



**Githere v Mwangi & 2 others; Waithaka (Proposed Defendant) (Environment & Land Case 95 of 2024) [2025] KEELC 3049 (KLR) (Environment and Land) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3049 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 95 OF 2024**

**MC OUNDO, J**

**APRIL 3, 2025**

**BETWEEN**

**JAYNE WANJIKU GITHERE ..... PLAINTIFF**

**AND**

**MARY WANJIRU MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**DAWAD PETROLEUM LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**THE LANDS REGISTRAR, NAIVASHA ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JULIUS WATHIYA WAITHAKA ..... PROPOSED DEFENDANT**

**RULING**

1. Coming up for determination is a Notice of Motion Application dated 6<sup>th</sup> November, 2024 brought under the provisions of Order 1 Rules 10(2); Order 51 Rule 1 & 4 of the Civil Procedure Rules 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and all other enabling provisions of law wherein the Applicant has sought for the following orders:
  - i. That the Court be pleased to join Julius Wathiya Waithaka as the 4<sup>th</sup> Defendant in the suit.
  - ii. That upon joinder of the intended Defendant as a party, the Honourable Court be pleased to order that the Plaint be amended to reflect the correct position.
  - iii. That further, upon joinder, the 1<sup>st</sup> Defendant be granted leave to amend her statement of defence and raise a counterclaim against the Plaintiff and the Proposed 4<sup>th</sup> Defendant jointly and severally.



- iv. That the cost of the Application be provided for.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Mary Wanjiru Mwangi, the 1<sup>st</sup> Defendant/Applicant herein who deponed that the proposed 4<sup>th</sup> Defendant was the Plaintiff's agent in respect to the suit property known as Kijabe/Kijabe Block 1/1091. That throughout the transfer of the suit property to her name and the subsequent sale to the 2<sup>nd</sup> Defendant, the Proposed 4<sup>th</sup> Defendant was a key person in that he was the one who had facilitated all the transactions with the knowledge of the Plaintiff which transactions are the subject of the instant suit. That further, the Proposed 4<sup>th</sup> Defendant had received over Ksh. 10 Million of the purchase price on behalf of the Plaintiff.
  3. That given that the Plaintiff had not named him as a Defendant despite being a necessary party in the proceedings herein, it was just and proper that the Court brings him on board to enable the matter to be effectively determined with finality.
  4. That she had also intended to raise a counterclaim that would seek substantive orders against the Plaintiff and the Proposed 4<sup>th</sup> Defendant, jointly and severally but the same was currently impossible as the Proposed 4<sup>th</sup> Defendant had not been made party in the instant suit. That it was thus in the interest of justice that the Proposed 4<sup>th</sup> Defendant be joined to facilitate the final and effectual determination of the issues arising in the suit herein.
  5. That having perused the evidence available to her, she was of the opinion that the Proposed 4<sup>th</sup> Defendant was a proper party to the present suit. That there was no prejudice that any other party in the matter herein would suffer should the Proposed 4<sup>th</sup> Defendant become a party to the instant proceedings.
  6. In response to the Application, the Plaintiff vide her Replying Affidavit dated 25<sup>th</sup> November, 2024 opposed the same for reason that she was the legal proprietor of the property known as Kijabe/Kijabe Block 1/1091 having acquired the same in the year 2009 after the death of her mother Jemimah Wambui Mbugua who had been the registered owner. That she had been in possession of the said property since the year 2009 and had leased the same to Mary Nyamoingi Karanja who was in actual occupation.
  7. That on or about 28<sup>th</sup> August 2023, the 2<sup>nd</sup> Defendant had attempted to evict her tenant from the property on allegations that it was the new owner of the property. That upon visiting the 3<sup>rd</sup> Defendant's offices in Naivasha to investigate what was going on, she had discovered that on or about 16<sup>th</sup> May, 2022, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had without her knowledge and consent fraudulently transferred the suit property to the 1<sup>st</sup> Defendant who had fraudulently sold it to the 2<sup>nd</sup> Defendant on or about 24<sup>th</sup> July, 2023.
  8. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were strangers to her and so was the individual named Julius Wathiya Waithaka who was sought to be joined in the instant case as the 4<sup>th</sup> Defendant.
  9. That contrary to the 1<sup>st</sup> Defendant's assertion, she had never authorized the said Julius Wathiya Waithaka to act as her agent for the sale of Kijabe/Kijabe Block 1/1091, she had not been a party or privy to the purported Memorandum of Understanding dated 24<sup>th</sup> May, 2022 entered into by Mary Wanjiru Mwangi, Timothy Mwaura, John Njuguna Thuo and Julius Wathiya Waithaka and neither was she party or privy to the purported Friendly Loan Agreement dated 10<sup>th</sup> July, 2022. That lastly, she had never received the alleged over Kshs. 10,000,000/= from either Julius Waithaka or the 1<sup>st</sup> Defendant.



