



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ibui & another v Ibui & 3 others (Environment & Land Case  
105 of 2016) [2022] KEELC 3848 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3848 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 105 OF 2016**

**CK NZILI, J  
JULY 27, 2022**

**BETWEEN**

**GEORGE MUREGA IBUI ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER WAIRURI MUREBU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**TITUS KIREA IBUI ..... 1<sup>ST</sup> DEFENDANT**

**JOSHUA KIREA MBIRITHI ..... 2<sup>ND</sup> DEFENDANT**

**STEPHEN KIREMA MBIRITHI ..... 3<sup>RD</sup> DEFENDANT**

**GEOFFREY KIRIANKI MBIRITHI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**A. Application for Joinder**

1. By an application dated 26.4.2022 the court is asked to join the land adjudication officer as a defendant in this suit. The application is supported by an affidavit sworn by Titus Kirea Ibui, the 1<sup>st</sup> defendant sworn on the even date. The grounds are that the title deeds being challenged were issued through a land adjudication process by the proposed defendant; that the decisions, actions and or omissions cited by the plaintiffs regarding the impugned title deeds are attributable to the proposed party; that if enjoined it will ensure the defendants will not carry a heavier evidential burden, than unreasonably fair to explain the procedural issues he undertook; there will be no prejudice to the plaintiffs, and lastly the proposed defendant is a necessary party to the suit.
2. In the supporting affidavit, the 1<sup>st</sup> defendant averred the proposed defendant played a vital role in connection to the facts and processes precipitating this suit.



## **B. Grounds of Opposition**

3. The plaintiffs oppose the application through a replying affidavit sworn on 5.5.2022 by George Murega Ibui. It is averred that the application was an afterthought and brought too late after the plaintiffs' witnesses had testified, who are elderly, bed ridden, sick and who have lost memory hence the delay and the attempt to hear the matter afresh would irredeemably prejudice and or cause injustice to the witnesses who cannot attend court to testify afresh. That the defendant on 3.2.2021 sought to join his co-defendant but did not seek the proposed defendant not to be joined. That the first defendant on 22.2.2021 applied for an order that the plaintiffs be ordered to avail the land adjudication officer to produce some documents, which application was dismissed.
4. Again on 27.1.2022 the defendants orally applied to file an alleged A/R objection proceedings, which application was rejected on 23.3.2022 and no appeal has been lodged.
5. Going by the above trends this application, according to the plaintiffs is made in bad faith so as to circumvent the unchallenged ruling set out above. Lastly it is averred that no decision, actions or omissions have been attributed to the Land Adjudication Officer given the case was based on fraud allegedly committed by the 1<sup>st</sup> defendant.

## **C. Oral Submissions**

6. Mr. Kibe Mungai counsel for the applicants orally submitted that under Order 1 Civil Procedure Rules, the proposed defendant was a necessary party since the principle is that all parties involved in a matter should all be made parties to a suit. Counsel submitted that under the law, the parties and the court are obligated to ensure the necessary parties come on board.
7. Counsel also submitted the proposed defendant was a necessary party not because of liability but because of the decisions he made regarding the suit land titles.
8. On the second element of fair hearing, counsel submitted that under the *Land Adjudication Act*, if a title deed is issued pursuant to the decision of an officer and questions arise over it, the title holder should not carry any evidential burden which is not his, but the said officer should be a party to the suit.
9. Counsel submitted that though there would be delay after the application is allowed the need to join the party is important for the ends of substantial justice to be met and the only way to do so was by bringing everyone on board.
10. Regarding the replying affidavit, counsel submitted he was not aware of the previous rulings and any oral requests made.
11. Counsel held the view that his client's application should not be taken as trying to circumvent the previous rulings but as made in good faith and at the earliest stage possible.
12. Counsel regretted he had inherited the case; his hands were tied and was only seeking for fair justice as government officers made certain decisions, otherwise the court should find the application with merits and allow it.
13. Mr. C.P Mbaabu counsel for the plaintiffs/respondents submitted the application was fatally defective and legally incompetent given there was no land adjudication offices Meru county under both Cap 283 and 284 Laws of Kenya applicable in this matter hence what was sought was to add a non-existent party.
14. Counsel submitted that going by the documents filed at page 9 of the defendants' bundle it is confirmed that the land before titling was under Kianjai adjudication section and if it was essential



