



Ouko & another v Mworja; Omwenga (Intended Interested Party) (Environment and Land Case Civil Suit 502 of 2011) [2023] KEELC 22483 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 502 OF 2011**

**JO MBOYA, J
DECEMBER 18, 2023**

BETWEEN

AARON TAFASIRI OUKO 1ST PLAINTIFF

**ROSALYN DOLLA OUKO (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF THE LATE JASON ATINDA OUKO - DECEASED) .. 2ND PLAINTIFF**

AND

JOHN MWORIA DEFENDANT

AND

NAHASHON OMWENGA INTENDED INTERESTED PARTY

RULING

Arguments

1. The Intended Interested Party, namely, Nahashon Omwenga has approached the Honourable court vide Notice of Motion Application dated the 4th December 2023; brought pursuant to inter-alia, the provisions of Order 1 Rule 10(2) of the *Civil Procedure Rules*; and in respect of which same has sought for the following reliefs; [verbatim]
 - i.Spent
 - ii. The Honorable court be pleased to issue/grant a stay of execution of the Judgment and Decree issued vide Nairobi ELC No 502 of 2011 dated the 3rd July 2023, allowing the Plaintiff to evict the Defendant from the parcel her presently occupies pending the hearing and determination of this application.



- iii. That the Honorable court be pleased to issue a stay of the enforcement of the orders issued by the ELC vide ELC No 502 of 2011 dated the 3rd July 2023, pending the hearing and determination of this Application.
 - iv. This Honorable court be pleased to grant Leave to Nahashon Omwenga, [the Interested Party] herein to join in the suit, as a person who has an identifiable stake and legal interest and duty in the proceedings.
 - v. This Honorable court be pleased to order that the Judgment entered on the 3rd July 2023; be reviewed and the orders issued therein together with consequential orders be set aside and that leave be granted to the Interested Party to file pleadings, as well as any such documents that he deems fit to support his claim over the suit property.
 - vi. That this Honorable court be pleased to order the suit herein to be heard De-novo.
 - vii. That this Honorable court do make such other further orders and/or directions as it may deems necessary in the circumstances.
 - viii. Costs of the Application be provided for.
2. The instant Application is premised and/or anchored on a plethora of grounds, which have been enumerated at the foot of the Application. Furthermore, the Application is supported by the affidavit of one, namely, Nahashon Kebwaro Omwenga; sworn on even date and in respect of which same has annexed one document, namely, a copy of the Originating summons filed vide ELC No 311 of 2011.
 3. Upon being served with the said Application, the Plaintiffs herein filed a Replying affidavit sworn by the 1st Plaintiff/Respondent and which affidavit is sworn on the 15th December 2023. For coherence, the Plaintiff/Respondents have contended inter-alia, that the instant Application has not only be made and/or mounted with unreasonable and inordinate delay, but, same is misconceived and legally untenable.
 4. Be that as it may, the instant Application came up for hearing on the 18th December 2023, whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of oral submissions.
 5. Consequently and in this regard, the Honourable court proceeded to and issued directions for the disposal of the Application, in the manner sought. For coherence, the Application was duly canvassed by way of oral submissions.

Parties' Submissions:

Applicant's Submissions:

6. The Applicant herein adopted and reiterated the grounds contained at the foot of the Application and furthermore reiterated the contents of the supporting affidavit sworn on the 4th December 2023. Besides, the Applicant herein thereafter raised, canvassed and highlighted three [3] grounds for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein bought and/or purchased a portion of the suit property from Jashon Atinda Ouko, now Deceased, in the year 1993; and thereafter the said Jashon Atinda Ouko, now deceased, curved out a portion of the suit property to and in favor of the Applicant.