10. That subsequently, it was clear that she had no claim or cause of action against the said Julius Wathiya Waithaka as he was a stranger who had never represented her in any transaction involving land parcel No. Kijabe/Kijabe Block 1/1091 at all. That indeed, the cause of action as had been pleaded in the Plaintiff dated 27<sup>th</sup> September, 2023 had been limited to the three Defendants therein named for recovery of land parcel No. Kijabe/Kijabe Block 1/1091 which had been fraudulently transferred to the them. That since she had no grievance or any cause of action against the said Julius Wathiya Waithaka, it would be untenable and oppressive to compel her to amend the Plaintiff to include a party who was a stranger to her and whose whereabouts was unknown to her. That further, the rules of civil procedure required that the Plaintiff pleads with sufficiency and clarity the cause of action against each or every Defendant named in a suit.
11. She deponed that as could be discerned from the grounds of the Notice of Motion and the Supporting Affidavit sworn by the 1<sup>st</sup> Defendant and the annexures therein, it was clear that the said Julius Wathiya Waithaka was well known to the 1<sup>st</sup> Defendant. That indeed Order 1 Rule 15 of the Civil Procedure Rules makes provision for third party proceedings whereby a Defendant can claim against any person who was not a party to the suit. That subsequently, considering the circumstances of the instant case, the correct procedure available to the 1<sup>st</sup> Defendant was to initiate third-party proceedings against the said Julius Wathiya Waithaka since it was the 1<sup>st</sup> Defendant and not the Plaintiff who had a claim against him.
12. She deponed that the Application herein had no merit but an attempt by the 1<sup>st</sup> Defendant to cause confusion in the Plaintiff's case as had been pleaded in the Plaintiff dated 27<sup>th</sup> September, 2023. She thus prayed that the same be dismissed with costs.
13. In a rejoinder, the 1<sup>st</sup> Defendant filed a Further Affidavit dated 14<sup>th</sup> January, 2025 sworn by Mary Wanjiru Mwangi, the 1<sup>st</sup> Defendant herein, wherein she reiterated the contents of her Supporting Affidavit sworn on 6<sup>th</sup> November, 2024 and then stated that the proposed 4<sup>th</sup> Defendant had been the agent of the Plaintiff for purposes of transferring the suit property known as Kijabe/Kijabe Block 1/1091 to her name. That throughout the transfer of the suit property to her name and subsequent transfer to the 2<sup>nd</sup> Defendant, the suit land had been vacant and as such the Plaintiff's allegation to the contrary had been incorrect. That in any case, had the Plaintiff been in occupation of the same since the year 2009 as had been alleged, she would have known when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had physically visited the suit property while conducting due diligence. She reiterated that the suit property had been transferred to her name and subsequently sold to the 2<sup>nd</sup> Defendant with the Plaintiff's knowledge and approval through his agent, the proposed 4<sup>th</sup> Defendant, who she sought to join in the instant proceedings.
14. She deponed that the only legal and valid title deed she was aware of was the one bearing the 2<sup>nd</sup> Defendant's name since the title bearing the Plaintiff's name had been surrendered to the 3<sup>rd</sup> Defendant and a new one issued in her name and later to the 2<sup>nd</sup> Defendant. That the Plaintiff/Respondent having denied any knowledge of the proposed 4<sup>th</sup> Defendant, it would be in the interest of all parties and indeed in the interest of the court that the proposed 4<sup>th</sup> Defendant was joined in the proceedings herein to shed light on the relationship he had not only with the Plaintiff but also with herself to enable the court effectively render justice in the instant matter. That indeed, from the annexures annexed in her Supporting Affidavit, it was evident that the proposed 4<sup>th</sup> Defendant was at the center of the dispute herein.
15. That while the Plaintiff/Respondent might not have a claim against the proposed 4<sup>th</sup> Defendant, she had intended to seek orders against him jointly and severally with the Plaintiff once the court had



allowed his joinder since the Proposed 4<sup>th</sup> Defendant, on behalf of the Plaintiff, had received a lion's share of the purchase price that had been made by the 2<sup>nd</sup> Defendant as had been demonstrated in the 1<sup>st</sup> Defendant's bundle of documents that had already been filed in court. That further, Order 1 Rule 10(2) of the Civil Procedure Rules give unfettered power to the court to join a party to a suit suo moto to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

