



Mburu v Evans & 8 others (1st - 3rd Defendants being sued as the administrators of the Estate of the Late Rahab Wanjiru Evans) (Environment & Land Case 154 of 2018) [2022] KEELC 13850 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 154 OF 2018
LA OMOLLO, J
OCTOBER 27, 2022**

BETWEEN

MERCY WANJIRU MBURU PLAINTIFF

AND

ELIZABETH WANJIRA EVANS 1ST DEFENDANT

CHRISTINE WANGARI 2ND DEFENDANT

MARY WANJIKU 3RD DEFENDANT

ELIZABETH WAMBUI 4TH DEFENDANT

MARY NYAMBURA 5TH DEFENDANT

SALOME NJOKI 6TH DEFENDANT

MARGARET WANJIRU 7TH DEFENDANT

MENENGAI OIL REFINERIES 8TH DEFENDANT

DELIVERANCE CHURCH 9TH DEFENDANT

1ST - 3RD DEFENDANTS BEING SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE RAHAB WANJIRU EVANS

RULING

Introduction

1. This ruling is in respect to the 1st, 2nd and 3rd defendants/applicant's notice of motion dated March 21, 2022.
2. The application seeks the following orders:



- i. Spent.
 - ii. Spent.
 - iii. That the names of the 1st, 2nd and 3rd defendants be struck off from the pleadings herein for misjoinder.
 - iv. That the court issues any other orders as it deems fit and just to grant.
3. The application is based on the grounds on its face and supported by the affidavit sworn on March 21, 2022 by one Elizabeth Wanjira Evans.

Factual Background.

4. The plaintiff commenced this suit *vide* a plaint dated April 19, 2018. In the plaint, she prays for judgment against the defendants for:
- a. A declaration that the plaintiff is the beneficial co-owner of all those parcels of land known as Nakuru Municipality Block 7/542, 545 and 546.
 - b. An order cancelling the title that has been issued to Menengai Refineries with regard to all that property known as Nakuru Municipality Block 7/542.
 - c. An order compelling the defendants to deliver vacant possession of all those parcels of land known as Nakuru Municipality Block 7/542, 545 and 546.
 - d. Costs and interest of this suit.
 - e. Any other orders that the court may deem fit to grant.
5. The 4th, 5th, 6th and 7th defendant filed their statement of defence dated May 11, 2018 on November 24, 2021 where they deny that the plaintiff is their sister. They aver that the claim for the part of the share of the proceeds from the sale of the property bequeathed to John Mburu ought to be canvassed either as a succession cause or as a monetary claim.
6. In the statement of defence, they admit that John Mburu was the son of the late Rahab Wanjiru Evans. They state that the late John was entitled to a share of the net intestate estate of the late Rahab Wanjiru Evans.
7. They also state that the widow and daughters of the late John Mburu appeared before their advocate and communicated their intention to gift one of the properties to the 9th defendant which is a church and to sell one of the properties to the 8th defendants. The proceeds of the sale were to be shared among the children and wife of the late John Mburu. Subsequently, transfers were effected to the 8th and 9th defendants.
8. They further state that after the transfers, the plaintiff through her advocate wrote to counsel for the defendants complaining that she had been left out of the sale and distribution of the proceeds therefrom.
9. They state that it was then agreed that if it was confirmed that the plaintiff is part of the family of the late John Mburu, then on sale of the property retained, the plaintiff would get a share larger than the rest.
10. The end by stating that the suit is frivolous and should be dismissed.
11. The 8th defendant in its statement of defence states that the property known as Nakuru Municipality Block 7/542 was purchased by it from the 4th, 5th, 6th and 7th defendants *vide* a sale agreement dated



April 12, 2016 and that it was legally transferred to it by them. It prays that the suit by the plaintiff be dismissed.

12. I have perused the court record and it does not contain the statement of defence of the 9th defendant and 1st, 2nd and 3rd defendants- the applicants herein.

