



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MOMBSA

ELC NO. 299 OF 2013

MASHA BIRYA DENA & 111 OTHERS PLAINTIFFS

- VERSUS -

FRANCIS KAHINDI KALUMEDEFENDANT

RULING

1. Preliminaries

1. Before the Honorable court for its determination is the Notice of Motion application dated 14th October 2021 by the Intended Interested Party. It is brought under the Provisions of Order 51 of the Civil Procedures Rules 2010 and Section 3A of Civil Procedure Act, Cap. 21 of the Laws of Kenya.

II. The Intended Interested Parties case.

2. The said application seeks for leave of court to have the intended Interested Party/Applicant to be joined in this suit as an Interested Party. It is grounded on the facts, averments and testimony of the 9 Paragraphed Supporting Affidavit of CHIRSTINE MWENDE sworn and dated 14th October, 2021

From this application, she deposed that she was the Interested party hereto and also one of the 111 members of a self help group known as the Mtwapa Land Tenants Associations being represented by the Plaintiffs herein and her address is care of a business entity trading as Jambo Jipya she held therefore to be competent to swear the affidavit. She deposed being a sole proprietor of an educational institution trading in the name and style of Jambo Jipya school which was a nursery, primary and secondary schools. She attached a certificate of business name for the said business entity.

3. She stated that on 21st July, 2020 she learnt that this Honorable Court issued an order for the maintenance of status quo over the suit land. According to her, despite of having the knowledge of the said orders, the 9th Defendant/Respondent intentionally disobeyed them. She held that the 9th Defendant/Respondent had illegally and without any colour of right evicted her from the suit land. He demolished her business premises and fenced off the parcel of land she occupied. He was in the process of constructing a permanent structure on the place. As a result, she held that the actions by the 9th Defendant/Respondent which were tantamount to willful breach and disobedience of the aforesaid court order had made it difficult for her to enjoy the afore stated.

4. She opined that she was apprehensive and was likely to be adversely affected by the suit filed by the Plaintiffs if she was not joined in the suit she therefore felt it was imperative that she be included in it before further proceedings took place. She argued that despite being represented by the Plaintiffs, it was imperative for her to be enjoined as an interested party in order to safeguard her interest in the instant case which was over the same subject property as it was where she carried out her business.

She argued that her interest would not be articulated unless she appeared in the proceedings to champion her cause.

III. The Replies by the 9th Defendant.

5. On 24th December, 2021 and 21st January, 2022, while opposing the Notice of Motion application, the 9th Defendant filed both a 9 and 8 Paragraphed Supporting Affidavits sworn by DANIEL MBOGO KALUME dated and sworn on 19th December, 2021 and 21st January, 2022 respectively. He annexed two (2) annexures marked as "DMK – 1 and 2"). From the very onset, this Court wishes to state that the second Supporting Affidavit was filed without the leave of court and therefore it is a nullity and hence expunged from record straight away. Indeed, the Honorable Court notes that there will be no prejudice suffered as it raises the same issues as the first filed affidavit. He deposed that the

application was application was incompetent for failure to disclose in what capacity she was seeking to be enjoined as an interested party – whether as a Plaintiff or a Defendant.

6. He further argued that the Applicant had not demonstrated her interest in the suit premises subject matter of this suit for the court to determine whether or not she was a necessary party.

In any case, he informed court that the Applicant had indeed filed a suit against him being ELC (Mombasa) Case No. 208 of 2019 in which case she was claiming to have purchased one eighth ($\frac{1}{8}$) of an acre on all that parcel of land known as Land reference No. MN/II/4427 (Original No. 3847/7). This property was not a subject matter of this suit. His contention was that the claim or cause by the Applicant against him was being championed in that case. Hence, her role in the instant case was irrelevant rather than just an issue of creating multiplicity of suits. To this effect he annexed a copy of an affidavit sworn by the Applicant dated 20th November, 2019 – Marked as “DMK -1”.

7. Furthermore, he argued that the Applicant was not one of the 111 Plaintiffs who filed this suit contrary to her averments under the Paragraph 1 of her Supporting Affidavit. He held that this fact was evident from the fact that they had filed an authority to institute this suit marked as “DMK -1” and her name was not included in the said suit of the 111 Plaintiffs. To him, she was misleading the court and she had perjured herself.

