



Oketch (Suing as the administrator ad litem of the Estate of Ludia Oketch Obuonde alias Ludia w/o George Oketch alias Ludia Oketch alias Lydia Oketch Ojwang Oketch alias Judia Oketch alias Ludia Ojwang) v Kapanga & 11 others (Land Case 91 of 2018) [2024] KEELC 5059 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5059 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 91 OF 2018**

**EK MAKORI, J
JULY 3, 2024**

BETWEEN

JOHN OLUOCH OKETCH (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF LUDIA OKETCH OBUONDE ALIAS LUDIA W/O GEORGE OKETCH ALIAS LUDIA OKETCH ALIAS LYDIA OKETCH OJWANG OKETCH ALIAS JUDIA OKETCH ALIAS LUDIA OJWANG) PLAINTIFF

AND

- SHARIFF KAPANGA 1ST DEFENDANT**
- FUAD WANJE KOMBE 2ND DEFENDANT**
- OMAR IDD 3RD DEFENDANT**
- KARISA SAFARI DIMA 4TH DEFENDANT**
- KASENA FOLENI 5TH DEFENDANT**
- JEY SHIDA BAO 6TH DEFENDANT**
- JULIUS KATANA MWARINGA 7TH DEFENDANT**
- CHARO KITSAO MWARINGA 8TH DEFENDANT**
- KARISA KALAMA 9TH DEFENDANT**
- KUPATA NGARE 10TH DEFENDANT**
- JUSTUS CHARO 11TH DEFENDANT**
- ALBERT KARISA SAFARI 12TH DEFENDANT**



RULING

1. The Plaintiff/Respondent filed the current suit simultaneously with a Notice of Motion Application brought under Certificate of Urgency dated 20th April 2018, mainly seeking orders of injunction against the Defendants/Applicants herein. The Plaintiff claimed that her mother purchased the suit property in 1971 and continued to be in physical possession of the land until her passing in 2013. However, this Court dismissed this claim on 11th July 2019 (Olola J.) on the grounds that the Defendants/Applicants have been in actual physical possession, occupation, and open utilization of Plot No. 59 Malindi for a while.
2. The Defendants/Applicants, having resided on the suit property for a significant period, assert their entitlement to the land under the doctrine of adverse possession. This legal doctrine, which is recognized in many jurisdictions including Kenya, allows a person who has been in possession of land without the owner's permission for a certain period of time to claim legal ownership. They applied for the same via Originating Summons - ELC No. 211 of 2018 against the late Arbi Ali Mohammed Mussani, the registered proprietor of Plot No. 59 Malindi. Unfortunately, Mussani passed away due to COVID-19-related complications on 26th March 2021, leading to the withdrawal of the application.
3. The Applicants have now approached this Court vide application dated 11th October 2023 seeking to join the Administrator Ad Litem of the Estate of the late Arbi Ali Mohammed Mussani and the Land Registrar Mombasa. In the eyes of Defendants/Applicants, they form a critical part of the Court's determination of this ownership wrangle. The Applicants also seek the stay of ELC No. 211 of 2018 to await the determination of the Administrators of the Estate of Arbi Ali Mohammed Mussani. The Applicant seeks leave to amend the pleadings in accordance with the changes.
4. Through the Plaintiff's Replying Affidavit dated 15th December 2023, it is notable that the Plaintiff has procured a Search Document dated 8th January 2024 indicating the registered proprietor of the suit property is one Ludia w/o George Oketch; the Applicants contend the Plaintiff/Respondent was able to procure a search document with the same portion number, Portion No. 59 Malindi but different Lt, Folio, and File Numbers. According to the Applicants - this casts a shadow of doubt on the authenticity of all the documents issued by the Land Registrar Mombasa, as logic dictates that there cannot exist numerous searches indicating different proprietors of the same parcel of land in the absence of any land sale agreements or any land transfer particulars. On this premises, the Applicants strongly believe that the Land Registrar Mombasa is the only party to shed light on the two searches. The Applicants thus seek in the pending application for the Court to grant leave to the Applicants to join the Land Registrar Mombasa as a party to these proceedings so that he can issue a comprehensive report on the discrepancies noteworthy on all the search documents that originate from that office.
5. In a reply via Replying Affidavit dated and sworn on 15th December 2022, Respondent John Olouch Oketch avers that the suit against the estate of Arbi Ali Mohammed Mussani abated as he died on 26th March 2021. Therefore, his estate cannot be joined in these proceedings.
6. The Respondent further avers that there is no formal application to join the Land Registrar Mombasa as prayed in the application; therefore, there is no basis for adding the Land Registrar Mombasa as a party in this proceeding.
7. The Respondent believes the issues raised herein can be canvassed at the main hearing. Stay orders cannot be issued at this stage as they will be geared toward stalling this matter, which has been pending



since 2018. Issuing stay orders at this stage could potentially prolong the resolution of this dispute, which has already been pending for a significant period of time.

