



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

E.L.C (O.S) 1 OF 2022

DAVID KAVYU & 13 OTHERS.....APPLICANTS

-VERSUS-

MWANGANGI MBINDYO

(Sued as representative of JOHN M. MUTINDA(Deceased).....1ST RESPONDENT

ABDULLAHI K. ADAN.....2ND RESPONDENT

FAITH MUTINDA.....3RD RESPONDENT

PHELES NGOVO.....PROPOSED 4THRESPONDENT

RULING

1. Before the Court is an Application by the proposed 4th Respondent dated 14th June 2021 brought under Order 1 Rule 10(2) and (4) and Rule 25 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking for ORDERS:

1. Spent

2. THAT PHELES NGOVO be enjoined in these proceedings as the 4th Respondent forthwith.

3. THAT upon being enjoined, the 4th Respondent be allowed within a period of 21 days to file the necessary pleadings to enable her take part in these proceedings or the remainder thereof.

2. The Application is based on the grounds that:

a. The proposed 4th Respondent is the registered proprietor of YATTA B2/KWA VONZA/15, YATTA B2/KWA VONZA/16 and YATTA B2/KWA VONZA/17.

b. A defendant in KITUI CMCC No.65 of 2019 between PHELES NGOVO-vs NDUNDA MUNYAO has vide a replying affidavit sworn on 5th December 2019 at paragraph 3 thereof alleged that he has been using the 4th Respondent's property since 1996 and that these properties are the subject of litigation herein before this court.

c. THAT the properties are vacant and indeed the court in KITUI CMCC NO.65 of 2019 PHELES NGOVO-vs-NDUNDA MUNYAO issued an injunction on 3rd June 2021 restraining the said defendant and his agents and others from entering the properties.

d. THAT the grant of this application will assist the court to ventilate all the issues conclusively and to finality.

e. THAT unless the application is granted then the applicant shall be deprived of her property unheard and against her constitutional rights to own property and be given a fair hearing.

3. The proposed 4th Respondent swore an Affidavit in support of her application and stated that she became aware of this matter when she

instructed a new counsel to peruse the file in **Kitui CMCC No.65 of 2019** between himself and Ndunda Munyao(Defendant) to ascertain the current position. Upon perusal, her advocate informed her that he found a replying affidavit by the said Ndunda Munyao stating that he has been using her properties since 1996 and further, that the said properties are the subject of litigation in this case and a court order for temporary injunction had been issued and the said order was confirmed on 3rd June 2021 pending full hearing and determination of the suit.

4. She reiterated that she is the registered proprietor of the said parcels of land and produced copies of the official searches on the properties and that she is holding all the 3 title deeds issued on 27th August 2013. It is the proposed 4th Respondent's averment that unless the orders sought are granted, she stands to suffer immensely.

5. The proposed 4th Respondent also filed submissions in support of her application where she stated that she relies on the provisions of Order 1 Rule 10(2) and (4) of the Civil Procedure Rules and Rule 25 thereof that provides for joinder of parties. She reiterated in her submissions that the Defendant in Kitui CMCC No.65 of 2019 represented by Ochieng' Ogotu Advocates who act for the applicants in this suitswore an affidavit stating that the suit lands are the subject of litigation before this court and this is what prompted the application that is now before this Honourable Court.

6. The proposed 4th Respondent submitted that in the event that the above stated advocate on record is unable to make a correlation between the suit property herein and her mentioned properties then she prays that this Honourable Court make a declaration that the two parcels of land herein are not inter-related/connected in any way and are distinct from each other.

1st Defendant/Respondent's Submissions

7. The 1st Respondent filed Grounds of Opposition dated 4th December 2021 opposing the application on grounds:

1. THAT the application is frivolous and lacks merit in law and/or facts.
2. THAT the application is meant to delay the expeditious determination of the suit herein.
3. THAT the application is an abuse of the court's process as it discloses no reasonable causes of action or defence.
4. THAT the application should be dismissed with costs to the 1st Respondent/Defendant.

8. The 1st Respondent also filed submissions and affirmed that the land that is the subject matter of dispute in the proceedings herein is **Parcel No. Yatta B2/Kwa Vonza/819**. The proceedings in Kitui CMCC No.15 of 2019 have not been presented to this Court and therefore the Chamber Summons has no merit and ought to be struck out and/or dismissed with costs since the matter is part heard and is remaining with only one day of hearing before its determination.

