



**Seii v Githaiga & 3 others (Environment & Land Case 300 of 2012)
[2023] KEELC 20298 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 300 OF 2012
OA ANGOTE, J
SEPTEMBER 21, 2023**

BETWEEN

JEPCHIRCHIR TERIKI SEII PLAINTIFF

AND

MEDAD NGUNJIRI GITHAIGA 1ST DEFENDANT

JOSEPH WAMBUGU GITHAIGA 2ND DEFENDANT

HELLEN WANGUI GITHAIGA 3RD DEFENDANT

THE LAND REGISTRAR 4TH DEFENDANT

RULING

1. In the application dated August 24, 2022, the plaintiff has sought the following reliefs:
 - a. This honourable court be pleased to make an order to join the Land Registrar Nairobi as a defendant in this matter.
 - b. This honourable court be pleased to make an order directing that upon joinder of the Land Registrar Nairobi as a defendant in this matter, the Land Registrar Nairobi be compelled to produce the Land Titles for Land Reference Numbers L.R. 5948/14 and L.R. 5948/16 and immediately release to the Plaintiff/ Plaintiff.
 - c. This honourable court be pleased to make an order directing that upon joinder of the Land Registrar Nairobi as a defendant in this matter, and the production by the Land Registrar Nairobi of the Land Titles for Land Reference Numbers L.R. 5948/14 and L.R. 5948/16, the Plaintiff shall be granted leave to subsequently amend her Further Amended Originating Summons amended on April 9, 2018 to include the two titles.



d. Costs be in the cause.

2. The application is based on the grounds on the face of it and the supporting affidavit sworn by Jepchirchir Teriki Seii, the plaintiff, who deponed that she was married to the 2nd defendant between June 8, 2002 and December 4, 2020 and that during the said time, the 2nd defendant approached the 1st defendant (her father in law) and the 3rd defendant, requesting an opportunity to purchase one of their properties in Karen, Land Reference No. 5448/14 known as No. 3 Tree lane (Currently No. 29 Makena's Place).
3. The plaintiff deponed that the 1st defendant responded on 3rd October 2008 through email stating that he had "given and gifted" both himself and the 2nd defendant half an acre with an option to purchase the other half of the land.
4. It is the plaintiff's case that she and the 2nd defendant raised the sum of Kshs. 5,500,000/- required for buying the other half acre and refurbishing the house, through joint savings of both herself and the 2nd defendant and a loan taken by the 2nd defendant.
5. According to the plaintiff, the 2nd defendant sent an email to the 1st and 3rd defendants on 05/02/2009 informing them of the manner in which herself and the 2nd defendant intended to pay off the price of the house; that the 2nd defendant and herself thereafter purchased the suit property; that herself and the 2nd defendant later wrote an email to their families on March 6, 2009 informing them that they were considering using the property as a guest house and that the 1st defendant responded to the email on the same day.
6. It is the plaintiff's case that she later realized that the 2nd defendant had removed her name from the Lease and was no longer interested in pursuing the interest of the family but was hiding behind the curtain of the 1st defendant with the intention of pushing the property from her reach, hence this case.
7. The 1st and 3rd defendants filed Grounds of Opposition in which they averred that no common questions of fact or law arise between the defendant and the proposed 4th defendant; that the grounds set out in the Motion do not meet the threshold test set out in Order 1 Rule 3 of the Civil Procedure Rules and that Order 16 Rule 1 provides a complete remedy for the production of documents or summoning of witnesses without the need for joinder of the proposed 4th defendant as a party to the suit.
8. The defendants averred that while the Plaintiff's basis of the application is an affidavit filed by the 2nd defendant in September 2014, they have not provided this court with any explanation for the 8 years delay in seeking to amend the Further Amended Originating Summons and that article 35(1), 50(k) and 159 of the Constitution are incapable of invoking the jurisdiction of the court for purpose of amendment of pleadings and joinder of parties.
9. The 2nd defendant also filed Grounds of Opposition in which he averred that the application lacks merit, is prejudicial and its sole objective is to perpetuate these proceedings in this court; that the application is speculative and a fishing expedition calculated to delay the fair hearing and determination of the suit; and that the Plaintiff has not demonstrated a reasonable cause of action against the intended 4th defendant.
10. The parties filed their respective submissions and authorities which I have considered.



Analysis and Determination

11. This suit was instituted in 2012 by the Plaintiff by way of an Originating Summons seeking the court to determine whether the 1st defendant led the her and the 2nd defendant to believe that they had purchased the suit property from him; whether the 1st defendant is now estopped from claiming title over the suit property despite never transferring the title to them and whether this court can make an order for specific performance against the 1st defendant.
12. This application was triggered by an affidavit sworn by the 1st defendant, wherein he disputed the existence of Land Reference Number 5948/14 and provided a different number being 5948/16. The Plaintiff has consequently filed this application seeking the joinder of the Land Registrar to clarify the issue of the proper title to the suit property.
13. Order 1 Rule 3 of the [Civil Procedure Rules](#) 2010 states that a person may be joined as a defendant against whom any right to relief arising out of an act or transaction is alleged to exist.

“All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.
14. Under Order 1 Rule 10(2), a court may, either on application made by a party or without, allow joinder of a party whose presence it considers to be necessary in a suit. This rule 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 power of a court to order joinder is one based on its discretion. Such power must be exercised judiciously and in accordance with the parameters set out in Order 1 Rule 10(2) of the [Civil Procedure Rules](#). This was ably elucidated in the case of [Civicon Limited v Kivuwatt Limited and 2 others](#) [2015] eKLR where 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.”

