



Lakeview Investments Limited v Odero (Sued as the Chairman, Nairobi Kenya Secondary Schools Heads Association); Ishiundu (Proposed Defendant) (Environment & Land Case 280 of 2017) [2022] KEELC 3861 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 280 OF 2017
CA OCHIENG, J
JULY 25, 2022**

BETWEEN

LAKEVIEW INVESTMENTS LIMITED PLAINTIFF

AND

**JOHN PAUL ODERO DEFENDANT
SUED AS THE CHAIRMAN, NAIROBI KENYA SECONDARY SCHOOLS
HEADS ASSOCIATION**

AND

SHILLA ISHIUNDU PROPOSED DEFENDANT

RULING

1. What is before court for determination is the plaintiff's notice of motion application dated the January 15, 2022 brought pursuant to order 22 rule 22(1), order 51 rule 1, order 1 rule 10(2), order 45 rules 1(a) & 2(1) of the *Civil Procedures* and sections 1A, 1B, 3A, 3B & 63(e) of the *Civil Procedure Act*. The plaintiff seeks the following orders:
 1. Spent
 2. That the honourable court be pleased to grant a stay of execution of the orders issued on May 15, 2020 which found the plaintiff's Director Joseph Oduor Okwaro in contempt of the orders of January 25, 2019 pending the hearing and determination of the instant application.
 3. That the honourable court be pleased to enjoin Shilla Ishiundu as a defendant in this suit and leave be granted to the plaintiff to amend the Plaint accordingly.



4. That the honourable court be pleased to order that the proposed defendant Shilla Ishiundu upon service, file her response to the instant application within seven (7) days from the date of service.
 5. That cost of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Joseph Oduor Okwaro where he refers to the orders issued by this court on January 25, 2019 restraining any parties from interfering with the suit properties namely Mavoko LR No 20154 – 20163. He confirms that he was cited for contempt on May 15, 2020 in respect to the orders issued on January 25, 2019. He claims it is the proposed defendant Shilla Ishiundu developing as well as erecting a permanent structure on the suit properties which she insists she purchased from a third party and there is thus a need for her to be joined to this suit as a defendant. He is aware the proposed defendant claims to have a title document to the portion of the suit property she occupies and has continued to construct thereon despite the interim orders issued on May 15, 2020. He avers that he is a stranger to the proposed defendant's interest in the suit property but believes her joinder to this suit will shed more light on who is in actual possession of the permanent development on the portion of the suit property. Further, that the plaintiff is aggrieved as well as prejudiced by the proposed defendant's continuous trespass on the suit property. He states that it is not the plaintiff developing the suit property. He reiterates that he is willing to have the said developments demolished pursuant to a court order as a sign of the plaintiff's innocence.
 3. In opposition to the instant application, the defendant filed a notice of preliminary objection and a replying affidavit. In the notice of preliminary objection, he insists the entire application is *res judicata* because a similar application seeking participation of the proposed defendant in the contempt sentencing had been determined. Further, that the court is *functus officio* on the issue of participation of Shilla Ishiundu and lacks jurisdiction to deal with the instant application. In the replying affidavit, he provides a history of the proceedings herein and opposes the joinder of Shilla Ishiundu as a proposed 2nd defendant. He contends that no evidence has been presented of her existence or proof of ownership of the alleged parcel of land. He reiterates that the instant application is frivolous and vexatious. Further, that there can be no joinder by omission and Shilla Ishiundu has not responded to the instant application.
 4. The proposed defendant opposed the application and filed a replying affidavit sworn by Sheila Likhwechi Ashiono where she deposes that the application is laced with mischief, half truths and meant to mislead the court. Further, that the same is factual and full of material non-disclosure. She explains that in 2008, Julius Mwangi Kamau (since deceased) and others entered into a partnership for the purchase of the suit property where they established a business entity known as Lakeview Investment Limited (the plaintiff herein). Further, that they purchased the suit property from Jennifer Ndege Waithera with intentions of sub-dividing the said land into subplots and selling the same to third parties. She confirms that the business partners disagreed forcing them to divide the suit property amongst themselves in accordance with their contribution. She explains that Julius Mwangi Kamau owned his share of land title number Mavoko Town Block 12/3060 out of which she purchased a portion therefrom at Kshs 700,000/=. She states that she took possession of the portion purchased and constructed thereon. Further, that she has fenced her land. She contends that she is a stranger to the suit property herein as the title numbers provided by the plaintiff are totally different from her parcel of land and she has never been issued with a notice of injunction. She insists she put up structures on the suit property before orders of injunction were issued. Further, that she was never served with any court orders. She reiterates that the instant application amounts to misjoinder. Further, that she is not the person referred to, in the instant application.



