Ms Qaram Auctioneers to fraudulently within his capacity as the advocate for the National Bank of Kenya and transferred the suit property LR No 10817/3 Nandi County, Tinderet District thus causing loss and damage.
3. In this application subject of this ruling, the defendant annexes an amended plaint wherein he alleges that the Judge acting together with others Ms Qaram Auctioneers fraudulently within his capacity as the advocate for the National Bank of Kenya transferred the suit property title No 10817/3 Nandi County Tinderet District thus causing loss and damage. He pleads particulars of fraud against the judge and states that the judge colluded with the bank to sell his property yet there was an existing court order issued by Justice Mwera and that he colluded with the bank to transfer the said parcel of land at an undervalue.
4. In some of the annexures, the plaintiff claims that the Hon Justice Patrick J Otieno of Kakamega High Court illegally transferred property No LR 10817/3 1892 acres belonging to the plaintiff and frustrating HCC 38 of 2009 to its conclusion. He attaches photographs of the said judge. He further annexes photographs of other judges who have no relation to this suit including Hon Lady Justice Farah Amin (as she then was) with the caption “Lady Justice Hon Farah Amin Resigns in a huff and cuff.”
5. He further annexes photographs with captions alleging that Hon PJ Otieno with Somalis associated with Justice Warsame in money laundering. Other photographs annexed depict Mr Justice Fred Ochieng and Hon Lady Justice Jacklyne Kamau as co-conspirators to defeat justice. He calls them as enemies of the Constitution.
6. Prior to the filing of the aforesaid application, this court had issued an order that the applicant approaches the National Legal Aid Service to assist him with his cause of to advise him or draft for him a necessary application in the matter within 10 days and serve. There is no indication whether the plaintiff/ applicant ever sought for legal aid.
7. The Attorney General filed grounds of opposition dated November 1, 2022 opposing the application for joinder of the Hon Justice PJ Otieno as the 6th defendant contending that the application offends the mandatory provisions of order 1 rule 3 of the Civil Procedure Rules which enumerates the circumstances where a defendant may be added in a suit; that the content of the affidavit in support of the application as drawn does not provide sufficient material facts in support neither does it clarify the contested issues as raised in the application; that the said chamber summons as drawn relies on matters which on the face bespeak of totally new and different cause of action separate from that in Siaya Civil Miscellaneous Case No 63 of 2021, the main suit; that to that extent,, the application is a novation of a new cause of action and an abuse of the court process; that the application as filed is misconceived, incompetent and otherwise legally untenable..
8. The Attorney General urged this court to dismiss the application with costs. The intended defendant did not file any response to the application.
9. The plaintiff applicant filed supplementary affidavit together with written submissions dated and file don November 21, 2022 but this court cannot make anything out of them. The applicant claims that he relies on 9 list of authorities that include 7 rulings and 2 judgments that are in his favour and attaches Kajiado High Court Civil Case No 43 of 2018 between Atlana Corporation v Clarence Mathcay Leadership and defendant and Training Institute, National Land Commission and Ethics and Anti-corruption Commission as interested parties. In that list are a list of 8 cases cited. The nexus between the cases cited and this case is not disclosed.



10. The only thing I gather is that the applicant accuses the intended 6th defendant of having colluded with Justice Warsame and Justice Chemitei to dismiss the suit No 9 of 2005, Kisumu HCC 278 of 2016 and Commercial Suit No 77 of 2018 for want of prosecution going against justice Mwera's orders not to auction Kotnelel Farm and pay Kshs 112,121,000 to the amorphous entities hence he is in contempt and that the plaintiff filed notice of appeal in the above suits. He therefore accuses Justice PJ Otieno of aiding and abetting money laundering to tax evading because he made illegal payment vouchers to Kamalambu Karatili Farmers Company despite numerous court orders from the lower court and High Courts.
11. The Attorney General filed submissions reiterating the grounds of opposition urging this court to dismiss the application for joinder.

