



**Ruda v National Land Commission & 3 others; Suleman & 17
others (Interested Parties) (Environment and Land Case Civil Suit
335 of 2017) [2022] KEELC 15451 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 335 OF 2017
LL NAIKUNI, J
DECEMBER 9, 2022**

BETWEEN

HARJI GOVIND RUDA PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

REGISTRAR OF TITLES MOMBASA 3RD DEFENDANT

ABEID HAKIM ABEID 4TH DEFENDANT

AND

NAZIR AHMED KASSAM SULEMAN INTERESTED PARTY

KAHINDI CHARO KALUE & 16 OTHERS INTERESTED PARTY

RULING

I. Introduction

1. The Plaintiff/Applicant herein, Mr Harji Govind Ruda moved this Honorable Court for its determination of the filed Notice of Motion application dated April 26, 2022. It was brought under the provision of Sections 1A, 1B and 63 of the [Civil Procedure Act](#), Cap 21 and Order 8 Rule 3 of the [Civil Procedure Rules, 2010](#).



II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant sought for the following orders reproduced herein verbatim: -
 - a. That this Honorable Court be pleased to grant the Plaintiff leave to amend his Paint to enjoin Edward Kirugu Land Surveyors as the 6th Defendant.
 - b. That upon being enjoined, the Defendant be given leave to file its Defence and or affidavits.
 - c. That the Court to issue further orders as it deems fit.
 - d. That the costs of this application be provided for.
3. The application was based on the grounds, testimonial facts and averments made out under the twenty (21) Paragraphed Supporting Affidavit of Harji Govind Ruda, the Plaintiff/Applicant herein, sworn and dated the April 26, 2022 together with six (6) annexures Marked as 'A', 'B', 'C', 'D', 'E' and 'F' annexed hereto. He was a male adult of sound mind and conversant with the facts of this case and therefore competent to swear this affidavit.
4. He deponed that he was the beneficial owner of Land Reference No N/VI/3790 (CR.27624) now registered as MN/V/2618 (CR 59000). He annexed a copy of the title marked as 'A'. He deposed that the property was previously registered as Plot NO MN/VI/3790 CR 27624 and the Deed Plan numbers 207769 issued in the year 1996. He stated that the registration was done though an error as pertinent was number or entry to read Section 5 Mombasa Mainland North and not Section 6. He stated that during the error correction period, the Plaintiff obtained a Court order on June 28, 2010 which directed the Commissioner of Land and Registrar of Titles Mombasa to rectify the error. He attached a copy of the said Court Order marked as 'B'.
5. According to him the said Court Order prohibited the Registrar of Titles Mombasa from registering any other title or grant in respect of the suit property to any other person but the Plaintiff. During that error correction period, the Interested parties in this suit covertly applied for adverse possession over suit property in Environment and Land case Number 194 of 2010 where they obtained a judgment dated October 30, 2014 awarding the 132 Acres which overlapped his land.
6. In the given circumstances, it became clear that the Interested Parties were guilty of material non-disclosure as the Plaintiff was never notified of proceedings before Hon Justice Mukunya. Neither was he accorded a fair hearing to defend his proprietary rights over the suit property before adverse orders were issued against him.
7. Moreover, the Interested Parties were aware that the Plaintiff was the owner of the suit property since they had already accepted compensation from him in the year 2009 and had cultivated on his land before hence the onus fell on him for enjoining him in the proceedings in ELC Case 194 of 2010.
8. The unfortunate scenario in court have arisen due to material non-disclosure of the interested parties by failing to notify the Court there was another order in place. In 2010 he was designated the title MN/V/2618 after correction of the error only to find out his rectified title had been allocated to Zeddy Aluouch Onwiny and grant to the title had been processed and registered as CR 59000 with Deed Plan No 345804 and a title thereafter.
9. He informed Court that the 1st Defendant had now illegally proceeded to issue the 3rd Defendant herein with Letters of Award/Compensation upon the acquisition of the said property by the 1st and 2nd Defendants who were facilitating the clearing of the corridor for development of the road commonly



known as Dongo Kundu Bypass leading to irreparable losses and damage to him. He deposed that in a strange turn of events, it came to his attention that the Survey Plan for the suit property was cancelled by the Intended 6th Defendant when undertaking survey work around the land. The cancellation was done while the above Court order was still in force and the notification were issued to them by the Land Registrar to the effect that the said plot was being cancelled to enable us defend their proprietary interest and hence according to him making the said cancellation null and void.

