



**Ojwang v Ntional Irrigation Authority & another (Environment & Land Case E010 of 2022) [2023] KEELC 21557 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21557 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E010 OF 2022  
AY KOROSS, J  
NOVEMBER 16, 2023**

**BETWEEN**

**JOHN SIRADUK OJWANG ..... PLAINTIFF**

**AND**

**NTIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Pursuant to the provisions of article 159 (2) of the *Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act* and orders 1 rule 10 (2), 2 rule 15 and 51 rule 1 of the *Civil Procedure Rules*, the 1<sup>st</sup> defendant has filed a notice of notion dated 06/12/2022 against the plaintiff and seeks the following main relief:
  - a. That the honourable court be pleased to strike out the suit as against the 1<sup>st</sup> defendant.
2. The motion is supported by grounds enumerated on its face and on the supporting affidavit deposed on 06/12/2022 by the 1<sup>st</sup> defendant's senior irrigation engineer Mr. Stephen Mutinda.
3. Mr. Mutinda contends the entire suit is frivolous, vexatious, scandalous and grossly redundant and an abuse of court process as it did not disclose a reasonable cause of action against the 1<sup>st</sup> defendant. Further, the plaint is silent on the cause of action against the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant has nothing to do with land parcels no. Siaya/Nyadorera B/1975 and Siaya/Nyadorera B/1976 (suit properties). In addition, the 1<sup>st</sup> defendant is an unnecessary party in the proceedings.
4. By the firm of P.C. Onduso & Co. Advocates who is on record for the plaintiff, the plaintiff, in opposition, filed grounds of opposition dated 20/12/2022. In it, he posits one ground; the motion is premature, lacks merit, frivolous, misconceived and an abuse of court process. The 2<sup>nd</sup> defendant



did not file any documents in opposition or file submissions. The motion is canvassed by written submissions.

### **1<sup>st</sup> Defendant's Submissions**

5. Its counsel, Mr. Akuya, for the firm of J.O.Juma & Company Advocates, filed written submissions dated 15/06/2023. The submissions identify a single issue for determination; whether the 1<sup>st</sup> defendant is a necessary party and is properly joined to these proceedings.
6. Counsel submits by order 1 rule 10 (2) of the *Civil Procedure Rules*, this court has discretionary power to order an improperly joined party be struck from proceedings.
7. According to counsel, the decision of *Werrot and Company Limited and others v Andrew Douglas Gregory and others*, Nairobi Milimani High Court Civil Case Number 2363 of 1998 [1998] LLR 2848 (CCK) sets out the litmus test in determining whether a party is suitable in a case when the court stated: -

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

8. In applying the 1<sup>st</sup> test, counsel submits the claim and plaintiff's documents show the suit is between the plaintiff and 2<sup>nd</sup> defendant and if at all the 1<sup>st</sup> defendant is compulsorily acquiring land, then it is being conducted under the auspices of the Ministry of Water, Sanitation and Irrigation. Counsel submits, it is evident the 2<sup>nd</sup> defendant is not a necessary party and it is being exposed to unnecessary expense.
9. On the 2<sup>nd</sup> test, counsel submits that apart from the descriptive part of the plaint and general reliefs against the defendants jointly without any reference to the 1<sup>st</sup> defendant, the plaint is bereft of any claim against the 1<sup>st</sup> defendant. Counsel submits the case is a misjoinder and no cause of action has been demonstrated against the 1<sup>st</sup> defendant.

### **Plaintiff's submissions**

10. His counsel, Mr. Onduso, filed written submissions dated 26/07/2023. Counsel adopted the 1<sup>st</sup> defendant's issue. In arguing the ground of opposition to the motion, counsel submits the 1<sup>st</sup> defendant is actively involved in compulsory acquisition and because of laches, it is liable and a claim lies against the 1<sup>st</sup> defendant. To buttress his position, counsel relies on the case *Jaffer v Standard Group Ltd & another* (Civil Case E101 of 2020) [2022] KEHC 9836 (KLR) (Civ) (14 July 2022) (Ruling) which stated: -

“...every person who takes part in or procures the publication is prima facie liable jointly and severally for damages caused.”

