



REPUBLIC OF KENYA



Ongenga v Sioka; Wanjala (Intended Defendant) (Environment & Land Case 18 of 2015) [2022] KEELC 12639 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 18 OF 2015
AA OMOLLO, J
SEPTEMBER 28, 2022**

BETWEEN

CORNEL BWIRE ONGENGA PLAINTIFF

AND

JULIUS BWIRE SIOKA DEFENDANT

AND

RAPHAEL BITTA SAUTI WANJALA INTENDED DEFENDANT

RULING

1. The applicant brought the application dated 18/1/2022 under the provisions of articles 40, 48, 50 of *the Constitution* 2010, Section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, order 10 rule 11, order 1 rule 10(2), order 22 rule 22, order 45 rule 1 of the *Civil Procedure Rules*, and section 7 of the *Limitation of Actions Act* cap 22, Laws of Kenya seeking for the following orders;
 - a. Spent.
 - b. The honourable court be pleased to grant leave to the applicant, Raphael Bitta Sauti Wanjala to be enjoined as the 2nd defendant in this suit.
 - c. There be stay of execution of orders dated December 9, 2021 pending the hearing of this application inter parties.
 - d. The judgment entered against the defendant/plaintiff herein on September 12, 2019 together with all the consequential enforcement proceedings and/or orders entered by consent or otherwise be reviewed, vacated and/or set aside to the extent that it affects the 2nd defendant's land title number Bunyala/Bulemia/2809 (a prior sub-division of the suit properties) for being an irregular judgment.



- e. The Intended 2nd defendant be granted leave to defend the plaintiff's suit, file his memorandum of appearance and defence and all documents in the suit herein.
 - f. The honourable court be pleased to direct that the Plaintiff do effect service of all court pleadings and court process herein upon the applicant/intended 2nd defendant.
 - g. Costs of this application be awarded to the applicant as against the plaintiff.
2. The application is supported by grounds listed on its face, and the supporting affidavit of Raphael Bitta Sauti Wanjala. He deposed that sometime in or between 1993 and 1994, the suit property herein LR Bunyala/Bulemia/2389 was initially sub-divided into new numbers LR 2760 and 2759 with the latter number being further sub-divided giving rise to the current LR Bunyala/Bulemia/2809. Following the said initial sub-division and further sub-division, the suit land LR Bunyala/Bulemia/2389 and 2759 were closed and the resultant new numbers Bunyala/Bulemia/2808 and 2809 registered. He stated that one of the resultant subdivisions LR Bunyala/Bulemia/2809 was transferred to him on 7/12/1994. The plaintiff filed a suit against the sole defendant alleging trespass into the plaintiff's land LR Bunyala/Bulemia/2760 and a judgment was delivered on 12/9/2019 against the defendant which judgement has affected his parcel of land LR Bunyala/Bulemia/2809 being a prior sub-division of the suit property land title LR Bunyala/Bulemia/2389 which is a prior sub-division of the suit property.
 3. The plaintiff/respondent filed a replying affidavit dated 9/2/2022 and stated that the instant case which the applicant seeks to be enjoined was with respect to LR Bunyala/Bulemia/2760 and 1435. That the defendant had encroached therein took forceful possession thereof and started destroying the existing boundary features and threatening his possession and occupation. He said to the best of his knowledge, his parcel LR Bunyala/Bulemia/2760 has nothing to do with the parcel of land the Intended Defendant alleges to be his and his parcel does not arise from the same sub-division with LR Bunyala/Bulemia/2809. He deposed to not being aware his parcel shares a boundary with the said number 2009 and that a claim in respect of the 2nd intended defendant's claim is a separate new number raising a new issue that cannot be determined in the instant case further which has been concluded and judgment delivered. He stated further that the judgment and decree of the court as delivered has already been executed and he is fully back in possession of his land as it used to be previously before the defendant/judgment creditor transgressed into his land. That the two parcels are different and distinct and the registered owners of LR Bunyala/Bulemia/2809 is a new party all together and therefore presenting completely new set of claims for the court's determination and the Intended defendant/applicant's cause of action lies within the provisions of Section 18 of the *Land Registration Act* and not before this court.
 4. The plaintiff/respondent filed a supplementary affidavit dated 9/3/2022 and stated that parcel No Bunyala/Bulemia/2809 claimed by the applicant does not share a boundary at all with judgment creditors parcel no. Bunyala/Bulemia/2760. He stated that the instant suit was a claim for unlawful encroachment and occupation and destruction of boundary features by the judgment debtor and not a claim as against LR Bunyala/Bulemia/2389 or any of the subdivisions thereof which the judgment debtor was in occupation of.
 5. The applicant filed a supplementary affidavit on 10th March 2022 and deposed that it is clear from paragraphs 1, 2 and 17 of the judgment herein that this case was concerned with a boundary dispute between three parcels of land namely LR Bunyala/Bulemia/1435, 2760 and 2389 and that the third suit property was closed and ceased to exist on 27/5/1993 upon its subdivision into LR 2759 and 2760. He stated that the court had no jurisdiction to hear the plaintiff's suit in the first place as it is a boundary dispute