Analysis and Determination

12. I have considered the application, the ground and supporting affidavit as well as the grounds of opposition as filed and the written submissions.
13. The issue for determination is whether the plaintiff/ applicant's application for joinder of Hon Justice PJ Otieno as a defendant to this suit is merited. The consequence of joining a party as a defendant is that the plaint will have to be amended to bring on board the joined party attaching a specific cause of action against him. In this case, the applicant has already filed a draft amended plaint as against the said intended party.
14. Order 1 rule 10(2) of the *Civil Procedure 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.”
15. The mater before me is simply whether to allow the application for the joinder of the interested party to these proceedings and whether the consequential order of amendment of the pleadings ought to be granted.
16. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:
 1. He must be a necessary party.
 2. He must be a proper party.
 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.



17. In *Kingori v Chege & 3 others* (*supra*), it was held that:

“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met:

- (1) There must be a right to some relief against him in respect of the matter involved in the suit.
- (2) His presence should be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings.

A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognizable in the court of law being an interest, which the court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.” [Emphasis added]...

Similarly, in this case none of the parties to the suit has sought to have the applicant joined as a party to the suit. Accordingly, the applicant cannot seek that he be joined as a plaintiff to these proceedings.

18. The Court of Appeal in *Pravin Bowry v John Ward and another* [2015] eKLR considered the principles to be considered in an application for joinder of parties to a suit and referred to the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU) as well as *Civicon Limited v Kivuwatt Limited and 2 others* [2015] eKLR wherein 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.”

19. In the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya* [2014] eKLR, the court held that:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

20. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 it was held that:

“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.”

21. On whether the intended defendant should be enjoined to this suit, I must reproduce the original cause of action wherein the applicant has attempted to amend the plaint to introduce the 6th defendant. The plaint reads:

“Republic of Kenya
In The Chief Magistrate’s Court At Kisumu
Civil Suit No 242 of 2020
Republic of Kenya
In The High Court of Kenya At Siaya
Civil Misc Case No 63 of 2021
David Oscar Owako.....plaintiff
- Versus -
Hon Justice FA Ochieng.....1st Defendant
Charles Odeny Orwa Aka



Samluwe Orwa.....2Nd Defendant

Emily aka Mama Ashley3Rd Defendant

The CS, Lands Hon Karoney.....4Th Defendant

The Registrar Of Lands Ardhi House

Mr FI Lubulelah.....5Th Defendant

Hon PJ Otieno.....6Th Defendant

Plaint

Amended Plaintiff

1. The plaintiff is a male adult of sound mind. His address of service for the purpose of this suit shall be PO Box 21330 - 00100, Nairobi.
2. The 1st Defendant is an adult of sound mind who resides in Kisumu. His address of service shall be a C/O a court process server.
3. The 2nd defendant is an adult of sound mind, a resident of and a neighbour at Migosi Estate Kisumu. Her address of service shall be C/O a court process Server.
4. The 1st defendant is a caretaker of plot at Migosi, where the plaintiff stays and is the one who has been receiving rent on behalf on behalf of the landlord.
5. That on or about June 20, 2020, the 1st defendant through the 2nd defendant, proceeded and disconnected by electricity and water services, and even refused my access to the court and to part my car and entry to my house despite the rent arrears hence i reported the matter to the Kondele Police Station vide OB No 38/21/6/2020 and OB No 67/27/5/20 and the 2nd defendant through her grant child Ashley damaged my car and also came with thugs to attack me at night and I had to seek for safety in a nearby hotel and as a result I incurred damages as follows: -
 - a. Paying demurrage of 300/= per day from June 19, 2020
 - b. Hotel charges of Kshs. 1,200/= per day from June 19, 2020.
 - c. Refurnishing, sanitizing the toilet and labour at account of Kshs 3,000.
 - d. A grill at hos rent house at a cost of Kshs 6,000.
6. The 6th defendant acting together with others M/s Garam Auctioneers fraudulently within his capacity as the advocate for the National Bank of Kenya transferred the suit property title LR 10817/3 Nandi County Tinderet District thus causing loss and damage.

Particulars of fraud of the part of the 6th defendant

- a. Colluding with the bank to sell the property belonging to the plaintiff measuring approximately



1892 acres against an existing order issue by Hon Justice Mwera.