10. Its for all these reasons that making the Intended 6th Defendant a party to this suit necessary to enable Court get a full appreciation of this matter taking that the suit property MN/V/2618 was purportedly cancelled by the intended 6th Defendant when allegedly undertaking survey work in the suit property. And the intended 6th Defendant has an in depth view of the matter arising from the suit to enable the Court to determine issues relating to the suit and no party will be prejudiced by the amendment. He urged Court to allow the application and grant the orders as prayed.

III. The Replying Affidavit of the 5th Despondent/Respondent

11. On June 10, 2022, while opposing the application dated April 26, 2022, the 5th Defendant/Respondent herein filed an eleven (11) Replying Affidavit sworn by Nazir Ahmed Suleiman, the 5th Defendant/Respondent herein and dated on June 10, 2022 together with three (3) annexures marked as 'NAKS – 1A, 1B & 1C, NAKS – 2, and NAKS – 3' annexed thereto. He deposed that the Applicant had approached the Court in bad faith and with unclean hands as the agreement dated September 7, 2007 which formed the basis of the suit was in respect to parcel number MN/VI/3790 which land was in Section VI whereas the land the Applicant was claiming now was in Section V To that effect he annexed a copy of the Sale agreement, title and the official search all marked as 'NAKA 1A, 1B and 1C respectively).
12. He further deposed that the above agreement was entered between the Applicant, Vista Properties Limited and Preston Mwalungha thus it could not be transferred in any way to another Section. Parties were bound by the terms and conditions of the agreement. He argued that the application was an abuse of the due process in that a party who had purchased land in Section VI could not lay claim on land situated in Section V. Therefore, the intention to join Edward Kiguru Land Surveyors, instead of the Director of Survey was an abuse of the Court process. Moreover, if the Applicant was interested on the record of the survey he ought to have applied to join the Director of Survey Kenya. He informed the Honorable Court that the Applicant had also applied to be joined in the suit ELC No 194 of 2010 through his application dated December 14, 2020 but which application was withdrawn by the Applicant. The Court in any case lacked requisite power to sift a party who has purchased land in another section. Further to that all allocations to land MN/V/387 were later revoked from the records by the Director of Surveyors as said lease hold was illegally acquired and were issued leasehold on an existing freehold title MN /V/387. Therefore, in conclusion, he deposed that the application lacked merit and should be dismissed with costs.

IV. Submissions

13. On June 13, 2022 while all parties were present in Court, directions were taken by consensus that the Notice of Motion application dated April 26, 2022 by the Plaintiff/Applicant be canvassed by way of written submissions with clear and stringent timelines thereof. Following that parties fully complied and Court directed it would deliver its ruling on notice accordingly.



A. The Written Submissions by the Plaintiff/Applicant.

14. On July 7, 2022, the Learned Counsels for the Plaintiff/Applicants the Law firm of Messrs. Borona & Associates Advocates filed their written Submissions dated even date. Mr Borona Advocate commenced his submission by providing a brief summary of the facts of the case. According to him the suit was initiated on September 13, 2017 by the Plaintiff surrounding the ownership dispute in all that parcel of land known as Land Reference numbers MN/VI/3790 (CR, 27624) and now registered as Land Reference Numbers MN/V/2618 (CR 59000). He stated that the said parcel of land was acquired through Compulsory acquisition process by the 1st Defendant for purposes of facilitating the clearing of the corridor for development of the road commonly known as Dongo Kundu Bypass. However, the Counsel held that the 1st Defendant illegally issued the 4th Defendant with letters of awards for compensation. It was for this very reason that the Plaintiff who felt short changed or wronged by this action that he decided to institute this suit before this Honorable Court seeking stay orders over the said payments of compensation by the 1st Defendant pending the hearing and determination of the suit. On September 27, 2017, the orders were granted.
15. He submitted that the joining of the Intended Defendant would be ideal as suit preferred against him raised questions of law and fact as the suit herein. To buttress his argument, the Counsel placed great reliance on the provisions of Order 1 Rule 3 and Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 and the case of: *Jacinta Wanjiru Wengwa – Versus - Sawel Theuri & 3 Others (2019)*.
16. The Counsel submitted that there was no dispute that the Plaintiff had a cause of action against the Surveyor (the Intended 6th Defendant) herein taking that the said Surveyor purported to cancel a plot that was a subject to these proceedings that belonged to the Plaintiff. He argued that the cancellation was done while there was a Court order dated June 28, 2010. He contended that the presence of the Surveyor in the suit was necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.
17. Further, the Intended 6th Defendant was a necessary party to the suit as he had undertaken the survey work in relation to the subject plots and would be in better position to clear up the issues surrounding the crucial ownership question that this Court would eventually address itself to. To support his legal reasoning, he cited the case of: *Mercy Wathira Njeru & 3 Others – Versus - Daniel Njeru Njoka Mbogo & 3 others (2019) eKLR*.
18. In conclusion, the Counsel averred that having established that the Intended 5th Defendant was a necessary party to this suit and the Plaintiff had a claim against him, he urged the Court to allow the application and the prayers sought thereof.