16. The court in *Joseph Njau Kingori v Robert Maina Chege & 3 others* [2002] eKLR distilled the guiding principles in considering whether to allow joinder of an intending party 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. Courts have further held that a party is necessary to a suit where it is shown that the legal reliefs sought would directly affect the person sought to be enjoined, to avoid a multiplicity of suits and where it is shown that the defendant cannot effectually set a defence unless that person is joined in it. This was set out in the Ugandan case of *Departed Asians Property Custodian Board vs Jaffer Brothers Limited* [1999] 1 EA 55 quoted with approval by the Court of Appeal in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR:

“ 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.”

18. The Court of Appeal also quoted its earlier decision in *Meme v Republic* (2004) KLR 637 wherein it held that joinder will be permissible:

- i. Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;
- ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
- iii. Where the joinder will prevent a likely course of proliferated litigation.”



19. In *Sammy Kanyi Kareithi v Barclays Bank of Kenya & 2 others; Ross Xavier Whitbey (Plaintiff)* [2021] eKLR as follows:

“Firstly, the court is empowered to join a party to a suit at any stage of the proceedings with or without an application by any party. Secondly, the mere delay in filing an application for joinder is not fatal. The pending suit is yet to be heard and the Plaintiff has not demonstrated what prejudice it has suffered by the late filing of the application. In the case of *Central Kenya Limited v Trust Bank Limited and 5 others* [2000] eKLR, the High Court had declined to grant leave to the Appellant to amend its plaint and to join additional defendants to the suit. In allowing the appeal, the Court of Appeal held that mere delay was not sufficient ground for declining leave unless such delay was the kind which could prejudice the adverse party beyond compensation in costs.”

20. On the basis of the above legal provisions and authorities, this court must now consider whether the proposed 4th defendant, the Land Registrar, ought to be enjoined to this suit. As has been set out in detail, the question herein is whether the Land Registrar is a necessary party to this suit; whether a relief flows from the proposed defendant to the Plaintiff or whether his presence is necessary to settle all questions involved in this suit.
21. It is clear from the facts herein that the joinder of the Land Registrar is with respect to proper identification of the suit property disputed herein. Further, the declaratory reliefs sought by the Plaintiff include orders that the 1st defendant subdivide the suit property into two halves and that one half of the suit property be transferred to her and the 1st defendant.
22. Considering that the Land Registrar is the custodian of all titles and would be the one to be called upon to effect any changes with respect to the title of the suit property herein, if at all, this court is satisfied that the proposed 4th defendant is a necessary party to this suit. Indeed, the delay in filing this application has not prejudiced the defendants in any
23. The Plaintiff herein has sought a mandatory injunction to compel the Land Registrar to produce title to the suit land and to release the same to her.
24. It is trite that a mandatory injunction can only be granted in an interlocutory application where special circumstances are established. This position was well stated by the Court of Appeal in *Kenya Breweries Ltd & another v Washington O Okeya* [2002] eKLR as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

25. It is also a settled principle that a mandatory injunction should not be granted at the interlocutory stage if it has the effect of granting the final relief.
26. In this case, the Land Registrar is the custodian of all land records, and this court can compel the 4th defendant to produce these government records at an appropriate time. At this interlocutory stage, however, an order to compel the release of title documents to the Plaintiff would be unprocedural.



27. This is because such an order circumvents the trial process and will in effect be a final relief without the evaluation of the merits of each party's case. Further, the Plaintiff has in no way argued or established any special circumstances that would necessitate that this relief be granted at this stage of trial.
28. In addition, other than copies, titles to land are not held by the Land Registrar, but rather, by the registered owners of land. Consequently, the orders as framed by the Plaintiff cannot be granted.
29. The Plaintiff has sought to amend her Amended Originating Summons if the order for the production of the titles of LR Nos 5948/14 and L.R. 5948/16 by the Land Registrar is granted.
30. Order 8 Rule 5(1) of the *Civil Procedure Rules* provides 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.”
31. The Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, quoted its earlier decision in *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991, in which it referred to *Bullen and Leake & Jacob's Precedents of Pleading* - 12th Edition on amendment 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 plaint the defendant would be deprived of his right to rely on Limitation Acts.”
32. This court is guided by the above. Certainly, should the 4th defendant file pleadings that establish that the suit in dispute is LR No. 5948/16, as argued by the 1st defendant, and not LR No. 5948/14 as indicated in the Plaintiff's pleadings, the Plaintiff will be required to amend her pleadings. Such amendment will however be limited to the proper identification of the parties and the suit property, to ensure that this suit is determined on its merits and not dismissed on a technicality.
33. In conclusion, the Plaintiff's application dated August 24, 2022 succeeds partially. This court grants the following orders:
- a. The Land Registrar, Nairobi, is joined in this suit as a 4th defendant.
 - b. The Land Registrar, Nairobi, to file a Replying Affidavit within 14 days of the date of this Ruling, and service of the Originating Summons.
 - c. The Plaintiff is hereby granted leave to amend the Amended Originating Summons within 14 days of the 4th defendant filing their pleadings.



d. Costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF
SEPTEMBER, 2023.**

O. A. ANGOTE

JUDGE

