



**Ngumi v Asava (Environment and Land Appeal 25 of 2021)
[2023] KEELC 19911 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 25 OF 2021
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

ELIZABETH WAITHERA NGUMI APPELLANT

AND

AVUTAGA WYCLIFFE ASAVA RESPONDENT

*(Being an appeal arising from the interlocutory ruling and order of Honourable
K. Bidali CM sitting in Naivasha in Naivasha CM ELC E007 of 2020-
Avutaga Wycliffe Asava(plaintiff) Vs. Elizabeth Waithera Ngumi(defendant))*

JUDGMENT

1. The background to the present appeal is that the respondent filed suit against the appellant seeking injunction and eviction orders as well as damages on the grounds that the defendant had trespassed onto Gilgil Township Block 3/445 (the suit land), built structures thereon and rented the same to business people without regard to the fact that the government had allocated the respondent the said portion of land. The appellant filed a statement of defence stating that the plaintiff's registration as proprietor if any was subject to rights acquired or in the process of being acquired by virtue of prescription and/or adverse possession; that the respondent had not demonstrated connection between the letter of allotment and the certificate of lease; that she erected houses on the suit land in 1981 and the respondent became entitled to the land only in 2020 when title was issued. She also filed a counterclaim stating that she had acquired plot No 194 from the original allottee in 1980, took immediate possession and developed the same. Thereafter adjudication was done and the suit land was issued with a number, LR 1317/212/64. The officials of the County council of Nakuru showed the suit land to the appellant in 1980 and she obtained approval of building plans and erected dwellings thereon. Adjudication and issuance of allotment letters was done in 1990 and the suit land was shown as LR 1317/212/65 on the ground. The plaintiff stated that she has therefore been in occupation on the land parcel for 40 years or so and has therefore acquired it by adverse possession as no



eviction proceedings were commenced after allocation was done. In 2014 a surveyor from the County government of Nakuru confirmed upon a visit that the physical location of LR No 1213/212/64 was occupied by the plaintiff while 65 was occupied by a third party.

2. Armed with the above described facts in her defence, the appellant applied to join the County Government of Nakuru to the suit as a third party. It is necessary to state at this point that the grounds in her application upon which the appellant sought to join the County Government as a third party are that she has been in occupation since 1981 and has acquired rights by prescription /or adverse possession and that the wrongful occupation has been caused by confusion on the part of the County Government, and that the County Government had through its surveyor acknowledged its error. The plaintiff avers that the dispute has arisen from the County Government of Nakuru's incorrect identification of plots to the occupants, and that she is entitled to claim full indemnity from the County Government.
3. This interlocutory appeal arises from the dismissal of the third party joinder application that the appellant filed on 9/8/2021 before the trial court which sought to an order that the appellant be granted leave to issue a third party notice to the County Government of Nakuru. The learned trial Magistrate Hon Bidali, CM stated that the appellant's claim against the respondent is that of adverse possession while the appellant's claim against the proposed third party is that of being shown the wrong parcel of land which she has now developed. He dismissed the application on 8/10/2021 on the principal ground that the issues arising should be triable only between the defendant and the third party, thus prompting the appeal whose main grounds as contained in the memorandum can be summarized as follows:
 - a. That the learned trial magistrate erred in law in the interpretation of order 1 rule 15 in that he allowed the plaintiff participation in the third party joinder motion while the rules envisage only an ex parte application;
 - b. That further the learned trial magistrate erred in construing the provisions of the paragraphs of order 1 rule 15 conjunctively rather than disjunctively;
 - c. That the learned trial magistrate erred in substantive law and procedural law and arrived at a finding that is neither supported by the authority that he cited nor the higher constitutional ideal of the need to do justice in every case.
4. The appeal was ordered disposed of by way of written submissions and both parties filed theirs of which I have had consideration while preparing the present judgment.
5. The issue that arises in the present case is whether the trial magistrate erred in his interpretation and application of Order 1 Rule 15 and in having the application heard inter-partes and in disallowing the joinder application.
6. Regarding the first issue I have examined the provisions of Order 1 Rule 15 and it provides as follows:

“ 15. Notice to third and subsequent parties [Order 1, rule 15.]

 - (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of



the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
- (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
- (4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.
- (5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.”