B. The Written Submissions by the 6th Intended Defendant

19. On June 28, 2022, the Learned Counsel for the 6th Intended Defendant, the Law firm of Messrs. Marende Necheza & Company Advocates filed their written submissions dated June 17, 2022. Mr Ondieki holding brief for Mr Shimaka Advocate submitted that the proposed 6th Defendant was not a necessary party and the decision will not affect him as clearly he would not be affected in any way by the final decision of this Court.
20. The Counsel argued that before a party was joined to a suit the Court ought to satisfy itself if the proposed party was needed and/or was a necessary party being an individual and not an office to the proceedings. He contended that the Plaintiff/Applicant was only dragging an unnecessary party to Court only in desperate actions to try and sanitize his own mistakes as per the contents of Paragraphs 3 to 5 of the Replying Affidavit. From the said pleadings, the Defendant/Respondent had averred



and also attached evidence that the Plaintiff/Applicant had purchased the property known as Land Reference Number MN/VI/3790 (CR. 27624) through a sale agreement dated September 7, 2007.

21. The Counsel held that the Plaintiff/Applicant knew very well that his claim would not be successful and therefore applied to join the unnecessary party – the Intended 6th Defendant instead of the office of the Director of Survey or the Land Registrar of Titles. The Counsel held that there are also chances that the Defendant might collude with the Plaintiff, and the Applicant should have enjoined the public office and not a representative. To support its arguments on all these legal reasonings, the Counsel relied on numerous cases being those of:- '[Cyrus Wamboka Nyaga Njue – Versus - Lucy Kanyau Nyau \[2019\] eKLR, Skov Estate Limited & 5 Others – Versus - Agricultural Development Corporation & Another \[2015\] eKLR; Marigat Group Ranch & 3 Others – Versus - Wesley Chepkoiment & 19 others \[2014\] eKLR.](#)
22. Finally, the Counsel urged this Honorable Court to find that the application was unmeritorious, frivolous, and a waste of Court's time and dismiss it in its entirety with Costs to the 5th Intended Defendant.

V. Analysis and Determination

23. The Honorable Court has keenly read the application, affidavits of both parties, the cited authorities, the evidence attached thereon and written submissions by both parties, the relevant provisions of the [Constitution](#) of Kenya, 2010 and the statutes. In order to arrive at informed, reasonable, just, and equitable decision the Honorable Court has framed the following salient two (2) issues for determination. These are:-
 - a. Whether the Notice of Motion application dated April 26, 2022 by the Plaintiff/Applicant herein has any merit.
 - b. Who will bear the cost of the application.

Whether the Notice of Motion application dated April 26, 2022 by the Plaintiff/Applicant herein has any merit.

24. The main issue in this application is on joinder of a party. Specifically, the Intended 6th Defendant herein for the reasons adduced thereof. The provision of Order 1 Rule 3 of the Civil Procedure Cap 21 provides 'inter alia' thus; -

All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

While the provision of Order 1 Rule 10 (2) provides thus: -

' 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.'



25. The Court in the case of: 'Mercy Waithira Njeru & 3 others – Versus - Daniel Njeru Njoka Mbogo & 3 others [2019] eKLR pronounced itself on the issue of joining party to a suit and stated as follows: -

‘The principal consideration before an order for joinder of a party to the proceedings is whether the presence of such a party is necessary in order to enable the Court to effectually and completely adjudicate and determine the real issues in controversy in the suit, thus, where the Court is of the opinion that there may be issues and/or questions that such a party would be well placed to respond to and/or answer to enable the Court to get a clearer picture of the issues and/or provide a basis for the Court to effectually and completely adjudicate upon the issues, the Court will order that such a party be enjoined to the proceedings.’