- to add a party then such a party would be an officer from that adjudication section and given no amendment had been sought it would be an exercise in futility to allow the application since there would be no such office to be served.
15. Further, counsel submitted that even if the application was referring to the current officer it would still be defeated by conceded fact that the adjudication section was closed after the registration and issuance of titles which have been annexed hence the officer and the officer was non-existent.
  16. Counsel also submitted that the application was not seeking to enjoin a land registrar who issued the title deed and who has powers unlike the land adjudication officer. Counsel submitted that under Order 1 Rule 10 (2) Civil Procedure Rules, the court has unfettered discretion to add a necessary party to pending proceedings. However, in this case the proposed party is not a necessary party because from the further amended originating summons there are documents, that there has been no illegality attributed to the land adjudication officers at the adjudication stage or at the issuance of title deed(s).
  17. In addition, counsel submitted that similarly in the 1<sup>st</sup> defendants replying affidavit by Titus Ibui, there has been no illegality or anything wrong attributed to an adjudication officer to warrant a joinder of the Land adjudication officer to this suit.
  18. The counsel also submitted that under paragraph 68 & 11 of the replying affidavit it is averred that their late father transferred the suit land to him as gift *inter vivos* and he proceeded to subdivide the land.
  19. Further counsel submitted that the illegality complained of, was committed by the 1<sup>st</sup> respondent to favour him and his co-defendant. To that extent, counsel also submitted no adjudication officer can be a necessary party to this suit and the submissions by the applicants that they are impugning the decision of the land adjudication officer are untrue. Counsel submitted in all the plaintiffs' documents there was no procedural infraction or omission alleged any land adjudication officer.
  20. Similarly, counsel submitted that the alleged illegality by the plaintiffs was solely against the 1<sup>st</sup> defendant who has admitted subdividing the land and the land adjudication officer merely implemented the decision.
  21. Therefore, given the defendants have not stated any scintilla of prejudice or injustice if the alleged non-existent party is not added, counsel submitted there would be no prejudice, real, imagined or perceived since the evidential burden rests with the plaintiffs on a balance of probabilities under Sections 107-112 of the *Evidence Act*.
  22. Additionally, submitted that to the contrary, it would be the plaintiffs who will be prejudiced if the application is allowed since PW1 & PW 2 have already testified and given Order 1 Rule 10 (C) Civil Procedure Rules requires upon the addition of a party to a suit, the originating summons be amended and fresh summons to issue, it will open a window for any party to seek to recall and cross examine the witnesses.
  23. In this instance since PW 1 testified *de bene esse*, counsel submitted that the plaintiff's suit would be prejudices based on the age, sickness and risk of senility of their two witnesses.
  24. In addition submitted there will also be delay since the case is at an advanced stage which would be contrary to Article 159 (2) (d) of *the Constitution*.
  25. Mr. Mbaabu submitted the element of affordability also comes into play since the plaintiffs will have to pay more, attend court and respond to new issues.



26. Further, counsel submitted the applicants have had competent lawyers and enough time to include other parties especially when the 1<sup>st</sup> defendant sought to add his co-defendants, hence the application was an afterthought with the sole aim of delaying the suit.
27. In reply, counsel for the applicants submitted that misdescription of parties is curable under Order 1 Civil Procedure Rules so the correct officer can still be added since there cannot be a wrong without a remedy.
28. Regarding the merits of the application, counsel urged the court to look at questions no. 3, 4 & 7 of the further amended originating summons and the evidence given under those titles which all refer to the land adjudication officer. Counsel urged the court to find that it is not to say the issues raised in the suit do not touch on the office of the land adjudication officer since all the records from page 20-29 of the plaintiffs' bundle of documents touch on that office, its decisions, acts of omission and commission. Therefore, counsel submitted that as makers of those documents, the issue of fraud is core in this case hence the land adjudication officer was a necessary party to this suit.
29. Further counsel submitted page 11-16 of the defendants bundle of documents relate to a letter dated 11.9.2010 to the District Land Adjudication and Settlement Officer Tigania West District, therefore they make him a necessary party who has a lot to do with this case. As concerns the recall of witness, counsel submitted they do not need to come back to court since the key person is the plaintiff.
30. Counsel also submitted that the court has to weigh the scales of justice and find all the parties will benefit if the application is allowed for substantive justice to be achieved.

#### **D. Issues for Determination**

31. Having gone through the application and the oral submissions, the issues for my determination are:
  - (i) What are the considerations in determining the application for joinder of a party?.
  - (ii) If the defendants' application has merits.
  - (iii) If the proposed party is a necessary party.