16. That it was in the interest of justice that the Proposed 4<sup>th</sup> Defendant be joined to facilitate the final and effectual determination of issues arising in the instant suit. That there was no prejudice that any other party in the present matter would suffer should the Proposed 4<sup>th</sup> Defendant become a party to the proceedings herein. That to the contrary, his participation in the proceedings herein would shed light and enable the court arrive at a just decision.
17. The 2<sup>nd</sup> Defendant was not opposed to the 1<sup>st</sup> Defendant's Application while the 3<sup>rd</sup> Defendant did not participate in the same.
18. Directions were taken for the disposal of the Application through written submissions, wherein the 1<sup>st</sup> Defendant/Applicant and Plaintiff /Respondent complied and filed their submissions to which I shall proceed to summarize as herein under.

#### **1<sup>st</sup> Defendant/Applicant's Submissions.**

19. The 1<sup>st</sup> Defendant/Applicant vide her submissions dated 1<sup>st</sup> February, 2025, framed one issue for determination, to wit; whether the Proposed 4<sup>th</sup> Defendant should be joined as the 4<sup>th</sup> Defendant in the instant suit. She placed reliance on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules to submit that the court had the power to order the instant Application suo moto since the 4<sup>th</sup> Defendant was a necessary party in the instant proceedings.
20. She reiterated that upon perusal of the Applicant's annexures, it was clear that the Proposed 4<sup>th</sup> Defendant was a key person since he had facilitated the transfer of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant, ostensibly acting as the Plaintiff's agent in the transaction. That whereas the Plaintiff seemed to have denied any knowledge of the said Proposed 4<sup>th</sup> Defendant, the Applicant's annexures had spoken to the contrary.
21. That indeed, the Plaintiff's arguments in opposing the Application herein had been a convenient way of shielding a crucial party from being held to account noting that the Plaintiff had also conveniently failed to name the proposed 4<sup>th</sup> Defendant. She thus submitted that the participation of the Proposed 4<sup>th</sup> Defendant as a party to the present proceedings was necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit and urged the court to allow the Application as prayed.
22. That in any case, no party stood to suffer any prejudice should the proposed 4<sup>th</sup> Defendant be brought onboard. That in fact, it was in the interest of justice that the Proposed 4<sup>th</sup> Defendant was joined in the proceedings herein to clarify on his role in the transactions leading to the instant dispute.

#### **Plaintiff /Respondent's Submissions.**

23. The Plaintiff /Respondent in opposition of the 1<sup>st</sup> Defendant/Applicant's Application dated 6<sup>th</sup> November 2024 filed her submissions dated 6<sup>th</sup> February, 2025 wherein she summarized the factual background of the matter in detail and then framed one issue for determination to wit; whether the she



should be ordered to amend the Plaintiff dated 27<sup>th</sup> September 2023 to include Julius Wathiya Waithaka as the 4<sup>th</sup> Defendant.