2nd and 3rd Defendant/Respondent's Response and Submissions

9. The 2nd Defendant/Respondent filed a Replying Affidavit in response and opposition to the proposed 4th Respondent's Application and stated that he is not aware of the proposed 4th Defendant's allegations that she is the registered proprietor of the said parcels of land and that this matter actually has nothing to do with YATTA B2/KWA VONZA/15, YATTA B2/KWA VONZA/16 and YATTA B2/KWA VONZA/17 at all and that the Applicant has failed to show correlation between her alleged parcels and the parcel in dispute in this matter.

10. The 2nd Respondent averred that the proposed 4th Respondent does not have any identifiable stake in the suit properties and that he will suffer great prejudice as the matter is part-heard and joinder of the Applicant will take the matter back to where it started. Further, the 2nd Respondent stated that there is no prayer for consolidation of this matter with Kitui CMCC Number 65 of 2019 which is a clear indication that the issues in the two suits are different and unrelated.

11. The 2nd and 3rd Respondents also filed written submissions and submitted that Order 1 Rule 10 of the Civil Procedure Rules that the Applicant has relied upon does not provide for a late comer who wants to join these proceedings. It was their submission that the resultant effect of the Applicant joining this suit would take the matter back to where it started and considering that the matter has been pending in court for the last 8 years, it will delay the matter and cause parties to incur unnecessary costs.

12. It is the 2nd and 3rd Respondents' submission that the applicant has not met the conditions governing the addition of parties to a suit because they have not shown that their presence is necessary in assisting the court to adjudicate on matters in issue.

13. They relied on the case of **Bernard Wamenju Kabuga -vs- John Kihenyong Kang'ethe & Another (2006) eKLR** where an application was brought to have a party joined after the Plaintiff closed his case and the court found that it will neither be fair nor just to have the party joined as it would mean that the plaintiff's case would be reopened and restarted.

14. Regarding the proposed 4th Respondent's prayer to make a declaration that the parcels of land subject to this suit are unrelated to those she mentions, the 2nd and 3rd Respondents submit that it is an attempt by her to get an order for her use elsewhere and submitted that this is an abuse of the court process and prayed that the application be dismissed with costs.

Applicants' Replying Affidavit and Submissions

15. The Applicants' in the original Originating Summons herein are in support of the proposed 4th Respondent's Application and filed a replying affidavit of Ndunda Munyao sworn on 13th January 2022 and written submissions. The Applicants relied on Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 which is to the effect that the addition of a party can be made at any stage of the proceedings and that the matter being at the hearing stage is immaterial.

16. The Applicants cited the case of **Rajab Ahmed Karume v. Chief Registrar and 3 others; Nairobi ELC 816 of 2012 as consolidated with ELC 47 of 2010(2019) eKLR** where the court held that an Interested Party is one who has a stake in the proceedings though he or she was not a party to the cause *ab initio*. They submitted that the proposed 4th Respondent has interest in the suit property though her title reads different numbers.

17. Further to this, the Applicants submitted that the issue as to whether the presence of the proposed 4th Respondent can bring clarity on the issues is irrelevant as they cited the holding of the **Court of Appeal in Civicon Limited v Kivuwatt Limited & 2 others(2015)eKLR** where the court held that the only reason which makes it necessary to make a person a party to an action is so that they should be bound by the result of the action and the question in the action which cannot be effectually and completely settled unless she is a party. The Applicants therefore urged the Court to allow the application.

Analysis and Determination

18. Determination of the application dated 14th June 2021 is made after due consideration of the application herein, replying affidavits and submissions made by Counsel. The rules governing joinder of a party are Order 1 of the Civil Procedure Rules which provide:

“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.”

19. The proposed 4th Respondent/Applicant has stated that she became aware of the existence of this suit when she saw an affidavit by the 2nd Applicant in the present Originating Summons Ndunda Munyao filed in **Kitui MCELC No.65 OF 2019** where she has sued the said Ndunda Munyao and where he stated that the suit land is the subject of another court case while referring to this case. The intended 4th Respondent states that she is the registered proprietor of **YATTA B2/KWA VONZA/15, YATTA B2/KWA VONZA/16 and YATTA B2/KWA VONZA/17**. However, the official searches that she relies on are for land parcels **YATTA B2/KWA VONZA/815, YATTA B2/KWA VONZA/816 and YATTA B2/KWA VONZA/817**. Further, according to the Amended Originating Summons herein, the subject of the Originating Summons herein is land parcel **YATTA B2/KWA VONZA/819(Originally Yatta B2/Kwa Vonza 201)**. The three sets of parcels of land are completely different by name.