6. The parties agreed to dispense with the hearing of the application by way of written submissions. The plaintiff/respondent filed his submissions on 9/3/2022 and said submitted that the defendant herein never mentioned, pointed out and/or informed the court of the subdivision of LR Bunyala/Bulemia/2759 to create new numbers which includes the parcel the applicant alleges to be the owner. He said that the claim between the judgment debtor and him was of forceful trespass and encroachment and the destruction of boundary features existing between LR Bunyala/Bulemia/2760 and 1435 on one side and LR Bunyala/Bulemia/2759. He submitted that the order of 9th December 2021 was for provision of security for surveyors and the land registrar to implement the court's judgment and order dated September 24, 2019 which was a result of the judgment debtor threatening them with physical harm and injury and in the process obstructed their work. He continued that the application must fail as the concluded suit was for a claim for trespass and encroachment does not lend itself for enjoinder by the applicant for the reason that the said claim is tailored to a specific transgressor. He said that the applicant is seeking to re-open proceedings and relied on the decision in [*JMK V MWM & another*](#) (2015) eKLR urging the court to decline the prayers.
7. The applicant filed his submissions on February 17, 2022 submitting that all the facts pleaded in the application and the supporting affidavit are uncontested and in the absence of a Replying Affidavit, the facts pleaded by the applicant must therefore be taken as the uncontested truth. He cited the Court of Appeal's decision in [*Daniel Kibet Mutai & 9 Others v Attorney General*](#) (2019) eKLR. On joinder of a defendant and setting aside judgment, he cited the case of [*Wanyoike Mungai V Beatrice Karanja & another*](#) and said it is a good exposition of the law on twin-issue of joinder of a party as a defendant and setting aside of judgment in light of the constitutional right to fair hearing and he urged the court to follow and uphold the same. He submitted that the impugned judgment herein was an irregular judgment as the plaintiff did not disclose the current numbers of the suit properties having been subdivided, the old number LR 2389 having been closed on subdivision and new numbers LR 2808 and 2809 issued. He said the plaintiff did not join the applicant as a defendant yet the applicant was registered as the owner of the resultant subdivision number LR 2809 on December 12, 1994 and no service of the court processes was ever effected upon him and yet a judgment was delivered which adversely affects LR 2389 which gave rise to 2759 and thereafter 2809. He continued that on this point alone, the honourable court will be justified to allow the application and set aside the judgment and consequential orders. He humbly submitted that the post-judgment proceedings including re-survey and rectification were equally null and void and that the impugned judgment was given without jurisdiction and relied on the decision in [*Edward Lilumbi & 3 Others v Diphina Ahembelewa & 6 Others*](#) (2019) eKLR where the court returned a verdict on the issue of jurisdiction over boundary disputes.
8. Having read the application before court and the rival affidavits and submissions made by the parties, I frame the issues for determination to be as follows;
 - a. Whether the judgment issued by this court on September 12, 2019 should be set aside/vacated/ reviewed on account of jurisdiction;
 - b. Whether the applicant has satisfied the conditions for the application of order 1 rule 10(2) of the [*Civil Procedure rules*](#);
 - c. Whether the plaintiff/respondent offended order 51 rule 14(1) of the [*Civil Procedure Rules*](#);
 - d. Who should pay costs of the application?
9. The applicant contends that the impugned judgement was made contrary to the provisions of section 18 of the [*Land Registration Act*](#) which vests determination of questions of boundaries on the Land



Registrar. The case is already heard and determined as between the parties and anyone wishing to challenge the jurisdiction of the court can only do so on appeal. This court must stay away from the temptation of being urged to sit on appeal on a judgement delivered by a judge of con-current jurisdiction.