### **Analysis and Determination**

11. Having considered the motion and its grounds, affidavit, grounds of opposition, parties' rival submissions and well cited provisions of law and authorities which shall guide this court, I will adopt the parties' issue as the single issue for determination.



12. As a preliminary matter, by the provision of order 1 rule 25 of the *Civil Procedure Rules*, the 1<sup>st</sup> defendant should have approached this court by way of a chamber summons and not in the manner it did. However, this court considers this a technical error and curable by article 159 (2) (d) of the *Constitution*.
13. As submitted by Mr. Akuya, the legal framework for joining or striking out a party from court proceedings is set out in order 1 rule 10 (2) of the *Civil Procedure Rules* which states 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.”
14. From this provision of law, it emerges the court may on its own motion or on application of any party to the proceedings as the circumstances herein, order the striking out of a party, who it finds is improperly joined. In the exercise of its discretion, the court must as a matter of cause, act according to reason, fairness and not according to its whims and caprice.
15. Order 1 Rule 3 of the *Civil Procedure Rules* outlines who a proper defendant is when it states as follows:

“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.”
16. While citing with approval the Supreme Court of Uganda case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU), the case of *Julius Meme v Republic & another* [2004] eKLR quoted an extract of the decision of Mulenga, JSC where the Learned Judge stated;

“The foregoing passage spawns certain principles which are opposite to the joinder of parties in a constitutional reference such as the present one: (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; (iii) joinder to preempt a likely course of proliferated litigation.”
17. By order 1 rule 5 of the *Civil Procedure Rules*, it is not necessary for the defendant to be interested in all reliefs and Order 1 Rule 7 thereof allows a plaintiff when in doubt, to join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.
18. Any person who is not or who will not be affected by the determination of the suit one way or the other or against whom the plaintiff's claims against but no cause of action has been disclosed has no business whatsoever being made a party to the suit. Such a party against whom there exists no cause of action is said to have been improperly joined as he has nothing to answer to in the suit though called upon to do so. See *Werrot and Company Limited* (Supra).
19. From paragraph 5 of the plaint, the plaintiff contends the 1<sup>st</sup> defendant caused to be published certain notices on behalf of the Ministry of Water, Sanitation and Irrigation. Further, the plaintiff made several



claims jointly against the defendants. However, in the reliefs, it is uncertain which defendant he seeks his claim against because some of the reliefs are sought against a singular defendant; it is uncertain whether it is against the 1<sup>st</sup> or 2<sup>nd</sup> defendant.

20. By section 107 of the [Land Act](#), the 2<sup>nd</sup> defendant which is a government body receives instructions from national and county governments on compulsory acquisition of land. In doing so, it must adhere to certain steps. From the record and circumstances of this case, the 2<sup>nd</sup> defendant received instructions from the Ministry of Water, Sanitation and Irrigation which is a body under the national government.
21. The 1<sup>st</sup> defendant is a national government body. At this stage, it is uncertain if the 1<sup>st</sup> defendant is a conduit of the Ministry of Water, Sanitation and Irrigation or if it instructed the Ministry of Water, Sanitation and Irrigation to instigate the process of compulsorily acquiring land or is liable for certain actions as alleged in the claim. In my view, this has to await full trial. I find the 1<sup>st</sup> defendant is a necessary party to these proceedings.
22. For the foregoing reasons and findings, the upshot is that the notice of motion dated 6/04/2023 is devoid of merit. It is accordingly dismissed. Costs shall be in the cause. Matter to be mentioned for directions on hearing on 06/2/2023.
23. It is so ordered.

DELIVERED AND DATED AT SIIAYA THIS 16<sup>TH</sup> DAY OF NOVEMBER 2023.

**HON. A. Y. KOROSS**

**JUDGE**

**16/11/2023**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Mr. Onduso for the plaintiff

Mr. Gakuya James for 1<sup>st</sup> defendant

N/A for 2<sup>nd</sup> defendant

Court assistant: Ishmael Orwa

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