8. On the other hand, Learned counsel for the Applicant has submitted that thereafter the Applicant herein entered into and executed a sale agreement with the Defendant herein and whereupon the Applicant sold to and in favor of the Defendant a portion of what had hitherto been sold unto him (Applicant) by one Jashon Atinda Ouko, now deceased.
9. Arising from the foregoing, Learned counsel for the Applicant has submitted that the Applicant herein therefore has a stake and/or interest in the suit property, which is the subject of the instant proceedings and thus same ought to be joined as an Interested Party.
10. Secondly, Learned counsel for the Applicant has submitted that the Honorable court is seized and or possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject Application; and in particular, to allow the joinder of the Applicant herein as an Interested Party.
11. Thirdly, Learned counsel for the Applicant has submitted that a Judgment has since been delivered in respect of the instant matter and wherein the Honourable court has since ordered and/or decreed the eviction of the Defendant from the suit property. Consequently and in this regard, Learned counsel for the Applicant has contended that the enforcement and/or execution of the decree under reference shall affect the rights and interests of the Applicant.
12. Finally, Learned counsel for the Applicant has submitted that the court is similarly seized of the Jurisdiction to set aside and/or review the Judgment under reference and thereafter allow the Applicant to be admitted as an Interested Party.
13. Premised on the foregoing, Learned counsel for the Applicant has thus implored the court to find and hold that the Application before hand is meritorious and thus ought to be allowed.

Plaintiffs'/respondents' Submissions:

14. The Plaintiffs herein relied on and adopted the contents of the Replying affidavit sworn on the 15th December 2023; and thereafter raised, highlighted and canvassed three [3] salient issues for consideration by the court.
15. First and foremost, Learned counsel for the Plaintiffs/Respondents' has submitted that the instant suit and/or proceedings was heard and concluded upon the delivery of the Judgment on the 3rd July 2023. In this regard, Learned counsel for the Respondents' has therefore submitted that there are no more proceedings to and in respect of which the Applicant herein can be admitted to.
16. Secondly, Learned counsel for the Respondents' has also submitted that upon the delivery of Judgment rendered on the 3rd July 2023, the Defendant herein proceeded to and filed a Notice of Appeal, whereby same sought to challenge the terms of Judgment and the resultant decree of the court.
17. Furthermore, Learned counsel for the Respondents' has also submitted that other than the Notice of Appeal, which was filed by the Defendant/Respondent, same [Defendant/Respondent], has also proceeded to and filed a substantive appeal before the Court of Appeal, which appeal is pending hearing and determination.
18. Based on the foregoing, Learned counsel for the Plaintiffs/ Respondents' has therefore submitted that insofar as the Judgment under reference is the subject of an appeal before the Court of Appeal, then this court cannot endeavor to impeach and/or upset the Judgment, without subordinating the process/proceedings before the Court of Appeal.
19. Finally, Learned counsel for the Respondents has submitted that the Applicant herein has been aware and/or knowledgeable of the existence of the instant suit from the onset. Further and in any event,



Learned counsel added that on or about March 2023, the Defendant/Respondent herein filed an affidavit and wherein it was intimated that the current Applicant was desirous to attend court and testify in respect of the instant matter.

20. To the extent that the Applicant herein was privy to and/or knowledgeable of the existence of the suit, at the very latest on the 6th March 2023, Learned counsel for the Respondents' has therefore contended that the current Application has been mounted with unreasonable and inordinate delay, which has neither been accounted for nor explained.
21. In view of the foregoing, Learned counsel for the Plaintiffs/Respondents has contended that the Application beforehand is not only premature and misconceived, but same is devoid and bereft of merits.

Defendant's Submissions

22. Though served with the subject Application, the Defendant/Respondent neither filed any Grounds of opposition nor Replying affidavit.
23. Furthermore, it is worthy to state and observe that Learned counsel for the Defendant/Respondent intimated to the court that insofar as the Defendant/Respondent has since filed/lodged a substantive appeal, same [Defendant/Respondent], is therefore not keen to participate in the current Application.
24. Pertinently, Learned counsel for the Defendant/Respondent left the matter to the determination by the Honourable court.

Issues for Determination:

25. Having reviewed the Application beforehand, as well as the Response thereto; and upon taking into account the oral submissions made by and on behalf of the Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether the instant Application has been made with unreasonable and inordinate delay; and if so, whether the delay has been accounted for.
 - ii. Whether there are any pending proceedings to which the Applicant herein can be joined [sic] as an Interested Party or otherwise.