24. She placed reliance in the decided case of Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR to submit that Julius Wathiya Waithaka was not a necessary or proper party to the instant proceedings since there had been no relief that she was seeking from him. That it was trite that the Plaintiff must plead with sufficiency and clarity the cause of action against each Defendant named in the suit and the reliefs being sought against the said Defendants. That however, in the instant case, the Plaintiff's cause of action in the suit herein had been well pleaded in the Plaintiff dated 27<sup>th</sup> September, 2023 that had been limited to the three Defendants named therein. That the cause of action was for recovery of Kijabe/Kijabe Block 1/1091 that had been fraudulently transferred by the three Defendants and that a party could not be compelled to amend his case to include a party and a cause of action he was not interested in.
25. That the reliefs sought by the Plaintiff in the Plaintiff dated 27<sup>th</sup> September, 2023 had been very clear. That in any case, the 1<sup>st</sup> Defendant had not pleaded that the decree that may be issued based on the reliefs sought by the Plaintiff could not be enforced against the three named Defendants without the presence of Julius Wathiya Waithaka.
26. Her further submission was that the attempt to rely on highly contested facts to compel her to amend her Plaintiff and include a party who was a stranger to her was in bad faith, mischievous and had amounted to a fishing expedition. That indeed, she had categorically denied either knowing the said Julius Wathiya Waithaka or instructing him to act as her agent in any transaction with the 1<sup>st</sup> Defendant over the suit property. That she had also denounced the document that had been produced by the 1<sup>st</sup> Defendant linking her to the said Julius Wathiya Waithaka and stated that the signature therein was not hers.
27. That on the other hand, the 1<sup>st</sup> Defendant had admitted that the said Julius Wathiya Waithaka was well known to her and that he was the one who had facilitated the disputed transactions. That subsequently, the 1<sup>st</sup> Defendant ought to bring him as her witness in the hearing to support her claim instead of attempting to have the Court compel her to amend her pleadings to introduce a person who was a stranger to her. That the presence of Julius Wathiya Waithaka as the 1<sup>st</sup> Defendant's witness was sufficient to enable the Court to effectively and completely adjudicate upon the issues/allegations that had been raised by the 1<sup>st</sup> Defendant.
28. She submitted that the 1<sup>st</sup> Defendant's plea that she had intended to raise a counter claim against the her and Julius Wathiya Waithaka could not be a basis for compelling her to amend the Plaintiff and add him as the 4<sup>th</sup> Defendant since a counterclaim could only be raised by a Defendant against a Plaintiff. That since a Defendant could not raise a counterclaim against a co- Defendant, the only option available to the 1<sup>st</sup> Defendant was to initiate third party proceeding against the said Julius Wathiya Waithaka since it was the 1<sup>st</sup> Defendant and not the Plaintiff who knew and had a claim against the said Julius Wathiya Waithaka.
29. She referred to paragraphs 18 and 19 of the 1<sup>st</sup> Defendant's Witness Statement dated 5<sup>th</sup> November, 2024 to the effect that the said 1<sup>st</sup> Defendant's numerous attempts to reach Julius Wathiya Waithaka had born no fruits and that the DCI officers had indicated to her that he had still been at large. That subsequently, the 1<sup>st</sup> Defendant was simply attempting to shift her obligation of bringing the said Julius Wathiya Waithaka to Court to the Plaintiff. That it would thus be untenable, unjust and oppressive to compel the Plaintiff to amend the Plaintiff to introduce a cause of action against a party who was stranger to her.



30. In conclusion, she urged the Court to find that the 1<sup>st</sup> Defendant had not made out a case for joinder of Julius Wathiya Waithaka. That the Plaintiff should be allowed to frame and prosecute her case without interference from the 1<sup>st</sup> Defendant. That since the narrative about the involvement of Julius Wathiya Waithaka in the transaction had been brought up by the 1<sup>st</sup> Defendant, she bore the burden of tracing and bringing him to Court to support her claim. That alternatively, the 1<sup>st</sup> Defendant had the burden of commencing third party proceedings against the said Julius Wathiya Waithaka in the event that she had a cause of action against him. She thus prayed that the instant Application be dismissed with costs.

