



REPUBLIC OF KENYA



KENYA LAW
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**Wanyama v Yusto (Environment and Land Case 32 of 2012)
[2024] KEELC 3256 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE 32 OF 2012
EC CHERONO, J
APRIL 11, 2024**

BETWEEN

EMILY CHONGE WANYAMA PLAINTIFF

AND

PATRICK MAMG'ENI YUSTO DEFENDANT

RULING

1. The Applicant has moved this Hon. Court vide a proposed Amended Originating Summons dated 21st August 2023 seeking answers to numerous questions. The Applicant is also seeking leave for Fridah Nafula Yusto and Louis Wanyela Mang'eni to be joined as interested parties and for the applicant to be allowed to act for the proposed interested parties under a power of Attorney. The application is supported by numerous annexures thereto.
2. By way of a response, the Defendant /Respondent through the Firm of M/S Wattangah & Company Advocates filed grounds of opposition dated 20th November, 2023.
3. When the said application came up for directions on 30/11/2023, the parties recorded the following orders by consent;
 - i. The Amended Originating Summons dated 21/8/2023 to be canvassed by written submissions.
 - ii. The Applicant is granted 21 days from today to file and serve his submissions.
 - iii. The Respondents are granted corresponding leave to file and serve their submissions within 21 days upon service



The Applicant's Summary of Facts and Submissions.

4. There's no affidavit in support of the application disguised as an Amended Originating Summons. There are also no grounds in support of the said application shown on the face thereof. What are framed as questions for determination in an Originating Summons appear like a soliloquy by a character in a play. For example, in paragraph 2B, the applicant averred as follows;

“2B. Whether, the Defendant/Respondent herein; cannot equally compensate for the Petitioner's/Applicant's abilities which secured LR. No. Ndivisi/Muchi/2737; LR. Ndivisi/Muchi/2645 and Ndivisi/Khalumuli/4798 for the 2nd Interested Party/ Respondent herein to pursue his education safely???”
5. There is no affidavit explaining the import and purport of the documents attached to the said Amended Originating Summons disguised as an application.
6. On his submissions, the applicant contends that he was approached by the proposed interested parties with a copy of a judgment delivered on 13th May, 2014; orders given on 23/11/2016, 12/4/2017 12/6/2017 and 6/9/2019 inquiring whether there was a law which allows an ordinary person to take up litigation of cases where practising Advocates have failed? The applicant submitted that he answered in the affirmative and informed them of the provisions of order 1 Rule 8 & 13; Order 9 Rule 2(a); Order 32 Rules 3 & 7 *CPR*, Article 50 sub-Article 7 of the *Constitution* of Kenya as well as Sections 4-14, 54 of the fifth schedule of the *Succession Act* CAP. 160 Laws of Kenya.
7. The Respondent did not file any response nor submissions as directed by the Court.

Legal Analysis and Decision.

8. I have considered the proposed Amended Originating Motion dated 21/08/2023 disguised as an application and the submissions in support thereto. I have also considered the Grounds of opposition by the Defendant/Respondent dated 20/11/2023.
9. Before I proceed in my analysis, it is imperative to take note of the following undisputed facts;
 - i. That this suit was heard and determined vide a Judgment delivered by this Honourable Court on 13th May, 2014.
 - ii. That the plaintiff's suit was allowed and defendant was ordered to refund the plaintiff a sum of Kshs. 1,385,000/ plus costs and interest.
 - iii. That the defendant failed to pay the plaintiff/Decree Holder the decreed sum forcing the plaintiff to apply for attachment and sale of land parcel No. Ndivisi/Khalumuli/2645 in satisfaction of the said Decree.
 - iv. That by an order issued on 12/06/2017, this Hon. Court allowed the sale of the said land parcel No. Ndivisi/Khalumuli/2645 to recover the decretal amount, costs and interest.
10. This suit had been commenced by way of a plaint dated 1st August 2012 and Amended on 18th December, 2012. It is trite that an application can only be commenced as prescribed under order 51 of the *Civil Procedure Rules*. A suit on the other hand can be commenced by either a Plaint, Originating Summons a Notice of Motion or Petition. This suit which was commenced by way of a plaint was actually heard and determined. An application by way of Originating Motion is not provided for under our Rules of procedure and this application therefore is an outright abuse of the court process. The proposed 2nd and 3rd interested parties cannot be added to a suit that has been heard and determined.



Their remedy in my view lies elsewhere. I also find that the applicant is a busy body without locus standi to act for the proposed Interested parties in a matter that has been heard and concluded.

11. The upshot of my finding is that the Amended Originating Motion dated 21st August 2023 is devoid of merit and the same is hereby dismissed with costs to the defendant/Respondent.

Orders accordingly.

READ DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 11TH APRIL, 2024.

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HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Benjamin Barasa -applicant
2. Mr. Wangila H/B for Wattangah for Respondent
3. Bett C/A

