



Gitwaru & 3 others v Njuki (Sued as the legal representative of the Estate of Benard Njuki Kiarie); Njeru (Applicant) (Environment & Land Case 77 of 2017) [2022] KEELC 3038 (KLR) (22 April 2022) (Ruling)

Neutral citation: [2022] KEELC 3038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 77 OF 2017**

EC CHERONO, J

APRIL 22, 2022

BETWEEN

**MWAGO GATUWAI GITWARU 1ST PLAINTIFF
ANTHONY NGARURI NJUKI 2ND PLAINTIFF
BENARD NJUKI KIARIE 3RD PLAINTIFF
JOSEPH WARURU KIARIE 4TH PLAINTIFF**

AND

**ESTHER MUTHONI NJUKI RESPONDENT
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BENARD
NJUKI KIARIE**

AND

JOANINA WACHIRA NJERU APPLICANT

RULING

1. The Applicant vide a Notice of Motion dated 1st July, 2021 and filed on 2nd July, 2021 is seeking the following orders :-
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to join the applicant herein, Joanina Wachira Njeru, as a party in this suit and grant her leave to file her pleadings.
 - d. That the costs of this application be provided for.



2. The application is premised on grounds set out on the face of the said application supported by her affidavit sworn on 1st July, 2021.
3. The application is opposed vide replying affidavits filed on 5th November, 2021 and 8th November, 2021 respectively.
4. When the application came up for hearing on 8th November, 2021 the parties through their advocates on record agreed to have the same canvassed by way of written submissions.
5. The applicant filed her submissions on 10th December, 2021 while the Plaintiffs/Respondents filed theirs on 14th February, 2022. The Defendant/Respondent did not file submissions at all.

Applicant's case and submissions: -

6. The Applicant's case is that the 1st Plaintiff and the Defendant are her brothers and at the time of instituting this suit, she was under the impression that she is one of the plaintiffs in the suit and that her claim over the suit land had been presented before this Honourable Court.
7. She stated that she later learned that she was just a mere witness for the plaintiffs and that the pleadings she had executed was a witness statement.
8. She stated that she felt that she was shortchanged and wishes to be joined as a party as she has a claim against the defendant who is registered to hold land parcel number Kabare/Nyangati/89 for himself and in trust for his siblings including herself.
9. She prayed to be granted leave to file the necessary pleadings and that it is in the interest of justice and fairness that the application be allowed and the orders sought be granted.
10. In her submissions, the applicant argued that order 1 Rule 10 of the Civil Procedure Rules, 2010 allows the court to add a person as a party to a suit at any stage of the proceedings, even where such a person was not a party to the suit. She relied on the case of *Bendele Gachiri Kamu –v- Githinji Karuku Ngondi & 2 others* [2018] eKLR.
11. She submitted that the respondents stands to suffer no prejudice whatsoever if the orders sought are granted, even where the matter is allowed to be heard de novo, as each party will have the chance to be heard and present their case on merit.
12. She prayed that this Honourable Court finds the application dated 1st July, 2021 meritorious and allow the same.

Plaintiffs/Respondents case and submissions: -

13. The Plaintiffs Advocate swore the replying affidavit on their behalf.
14. She stated that after discussing with the 1st plaintiff, she advised them to bring the applicant along so as to record a statement in support of the case.
15. She further stated that all along when the matter came up for hearing, the applicant never informed her that she had any claim over the suit land in which case she could have framed the claim and issues to include her as one of the plaintiffs and even presented receipts for legal fee reflecting her name as one of the plaintiffs.
16. She stated that it was pretentious and false for the applicant to claim that she was under the impression that she had instructed her as she clearly explained to her witness statement.



17. She also stated that the applicant cannot be heard to say that she was shortchanged as she never went to her office to give instructions and thus the application had been brought in bad faith.
18. She further stated that the application is an abuse of court process as the parties had closed their respective cases and wondered in what capacity the applicant would be joined as a party. She further submitted that there was no provision under the law to order the Applicant to be joined after hearing has been concluded.
19. The plaintiffs submitted that the applicant has moved the court under order 1 rule 3 which provides for an application to be joined as a defendant in a suit. However, this suit belongs to them and that it is for them to choose whom to sue and therefore, the application ought to fail.
20. They submitted that a party is bound by her pleadings and relied on the case of *IEBC & another versus Stephen Mutinda Mule & 3 others* (2014) eKLR.
21. They further submitted that the application cannot succeed on merit as the applicant had not exhibit any receipt for legal fee paid to the Plaintiff's advocates and when she signed a witness statement which she produced as part of her evidence, she didn't say that she wanted to be joined as a party to the suit.
22. She submitted that the application was an afterthought and an abuse of the court process and should be struck out with cost.

