



**Kirgotty v Castro; Nairobi City County Assembly Service Board (Intended Interested Party)
(Environment & Land Case E010 of 2021) [2023] KEELC 19065 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E010 OF 2021
CA OCHIENG, J
JULY 25, 2023**

BETWEEN

SIMEON OLE KIRGOTTY PLAINTIFF

AND

ROMEO CASTRO DEFENDANT

AND

**NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD INTENDED
INTERESTED PARTY**

RULING

1. What is before Court for determination is the Defendant’s Chamber Summons Application dated the 29th April, 2021 and filed on 3rd May, 2021 brought pursuant to article 159 of the Constitution, sections 1A, & 3A of the Civil Procedure Act as well as order 1 rule 10 (2), (4) and (25) including order 40 rule 7 of the Civil Procedure Rules. The Defendant seeks the following orders:
 1. Spent
 2. Spent
 3. That the names of Florence Njeri Mungai, Mr. Stephen Muriu, Mr. Urbanus Kaloki, Mr. Gideon Musyoki, Maureen Temi be enjoined in the suit as the 2nd, 3rd, 4th, 5th and 6th Defendants respectively.
 4. Spent
 5. The Court be at liberty to make such other or further orders as it deems expedient to meet the ends of justice.



6. That the Costs of this Application be awarded to the Defendant/ Applicant against the Plaintiff/Respondent.
7. The costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Gavin Romeo Castro.
3. It is the Applicant's contention that on or about May, 2017, he was approached by one Florence Njeri Mungai who was selling her property known as Mavoko Town Block 2/5304 for a consideration of Kenya Shillings Four Million (Kshs. 4,000,000).
4. He explains that the vendor intimated to him that Mavoko Town Block 2/5304 had been a resultant subdivision of Mavoko Town Block 343 and 344 by the original owner Mr. Stephen Muriu.
5. Further, that the said subdivisions yielded several parcels of land ranging from Mavoko Town Block 2/5300-5314. He explains that he agreed to purchase the property once he was taken to the site by the vendor.
6. Further, that they entered into a Sale Agreement, which terms he has highlighted in his affidavit and the said sale was concluded on 14th August, 2017 with a Title Deed duly registered in his name. He confirms building his matrimonial home on the aforesaid land.
7. He states that an apparent error occurred during subdivision of the mother title and issuance of the new Title Deeds as the Plaintiff's property known as Mavoko Town Block 2/5303 does not exist on site based on current physical occupancy. He enumerates the various resultant subdivisions and its current owners as well as the anomalies on the ground.
8. He claims that Stephen Muriu through his appointed guardian Charles Muriu Mwangi offered the Plaintiff a vacant parcel of land to replace the lost one.
9. He reiterates that both the Plaintiff and himself were not present during subdivision but inherited previous land owners' mistakes.
10. Further, that joining the proposed Defendants to this suit will save judicial time as they are necessary parties herein and it would be difficult to enforce a Judgment or order emanating from this matter without them.
11. The Plaintiff opposed the instant Application by filing a Notice of Preliminary Objection as well as a Replying Affidavit. In the said Notice of Preliminary Objection, he avers that:
 1. The Defendant herein seeks to enjoin M/S Florence Njeri Mungai, Mr. Stephen Muriu, Mr. Urbanus Kaloki, Mr. Gideon Musyoki and Ms. Maureen Temu as the 2nd, 3rd, 4th, 5th and 6th Defendants respectively without following due legal procedure and as such will plunge this legal process into a procedural quagmire.
 2. The Defendant's Application is therefore fatally defective, bad in law and an abuse of Court process and ought to be struck out with costs forthwith.
12. In the Replying Affidavit, he contends that the Application offends rules of basic but pertinent and cognitive procedure rendering its probative value vis a vis the intention of the Defendant herein nugatory. He argues that should the court allow the instant Application, the Defendant will be abdicating his duty with regard to extraction of summons to enter appearance, tracing and service upon the said proposed Defendants to the Plaintiff. Further, that the issue for determination is



encroachment upon his land. He insists that the proposed Defendants should be joined as Third Parties. He avers that he stands to suffer prejudice if the Application is allowed. He reiterates that the Defendant continues to construct on the suit land to his detriment.