Applicants' Contention.

13. The affidavit in support of the application, as earlier mentioned is sworn by one Elizabeth Wanjira Evans (1st defendant).
14. She introduces herself as an administrator of the estate of the late Rahab Wanjiru Evans adding that she has authority of her co-administrators to swear the affidavit.
15. She contends that the administration of the estate of the late Rahab Wanjiru Evans is pending determination under Nakuru High Court succession cause No 96 of 2000.
16. She further contends that pursuant to an order of the Court of Appeal, the estate of Rahab Wanjiru Evans was distributed adding that the beneficiaries were duly represented by their advocates.
17. It is her contention that the plaintiff is a daughter to her late brother John Mburu adding that John Mburu died before their mother did. She has attached a copy of the plaintiff's birth certificate.
18. She contends that during distribution of the estate by the Court of Appeal, the plaintiff was given a share of their mother's estate as a member of the house of John Mburu.
19. The applicant further contends that pursuant to the said orders, they executed transmission forms and forwarded them to Githui & Company Advocates for their further action as directed by the court.
20. She contends that they were surprised when they later learnt that the plaintiff had been excluded from the list of beneficiaries.
21. She avers that they wish to assist the plaintiff benefit from the estate but that it can only be done if their names are removed from the list of defendants and either brought in as interested parties or co-plaintiffs.
22. She ends her deposition by urging the court to allow their application.

8th Respondent's Response.

23. In response to the application, the 8th defendant/respondent filed its grounds of opposition dated May 12, 2022 where it averred that the said application is mischievous, vexatious and incompetent.
24. It deposes that the 1st, 2nd and 3rd defendants/respondents have not demonstrated the threshold required for a declaration of a misjoinder.
25. The 8th defendant/respondent further deposes that the application failed to identify the prejudice that the 1st, 2nd and 3rd defendants would suffer for failure to be struck out from the suit.
26. It urges the court to dismiss the application with costs.

4th-7th Respondent's Response.

27. The 4th-7th defendants/respondent also filed their grounds of opposition dated May 12, 2022. It has four grounds. One, that the applicants are necessary parties to the proceedings considering the process



of transmission of the suit properties is yet to be completed and that continuance of the suit with them would be the only assurance that they will perform their duties as administrators.

28. The second ground is that transposing the applicants to interested parties would make it impossible to enforce any orders issued by this court when transmission is yet to be satisfied.
29. Thirdly, that the question of sale of Nakuru Municipality Block 7/542 to the 8th defendant/respondent ought to be concluded by participation of the applicants.
30. The fourth point raised by them is that to have the title by the 8th defendant/respondent cancelled, the applicants participation is necessary for them to give an account of the events leading to the said registration. Finally, that the applicants would not suffer any prejudice if they continue to participate in these proceedings.

Plaintiff's Response.

31. The plaintiff in response filed a replying affidavit dated May 5, 2022.
32. She states that she is the daughter to the late John Mburu.
33. She deposes that together with her siblings the 4th – 7th defendants they were awarded properties Nakuru Municipality Block 7/542, 545 and 546 *vide* the Court of Appeal judgment dated December 18, 2014.
34. She further deposes that Nakuru Municipality Block 7/545 is still registered in the name of the late Rahab Wanjiru Evans and that any order with respect to the said property can only be implemented by the 1st -3rd defendants/applicants in their capacity as administrators.
35. She also deposes that as informed by her advocates, which information she believes to be true, the 1st – 3rd defendants/applicants having admitted that they have a role to play in the proceedings have been rightly sued as defendants.
36. She further deposes that as informed by her advocates, which information she believes to be true, the applicants have not sought any order to be transposed from defendants to plaintiffs or from defendants to interested parties. She adds that the applicants are bound by their pleadings and hence all averments on being joined either as defendants or interested parties are misplaced and superfluous.
37. The plaintiff deposes that as informed by her advocates, which information she believes to be true, joining the applicants as interested parties does not arise as interested parties are neither plaintiffs nor defendants hence no substantive orders can be made against such a party.
38. She also deposes that the applicants have not demonstrated any help they could extend to her and why if at all any such help cannot be extended to her in these proceedings in their capacity as defendants.
39. She deposes that as informed by her advocates, which information she believes to be, the applicants have not demonstrated any benefit she might get if their names are struck out from this suit. She finally urges the court to dismiss the application as it has been brought in bad faith.