Defendant/Respondent's case: -

23. The Defendant on the other hand averred that the application was incompetent, bad in law and an abuse of the Court process.
24. She stated that this case started in 2017 and that the same is pending judgment after all parties testified and filed their final submissions therefore, the application would unfairly delay the fair and expeditious determination of the suit.
25. She stated that the application had been made in bad faith and is an afterthought and that if the same is allowed, it would mean that the suit would have to be heard afresh which would not be in the interest of justice.
26. She stated that as the plaintiff's witness, the applicant didn't allege anywhere in her witness statement and evidence in court that she was a beneficiary of the suit land and therefore her proposed claim would be contradicting her statement and evidence- in- chief.
27. She stated that if at all the applicant has a legitimate claim which she does not, she ought to file her separate case as the defendant cannot be a defendant in the draft defence and counterclaim since the plaintiffs have no claim against her.
28. She prayed that the application be dismissed with costs.

Analysis: -

29. I have considered the application, the parties' rival affidavits and submissions as well as the relevant law.
30. The applicant has brought the application under Order 1 rule 3 which provides that: -

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.

31. The applicant's application though it has been vehemently opposed, is to be enjoined in the suit. There appears to be contradictions in that the applicant claims that she was under the impression that she was a plaintiff in this suit. However, from the draft defence and counter claim, she seeks to be added as a defendant.
32. In her submissions she relied on Order 1 Rule 10 which she claimed allows the court to add a party to a suit at any stage. The said Order 1 rule 10 (2) provides 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.
33. The plaintiff/respondents on the other hand claims that since the suit belongs to them, it is for them to choose whom to sue and therefore the application ought to fail.
34. The Defendant/Respondent on her part also claims that allowing the application would delay the suit which was only awaiting a judgment date.
35. It is trite law that Joinder is allowed where the addition of a party to the suit may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. In the case of *JMK v MWM & another* [2015] eKLR the Court of Appeal held that:

Order 1 Rule (10) (2) of the [Civil Procedure Rules](#) empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

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.



36. Since the Applicant has moved the court to be added as a party, she is therefore supposed to satisfy to this Honourable Court that her joinder as a party to this suit will be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the dispute.
37. It is her case that she has a claim against the defendant who is registered to hold land parcel number Kabare/Nyangati/89 for himself and in trust for his siblings including herself.
38. The applicant has also stated that the 1st Plaintiff and the Defendant are her siblings which fact has not been denied.
39. From the plaint and counterclaim, both the applicants are seeking a declaration for a customary trust over land parcel number Kabare/Nyangati/89.
40. Both the Plaintiffs and Defendant insist that the Applicant did not have a claim in the suit land and that is she elected to be a witness in support of the plaintiffs' case. I have looked at the witness statement dated 16th May, 2017 and find nowhere the applicant laid claim over the suit land.
41. I therefore find that the applicant's claim is an afterthought which has come too late in the day when both the plaintiffs' and defendant's cases have been closed and submissions have been filed and the matter only awaits delivery of judgment.
42. In addition and as indicated earlier on, the applicant was well aware of the existence of this suit but elected to be a witness as opposed to being a party.
43. She has not refuted the evidence by one of the plaintiffs' witness that she did not instruct their lawyer or even pay legal fees as one of the parties in this suit.
44. The Applicant can therefore not be heard to claim that she was short changed or that she is a necessary party to this suit yet she was all along aware of her role as a witness.
45. The applicant has therefore not satisfied this Court that her addition as a party to the suit will enable the effectual and complete adjudication and settlement of all questions involved in the suit.

Conclusion: -

46. From the foregoing I find that the Notice of Motion dated 1st July, 2021 is without merit and the same is hereby dismissed. Since the parties are family members, I order each party to bear their own costs. It is so ordered.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 22ND APRIL, 2022.

HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

Ms Makazi holding brief for Nyaga Gitari for Plaintiff

Mr. Asimwe holding brief for Magee for the Defendant

Kabuta – Court clerk.

