



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**James Ndung'u Kero v Chief Land Registrar, Director Of Survey
& Attorney General (Environment & Land Case E046 of 2021)
[2022] KEELC 1446 (KLR) (16 February 2022) (Ruling)**

James Ndung'u Kero v Chief Land Registrar & 2 others [2022] eKLR

Neutral citation: [2022] KEELC 1446 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E046 OF 2021
FO NYAGAKA, J
FEBRUARY 16, 2022**

BETWEEN

JAMES NDUNG'U KERO PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

DIRECTOR OF SURVEY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

Court underscores the need for properly drafted pleadings.

The court underscored the need for properly drafted pleadings and the need to follow the requisite procedure in enjoining interested parties. In particular, the court laid out the purpose of and the proper manner in which grounds of opposition and a supporting affidavit should be drafted.

Reported by John Ribia

Civil Practice and Procedure – pleadings – affidavits – supporting affidavit - form and substance – purpose of a supporting affidavit – what was the proper manner of drafting a supporting affidavit - what was the purpose of a supporting affidavit - what point of view/perspective was a deponent of an affidavit to narrate their facts (first, second or third person).

Civil Practice and Procedure – pleadings – grounds of opposition – form and substance – what was the proper manner of drafting grounds of opposition.

Civil Practice and Procedure – interlocutory application - prayers that one could ask for in an interlocutory application – whether it was proper for a party to seek final orders such as orders determining who was the bona fide owner of a parcel of land at the interlocutory stage - whether joinder of parties to a suit as interested parties was done as of right.



Civil Practice and Procedure – joinder of parties – interested parties – where one did not seek leave to enjoin parties as interested parties – what grounds should a court consider in determining whether one qualified to be enjoined as an interested party - .

Brief facts

The plaintiff contended that he acquired the suit land from Nyakinuya Mugumo farm by virtue of him owning a share in the farm. His complaint was that the defendants had been interfering with his use of the suit land and had threatened to evict him from it yet it was his matrimonial home. The plaintiff prayed to be declared as the *bona fide* owner of the suit land.

Issues

- i. What was the form and nature of an affidavit?
- ii. What was the purpose of a supporting affidavit?
- iii. Whether it was proper for a party to seek final orders, such as orders determining who was the *bona fide* owner of a parcel of land, at the interlocutory stage.
- iv. Whether joinder of parties to a suit as interested parties was done as of right.
- v. What grounds should a court consider in determining whether one qualified to be enjoined as an interested party?

Held

1. Some pleadings and actions of some parties were so bad that it pained the court when going through them and it wished that they were never filed or done respectively. They depressed the court and that was not healthy at all. The instant pleadings, the supporting affidavit, and the grounds of opposition were so poorly drawn that they did not pass for those drawn by a qualified lawyer. If it were possible all law schools in Kenya should take hold of and use them as teaching aids in civil procedure classes so as to remind students of what they should not do in drafting of pleadings.
2. The grounds on the face of the application were not spelt out clearly. The court was unable to identify the grounds as drafted. The paragraphs alleged to constitute grounds were drafted so poorly that they occasioned the court a lot of stress and agony in discerning what they brought out in terms of information in support of the application. It took a lot of judicial and private life time in trying to figure out what the applicant wished the court to rely on.
3. The applicants' supporting affidavit fell short of the form of an affidavit and did not bring the intention and purpose of a supporting affidavit. There was no correlation between the so called supporting affidavit and the application. Whereas an affidavit was supposed to be drawn in the first person in order to attribute the depositions to the person making the oath, the one attached to the application was gravely at variance. It was drawn in a mixed grill of both the first and third person. Even then, the introductory paragraph contained information the court could hardly attribute to the plaintiff.
4. The affidavit was incurably defective in form, not even article 159 (2)(d) of the Constitution could cure it. The court attempted to breathe as much oxygen into it, using the oxygen principle, so as to look at the merits of the application.
5. The prayer that sought for the applicant to be declared as the *bona fide* registered owner of the land was couched in the manner of a final prayer warranting a final order. There was no prayer that could be issued at an interlocutory stage. In issue was conclusive of proof of ownership, the court could not grant orders relating to ownership at an interlocutory stage. Prayer 3 was also couched in similar language and did not state when it should be granted to last. Additionally, it contained evidence in the last half thereof. Put in simple terms, the applicant indirectly prayed for a declaratory order, at an interlocutory stage, to the effect that the plaintiff was the registered owner of the suit land.
6. The Attorney General introduced 3 interested parties to the suit without seeking leave of the court to introduce them as parties to the suit. It was un-procedural to do so. Order 1 rule 10 of the Civil Procedure Rules and rules 2 and 7 of the Constitution of Kenya (Protection of Rights and



Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice No. 117 of 2013) provided for the manner of joinder of persons wishing to be introduced as interested parties to suits. The actions of the Attorney-General amounted to backdoor ushering of parties into a suit. They were improperly enjoined as parties to the suit. Enjoinment of parties was not as of right.

7. To be an interested party, one must move the court by way of a formal application. Enjoinment was not as of right, but was at the discretion of the court; hence, sufficient grounds had to be laid before the court, on the basis of the following elements:
 1. The personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.
 2. The prejudice to be suffered by the intended interested party in case of non-joinder had to also be demonstrated to the satisfaction of the court. It had to be clearly outlined and not something remote.
 3. A party had to, in its application, set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the court.
8. Some of the grounds of opposition were not grounds of opposition properly so called, they too set out explanations of facts. It was not demonstrated to the court how the application was scandalous, frivolous and vexatious and a clear definition of an abuse of court process as claimed by the 3rd respondent. The *vice versa* would be held to be correct of the grounds of opposition since did not disclose any point of law or otherwise to challenge the application.
9. The respondent had stated that the court became *functus officio*, and thus lacked the judicial authority to entertain the application. However, he did not in any way give evidence of the court becoming *functus officio*. He did not show how the prayers sought related to a past order of the court on similar terms. He did not also explain how the court lacked jurisdiction in the suit. Therefore, the grounds of opposition were misplaced, lacking in content and were dismissed summarily.
10. Both the application and the grounds of opposition did not help the court in the adjudication of the instant application. Other than the fact that the court would frame the issue as to whether or not the application was or was not incompetent and answer it for reasons explained above on the paucity of the proper orders the court could grant, there were no other issues to meaningfully consider. Both prayers in the application sought orders that would do no more than determine the matter conclusively at the interlocutory stage.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

1. Francis Kariuki Muruatetu & Another v Republic & 5 Others (Petition 15 & 16 of 2015 (Consolidated); [2016] eKLR) — Explained
2. Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012; [2012] KEHC 2480 (KLR)) — Explained

Statutes

1. Civil Procedure Act (cap 21) — Section 1A; Section 1B; Section 3; Section 3A — Interpreted
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — Order 1 Rule 10 — Interpreted
3. Constitution of Kenya, 2010 — Article 40; Article 159 (2)(d) — Interpreted



4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice No 117 of 2013) — Rule 2; Rule 7 — Interpreted

Advocates

I have instructions to act

RULING

1. Some pleadings and actions of some parties are so bad that it pains the court when going through them and it wishes that they were never filed or done respectively. Actually, they depress the court, and that is not healthy at all. In my humble view the pleadings in form of the application before me, the supporting affidavit, and even the grounds of opposition thereto were so poorly drawn that they do not pass for those drawn by a qualified lawyer. In my humble view if it were possible all law schools in the country should take hold of and use them as teaching aids in Civil Procedure classes so as to remind students of what they should not do in drafting of pleadings.
2. The plaintiff/applicant filed a notice of motion dated 23/7/2021 on 6/9/2021. It was brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, article 40 of the Constitution and “all enabling provisions of law.” He sought the following orders:
 - 1)spent
 - 2) That the plaintiff/applicant despite being the bona fide registered owner of the land known as LR No 1803/483 register Folio No H29 Folio 178 File No 30740 under the tenure of a Fee Simple currently registered under the name of one James Ndung’u Kero has been interfered with including threatening him to be evicted by the defendants/respondents.
 - 3) That this honourable court issues (sic) a temporary injunction restraining the defendants/respondents from dealing, trespassing and/or otherwise occupying the registered land belonging to one James Ndung’u Kero since (sic) the orders sought are not granted he will suffer irreparable damage as the above mentioned land is (sic) his matrimonial home which he has occupied for more than 30 years and has equally made some developments on the said piece of land.
3. The grounds on the face of the application were not spelt out clearly. From a thorough perusal of the record, this court was unable to identify the grounds as drafted. The paragraphs alleged to constitute grounds were drafted so poorly they occasioned the court a lot of stress and agony in discerning what they brought out in terms of information in support of the application. It took a lot of judicial and private life precious time in trying to figure out what the applicant wished the court to rely on.
4. Upon careful perusal of the contents of both the notice of motion and the plaint, this court noted that what was stated as grounds from (i) to (vii) inclusive were a replica or a copy-and paste reproduction of the averments in between paragraphs 5 to 11 inclusive and the reliefs sought. The grounds on the face of the application are a replica of the plaint. Thus, apart from the prayers sought (of which are also unclear) in the notice of motion which is interlocutory in nature has taken the exact form of a (the) plaint. For instance, ground (i) is a replica of paragraph 5 of the plaint, (ii) a replica of paragraph 6, (iii) of paragraph 7, (iv) of paragraph 8, (v) of paragraph 9, (vi) of paragraph 10, (vii) of paragraph 11. Additionally, it took the form of the plaint because after the purported last ground, number (vii) it also