Analysis and Determination

Issue Number 1 - Whether the instant Application has been made with unreasonable and inordinate delay; and if so, whether the delay has been accounted for.

26. The Applicant herein as filed the subject Application and in respect of which same seeks to be joined into the subject suit (sic) as an Interested Party, with a view to ventilating what the Applicant contends to be his lawful rights to and in respect of the suit property.
27. Other than the foregoing, the Applicant herein also contends that he is a bona fide purchaser for value as pertains to and in respect of LR No 3859/6 [now known as 3589/51] otherwise referred to as the suit property.
28. Be that as it may, it is important to state and recall that the subject matter was filed in court on or about the year 2011; and thereafter the hearing thereof proceeded up to and including February 2023, whereupon the respective Parties closed their cases.



29. Notwithstanding the foregoing, on or about the 6th March 2023, the Defendant/Respondent herein filed an Application wherein same sought to re-open the defense case with a view to calling additional evidence. For coherence, the additional evidence which was sought to be called was via one, namely, Nahashon Kebwaro Omwenga, who was indicated to have been duly notified and informed of the issue beforehand.
30. From the contents of the affidavit sworn on the 6th March 2023, it became evident and apparent that the current Applicant herein was privy to and/or knowledgeable of the existence of the instant suit and the facts attendant thereto.
31. Consequently and in view of the foregoing, there is no gainsaying that if the Applicant herein was keen and diligent to join the proceedings beforehand, in whatsoever capacity, then it was incumbent upon the Applicant to mount a suitable Application at the very earliest.
32. Despite the foregoing, the Applicant herein did not take any steps and/or measures to join the suit and ventilate his claims and/or interests or at all.
33. Owing to the foregoing, what comes to mind is that despite having been aware of the subject proceedings, the Applicant herein adopted a don't care [leisure faire] attitude and same has merely sprang into action more than 9 months from the time when same ought to have approached the Honourable court.
34. Furthermore, it is not lost on the court that despite the time lapsed and/or duration taken prior to and/or before mounting the current Application, the Applicant has neither found it expedient nor just, to account for the delay attendant to the Application.
35. To my mind, any Claimant, the Applicant not excepted, who is desirous to partake of and/or benefit from the Equitable discretion of the Honourable court, is called upon to approach the seat of Justice timeously and with due promptitude.
36. Further and in any event, where the Claimant, the Applicant not excepted fails to mount or lodge the application timeously, then it behoves the Applicant to account for the delay attendant to the Application; and to demonstrate honesty, fidelity and candour.
37. Be that as it may, the Applicant herein has neither approached the Honourable court timeously nor has same been candid with the court as pertains to when same (Applicant), got to know of the existence of the suit; and why same [Applicant], failed to move with due diligence and dispatch.
38. To my mind, where a person, the Applicant not excepted seeks exercise of discretion of the Honourable court, but fails to display candour and/or offer plausible reasons for the delay, then the Honourable court ought not to exercise Equitable Jurisdiction/discretion, in favor of such a Party.
39. In respect of the foregoing exposition of the law, it suffices to take cognizance of the holding of the Court of Appeal in the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court held thus;

“ 12. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mereasking. An applicant is required to make out a case entitling him to the



court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.”

40. Consequently and in view of the foregoing, my answer to issue number one [1], is to the effect that the Applicant herein has approached the Honourable court with unreasonable and inordinate delay, which has neither been accounted for nor explained.

41. In the premises, it suffices to point out that the subject Application by and on behalf of the Applicant is defeated by the Doctrine of Latches.

Issue Number 2 - Whether there are any pending proceedings to which the Applicant herein can be joined [sic] as an Interested Party or otherwise.

42. Other than the fact that the Application was filed and/or mounted with inordinate delay, which has been canvassed and discussed in the preceding paragraphs, there is yet another pertinent issue that deserves due interrogation and analysis.

43. To this end, it is worthy to recall that the subject matter was heard and disposed of vide Judgment rendered on the 3rd July 2023, whereupon the Honourable court entered Judgment for and in favor of the Plaintiffs/Respondents.