### **Determination.**

31. I have considered the 1<sup>st</sup> Defendant/Applicant's Application, the response by the Plaintiff / Respondent, the Parties written submissions, the law and the authorities herein cited. The 1<sup>st</sup> Defendant/Applicant by a Notice of Motion dated 6<sup>th</sup> November, 2024 seeks orders that the proposed 4<sup>th</sup> Defendant be joined to the suit, that the Plaintiff amend her Complaint to capture the correct position and that she be given leave to amend her statement of defence and raise a counterclaim against the Plaintiff and the Proposed 4<sup>th</sup> Defendant jointly and severally.
32. The reason for making the application as advanced by the 1<sup>st</sup> Defendant/Applicant is that the proposed 4<sup>th</sup> Defendant was the Plaintiff's agent in respect to the sale and transfer of suit property known as Kijabe/Kijabe Block 1/1091, and that he had facilitated all the transactions with the knowledge of the Plaintiff wherein he had also received over Kshs. 10,000,000/= as the purchase price on behalf of the Plaintiff. That subsequently, the proposed 4<sup>th</sup> Defendant was a proper party in the instant suit hence it was in the interest of justice that he be joined to facilitate the final and effectual determination of the issues arising in the suit herein.
33. The Application was opposed by the Plaintiff /Respondent for the reason that the proposed 4<sup>th</sup> Defendant was a stranger to her. That she had neither authorized him to act as her agent for the sale of Kijabe/Kijabe Block 1/1091 nor had she been a party or privy to the purported Memorandum of Understanding dated 24<sup>th</sup> May, 2022 entered into by Mary Wanjiru Mwangi, Timothy Mwaura, John Njuguna Thuo and Julius Waithinja Waithaka, or the purported Friendly Loan Agreement dated 10<sup>th</sup> July, 2022. That the signature appearing on the aforesaid document was a forgery and she had never received the alleged over Kshs. 10,000,000/= from either Julius Waithaka or the 1<sup>st</sup> Defendant. That subsequently, she had no claim or cause of action against the proposed 4<sup>th</sup> Defendant since the cause of action as had been pleaded in the Complaint dated 27<sup>th</sup> September, 2023 had been limited to the three Defendants named therein, thus it would be untenable and oppressive to compel her to amend the Complaint to include a party who was a stranger to her and whose whereabouts was unknown to her.
34. In the case of *Civicon Limited vs. Kivuwatt Limited & 2 others* (2015) eKLR, the Court of Appeal referred to O'Hare & Hill's *Civil Litigation*, 7<sup>th</sup> Edition (1996) page 101 where the authors have stated that:

“One cannot be added as a Plaintiff unless one gives one's consent in writing. In contrast, anyone can be joined as a Defendant even against his wishes. However, no person can be a Defendant unless the Plaintiff claims some relief, even if only a declaration, against him. The general rule of practice is that the Plaintiff is “dominus litis.” This means that he is entitled to choose the Defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue.”



35. Pursuant to aforesaid, a Defendant can only enjoin another person to a suit as a third party where that person is not already a party to that suit. This is because a third party proceedings are where a Defendant in an action has a claim for indemnity or contribution from a third party. The claim is separate from the main claim but has links and/or is connected to the Plaintiff's claim against the Defendant.
36. Indeed the Plaintiff has been categorical and consistent that she never authorized the said intended 4<sup>th</sup> Respondent, one Julius Wathiya Waithaka to act as her agent for the sale of Kijabe/Kijabe Block 1/1091, she had not been a party or privy to the purported Memorandum of Understanding dated 24<sup>th</sup> May, 2022 entered into by Mary Wanjiru Mwangi, Timothy Mwaura, John Njuguna Thuo and Julius Wathiya Waithaka and neither was she party or privy to the purported Friendly Loan Agreement dated 10<sup>th</sup> July, 2022. That lastly, she had never received the alleged over Kshs. 10,000,000/= from either Julius Waithaka or the 1<sup>st</sup> Defendant and therefore she had no claim or cause of action against the said Julius Wathiya Waithaka as he was a stranger to her. That indeed, the cause of action as had been pleaded in the Plaint dated 27<sup>th</sup> September, 2023 had been limited to the three Defendants therein named for recovery of land parcel No. Kijabe/Kijabe Block 1/1091 which had been fraudulently transferred to the them. That since she had no grievance or any cause of action against the said Julius Wathiya Waithaka, it would be untenable and oppressive to compel her to amend the Plaint to include a party who was a stranger to her and whose whereabouts was unknown to her.
37. 'Dominus litis' is a Latin term that literally translates to "master of the suit" or "owner of the litigation." In legal terms, it refers to the party who has the right to control and direct the course of a lawsuit. This is typically the Plaintiff in a civil case, as she is the one who initiated the action and is seeking a remedy.
38. The Plaintiff therefore has the right to choose the parties to sue (Defendants), determine the claim and the relief sought, select the jurisdiction or forum where the case will be heard (within legal limits), decide whether to pursue or abandon the claim, and to instruct counsel on the strategy and direction of the case. This means that a party cannot be added as a Defendant in any suit without the consent of the Plaintiff as to do so would be to introduce a new cause of action or to alter the nature of the suit altogether. A Plaintiff cannot therefore be forced to sue any person as a Defendant. (see also Okiru & 4 others v Ombangai; Omukaga (Applicant) (Environment and Land Appeal E017 of 2021) [2025] KEELC 244 (KLR) (31 January 2025) (Ruling)
39. In the end I find no merit in the application dated the 6<sup>th</sup> November, 2024 which is herein dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 3<sup>RD</sup> DAY OF APRIL 2025.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