13. The Application was canvassed by way of written submissions.

Analysis and Determination

14. Upon consideration of the Notice of Motion Application dated the 29th April, 2021 including the respective affidavits, annexures, Notice of Preliminary Objection as well as rivaling submissions, the only issue for determination is whether the proposed Defendants should be allowed to be joined in these proceedings.
15. The Defendant in his submissions reiterates his averments and provides a history of the suit lands. He argues that the Plaintiff is guilty of material non-disclosure as he concealed the fact that the parties herein together with other registered owners of parcels of land situated in the same area being Mavoko Town Block 2/5301-5314 had engaged the Local Provincial Administration in a bid to solve the existing boundaries dispute. Further, that the Plaintiff intentionally concealed the fact that he was duly offered by one Mr. Stephen Muriu, the previous owner of the mother title, a vacant parcel of land within the same area to replace the lost one.
16. He further submits that the proposed Defendants are necessary parties to the suit and the Plaintiff's Preliminary Objection should be disallowed. Further, that both the Plaintiff and himself have definite proprietary rights which only need a boundary ascertainment. To buttress his averments, he relied on the following decisions: *Jashvantsing L Solanki v Diamond Trust Bank (K) Ltd* (2013) eKLR and *Technomatic Limited TIA Promopack Company v Kenya Wine Agencies Limited & another* (2014) eKLR.
17. The Plaintiff in his submissions reiterates his averments and insists that the intention of the Defendant herein to join other Defendants to the suit herein is fatally defective and not even the Oxygen Principle can resuscitate this. To support his arguments, he has relied on the following decisions: *Nicholas Kiptoo Arap Salat v IEBC & 6 Others* (2013) eKLR and Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others}} (2014) eKLR.
18. In respect to joinder of a Defendant to a suit, order 1 rule 10(2) of the *Civil Procedure Rules* stipulates *inter alia*:
- “(2) 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.”
19. In the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya* (2014) eKLR, it was 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. On perusal of the pleadings herein including documents filed, I note the Plaintiff filed his Plaint on 28th January 2021 where he sought for eviction orders as well as a permanent injunction restraining the Defendant or his agents or any other person claiming under him from interfering with land known as Mavoko Town Block 2/5303. Further, the Defendant filed a Defence including Counter-claim, where he denied the Plaintiff’s claim and it emerged that Mavoko Town Block 2/5303 and Mavoko Town Block 2/5304 were resultant subdivisions of Mavoko Town Block 343 and 344 respectively that were initially owned by Stephen Muriu.
21. The Defendant in his Defence explained that there was an error during the subdivision which was brought to light that even though in the sketch map, the Plaintiff’s suit property is sandwiched between the Defendant’s land as well as Mavoko Town Block 2/5302, however the same was non-existent on site. Further, that the representative of the vendor one Charles Muriu Mwangi offered the Plaintiff a vacant parcel of land to replace the lost one.
22. The Defendant has also sought for various prayers including an order for the Machakos District Land Registrar to carry out a resurvey with a view to reassigning the boundaries as per the current existing boundaries.
23. The Plaintiff has not denied subdivisions of Mavoko Town Block 343 and 344 yielded several parcels of land ranging from Mavoko Town Block 2/5300-5314. Further, that the proposed Defendants are owners of some of the aforementioned parcels. The Plaintiff’s main contention is that the Defendant has adhered to a wrong procedure and the proposed Defendants should be joined as third parties.
24. In the case of *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.”
25. Based on the facts as presented and relying on the legal provisions I have quoted while associating myself with the cited decisions, I opine that since the main issue in dispute between the Plaintiff and Defendant revolves around encroachment to land and boundary dispute, noting that some of the proposed Defendants purchased the aforementioned resultant subdivisions from one Stephen Muriu who was the original owner of the mother title, they are actually necessary parties to this dispute.



Further, that their involvement in these proceedings is necessary to enable the court effectually and completely adjudicate upon as well as settle all questions involved in the suit. From the prayers sought in the Counter-claim in respect to re survey, it is my considered view that they will be affected by any decision emanating from this suit. To my mind, noting that there is even a Counter-claim, I find that the Plaintiff has not demonstrated what prejudice he stands to suffer if the proposed Defendants were joined in these proceedings as Defendants.

26. It is against the foregoing that I find the Notice of Motion Application dated the 29th April, 2021 merited and will allow it. I will disallow the Notice of Preliminary Objection dated 2nd June, 2021. Costs will be in the cause.
27. I direct that the Defendants be served with summons to enter appearance within thirty (30) days from the date hereof, after which they are directed to file and serve their respective Defences in fourteen (14) days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY, 2023

CHRISTINE OCHIENG

JUDGE