He stressed that the court order of 21st July 2020 never applied to the Applicant as she then was not and has never been a party to the suit. He averred that moreover, the Applicant was never evicted from any of the suit premises and hence the allegations that he had intentionally disobeyed the orders of the court was baseless and untrue. In the long run, he urged court to dismiss the application with costs.

IV. The Submissions

8. The Learned Counsel for the 1st, 2nd, 3rd and 5th Defendants on 15th December, 2021 indicated that they were objecting to the Interested Party coming on record. On 10th November, 2021, they were directed by Court to file a reply, which on 24th December, 2021 they complied. Although this court directed that the matter be canvassed by way of written submissions, on 8th February, 2022, all parties being Mr. Philip Adede Advocate for the Intended Interested party and Mr. Vincent Omollo Advocate for the 1st to 5th Defendants herein by consent agreed to forego that right and allow court to proceed to render its ruling based on the filed affidavits.

IV. Analysis and Determination

9. I have read the pleadings filed by the parties with regard to the Notice of Motion application dated 14th October, 2021 by the proposed intended interested party – Christine Mwendu and the relevant provisions of the law.

In order to arrive at an informed and just decision this court has framed the following issues for consideration.

a. What constitutes the fundamental requirements to consider for the application for joinder of party in law.

b. Whether the proposed Interested Party through her filed Notice of Motion Application dated 14th October, 2021 meets the required threshold for joinder of party?

c. Who will meet the costs of the suit?

ISSUE No. a). What constitutes the fundamental requirements to consider for the application for joinder of party in law.

Brief facts:-

10. Before proceeding further on the analysis of the above framed issues, the Honorable court feels it important, first and foremost to provide some brief facts to the case. On 19th December, 2013 the 1st and 2nd Plaintiffs herein instituted this representative suit on behalf of the 111 other persons. There is an authority to that effect annexed thereto. The suit was against the Defendants. The Plaintiffs claimed to have been occupying the suit land – Land Reference Number Plot 742/III/MN situated at Mtwapa for over 20 years and had invested heavily on the parcels as each of these individuals occupied and had constructed residential and commercial premises on it. In November, 2013, the Defendants commenced carrying out survey on the plot of land without notice to the Tenants/Occupants for purposes of alienating it. The Plaintiffs averred that the Defendants intended to evict them from the suit land. In the end of it, the Plaintiffs sought permanent injunction restraining the Defendants from evicting them.

11. On the other hand, through a filed Defence dated 21st March, 2014 the Defendants denied having such intentions of evicting the Plaintiffs from the suit land. They claimed the suit land was registered to one Jumwa Kalume Kitsaumbi and who wanted the Plaintiffs out the suit land. Now since these are the substantial issues of the main suit, guided by the rule of “*Sub Judice*”, I wish to defer it until the case is heard and finally determined.

12. Nonetheless, as far as the Proposed Interested Party is concerned, she is a proprietor of a business entirely trading as Jambo Jipya School on a portion of Plot known as land Reference numbers No. MN/II/4427 (Original No. 3847/7 Mainland North) which caters for an educational institution consisting of a nursery, primary and secondary Schools of approximately 200 students. She claims to have purchased an eighth ($\frac{1}{8}$) of an acre from the above plot from one Jones Muchiti Chitahi for a sum of Kenya Shillings One Million Five Hundred Thousand (KShs. 1,500,000/=). A copy of the sale agreement attached to the supporting affidavit refers to Jones Muchiti Chitahi as a

beneficial owner who had bought the land from Daniel Mbogoh Kitsaumbi, the 9th Defendant. From the pleadings, it is evident that there seem to be protracted disagreements between Mr. Kitsaumbi and the Applicant culminating in instituting a suit ELC No. 208 of 2019 against him. The suit is still pending hearing and determination. The instant suit has accorded her an ample opportunity to continue championing her case on her property and against the 9th Defendant. That is enough of the facts so far.

13. Now back to the issue framed under this sub – heading. The concept and substratum of joinder of parties is solely governed by the provisions of Order 1 Rules 1 to 25 of Civil Procedure Rules, 2010. Upto now this Court still wonders as to the reason why the Applicant failed to cite the Provisions of Order 1 Rule 10 of the Civil Procedure Rules 2010 being the appropriate law for this purpose. But nonetheless this being a land matter, the court is not preoccupied but too much issues bordering on technicalities thereof and hence let the matter lay.