#### **E. History of the suit**

32. The history of this matter was set in the ruling delivered on 23.3.2022 George Murega Ibui & 2 others vs Titus Kirea Ibui & 3 others (2022) eKLR.
33. An order of status quo has been on since 30.5.2017 by consent of parties. Compliance with Order 11 was ordered in 2017.
34. The originating summons was amended by an order issued on 6.2.2019. Thereafter on 3.2.2021, the 1<sup>st</sup> defendant brought on board three additional defendants. The suit began in earnest on 22.2.2021 with PW 1 & PW 2 testifying. A further hearing was set for 26.5.2021. An application was made by the defendants leading to a ruling delivered on 19.5.2021 in which the defendants request that the land adjudication officer be ordered to testify on behalf of the plaintiffs was disallowed. Parties were however allowed to be at liberty by consent to produce the documents without calling the makers.
35. The 1<sup>st</sup> defendant made his reply to the originating summons on 18.4.2017 and later on filed a witness statement and a list of documents dated 12.2.2021.
36. In the documents the 1<sup>st</sup> defendant never made any mention that the land adjudication officer was a necessary witness or a party for that matter to this suit.



37. Further in the said replying affidavit and the witness statements the defendants did not lay any blame or allude to calling the land adjudication officer as one of their as an expert witness.
38. In the ruling delivered on 23.3.2022 the defendants were seeking to file additional evidence allegedly requested for through a letter dated 2.4.2019 and incidentally received on by a letter dated 26.1.2022. The court made a finding that to allow such a request would amount to an abuse of the court process.

#### **F. The Law on Joinder**

39. Order 1 Rule 10(2) of the Civil Procedure Rules provides that a court may at any stage, on such terms as may appear to the court to be just, order that the name of any party who ought to have been joined as defendant(s) or whose presence before the court may be necessary in order to effectually and completely adjudicate upon and settle all questions involved in the suit be added.

#### **G. Brief Facts & Issues before the court**

40. The plaintiffs approached this court by invoking its jurisdiction as set out under Order 37 Rules 1, 16, 17, 18 and 19 of the Civil Procedure Rules.
41. Order 3 Rule 1 provides that that any trustee or any person claiming to be interested as cestine que trust may seek for determination without the administration of the estate or trust, for any questions affecting the rights or interests of the person claiming to be heir or cestine que trust.
42. The question posed by the plaintiffs herein as per the further amended originating summons are ten in number among them; if the parcel of land and subdivisions were formerly under Kianjai adjudication section and if as at 27.6.2006 they were in the names of the deceased; if before the deceased passed on the said parcels had been bequeathed to the plaintiffs mother and siblings by the deceased; if the 1<sup>st</sup> defendant had been given 7 acres before 27.6.2006; if the plaintiffs mother lived on the suit land and developed it; whether the 1<sup>st</sup> defendant fraudulently and illegally subdivided, or caused subdivisions of L.R NO. 4690 and transferred to himself, the plaintiff and other three defendants as Parcels No's 4690, 8967, 8969, 8970 and 8971 without any form of grant of letters of administration, consent or knowledge of the plaintiffs; whether the defendants have any protectable or justiceable right or interest over the suit land and lastly if the registration of the suit land in the name of the defendants should be cancelled and the suitlands be registered to the rightful heirs or be reverted to the name of the deceased to be distributed under succession cause to the rightful heirs.
43. The basis of the originating summons was that the deceased passed on 27.6.2006, no letters of administration have been taken out except the limited grant dated 15.7.2016.
44. The defendants answer to the questions posed is contained in the replying affidavit sworn on 18.4.2017, witness statements and the list of documents in the bundle dated 12.2.2021.
45. The defendants stated that on 27.6.2006, the deceased called them and shared the land then remaining in his name and transferred to the 1<sup>st</sup> defendant, L.R Kianjai/Kianjai/4120 & 4690 before his death with the knowledge of all the family members while L.R No. 4690 was given to him in 1995.
46. The 1<sup>st</sup> defendant denied that L.R No. 4969 & 4120 ever belonged to the 1<sup>st</sup> plaintiff and his mother. He averred that after the death of their father, L.R No. 4690 was subdivided and registered to the named beneficiaries at paragraph 8 while Parcel No. 807 & 5989 remained in the deceased names. He denied any fraud as alleged but maintained that the transfer of L.R No. 4690 and 4120 was a gift intervivos. The 1<sup>st</sup> defendant maintained the names of the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs were inserted in the originating summons without their consent.



47. The defendants filed a list of documents dated 12.2.2021 containing copies of the title deed for L.R No. 8969 & 8967, ministry of land summons, minutes of the family meeting held on 15.8.2009, 7.8.2010, 28.8.2010 letter dated 11.10.2010.