44. Following the conclusion and/or determination of the instant matter, it is worthy to state and reiterate that the proceedings herein terminated and thus there are [sic] no more pending and/or outstanding issue(s) in controversy, worthy of interrogation and determination.

45. Suffice it to point out that the joinder of a Party, the Applicant herein not excepted, in a matter, can only be undertaken with a view to assisting the Honourable court to effectively and effectually resolve/ adjudicate upon the issue in controversy.

46. However, where a Judgment has been rendered and/or delivered, it becomes crystal clear that all issues which were in dispute and/or in controversy, would stand determined and henceforth there cannot be any argument about any pending and/or outstanding issue, save for execution, to be canvassed and/or determined by the court.

47. Based on the foregoing analysis, it is therefore my humble albeit considered view that the Applicant herein cannot now seek to be joined as an Interested Party, over and in respect of a matter that has been heard and concluded. Quiet clearly, the joinder that is sought for by the Applicant, [if allowed], would be for cosmetic purposes.

48. Furthermore, it is imperative to state and underscore that the relevant provisions that underpinned the joinder of a Party, the Applicant not excepted, whether as a Co-Plaintiff, co-Defendant, Interested Party or Necessary party is Order 1 Rule 10(2) of the [Civil Procedure Rules, 2010](#).

49. For ease of reference, the provisions of Order 1 Rule 10(2) of the [Civil Procedure Rules, 2010](#); are reproduced as hereunder;



[Order 1, rule 10.] Substitution and addition of parties.

10.

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (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.

50. Other than the provisions alluded to [supra], the purpose and circumstances of joinder were also highlighted and elaborated upon by the Court of Appeal in the case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR (Civil Appeal No 45 of 2014), where the court stated and observed as hereunder;

“Again the power given under the Rules is discretionary which discretion must of necessity 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.”

51. Similarly, it is also worthy to take cognizance of the decision in the case of *Pravin Bowry v John Ward & another* [2015] eKLR, where the Court of Appeal held thus;

“The exercise of this jurisdiction is pegged upon the discretion of the court in making a determination as to whether the party sought to be added will facilitate the effectual and complete settlement of all the questions in the suit.”

52. Most recently, the Court of Appeal re-visited the issue as to whether a Party can be joined into proceedings which have since been concluded and/or determined in the case of *Mwanajuma Juma &*



2 others v Mohamed Hamis Mwajamwanda & 3 others Civil Appeal No 101 of 2018 (UR), where the court stated and held thus;

- “ 18. The issue before us in this appeal is whether in the circumstances of this case, the trial court was justified in dismissing the Appellant’s application for joinder. The learned judge was swayed in arriving at his decision by the decision of this court in *JMK v MWM & another* (2015) eKLR in which it was held that;

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd v Said & others* [2014] EA 448, stated that 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.

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.

53. Furthermore the court proceeded and stated thus;

“Based on the decision of this court, the learned judge cannot be faulted for finding that at that stage the Appellants could not be joined to the proceedings. Therefore, if the Appellants could not be joined into the proceedings, the other prayers that are depended on their being joined must necessarily collapsed”

54. Instructively and for good measure, the joinder of a Party can only be taken and/or made at any stage of the proceedings, provided that there remains some issues in controversy, pending determination and/or adjudication by the court and not otherwise.
55. Consequently and in view of the foregoing, I come to the conclusion that insofar as Judgment had hitherto been rendered and/or proclaimed in respect of the instant matter, the proposed joinder, which is adverted to by the Applicant, would be an act in futility and vanity.

Final Disposition:

56. Having reviewed and analyzed the issues that were enumerated in the body of the Ruling herein, it must have become crystal clear that the Application by and on behalf of the proposed Interested Party/Applicant, is not only misconceived, but same is also legally untenable.



57. In a nutshell, I come to conclusion that the Application dated the 4th December 2023; is devoid and bereft of merits and thus same be and is hereby dismissed with costs to the Plaintiffs/Respondents.

58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Ms. Muthoni Mwangi for the proposed intended interested party/Applicant

Mr. Ng'eno h/b for Dr. Ken Nyaundi for the Plaintiffs/Respondents

Mr. Wokabi Mathenge for the Defendant/Respondent