contains the manner of and the reliefs sought. The immediate line begins with the “reasons whereof” and then outlines the prayers in the Plaint before it is signed off. It is concluded as follows:

“Reasons whereof the plaintiff prays for judgment against the defendants for:-

- a) Permanent injunction restraining the defendant, agents... situate in Nyakinyua Mugumo Farm against the defendants
- b) Costs of this suit
- c) Any other relief this honourable court deems fit to grant.

Dated at Kitale this July 23, 2021”.

5. The application was supported by an affidavit sworn by learned counsel on 23rd July, 2021. The purpose and import of a supporting affidavit are to explain, clarify, expound, illustrate in greater detail the facts relied on in an application. Further, it introduces evidence in support of the depositions in it in form of annexures. The intention and purpose of a supporting affidavit is to bring out a nexus between the prayers and the grounds an application as well as to introduce documentary evidence to prove facts that asserted by the applicant. (Emphasis mine).
6. A cursory perusal of the applicants’ supporting affidavit filed on 8/9/2021 reveals that it too clearly falls short of the form of an affidavit and does not bring the intention and purpose of a supporting affidavit. To me, there is no correlation between the so called supporting affidavit and the application. Whereas an affidavit is supposed to be drawn in the first person in order to attribute the depositions to the person making the oath, the one attached to the application is gravely at variance. It is drawn in a mixed grill of both the first and third person. Even then, the introductory paragraph contained information the court could hardly attribute to the plaintiff. Its contents were to the effect that “I, ... (name withheld) an Advocate of the High Court of Kenya PO Box Kitale do hereby certify that the instant application is of utmost urgency and ought to be heard on a priority basis and the nature of the urgency is that;

“I have instructions to act for the petitioner/plaintiff applicant

1. That I became a shareholder as a bona fide purchaser
2. That the said piece of land was transferred to the petitioner/plaintiff applicant...
3. That however, the defendants/respondents without an iota of justification....
4. That the said piece of land entails his matrimonial home and further developments.
5. That if the orders sought are not granted he stands...
6. That he has made a complaint via a letter....
7. That my application is made in good faith
8. That the application is made in interest of ...
9. That what is stated herein above is true to the best of personal knowledge..

Sworn by ... (Advocate name)..”