The Black Law Dictionary 9th Edition defines **“Interested Party” as a party who has a recognizable stake and therefore a standing in a matter”**

Similarly, under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedures Rules 2013 (The Mutunga Rules) provides it thus:-

“.....as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not directly involved in the litigationOne who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless himself or she herself appears in the proceedings and champions his or her cause”

Also refer to the case of HCCC. Civil Suit No. 115 of 2019 - John Harun Mwau – Versus - Simeone Haysom & 2 Others, AG (2021) eKLR.

14. It is trite law that on the decision for joinder, court has discretionally power to do so. Which means it should be applied capriciously and judicially without any biases or abuse of the power. What to be considered for joinder are the following facts. Firstly, it is based on the principles of natural Justice – not to be condemned unheard and accorded an opportunity to be heard (**Principle of audi alteram partem**).

Secondly, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transactions alleged to exist – whether jointly or severally or in the alternative or in the alternative where of such persons brought separate suits any common question of law of fact would arise – Order 7 Rule 9 of Civil Procedure Rules, 2010.

Thirdly a court even on its own motion (*suo moto*) add a party to the suit if such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore joinder of parties is permitted by law and it can be done at any stage of the proceedings.

15. But, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (**See Lucy Nangari Ngigi & 128 Others –Versus- National Bank of Kenya Limited & Another (2015) eKLR**)

ISSUE No. (b) Whether the proposed Interested Party through her filed Notice of Motion Application dated 14th October, 2021 meets the required threshold for joinder of party?

16. The above illustrated legal litmus test on joinder is what I shall apply to the instant case. In consideration and application of all the facts stated here, this Court strongly holds that the proposed Interested Party has failed to demonstrate that it qualifies to be joined in the instant case. In saying so, it relies on the following reasons. These are:-

Firstly, the Applicant is the proprietor of an educational institution business. From the pleadings in the filed suit by her being ELC (Mombasa) Case No. 208 of 2019 she is claiming to have purchased one eighth ($\frac{1}{8}$) of an acre on all that parcel of land known as Land reference No. MN/II/4427 (Original No. 3847/7) and that is where her business is situated. This property is not a subject matter of this suit. In the instant case, the Plaintiffs are claiming to have been occupying the suit land – Land Reference Number Plot 742/III/MN situated at Mtwapa for over 20 years. Clearly, like day and night, I see no connection between the two parcels at all to warrant the Applicant being joined in the suit. In other words, the proposed or the relief sought by the Intended Interested Party is incompatible to or totally different from the existing cause of action or the relief. As stated above, there is no common question of fact or law that arises between the existing case and the intended Interested Party for court to make this determination for joinder.

17. Secondly, there exists a dispute between the Applicant and the 9th Defendant matter being in ELC No. 208 of 2019 over breach of contract. That cause of action is different from the claim herein. There will be no value added by her being joined in this suit. If anything, the Court feels the Applicant may be harboring some personal Vendetta and wanting to reach out on the 9th Defendant but using the instant case. That is not acceptable at all.

Thirdly, the instant case is a representative suit of 111, although her name is not included in the list but her interest will be ventilated by the Plaintiffs. This is an extremely sensitive and emotive matter where many persons are adversely affected. To allow the application would be opening up the pandoras box or floodgate where all of them would want to be joined for one reason or the other. In other words, it would be setting a bad precedent across the board as all parties would want to be joined.

Fourthly, the Court fully concurs with the Learned Counsel for the 9th Defendant, as the Applicant has failed to clearly state or spell out her stake in the matter whether she coming in as a Plaintiff or Defendant which is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. On the contrary, this may only cause a lot of confusion in the management of the matter.

Finally, although the application for joinder may be considered at any stage of the proceedings, this matter is already part heard and may cause more delay and costs to the litigants should this application be considered. It is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance.

IV. Determination

18. Ultimately, based on the detailed analysis made out here, this court concludes that the Notice of Motion application dated 14th October, 2021 by the Intended Proposed Party is a nullity and unmeritorious hence it is hereby dismissed without orders to costs.

IT IS ORDERED ACCORDINGLY

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF FEBRUARY, 2022

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT

MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant.
- b. Mr. Martin Tindi Advocate for the Plaintiff.
- c. Mr. Vincent Omollo Advocate for the Defendants.