10. On whether the judgment can be set aside, reviewed or varied, this court guided by the principles set out in the case of *Patel v EA Cargo Handling Services Limited* (1974) EA 75, the Court of Appeal held as follows:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

11. The applicant argues that the orders emanating from the judgment has affected his land and he was not joined in the proceedings to allow him present his defence. He annexed a copy of a draft statement defence to his affidavit in support of the claim. Indeed it is true that the applicant was not a party to the suit and the proceedings that ensued. In the plaint filed, the prayers sought at paragraph (1A) read thus;

“(1A.) An order for the Land Registrar and Land Surveyor, Busia to visit land parcels numbers Bunyala/Bulemia/2760, Bunyala/Bulemia/1435 and Bunyala/Bulemia/2389 and survey the same, re-establishing and fixing boundaries there between.”

12. The applicant has explained that as at 2015, parcel No Bunyala/Bulemia/2389 was no longer in existence as it is what was sub-divided to create LR No 2759 and 2760. That LR 2759 was also sub-divided to create inter alia LR Nos 2809 owned by the applicant. At paragraph 20 of the judgment rendered on 12/9/2019, the judge granted prayer 1A of the plaint allowing for the survey visit. The surveyors’ visited and filed their report dated January 31, 2022. They stated that the objective of the visit was to establish the boundaries of parcel Nos Bunyala/Bulemia/1435 and Bunyala/Bulemia/2760 with their neighbours respectively. The surveyor reported that after measurements, they placed boundaries for 2760 and placed gappings between the Musiola trees to concentrated the boundaries.

13. The report does not make mention of the boundaries established between LR 2760 and LR 2809. They referred to the other parcels without being specific. The report does not indicate if the owners of these neighbouring plots participated. The applicant avers that as a result of the survey exercise, his land was taken and therefore he wants the judgment to be set aside. A reading of paragraph 20 of the judgment did not award the Respondent any land. It merely ordered for the identification of the boundaries. Therefore, I see no need of setting aside the judgment. The appropriate step would be to join the applicants to these proceedings and have the execution of prayer (1A) with his participation. Therefore the earlier survey exercise undertaken on December 17, 2021 is set aside. The repeat exercise shall be done on a date set and the exercise to go on in the presence of both parties.

14. In the case of *Technomatic Limited T/A Promopack Company v Kenya Wine Agencies Limited & another* [2014] eKLR, Havelock J set out the guiding principles in enjoining a party to a suit as follows;

“order 1 rule 10 (2) states ‘the court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the court to be just order that the name of any party improperly joined whether as a plaintiff or defendant



be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added’.

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit”

15. Using the above set out principles, I am satisfied that the applicant meets the threshold since he falls under ground 3, 4 & 5 in the listed case. Although in this case judgement has already been entered, the same was not conclusive as it required some exercise to be done. The execution of the decree is a proceeding which any affected party can move the court to challenge within the same suit instead of filing a new suit. I was unable to trace the decree extracted but the fact that the applicant’s title traces its roots from one of the parcels mentioned in the pleadings, he became a necessary party. I do allow his prayer to be joined in this suit.

16. Reference is made to the decision on *JMK v MWM & Ano* (2015) eKLR dealing with the applicability of order 10(2) of the *Civil Procedure Rules* where the trial judge rendered himself thus;

“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 proceeding 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.”

17. In light of the foregoing, I find merit in the application and allow it by making the following orders;

- a. The applicant Raphael Bitta Sauti Wanjala is joined as 2nd defendant in the suit.
- b. The prayer for setting aside the judgment is declined however this court has set aside the execution undertaken on the December 17, 2021 and the consequential boundaries planted by the surveyor.



- c. An order be and is hereby made that the execution through surveying the boundaries be done in the presence of all parties to this suit (including the applicant now joined as a 2nd defendant).
- d. The costs of the survey visit be shared equally between the plaintiff and 2nd defendant. The plaintiff being made to pay for his failure to join the 2nd defendant during the exercise.
- e. The court shall give further directions as the parties deem fit.
- f. Each party to meet their respective costs of the application.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

