



REPUBLIC OF KENYA



Salim v Kithome & 3 others; Said & another (Applicant) (Environment & Land Case 311 of 2014) [2025] KEELC 341 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELC 341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 311 OF 2014
SM KIBUNJA, J
FEBRUARY 5, 2025**

BETWEEN

MOHAMMED ALI SALIM PLAINTIFF

AND

STANLEY MUNUVE KITHOME 1ST DEFENDANT

JERRY EDWIN OMWARE 2ND DEFENDANT

**ADMINISTRATORS OF THE ESTATE OF KIBIBI MAJALIWA AND OMAR
JUMA SAID 3RD DEFENDANT**

SAMMY MWANGI KAMAU 4TH DEFENDANT

AND

SAID JUMA SAID APPLICANT

LALI JUMA SAID APPLICANT

RULING

Notice of Motion Dated 15th July 2024

1. The notice of motion dated the 15th July 2024, was filed through Ms. Tindika & Company Advocates signing off for the “1st defendant, & Said Juma Said and Lali Juma Said.” The application invokes Articles 50 & 159 of *the Constitution*, sections 24 to 26 of the *Land Registration Act* No. 3 of 2012, sections 1A, 1B and 3A of *Civil Procedure Act*, and Order 51 Rule 10 of Civil Procedure Rules, and seeks for the following orders:

1. “That this Honourable Court be pleased to make an order that Said Juma Said and Lali Juma Said, the Administrators of the Estate of the late Kibibi Mzee Majaliwa, be enjoined as Defendants in this matter.



2. That upon the said joinder, Said Juma Said and Lali Juma Said be allowed to file a defence, Witness Statement(s) and Documents in this matter.
3. That costs of this Application be provided for.”

The application is premised on the seven (7) grounds on its face and supported by the affidavit of Said Juma Said, sworn on the 15th July 2024, inter alia deposing that the land herein initially belonged to Juma Said Mwatsulika, father to deponent, and Lali Juma Said; that upon the death of their father, the land was transmitted to their mother, Kibibi Mzee Majaliwa and their late brother Omar Said Juma; that their mother sold a portion of the land to the 1st defendant; that the land was subdivided by the 3rd defendant, and their mother died intestate on 28th July 2010; that the deponent and his sister have obtained Limited Grant Ad Litem in respect of their mother’s estate in Mombasa CM MISC. SUCC. CAUSE NO. E092 OF 2024, and their desire is to be joined in this suit for the purposes of giving evidence in regard to the issues relating to the suit property’s transactions.

2. The application is opposed by Mohamed Ali Salim, the plaintiff, through his replying affidavit sworn on 24th September 2024, in which he among others deposed that the 3rd defendant was the original owner of the suit property that he transferred to the 4th defendant, from whom he purchased it in October 2009; that the Estate of Kibibi Majaliwa and Omar Juma Said have been aware of this suit as borne by the orders of 17th October 2018 striking out the 2nd defendant from the suit; that the applicants have waited for five years from date of the previous order before filing the application; that Said Juma Said and Lali Juma Said have never been part of the transactions over the suit property, have not shown justifiable interest over the said land and have not met the threshold for joinder in the suit; that the application is misconceived, an abuse of court process and should be dismissed .
3. The 3rd defendant also opposed the application through his replying affidavit sworn on 4th October 2024, in which he inter alia deposed that the joinder of Said Juma Said and Lali Juma Said will not add any substance in the proceedings as they were not involved in the transactions, but will only muddy the waters; that the application is frivolous, vexatious an abuse of court process, devoid of merits and should be dismissed with costs.
4. The learned counsel for Applicants and 3rd defendant filed their submissions dated the 30th October 2024 and 11th November 2024 respectively, which the court has considered.
5. The issues for determination are as follows:
 - a. Whether the applicants have met the threshold for joinder of Said Juma Said and Lali Juma Said as defendants.
 - b. Who bears the costs?
6. After careful consideration of the grounds on the applicants’ notice of motion, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and the record, the court has come to the following determinations:
 - a. That Ms. Tindika & Company Advocates, came on record for the 1st defendant/1st applicant through the memorandum of appearance dated the 22nd February 2015 and filed on the 24th February 2015. I have perused the entire record and have not come seen any notice of appointment of advocate filed by the said advocates for Said Juma Said and Lali Juma Said, who I have captured above as the 2nd and 3rd applicants respectively.



- b. Addition of defendants is provided under Order 1 Rule 3 of the Civil Procedure Rules which states as follows:

“ 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.”

The plaintiff commenced this suit through the plaint dated 9th December 2014 against Stanley Munuve Kithome, the 1st defendant, terming him a trespasser, and seeking for inter alia permanent and mandatory injunction, damages and costs. The 1st defendant responded through the statement of defence and counterclaim dated 31st August 2015, and amended statement of defence and counterclaim dated 30th November 2017, among others introducing the 2nd to 4th defendants. The 1st defendant sought for inter alia declaratory order that title issued to 3rd & 4th defendants and or plaintiff was fraudulent, null and void ab initio and should be cancelled; that the title to the said land be issued to him and 3rd and 4th defendants be condemned to pay his costs in the suit and counter claim.

- c. The record confirms that on the 16th October 2018, the court heard counsel present and ordered inter alia that, “the 2nd defendant is not properly sued. The 2nd defendant is thus struck off from the proceedings herein unless the 1st defendant names who the administrator is and serves him/her with the pleadings herein.” That order has not been reviewed, set aside, varied or successfully appealed against to date. The instant application appears to be a means for the 1st defendant to accomplish his original intention to join the administrators of the estates named as 2nd defendant to the proceedings, in fulfilment of the order of 16th October 2018.
- d. Order 1 Rule 3 of Civil Procedure Rules that is set out above, provides for who may be joined as defendants in a proceedings. The main consideration under the said provision is that the person sought to be joined should be one “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 or alternatively, where if separate suits were brought against such person any common questions of law or fact would arise.” The grounds on the notice of motion and the depositions in the supporting affidavit leaves no doubt that the pursuit of Said Juma Said and Lali Juma Said being joined in the suit is for them to testify or give evidence on matters to do with the suit land. There is no mention of any legal or beneficial interest that they may have over the suit property or any part thereof. It is trite that one does not require to be a party to qualify as a witness in a suit before the court. All that is required is for the party that wishes to call one as a witness in their matter to have their evidence recorded in a witness statement or deposition and filed with the court, served on the opposing party and then be availed during the hearing. The said two applicants are therefore not necessary parties in the suit for the effectual and complete adjudication of the issues in dispute between the parties already before the court. Indeed, the 1st defendant counterclaim does not contain any allegation or relief sought against them. The plaintiff’s plaint equally has no claim against the two or any relief sought against them. In case the 1st defendant want the two as his witnesses, he should seek legal advice from his counsel on how to attain that as the application to join them as parties is without merit.
- e. That section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events unless where the court for good cause orders differently, and as the applicants have lost in their application, they will pay the plaintiff’s and 3rd defendant’s costs.



7. From the foregoing determinations on the application dated the 15th July 2024, I find and order as follows:

- a. The applicants' notice of motion is without merit and is dismissed.
- b. The applicants to pay the plaintiff's and the 3rd defendant's costs in the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF FEBRUARY 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Plaintiff: M/S Wandera for Mulango

Defendants : Mr Tindika for 1st Defendant,

Mr Asige for 3rd Defendant

Applicants : Mr Tindika

Shitemi – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

