



**Leichum & another v Ngonde & another; Khalid Salim Naaman & Said Salim Naaman
(Appointed Administrators of the Estate of Moza Toban - Deceased) (Proposed Defendant)
(Environment & Land Case E014 of 2023) [2024] KEELC 5139 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5139 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E014 OF 2023**

**EK MAKORI, J
JULY 10, 2024**

BETWEEN

JOACHIM LEICHUM 1ST PLAINTIFF

JUDITH AOKO LEICHUM 2ND PLAINTIFF

AND

ISKER ADHIAMBO NGONDE 1ST DEFENDANT

LAND REGISTRAR MOMBASA 2ND DEFENDANT

AND

**KHALID SALIM NAAMAN & SAID SALIM NAAMAN (APPOINTED
ADMINISTRATORS OF THE ESTATE OF MOZA TOBAN -
DECEASED) PROPOSED DEFENDANT**

RULING

1. Before the Court is the Proposed 3rd Defendant’s application dated 27th March 2024 premised on the grounds on its face and the averments contained in the affidavit of Khalid Salim Naaman sworn on an even date. The Motion primarily seeks for grant of the following prayer:

Khalid Salim Naaman & Said Salim Naaman (Appointed administrators of the Estate of Moza Toban (Deceased)) be joined in the suit as 3rd Defendants.

2. The Motion is opposed by the Plaintiffs and the 1st Defendant through their respective Replying Affidavits on record, arguing that the joinder will be unwarranted because the proposed 3rd Defendants’ stake in the claim will be reversionary interest, which will not be affected by these proceedings.



3. When the Motion was placed before the Court for hearing on 30th April 2024, the Plaintiffs' and 1st Defendant's counsel consented to the Applicants joining these proceedings as interested parties instead.
4. All the parties complied with the directions that the application be disposed of through written submissions.
5. The Applicants firmly believe that their presence before the court is not just necessary but crucial. They are the sons and administrators of the estate of the Late Moza Toban, and they are convinced that the property in question rightfully belongs to them. This belief, rooted in their understanding of Article 40 of *the Constitution*, has led them to join this case to protect their interest in the land.
6. The Applicants assert that they have a strong defence against both the Plaintiff's and 1st Defendant's claims against the suit property. They equally assert that they have an equally straightforward counterclaim against the plaintiffs' and 1st Defendant's claims. To enable the Applicants to defend both the Plaintiffs' and 1st Defendant's claims and raise a counterclaim against both the Plaintiffs and 1st Defendant, they have proposed to be joined as 3rd Defendants.
7. That the proposed 3rd Defendants are persons having a legal interest in the suit property capable of being protected and ought, therefore, to be made necessary parties to any suit touching on and or affecting the same.
8. The proposed joinder of the Applicants into this suit as parties has not been opposed by both the Plaintiffs and the 1st defendant. In their respective responses and at the hearing on 30th April 2024, the Plaintiffs claimed not to have a dispute with the Applicants and proposed to have them joined as Interested Parties, a position adopted by the 1st Defendant's counsel but opposed by the Applicants.
9. In response thereof, the Plaintiffs filed a replying affidavit sworn on 23rd April 2024 by Joachim Leichum, the 1st Plaintiff herein. In the said replying affidavit, the Plaintiffs are not opposed to the proposed 3rd Defendant being joined in the suit, save that they are joined as Interested Parties and not as Defendants. The Plaintiffs' position was further supported by the Advocates on record for the 1st Defendant, Isker Adhiambo Ngonde, who has deposed a replying affidavit.
10. In their submissions, counsels for the parties in this suit cited various judicial decisions regarding parties being joined as either Principal Parties or Interested Parties.
11. The issue then, which I commend for this Court's determination, is whether the 3rd proposed Defendants should be joined as Defendants or Interested Parties to the suit.
12. Order 1 Rule 10(2) and (4) of the Civil Procedure Rules, 2020 provides as follows:

“10(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....

(4) Where a defendant is added or substituted, the Plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the Plaintiff shall be served on the new defendant and, if the court thinks fit, on the original defendants.”



13. In *Pravin Bowry v John Ward and another* [2015] eKLR, the court reiterated the principles guiding joinder of parties and referred to the Supreme Court of Ugandan decision in the case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) where the court stated as follows:

“A clear distinction is called for between joining a party who ought to ‘have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...”

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit”

14. It is the discretion of the Court to join a party to the proceedings which discretion has to be exercised judicially; see *Civicon Limited v Kivuwatt Limited and 2 others* [2015] eKLR on the interpretation of Order 1 rule 10 (2) of the Rules Civil Procedure Rules observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings”

15. But the Court has to be cautious when asked to join a party as a Defendant; see, for example, *Munyao J. in Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others* [2014] eKLR, where he declined to allow joinder of a Defendant when he stated as follows:

“15... Caution needs to be exercised when a party wants to join proceedings as defendant. This is because the court would not want to impose a party upon the plaintiff unless it will not be prudent to determine the matter without such party being defendant. For example, if in an action against a tortfeasor, an employer of such tortfeasor applies to be enjoined as defendant because the tortfeasor was acting under the command of the employer, there should be no problem with such application, for the plaintiff’s claim against the chosen defendant is the same claim against the principal. But where the plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him, for each person has a right to choose against whom to assert his claims against. The plaintiff could have his genuine reasons as to why he does not wish to proceed against other persons, and issues of costs will also be involved.”

16. In this case, the plaintiffs have made a choice on whom to sue. They have chosen to sue the 20 persons named as defendants. They have sued them because they say that it is these 20 persons who are trespassers and who are an impediment to the sub-division of the Group Ranch. In their replying affidavit, they have said that the intended interested parties are strangers to them, and that they are persons who are not residents of the suit land, but reside elsewhere. It is apparent that they have avoided suing the applicants because they do not consider the applicants to have trespassed on the suit land. That is their view of the matter and I think that view needs to be respected...



17. Even if I were to take this application as an application by persons who want to be enjoined as defendants with a counterclaim, I am unable to allow it, for the plaintiffs do not wish to proceed against them, and as I earlier said, such choice needs to be given paramount consideration. I am unable to bring myself to including the applicants as defendants when the plaintiffs clearly state that they have no claim against them. I think the proper way is for the applicants to proceed to file a suit of their own if they feel that they have certain rights over the suit land.
18. The Applicants' claim in this matter is reversionary interest to the Estate of Mozan Toban (deceased), which is not due until the expiry of the lease period. This period runs from 1st May 1967 to 1st May 2033, a total of 66 years as granted in the lease. The Plaintiffs elected not to sue them as Defendants. They will be admitted as Interested Parties to secure their reversionary Interest and ensure any orders emanating from this suit will not negatively affect their interests.
19. The upshot is that the application dated 27th March 2024 has been partially successfully. The Applicants are admitted as Interested Parties. There will be no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 10TH DAY OF JULY 2024

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Gakuo, for the Plaintiffs

Mr. Mouko, for the 1st Defendants

Ms. Mwangi, for the Proposed 3rd Defendants

Happy: Court Assistant