Issues for Determination

40. The 8th defendant/respondent filed its submissions dated May 27, 2022 on May 31, 2022 and identified the following issues for determination:
 - a. Whether the applicant's claim offends the provisions of order 1 rule 14 of the *Civil Procedure Rules, 2010*.



- b. Whether there was a misjoinder and the 1st, 2nd and 3rd defendants' names should be struck out from the suit.
41. On the first issue, the 8th defendant/respondent relied on order 1 rule 14 of the *Civil Procedure Rules*. She submits that the said order provides that any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner. she further submits that the applicants presented their request vide a notice of motion contrary to the said provisions hence the application ought to be struck out.
42. On the second issue, the 8th defendant/respondent relied on order 1 rule 10(2) of the *Civil Procedure Rules* and submits that in misjoinder, it is trite in law that the applicants must demonstrate that they are not a necessary party to the suit. It further submits that the applicants are indeed necessary parties by their own admission since they admit that Nakuru Municipality Block 7/545 is still in the name of the estate therefore under their control as administrators. It submits that it is essential that the applicants account for the three properties in dispute to the extent that transfer was undertaken in favor of all beneficiaries.
43. The 8th defendant/respondent relied on the case of *Werrot and Company Ltd & others v Andrew Douglas Gregory & others* (as quoted in the case of *Okiya Omtatah Okoiti & Ano v Bidco Africa & 4 others* [2018] eKLR and submits that the applicants have failed to show how unnecessary their participation is in the claim hence their application should fail. It submits that the applicants have also failed to identify the prejudice they would suffer for failure to be struck out from the suit.
44. The 4th -7th defendants/respondents on the other hand filed their submissions dated May 30, 2022 on June 2, 2022 and identified the following issues for determination:
- a. Whether the applicants have demonstrated sufficient cause to have their name struck out for misjoinder.
- b. Who should bear the costs of this suit?
45. On the first issue, the 4th – 7th defendants/respondents rely on the case of *Kizito M. Lubano v KEMRI Board of Management & 8 others* [2015] eKLR and reiterate that the 8th defendant/respondent's submission on the necessity of the applicants as parties to the case. They further submit that the applicants qualify to be in the present proceedings to enable all the questions involved to be adjudicated as their names have been extensively mentioned in the suit.
46. They finally submit that the applicants are necessary parties who should take part in these proceedings as defendants and upon dismissal of the instant application, costs ought to be awarded to them.
47. Upon perusal of the application, supporting affidavit, replying affidavit, grounds of opposition, annexures and submissions filed in respect of this application, it is my considered view that the following issues arise for determination:
- a. Whether the applicants' names should be struck out from the suit for misjoinder.
- b. Who should bear the costs of this application?

Analysis and Determination.

48. I have taken into consideration the pleadings in this matter, the affidavit in support of the application, replying affidavits in opposition to the application and the rival submissions filed by the parties herein.



A. Whether the 1st, 2nd and 3rd Defendants/Applicants names should be struck out from the suit for misjoinder.

49. The law relating to joinder and misjoinder is found in order 1 rule 10(2) of the [Civil Procedure Rules](#) which provides as follows:

(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.

50. The power given under the rules is discretionary which discretion must be exercised judiciously. The objective of this provision is to ensure that all person who might have an interest in a matter are brought on record, remain on record or removed from it. This ensures that the dispute is determined with their participation avoids multiplicity of suits.