8. From the materials and the averment by the parties, the issues that I frame for the decision of this Court is whether to stay proceedings in ELC 91 of 2018 temporarily and, after that, join the Administrator ad litem of the estate of Arbi Ali Mohammed Mussani as proposed defendants in these proceedings. Whether to join the land Registrar Mombasa in these proceedings. As an interested party or issue summons against the said officer and whether to grant leave to amend the proceedings to accord with the intended changes and who should bear the costs of the present application.
9. On the issue of joinder of the Administrator Ad Litem of the Estate of Arbi Ali Mohammed Mussani as a Proposed Defendant to these proceedings, the Defendants/Applicants assert that they have been with peaceful and unchallenged physical possession and utilization of all that parcel of land referenced as Plot No. 59 Malindi since time immemorial. Their forefathers enjoyed such proprietary rights and consequentially passed on the same to them. They have maintained such open possession and utilization of the parcel of land to this day. The parcel of land referenced as Portion No. 59 Malindi is home to a wide variety of people of all likes and colors, who have even buried their lost loved ones thereon. The Plaintiff's and the proposed Defendant's claims and documents are falsified as none has ever been or resided on the ground. The proposed Defendant's claim is still up to the Court to determine; however, the Court is devoid of facts, which compounds the reason to join the administrator of the Estate of the Late Arbi Ali Mohammed Mussani so as they can exercise their right as per Article 50 of *the Constitution* of Kenya and bring the Court to a wiser or more informed factual position to determine the suit justly and expeditiously. Further, the Applicants state that the Plaintiff shall not suffer any prejudice should the Administrator Ad Litem of the Estate of Arbi Ali Mohammed Mussani be joined as a party to this suit. The same the Applicants believe shall be necessary to shed light on the reluctance of the Plaintiff to join the estate of late Arbi Ali Mohammed Mussani.
10. Whether to join the Land Registrar Mombasa as a Proposed Defendant to these proceedings, the Applicants wish to bring to the attention of the Court the existence of numerous Land Searches conducted at the Land Registry Mombasa on diverse dates which indicate different registered proprietors of the same parcel of land. The Applicants, having qualified to be awarded ownership of the parcel of land through adverse possession, conducted several searches at the Land Registry Mombasa in 2015 and 2018, which indicated the registered proprietor as the late Arbi Ali Mohammed Mussani, which necessitated the inception of ELC 211 of 2018 against the said Arbi Ali Mohammed Mussani (deceased). The Plaintiff, too, has a land search dated 29th January 2021 and 8th January 2024 indicating Ludia w/o George Oketch as the new proprietor of the same parcel of land. The Applicants contend that they have noticed a difference in the Lt, Folio, and File Numbers of the same parcel of land from the duplicate land registry records, hence the need to join the Land Registrar Mombasa.
11. Joinder of parties to proceedings is governed by Order 1 rule 10(2) of the Civil Procedure Rules, which provides that:

“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.”



12. In Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR, Odunga J. held as follows on the issue of joinder:

“The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori vs. Chege & 3 Others [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant, there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

56. In *Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55, it was held 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 involve in the suit. 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 completely adjudicate upon and settle all the questions involve 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 the avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

57. In *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015] eKLR, the court 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 or inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles



set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

13. In this matter, the Applicants seek to have the Administrator Ad Litem of the Estate of Arbi Ali Mohammed Mussani joined as defendants. An OS ELC 91 of 2018 was brought against the Estate of the said Mussani, who unfortunately died before he was joined in these proceedings. In those proceedings, the lawyer of the Estate, Mr. Wanga, sought several adjournments to make administrators of the Estate available, but to no avail. The Respondent aver that the said Mussani died on 26th March 2021; the suit abated after a year since no such administrator(s) has /have been appointed, and therefore, his estate cannot be joined in these proceedings. Suppose the argument by the Respondent is anything to go by since I see no retort from the Applicants; such party/parties cannot be included in these proceedings. That/those will be imaginary party/parties. The Court will not go into such a fishing expedition.
14. On the joinder of the Land Registrar Mombasa applying the same test—whether he will be a necessary party in these proceedings—I think not, the reasons being that the Land Registrar will only be required to produce the entire record and entries in the register of the subject suit property. At the implementation stage, he will abide by the orders emanating from these proceedings. He is not a necessary party in this suit.
15. Whether to stay the proceedings of ELC 91 of 2018 until the Administrator Ad Litem of the Estate of Arbi Ali Mohammed Mussani shall be provided before the Court, given my findings in paragraph 14 above, staying ELC 91 of 2018 will be unnecessary. The allegation that the suit has already abated has not been answered. Nothing shows that the Administrators Ad Litem of the Estate will ever be found. This suit cannot be stood over indefinitely. It will be against the policy of this Court in Active Case Management strategy. The orders sought are hereby declined.
16. It follows, too, that the order for amendments to the pleadings will not stand the parties sought to be joined being unnecessary in these proceedings.
17. The Applicants can only seek a summons to the Land Registrar to clarify the discrepancies alleged in the postal searches.
18. Therefore, the application dated 11th October 2023 is hereby dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 3RD DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Oloo, for the Respondent

Happy: Court Assistant

In the absence of;

Ms. Marende Necheza for the Applicants