- b. Colluding with the bank to secretly transfer the suit property belonging to the plaintiff measuring approximately 1892 Acres and an under valued price.
7. There is no other suit pending at concluded between the defendants and the Plaintiff over the same subject matter.
 8. This honourable court has jurisdiction to hear and determine this matter.

Reasons whereof the plaintiff prays for judgment against the defendants

1. That pending the hearing and determination of this suit, the honourable court be pleased to grant an order of injunction restraining the defendants from interfering, with the plaintiff's peaceful occupation, access and reconnection of amenities at his rental house at Migosi Estate within Kisumu.
2. Order of the cancellation of the title deed Kamalambu Karatili Farmers Company.
3. Order reverting the ownership of the title No Kalamambu Karatili Farmers Company to its original owner who are the plaintiff's parents now deceased.
4. The plaintiff confirm grant should bear his name in the new title.
5. Order for compensation for loss of use of the parcel of land title LR No 10817/3 Nandi County Tindereret District measuring approximately 1892 acres.
6. General damages.
7. The cost of this application be provided for.

Dated at Kisumu this day of 2020.

Dated at Siaya this 6th day of October 2022.

David Oscar Owako

Plaintiff/Applicant

Plaintiff

Drawn and filed by:

David Oscar Owako

BOX 21330 - 00100

NAIROBI

To be served upon:

Charles Odieny Orwa aka Samuel Orwa

Emily aka Mama Ashley



HON PJ Otieno - Judge

E-mail:info@oyoadvocates.com

22. The above proposed amendment is what the applicant herein wishes this court to allow, upon allowing the application for joinder of Hon Justice PJ Otieno as a defendant.
23. The Court of Appeal in Tanzania in *Tang Gas Distributors Ltd v Said & others* [2014] EA 448 stated as follows as regards the joinder of parties to proceedings:

“The power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

24. In *Martin Kirima Baithambu v Jeremiah Miriti* [2017] eKLR, the court stated that:

“The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invoke the procedure provided under order 1 rule 15 of the *Civil Procedure Rules*. I say these things for the sake of jurisprudence.”

25. Having considered the original plaintiff and the amended draft plaintiff in this case, I find no nexus between the intended defendant and the original defendants in the matter or even the cause of action as originally filed. In my humble view, addition or joinder of the intended defendant will only render these proceedings appear vexatious as he would add no value to the cause of action.

26. As regards the proposed amendment to the plaintiff, order 8, rule 5 of the *Civil Procedure Rules* stipulates that:

“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.”

27. The principles guiding the grant of application to amend pleadings are now trite and the same can be summarized as follows, as re stated by Odunga J in in *Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR that:

1. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See *Tidelsay v Harpic* [1878] 10 CH D 393 at 396.
2. The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle. See *Eastern Bakery v Castellino* [1958] EA 461.



4. The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See *British India General Insurance Co Ltd v GM Parmar* [1966] EA 172
5. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However, there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice caused if the other side can be compensated by costs. See *British India General Insurance Case (supra)*.”
28. Thus, the court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party.
29. In the instant case, the applicant’s proposed joinder and amendment will bring a totally new cause of action which could have formed the basis of a different suit all together and totally unrelated to the present suit. To enjoin the proposed party to this suit will bring confusion as the cause of action as earlier filed has nothing to do with the proposed amendment.
30. For the above reasons, I find the application for joinder to be misplaced and unmerited. It is hereby dismissed with an order that each party shall bear their own costs of the application.
31. As this file is one of those that are required to be placed before me for consideration together with Kisumu HC Miscellaneous Application No E163 of 2021 seeking to declare the applicant plaintiff herein as a vexatious litigant, I hereby direct that this file be placed in Kisumu High Court Miscellaneous Application No E163 of 2021 for mention on January 17, 2023 with a view to fixing a judgment date in the said matter which is between the Hon Attorney General v David Oscar Owako.
32. Parties to be notified accordingly.
33. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF DECEMBER, 2022

RE ABURILI

JUDGE