7. I will not go further than stating that I found it a difficult to understand that even where the Advocate was instructed to act for the applicants, he was obligated to draw the affidavit properly to bring out the issues that came into his personal knowledge as he deponed. In my considered view, the affidavit is incurably defective in form, not even article 159(2)(d) of the Constitution can cure it. But let me breathe as much oxygen into it, using the oxygen principle, so as to look at the merits of the application. I take it that it is drawn in the first person only and taken the contents of each paragraph into account. The gist of the contents is that land parcel LR No 1803/483 (whose size is 1 1692 Ha) was acquired by the plaintiff/applicant (in an unknown year) from land parcel Nyakinyua Mugumo Farm LR No 1803 by virtue of him owning a share in the latter Farm. His complaint was that the defendants have been interfering with his use of the said piece of and have threatened to evict him from it yet it is his matrimonial home. On 8/7/2021 he complained to the defendants *vide* a letter (not annexed). He prayed for the grant of the orders sought since he made his application in good faith. He did not annex to the Application any evidence of ownership of the said parcel of land.
8. I have to comment also on the prayers sought in the application. Except the one that is already spent, the two numerous errors. Prayer (2) is couched in the manner of a final prayer warranting a final order. There is no prayer for its issuance in the interlocutory stage. Moreover, as clearly it depicts, its content particularly of the finding that the applicant is “the *bona fide* registered owner of the land” in issue is conclusive of proof of ownership. I am afraid the court cannot grant it. Prayer 3 is also couched in similar language and does not state when it should be granted to last. Additionally, it contains evidence in the last half thereof and conclusive of contested facts. Put in simple terms, the applicant indirectly prays for a declaratory order at this interlocutory stage that the plaintiff is the registered owner of the suit land.
9. Be that as it might have been, the application was opposed through grounds of opposition filed by counsel who was for the 3rd defendant/respondent.
10. In relation to the grounds, this court observes that the learned state counsel introduced three (3) interested parties to the suit. These were one Peter Njogu Karanu, Peter Gaiitho Karanja and Mathew Mitheu Rimui. The Attorney General did not seek leave of the court to introduce them as parties to the suit. It was un-procedural to do so. order 1 rule 10 of the Civil Procedure rules and rules 2 and 7 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice No 117 of 2013) provide for the manner of joinder of persons wishing to be introduced as interested parties to suits. What the Attorney-General did in this process was nothing but backdoor ushering of parties into a suit. Therefore, they are improperly enjoined as parties to the suit. Enjoinment of parties is not as of right.
11. To make the matter clear, an interested party was defined in the case of: Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR, where the court stated as follows:

”...one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one 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 he or she herself appears in the proceedings, and champions his or her cause...” One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

 - i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.



- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
 - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”
12. Persons wishing to be enjoined as interested parties should satisfy the criterion set out in the above case and buttressed by the Supreme Court in *Francis Kariuki Muruatetu & another v Republic & 5 others*, Petition 15 as consolidated with 16 of 2013 [2016] eKLR.
 13. Secondly, in my humble view, some of the grounds of opposition are not grounds of opposition properly so called: they too set out explanations of facts. For instance, ground 3 explained the purpose of a preliminary objection. It states:

“(2) for avoidance of doubt, preliminary application is meant to address the needs of the parties for immediate and temporary protection of their rights and property pending discussion on the merits by the court in the main suit. The orders to be sought at a preliminary application are meant to protect and/or conserve the subject matter of the dispute from dissipation (*sic*) as the main dispute is taken through the litigation process.”
 14. The 3rd respondent also objected the application, terming it as scandalous, frivolous and vexatious and a clear definition of an abuse of court process. It was not demonstrated to the court how the application fell into the parameters of all the grounds as given in the omnibus ground of opposition. This court humbly notes that the vice versa would be held to be correct of the grounds of opposition since do not disclose any point of law or otherwise to challenge the application. The respondent has stated that this court became *functus officio*, and thus lacked the judicial authority to entertain the application. However, he did not in any way give evidence of the court becoming *functus officio*. He did not show how the prayers sought relate to a past order of the court on similar terms. He did not also explain how the court lacked jurisdiction in the Suit. I have looked at the pleadings by all the parties. I find no issue that makes the court lack jurisdiction. In the submissions of all the parties I did not find any argument or highlight on the two issues. In short, the grounds of opposition in its entirety are misplaced, lacking in content and must be dismissed summarily.

Determination

15. This court has carefully considered the application, the affidavit in support, the grounds of opposition and the submissions on record as well as the law and the case law cited. It finds that both the application and the grounds of opposition do not help it adjudication of this application. Simply put, other than the fact that the court would frame the issue as to whether or not the application was or was not incompetent and answer it that for reasons explained above about as to the paucity of the proper orders the court could have granted it was not, there were no other issues to meaningfully consider. This is for the reason that both prayers in the application sought orders that would do no more than determine the matter conclusively at the interlocutory stage.
16. In conclusion, the respondents did not assist this court as much in arriving at the determination it has. Thus, this court finds the application dated July 23, 2021 without any merits whatsoever and dismissed it with no order as to costs.



17. For the purpose of fast-tracking this case, the parties herein are directed to file and serve on each any necessary documents or applications within 21 days of this order. The matter shall be mentioned virtually on March 16, 2021 at 8.30 am for further directions.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 16TH DAY OF FEBRUARY, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