20. The Applicants in this suit (OS) do not claim any rights to the parcels of land claimed by the Applicant herein that is either **YATTA B2/KWA VONZA/15, YATTA B2/KWA VONZA/16 and YATTA B2/KWA VONZA/17** or **YATTA B2/KWA VONZA/815, YATTA B2/KWA VONZA/816 and YATTA B2/KWA VONZA/817**.

21. The question for determination is whether the Applicant herein is a person who ought to have been joined in this suit in the first place, 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. In my view the proposed 4th Respondent has not shown that she has any proprietary interest in the land in dispute that would have made her a necessary party to this suit. She has also not shown that she would be affected either legally or financially by the judgement of this court in the present suit. In the Courts view any judgement entered in the current suit can only be binding on the suit land **YATTA B2/KWA VONZA/819 (Originally Yatta B2/Kwa Vonza 201)** and the owners thereof.

22. The Learned Judges of Appeal in **Civicon Limited v Kivuwatt Limited & 2 others [2015] eKLR** quoted *the case of Gurtner vs Circuit (1968) 1 All ER 328* where it was held that, a party may be enjoined if he can demonstrate that any order in the action would directly affect him either legally or financially. (Denning, M.R.) stated thus:

“...The bureau clearly had a commercial interest in resisting the declaration; but that is not enough. John Stephenson J accepted the analysis of the rule and the many previous decisions under it contained in the exhaustive judgment of Devlin, J., in A Amon vs Raphael Tuck & Sons, Ltd. (1956) 1 All ER 273 and took the view that the court had no jurisdiction to add a party against the will of the plaintiff unless the person seeking to be added was:

“...at least able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action...”

...The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party...”

Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.”

23. From the pleadings before this court the suit land is clearly defined as **YATTA B2/KWA VONZA/819** and the parties to the suit clearly stated and their relationship to the suit land. Any orders that can be made in this suit can only relate to and be enforced against the suit land and the parties to the suit. The parameters for determination of a claim for adverse possession are clearly settled and the same are known to the court and to the parties herein and their legal representatives. In my view the Applicant herein has not shown that her presence in this suit is necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit and especially involving the suit parcel of land. In the case of **Pravin Bowry v John Ward and Another [2015] eKLR** the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court referred to the **Ugandan case of Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)** where the court stated as follows:

“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 to adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved 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 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.” (Emphasis by underline).”

24. Similarly, it was held in the case of **Temple Point Resort Limited v Accredo A G & 5 others [2018] eKLR** “*It is, however, important to state that a party who desires to join proceedings must lay the basis for such an application. An applicant must also justify why the application for joinder is being made at that particular point in time. This will help the court in determining whether the application is being made in good faith.*”

25. The Applicants in the Originating summons support the joinder of the proposed intended 4th Respondent and claim that even though the proposed 4th Respondents titles read differently the physical property she refers to is part of the suit property. The court finds the allegations by the Applicants strange for the reason that having known this to be the position, it is not clear why they did not join the proposed 4th Respondent as a party to the suit in the first place. Further, the applicant has not stated that she seeks to be joined in the suit due to any confusion in the location of the suit property or any issue relating to the boundaries to the various properties referred to. The present suit relates to adverse possession and not determination of whether or not the titles held by the parties are legitimate. The Applicants have not shown that any determination of their possession or lack thereof of land parcel **YATTA B2/KWA VONZA/819 (Originally Yatta B2/Kwa Vonza 201)** will affect the applicant. It is further noted that David Ndunda who swore a replying affidavit on behalf of the applicants in the Originating Summons has also filed a counterclaim in KITUI CMCC No.65 of 2019 seeking a declaration that he is entitled to **land parcels YATTA B2/KWA VONZA/815, YATTA B2/KWA VONZA/816 and YATTA B2/KWA VONZA/817** by virtue of adverse possession.

26. It is my opinion that the proposed 4th Respondent/Applicant has not laid the basis for joinder in this particular suit. I therefore find that the application lacks merit and the same is hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 27TH DAY OF APRIL, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and online in the presence of-

C. Nzioka: Court Assistant

Mwatine Advocate holding brief for Munyalo for the proposed 4th Defendant/Applicant

M/S Otieno Advocate for the Plaintiff/Respondent

Kinyua Musyoki Advocate for the 1st Defendant/Respondent and holding brief for B. M. Musyoki for the 2nd and 3rd Defendant/Respondents