## H. The Context of the Dispute

48. Given the myriad of applications by parties in this suit it is necessary to set out and contextualize and define the scope of inquiry of this originating summons so that moving forward parties can confine themselves only to the issues before the court in view of the courts limited mandate under Order 37 Civil Procedure Rules.
49. While looking at the scope and mandate of the court under this section, the Court of Appeal in *Mukesh Manchand Shah & another vs Prijat Shah & another* (2015) eKLR, held that an application by originating summons has never been a substitute for initiating contentious issues of facts. Looking at the history of its evolution, the sole object being to provide simplicity of the process and to eliminate prolonged pleadings hence its simple form no. 26 or 27 of appendix A in which facts and evidence are set forth in an affidavit or affidavits unless under Rule 19 the court gives directions for it to be converted into a plaint.
50. The questions in the further originating summons are rather simple based on the facts pleaded above and as has been said often parties are bound by their pleadings and issues flow from the pleadings. See *Mutinda Mule vs IEBC* (2014) eKLR.
51. The defendants herein have never pleaded anything touching on the role of the land Adjudication Officer in the process of the subdivision and transfers of the suit parcels from the deceased to themselves and or the plaintiffs.
52. The defendants have never sought for witnesses summons against any land adjudication officials or the land registrar for that matter, since the suit land are admitted to fall under the [Land Registration Act](#).
53. In my view parties can only deal with issues and questions as they have framed in their pleadings particularly given the limited scope of the role of the court under Order 37 Civil Procedure Rules. In this matter parties have admitted some of the suit parcels of land form part of the estate of their deceased father and letters of administration are yet to be sought and obtained.
54. In that case, this court must confine itself to its mandate and so should the parties as set out under order 37 Civil Procedure Rules.
55. In *Raila Odinga vs IEBC* (2017) eKLR the Supreme Court of Kenya held parties should not be allowed to travel outside the contours they have set in their pleadings, otherwise they will conflate issues and derail justice contrary to the overriding objective of the court which is the expeditious disposal of suits in an efficient timely and cost-effective manner as set out under sections 1A, 1B, 3A of the [Civil Procedure Act](#) and Article 159 of [the Constitution](#).
56. Having the above context, scope of its mandate and the circumstances in mind, the question now is whether the proposed party by the defendants is a necessary party under Order 1 Rule 10 Civil Procedure Rules to help the court effectually and completely adjudicate upon and settle all questions involved in this suit as set out in the further amended originating summons.
57. Going by the pleadings set above and the list of documents by the parties, it is quite obvious both of them rely on an adjudication record from Kianjai Adjudication Section Meru Adjudication area for sheet no. 20 made under the [Land Consolidation Act](#).



58. PW 3 has already produced without objection P. exh no. 5 and a copy of the adjudication record for parcel no's 807, 4120, 5989, 8967, 8968, 8969, 8970 and 8971 as P. exh 8-15 respectively.
59. The burden of proof lies with he who alleges under Sections 107 – 112 of the *Evidence Act*. In this case the evidential burden lies with the plaintiffs under Order 37 Civil Procedure Rules to prove his right and interests on the question titles of land.
60. The defendants have not filed any counter claim or posed any questions as regards the role of the land adjudication officers and by extension the land registrar who registered and issued the resultant title deeds so as to claim that they should shoulder or share alongside them, the evidential burden as submitted by Mr. Kibe Mungai advocate for the defendants.
61. The court at the start of hearing this suit issued directions for the questions herein be determined through viva voce evidence. This should not be interpreted to mean that the court widened the scope of the matters to include all and sundry and for parties to bring issues beyond the facts pleaded in their respective affidavits.
62. As regards affordability in *Kibutiri vs Kibutiri* (1983) eKLR the court gave a warning in form of advice to ingenious lawyers wasting clients' money and courts time engaging in endless and unnecessary conduct.
63. In this matter parties agreed on viva voce evidence in a responsible manner. Unfortunately, the matter has endlessly dragged on with several interlocutory applications defeating the very essence of a summary procedure under Order 37 Civil Procedure Rules which is intended for simple matters to be settled without the expense of bringing action in the usual way.
64. In my humble view, therefore and based on the foregoing I find no basis in enjoining the proposed party to this suit since the proposed defendant is not a heir, creditor, legatee or cestui que trust as provided under Order 37 Rule 1 Civil Procedure Rules under which the jurisdiction of this court has been invoked.
65. On the contrary the land adjudication officer and the land registrar are relevant and necessary witnesses in this suit.
66. For the end of justice to be met and in order to fast track this matter, I exercise my power and discretion under Section 22(b) and the *Civil Procedure Act* as read together with Order 16 Rule 1 & 6 Civil Procedure Rules, witnesses summons to issue to the relevant officers to come and testify in this suit. The application dated 26.4.2022 is dismissed with costs for lack of merits.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27<sup>TH</sup> DAY OF JULY, 2022**

**In presence of:**

**C/A: Kananu**

**C.P Mbaabu for plaintiffs**

**HON. C.K. NZILI**

**ELC JUDGE**