51. While striking out a party from proceedings is a remedy available under the provisions of order 1 rule 10 (2), my view is that if no prejudice will be occasioned to a party by him/her/it remaining in proceedings, then it is not be necessary to strike them out. In any event, should the court find that they were not a necessary party or that no cause of action has been established against them, then the suit shall be dismissed with costs to them. This would then serve as a lesson to a party who has drags another to court without as just cause.

52. The 1st, 2nd and 3rd defendant's reasons for seeking orders that they be struck out from the suit is that- they already discharged their duties as administrators by executing transmissions form of Nakuru Municipality Block 7/542, Nakuru Municipality Block 7/545 and Nakuru Municipality Block 7/546 in favour of the 5 beneficiaries of the estate of John Mburu.

53. They state that they then forwarded the forms to their advocate as ordered by the court. They further state they were shocked to learn that the plaintiff had been disinherited. They state that they want to assist her benefit from the estate and can only do it if their names are removed from the list as defendants and urge that, instead, they be transposed to interested parties or co-plaintiffs.

54. Importantly, they admit that Nakuru Municipality Block 7/545 is still in the name of the estate. Their claim, therefore, that they have discharged their duties as administrators of the estate cannot hold. Further, I note that the orders of transposition as plaintiffs and/or interested partis has not been sought in the application.

55. Nakuru Municipality Block 7/545 forms the subject matter of this suit and any orders that will be issued by this court in respect of the said property will invariably require their involvement.

56. In [Kizito M. Lubano v Kemri Board of Management & 8 others](#) [2015] eKLR, the learned judge cited with approval the decision in [Amon v Raphael Tuck and Sons Ltd](#) (1956)1 ALL ER at page 273. It was held as follows:

A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and competently adjudicate upon ad settle all questions involved in the cause or matter.



57. In *Perrot & Co Ltd & others v Andrew Douglas Gregory & others* Nairobi HCCC No 2263 of 1998, the learned judge sets out a test for determining who a necessary party to proceedings is. He states as follows;

“For determining the question whom is a necessary party there are two tests.

- i. There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and
- ii. It should not be possible to pass an effective decree in the absence of such a party”

58. The issues raised by the 1st, 2nd and 3rd defendant on misjoinder and their preference to be joined and/or transposed to interested party or co-plaintiffs are not of such significance as the 1st, 2nd and 3rd defendants attach to them.

59. My view is that no prejudice or injustice shall be occasioned to the applicants by them remaining in these proceedings. There might be inconvenience but that can be remedied by awarding them costs after the suit is heard and determined on merit.

60. In *Humphrey Mbaka Nandi t/a Nyati Distillers Limited v Equity Bank(K) Ltd & 2 others* [2018] eKLR the learned judge cited with approval the decision in *DT Dobie and Company (K) Ltd v Joseph Mbaria Muchina & another* (1982) KLR 1 the learned judge explained that the appellate court considered several english decisions on the subject of striking out the defendant from a suit and concluded that:

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ supra).

61. For the foregoing reasons, I find that the 1st, 2nd and 3rd defendant’s application lacks merit.

B. Who should bear the costs of this application?

62. The general rule is that costs shall follow the event. this is in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

63. Consequently, the application dated March 22, 2022 is dismissed with costs to the plaintiff, 4th, 5th, 6th & 7th and 8th defendants.

64. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF OCTOBER 2022.

L. A. OMOLLO



JUDGE

In the presence of: -

Miss Ogange for the Plaintiff/Respondent.

Mr. Kibet for the 4th, 5th, 6th, & 7th Defendants/Respondents

Mr. Opando for the 8th Defendant/Respondent

No appearance for the 9th Defendant/Respondent

No appearance for 1st, 2nd and 3rd Defendants/Applicants

Court Assistant; Ms. Monica Wanjohi.