26. In the instant case, the Plaintiff/Applicant herein avers that the Intended 6th Defendant, a Surveyor’s firm trading in the names and style of Messers. Edward Kurugu Land Surveyors did the survey work on the suit land that led to the cancellation of the Applicants land which is MN/V/3790 now registered as MN/V/2618. The position taken by the 5th Defendant herein that the Intended 6th Defendant was not a necessary party and the decision would not affect him. He held that there were also chances that the Intended 6th Defendant ought collude with the Plaintiff.
27. From the critical perusal of the evidence on record, it is apparent clear that it is paramount that the Court understands how land which was registered under the names of the Plaintiff/Applicant as Land Reference Numbers MN/V/3790 (CR 27624) came to be registered as MN/V/2618 under a third party despite there being a Court order not to register the said property to a new party. It is not in dispute that it is the Intended 6th Defendant who allegedly carried out the surveying exercise on all that parcel known as Land Reference Numbers or land registered as MN/V/2618, it would be in my considered opinion emphatically aid the Court in painting a clear picture of how the cancellation occurred and on what basis. As it were, I discern that this would assist the Honorable Court to effectually and completely adjudicate upon these issues enabling the Court to arrive at an informed decision eventually. The 5th Defendant raised the issue that the 6th Defendant might collude with the Plaintiff/Applicant. This being a Court of law and evidence, since so far this allegation is founded on no substantial evidence tendered by the 5th Defendant, the Court will only treat it as baseless, unfounded and unsubstantiated hearsay. I say so based on the provisions of Section 107 of the *Evidence Act*, Cap 80 which holds that it is the one who alleges that has to prove. This has not happened as yet.
28. In the meantime, this Honorable Court is fully satisfied that the application by the Plaintiff/Applicant is meritorious.

Who will bear the costs of this application?

29. It is now well established that the issue of costs is discretionary. Costs is the award that is granted to a party at the conclusion of any process, proceedings and legal action in any litigation. The provision of Section 27 (1) provides that Costs follow the event. By event herein it means the outcome of any process, proceedings and legal action.
30. In the instant case, although the Plaintiff/Applicant has been successful in the prosecution of its application, the costs will be in the cause since the main suit is yet to be heard and determined.

VI. Conclusion & Disposition

31. In conclusion, having conducted an indepth analysis of the framed issues herein, the upshot of the matter based on preponderance of probability, the Honorable Court is fully satisfied that



the application by the Plaintiff/Applicant herein has strong legal basis. Specifically, therefore, the Honorable Court proceeds to grant the following orders. These are:-

- a. THAT the Notice of Motion application dated April 26, 2022 by the Plaintiff/Applicant herein has merited and therefore be and is hereby allowed.
- b. THAT the Plaintiff /Applicant herein be and is hereby granted twenty one (21) days leave to amend and serve his Plaint by joining a party trading in the names and style of Messrs. Edward Kirugu Land Surveyors as the 6th Defendant herein.
- c. THAT the joined 6th Defendant be and are hereby granted 14 days leave thereafter upon service with the Amended Plaint to fully comply with the provisions of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010 to wit filing of Defence and/or Counter Claim, if need be, filing well bound and paginated List of documents, the documents, List of witnesses, witness Statements, and other relevant affidavits.
- d. THAT upon service, the Plaintiff be granted a Seven (7) days corresponding leave to file Reply to the Defence and/or Counter claim, further Affidavits and documents, if need be.
- e. THAT for expediency sake, this matter should be fixed for hearing and determination within the next One Hundred and eighty (180) days from this date hereof that is on May 16, 2023. There should be a mention on March 1, 2023 for Pre – Trial Conference in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010.
- f. THAT the costs of the application to be in the Cause.

IT IS ORDERED ACCORDINGLY.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS9TH.....DAY OF.....DECEMBER, 2022.

HON. MR. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Borona Advocate for the Plaintiff/Applicant.
- c. No appearance for the 1st, 2nd, 3rd, 4th & 5th Defendants.
- d. No appearance for the 16 Interested Parties.