7. There is therefore no dispute that Order 1 Rule 15 (c) provides for an application for leave to issue a third party notice to be made by an ex parte application in chambers. The participation of the plaintiff is not necessary in the hearing of that application. The ruling delivered by the trial magistrate shows clearly that the plaintiff was involved in the application and that he opposed it. In this court’s view, the appellant’s view is correct in that the entertaining by the trial court of the plaintiff’s arguments at the hearing of the ex parte application was improper and unsupported by the rules.



8. The next issue relating to the trial court's interpretation of the rule is whether the trial magistrate erred in holding that the issues between the defendant and the proposed third party should be essentially interlinked with the issues between the plaintiff and the defendant. On that issue a further perusal of Order 1 Rule 15 shows that the same provides for joinder of third parties not already party to the suit by a defendant who considers that:
 - a. he is entitled to contribution or indemnity from a proposed third party;
 - b. he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same relief or remedy claimed by the plaintiff;
 - c. he is claiming that any question or issue relating to or connected with the subject matter of the suit is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendants but also as between the plaintiff and the defendant and the third party.
9. The appellant submits that all that an applicant needs to do at the application stage is to demonstrate the nature of relief that he or she claims against the third party and there is no obligation to present evidence of liability. In this court's view that is only partially correct in that the grounds relied on for the seeking of the relief against the proposed third party are also not to be left behind. I have examined the third party joinder application and in my view it provided the appropriate grounds and the relief proposed to be sought against the third party once joined.
10. I am also in agreement with the appellant's submission that Order 1 Rule 15 provides for several distinct scenarios which may require joinder of a third party and the paragraphs of that rule ought not be construed conjunctively. The trial magistrate appears to have misdirected himself by confining the determination of that application only on the basis of whether there was interlinkage between the plaintiff's and defendant's claim on one hand and the defendant's and the proposed third party's claim on the other. In this court's view, the mere mention in the third party joinder application of the appellant's need to join a third party to bear liability for contribution or indemnity and the providing of the ground upon which such proposed relief was sought to be claimed was sufficient basis upon which to grant the order sought as long as the claim arose in relation to a subject matter of the suit between the plaintiff and the defendant.
11. With regard to whether the trial magistrate erred in arriving at a finding that was not supported by the higher ideal to do justice in all cases, the appellant cited Article 48 of the Constitution which is in respect of facilitation by the state to all persons to ensure access to justice. In the present case the appellant had access to justice facilities and all that is in issue is how the interpretation of a procedural law affected her opportunity to seek justice against a third party by whom she felt aggrieved. There are no non-deliberative or rather merit based barriers to her attempts to obtain justice against the County as would allow the provisions of Article 48 to kick in. It is a matter of interpretation of procedural law that aggrieved her.
12. It is this court's view that the provisions of Article 50 of the Constitution would play a greater role in this regard in that it provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The question would rather lie in the direction of whether it was fair in terms of both procedural law and substantive law to deny the appellant the constitutional right to ventilate her grievance against the County in the same proceedings filed by the respondent, yet her grievance with the County was in relation to the subject matter of that very suit. Taking a further look at the horizon, an onlooker may foresee potential injustice in future by way of the now avoidable



need for ventilation of the res judicata doctrine, or worse still, the possible occurrence of the noxious mischief of multiplicity of suits. In this court's view, failure to join all the residents on the ground who are directly or indirectly affected by the wrong numbering and allocation of plots within the locality in the respondent's suit is already grievous enough and the question arises as to whether justice can truly be done with only the present two parties litigating, but that is an issue for another day or for the parties to contemplate upon.

13. The upshot of the foregoing is that the appellant's appeal has merit and it must succeed. Consequently, I hereby issue the following final orders:
- a. The order and ruling delivered by Hon K. Bidali on 8/10/2021 dismissing the application dated 9/8/2021 is hereby set aside and it is hereby substituted with an order allowing the application dated 9/8/2021.
 - b. Consequently, a third party notice shall issue at the appellant's instance to the County government of Nakuru under order 1 rule 15 of the *Civil Procedure Rules* and the sequential mechanisms expected under order 1 rule 15 to Order 1 Rule 22 shall be effected as may be necessary to ensure the appellant's proposed claim against the third party is brought before court.
 - c. The costs of both the application dated 9/8/2021 in the trial court and of this appeal shall be borne by the respondent in this appeal who opposed both the application and the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