5. The application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the notice of motion dated the January 15, 2022 including the respective affidavits, notice of preliminary objection and rivaling submissions, since the plaintiff's director had already been sentenced for having been found in contempt of the order of court, at this juncture, the only issue for determination is whether the proposed 2nd defendant Shilla Ishiundu should be joined in these proceedings.
7. The plaintiff in its submissions reiterated its averments and insists the proposed defendant resides on the suit property and her plot was excised from the blocks which it claims. Further, that the proposed defendant admits having purchased her portion of land from one Julius Mwangi Kamau who was a former director to the plaintiff. It contends that the proposed defendant admits having constructed a permanent house on the suit property which portion was subject to contempt proceedings. To support its arguments, it relied on the following decisions: Nairobi High Court Civil Suit No 115 of 2019 [*John Harun Mwau Vs Simone Hayson & 2 others*](#) and *Meme Vs Republic* (2004) 1EA, 124.
8. The defendant in his submissions insists there is no legal or factual nexus connecting Shilla Ishiundu to the land which is subject of this case. Further, that there is no compelling reason presented to show the court that Shilla Ishiundu is a necessary party to this suit. He further submits that the plaintiff has not shown which orders may affect the proposed defendant. To support his averments, he relied on the following decisions: [*Kenya Electricity Transmission Co Ltd Vs Kibii Arap Biego & 14 Others Eldoret Holdings Co Ltd \(proposed Interested Party\)*](#) (2021) eKLR; *Departed Asians Property Custodian Board Vs Jaffer Brothers Ltd* (1999) 1EA 55 (SCU) and [*Robert Githua Thuku V William Ole Nabala & 9 Others*](#) (2018) eKLR.
9. The proposed defendant in her submissions reiterates that she did not disobey the orders issued by this court as she was not a party to these proceedings and neither was she served. She further submits that this court should not allow the application for joinder as she is not a proper and necessary party herein. Further, that there is no relief flowing from her to the plaintiff and that the ultimate order or decree can be enforced without her participating in these proceedings. She insists the consequential order of amendment of the pleadings should not be granted. To buttress her averments, she relied on the following authorities: [*Republic Vs Attorney General & Another Ex parte Mike Maina Kamau*](#) (2020) eKLR; [*Indian Airports Employees Union Vs Ranjan Catterjee & Another*](#) (AIR) 1999 SC 880; [*Kingori Vs Chege & 3 Others*](#) (2002) 2 KLR 243; [*Zephir Holdings Ltd Vs Mimosa Plantations Ltd Jeremiah Matararo & Ezekiel Misango Mutisya*](#) (2014) eKLR ; ; *Abdul Karim Khan V Mohamed Roshan* (1965) EA 289 CA and *Eastern Bakery Vs Castellino* (1958) EA 461.
10. In respect to joinder of a party to proceedings already in court, order 1 rule 10(2) of the [*Civil Procedure Rules*](#) stipulates *inter alia*:
 - (2) 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.”
11. 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 and referred to the



Ugandan decision of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU) where it was held that:

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 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 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."

12. Further, in the case of *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR the Court observed as follows:

Again the power given under the rules is discretionary which discretion must be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.

...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in order i rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

13. On perusal of the plaint, defence, instant application, respective affidavits including annexures herein, I note the proposed 2nd defendant admits having purchased her portion of land from one of the Directors of the plaintiff. She confirms that the original parcel was owned by the plaintiff but the partners sub-divided it, and each took their respective portion. Further, she even annexed the original Sale Agreement which the plaintiff had executed to purchase suit land from Jennifer Ndege Waithera in October, 2013. The proposed 2nd defendant admits that she has constructed a permanent house on the suit land including a perimeter wall. I note the plaintiff's director was cited for contempt for having constructed on the suit land despite existence of the injunctive orders, which fact he denied. Insofar as the defendant and proposed defendant have vehemently opposed this application, the annexures the proposed defendant has filed in court demonstrate there is a strong nexus of her land to that claimed by the plaintiff. Further, I note the fulcrum of the dispute herein revolves around a claim for the same land where the parties are holding different titles. I opine that insofar as the proposed defendant's name has been referred to as Shilla Ishiundu and not Sheila Ashiono, but by virtue of the fact that she admits



to have purchased her land which was a portion of the suit property from a former director of the plaintiff and even annexed an initial sale agreement to that effect as well as constructed thereon, these facts cannot be ignored by this court.

14. Based on the facts as presented while relying on the legal provisions I have quoted and associating myself with the decisions cited, it is my considered view that the proposed defendant has a stake in these proceedings and her involvement herein is necessary to enable the court effectually and completely adjudicate upon as well as settle all questions involved in the suit. Further, that she will indeed be affected by any decision from the suit herein.
15. It is against the foregoing that I find the instant notice of motion application partially successful and I will proceed to allow prayers No 3 and 4 only.
16. Further, for good order, I direct that the plaint be amended and the same be served on all the parties within seven (7) days from the date hereof, after which all the defendants are granted leave of fourteen (14) days to file and serve their respective defences.
17. Costs of this application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY, 2022

CHRISTINE OCHIENG

JUDGE

